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# **EU JOINT TRANSFER PRICING FORUM**

## **CONTRIBUTION BY PROF. MAISTO ON PENALTIES**

[Please note that this report is a contribution by a Business Member of the EU Joint Transfer Pricing Forum and does not represent the opinion of the Forum as a whole]

# REVIEW OF PENALTY REGIMES WITHIN THE EU REGARDING TRANSFER PRICING DOCUMENTATION AND ADJUSTMENTS<sup>1</sup>

## THE TRANSFER PRICING PENALTIES REPORT

### I INTRODUCTION

1.1 As indicated by the Commission in its Communication to the Council regarding the EU Joint Transfer Pricing Forum (JTPF) on April 23, 2004<sup>2</sup>, the work of the JTPF may be extended for another two years. In case the Commission will extend the work of the JTPF, its agenda will among others include the formulation of a recommendation to the Council on documentation and penalties related to, or arising from, a transfer pricing adjustment. In order to formulate such recommendation on to the Council, it is of the essence that the JTPF has a good overview of the different penalty regimes with respect to transfer pricing adjustments applicable in each of the Member States.

1.2 Some preliminary study on penalties and transfer pricing was undertaken by the JTPF during its working program in 2003. Particularly, this effort is reflected in the "background document on the replies received from Member States on the application of transfer pricing rules and the arbitration convention"<sup>3</sup> which reports a survey on penalties foreseen in case of absence or late submission of

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<sup>2</sup> Com(2004) 297 final

<sup>3</sup> JTPF/008/BACK/2002/EN.

the required transfer pricing documentation<sup>4</sup>. Yet, penalties and documentation was addressed by the International Bureau of Fiscal Documentation in its “survey of transfer pricing documentation requirements in EU Member States and the Candidate Countries”<sup>5</sup>. Following these surveys, the JTPF summarized its findings on the subject matter in its first report to the Commission and stated that: “considering the complexity of the issue and the potential impact on domestic legislation, the JTPF decided to defer more in-depth discussions on this to a later stage”.

1.3 There are several reasons why penalties deserve special attention in the context of transfer pricing and the issues raised by the subject matter are not to the exclusive interest of the business sector. They affect trade between associated companies within the European Union but also the administration of tax rules and compliance by the tax authorities of the Member States. It is also worth considering the effects of penalties on the competitiveness of the Single Market insofar as EC trade is made more burdensome compared to similar trade(s) affected within other competitive markets such as the United States of America in which States are also exposed to erosion of local taxes. Experience of federal States may also contribute ideas for discussion. For this reason, the survey also includes a brief survey of penalties on transfer pricing adjustments as they are applied in Switzerland and the United States of America at the level of local taxes.

1.4 In addition, substantial differences between the applicable penalty regimes within the EU should be avoided as such can lead to significant distortions. For instance, a severe penalty regime in one Member State may give rise to overstatements of the taxable income of group companies in that particular Member State and understatements of the taxable income of group companies residing in Member States that apply more lenient penalty regimes. As a result, the arm’s length principle will not be the main principle used to establish transfer prices in related cross border transactions. Therefore, in order to avoid these distortions, the applicable penalty regimes within the EU should to a certain extent be harmonized. This issue has also been pointed out by the OECD

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<sup>4</sup> Q3 of the Questionnaire.

<sup>5</sup> Doc. JTPF/009/BACK/REV1/2003.

in its Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations”<sup>6</sup> (hereafter referred to as the “OECD Guidelines”).

- 1.5 The comprehensive ramifications of the subject is the underlying reason for which, upon the initiative of some members of the JTPF, tax experts representing the then 15 Member States of the EU have undertaken in late April 2004 this comparative study (hereinafter “The Transfer Pricing Penalties Report”). In 2005 the Transfer Pricing Penalties Report has been updated to cover the 10 acceding EU Member States. The contributors are all practicing tax law in independent law firms.
- 1.6 The purpose of the Transfer Pricing Penalties Report is (i) to provide a survey of the different legislative rules on penalties and transfer pricing in 25 EU Member States; (ii) to identify principles and rules that are common to all or most of these Member States; (iii) to demonstrate that in some Member States penalties constitute a threat to related parties transactions across the borders; (iv) to offer the JTPF a possible solution to be taken into account in formulating its recommendation to the Council.
- 1.7 In past years, the OECD has extensively addressed the subject of penalties and transfer pricing. A rather comprehensive study on penalties had been carried out in 1990 within the context of a survey on taxpayers’ rights and obligations<sup>7</sup>. The subject of penalties in the context of transfer pricing was however discussed at a later stage in the 1995 OECD Guidelines<sup>8</sup>. It is advocated that the OECD Guidelines are in any event referred to by the JTPF in its work on the subject. They indeed provide for a common background and in addition the reference to the OECD Recommendation would be consistent with the past JTPF acknowledgment of the relevance of the OECD work on the subject.

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<sup>6</sup> OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, loose leaf, Paris Chapter 4, paragraph 4.26.

<sup>7</sup> OECD, *Taxpayers’ rights and obligations. A survey of the legal situation in OECD Countries*, Paris 1990.

<sup>8</sup> Penalties are dealt with in Chapter 4.

1.8 The most important feature of the OECD study on the subject is the debate on the relationship between transfer pricing and tax avoidance. The variety of situations in the different Member States is indeed also related to the perception and appreciation of transfer pricing which in some Member States is regarded as a tax avoidance technique so that such characterization influences the penalty regime applied by the tax administration of such State in the event a transfer pricing adjustment is made. It is important that Member States and the JTPF address this issue taking into account that a certain degree of consensus may already be found in the OECD Guidelines. In its 1979 report, the OECD explicitly states that transfer pricing issues should not be confused with problems of tax fraud or tax avoidance, even though transfer pricing policies may be used for such purposes<sup>9</sup>.

The OECD Guidelines indeed establish some important common principles that have been agreed by the OECD Member Countries:

- i) The imposition of a substantial non-fault penalty based on the mere existence of an understatement of a certain amount is unduly severe when such understatement is attributable to a good faith error rather than the taxpayer's negligence or wilful conduct to avoid taxes;
- ii) It is unfair to impose substantial penalties on taxpayers who have made a reasonable effort in good faith to set the terms of their transactions with related parties in a manner consistent with the arm's length principle;
- iii) In particular, it is inappropriate to impose a transfer-pricing penalty on a taxpayer for failing to consider data to which it did not have access, or for failure to apply a transfer pricing method that would have required data that was not available to the taxpayer.

1.9 Given the complexity of most transfer pricing issues, it is likely that tax administrations and taxpayers apply different conditions in order to determine an at arm's length price for a related party transaction. Such difference may give rise to an adjustment of a taxpayer's taxable base. In case of cross-border transactions, such difference may even result in a difference of opinion between

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<sup>9</sup> OECD, *Report of the OECD Committee on Fiscal Affairs on Transfer Pricing and Multinational Enterprises (1979)*, loose leaf, Paris, Preface paragraph 3

tax administrations of different States. As a consequence, double taxation may occur. Such double taxation should, however, generally be resolved either via a mutual agreement procedure or a procedure pursuant to the EU Arbitration Convention (“AC”).

1.10 The situation mentioned above is different in the case where penalties are imposed upon the adjustment of a taxpayer’s taxable base. As penalties are normally not reduced or waived in a mutual agreement procedure or an AC procedure, they will constitute additional costs for the taxpayer. For that reason the OECD Guidelines stress the importance of a possibility to cancel or mitigate an imposed penalty in a case where a mutual agreement procedure results in a withdrawal or reduction of an adjustment. The imposition of these penalties may even have a more far-reaching consequence; namely if such penalty will be regarded as a ‘serious penalty’ as described in Article 8 paragraph 1 of the AC. In such a situation, the competent authority of the Member State involved will not be obliged to cooperate with an AC procedure.

1.11 The survey of the 25 EU Member States’ penalty regimes contained in this Transfer Pricing Penalties Report is primarily but not exclusively focused on internal laws of the Member States. Indeed, it was felt that penalties as governed by internal laws would not have exhausted the subject matter: the application of the Human Rights and Fundamental Freedoms (“ECHR”) and the conformity of such internal laws penalty regimes with EU legislation and principles (discrimination, proportionality, compatibility with freedom of establishment, etc.) should also be taken into account. A more severe penalty regime with respect to transfer pricing documentation requirements and transfer pricing adjustments in cross border transactions, or even more stringent transfer pricing documentation requirements in cross border situations, may well constitute an infringement of the fundamental freedoms as laid down in the EC Treaty.

1.12 The information contained in this Transfer Pricing Penalties Report is based on the replies to a questionnaire circulated among the contributors. Such replies are summarised on a per country basis as an Annex.

1.13 The primary distinction that may be found in the survey is between penalties arising from an adjustment and penalties arising from a failure to keep or provide documentation by the taxpayer to the tax administration. The concept of penalties as used in the survey is not limited to penalties that are classified as “penalties” under the internal rules of the particular Member State. It also includes impositions that may be classified as (deductible/non-deductible) interest or additional tax charges, but that are in fact similar impositions. Furthermore, non-monetary sanctions such as the reversal of the burden of proof are included in the survey’s penalty concept.

## II COUNTRY SURVEY

### 2.1 Specific penalty regime with respect to transfer pricing

Nearly all of the 25 EU Member States do not apply specific penalty regimes with respect to transfer pricing (see Table 1). Denmark, France and Germany are the only Member States that have introduced a specific penalty regime for non-compliance with their specific transfer pricing documentation requirements. All other EU Member States apply their general penalty regime in such situations. With respect to penalties imposed upon a transfer pricing adjustment, Greece is the only Member State that imposes different penalties upon a transfer pricing adjustment.

### 2.2 Penalties on transfer pricing documentation and transfer pricing adjustments

All 25 Member States can impose penalties for non-compliance with late submission or omission of transfer pricing information requested by the tax administration (see Table 5). In most of the Member States, these penalties are imposed in order to provide a disincentive for (i) not complying in a timely manner with information requests from the competent tax authorities and (ii) not complying with the documentation requirements set forth by law. As such, the purpose of these penalties is in line with the view of the OECD Committee on Fiscal Affairs that recognizes that the main objective of a civil tax penalty should be promoting compliance. Penalties for non-compliance with late submission or omission of transfer pricing information generally have the form of a monetary penalty (i.e., either a flat rate penalty or a tax-gearred penalty), a non-monetary sanction (i.e., reversal of the burden of proof), or in case of a taxpayer’s deliberate non-compliance, a criminal penalty.

In nearly all 25 Member States (with the exception of Luxembourg) administrative penalties can be imposed in a case where the taxpayer's taxable profits are amended due to a transfer pricing adjustment (see Table 3). Almost all of these States impose these penalties either if the transfer pricing adjustment exceeds a certain threshold or the adjustment is caused either due to the taxpayer's negligence or its deliberate intent to evade taxes. Greece, Poland, Slovak Republic and Czech Republic are the only Member States that impose penalties in case of a non-fault transfer pricing adjustment. In the case of Greece, the taxpayer may, in principle, avoid the adjustment and the penalty if it can demonstrate that it did not intend to avoid direct or indirect taxes. In Poland, Slovak Republic and Czech Republic, administrative penalties are levied regardless of the attitude of the taxpayer.

Note, however, that tax authorities in some Member States in practice always presume negligence and therefore a penalty is almost always imposed. The subsequent waiver of such penalty by a tax court proves in practice to be difficult.

The administrative penalties upon a transfer pricing adjustment are generally imposed as a percentage of either the profit adjustment itself or the additional tax payable. In addition to these penalties, most Member States impose an interest charge for late payment of the additional tax due. Apart from administrative penalties, Member States also have the ability to prosecute the taxpayer in cases of deliberate tax avoidance or fraudulent manoeuvres.

### **2.3 Criminal penalties on transfer pricing**

13 of the 25 EU Member States do not have the possibility to prosecute taxpayers in case of non-compliance with transfer pricing documentation requirements (See Table 2). The Member States that do have such ability generally only prosecute taxpayers in very serious cases such as non-compliance with fraudulent intent or deliberately providing incorrect/misleading information. The criminal penalties can either be in the form of a monetary fine that can range between Euro 250 and Euro 15,977,912 or in the form of an imprisonment that generally ranges between a few days and 10 years. The number of Member States that have the ability to impose a criminal penalty in case of a transfer pricing adjustment is substantially higher i.e., all 25 Member

States. These criminal penalties are generally only imposed in case of (i) a deliberate violation of the law, (ii) tax fraud or (iii) knowingly providing incorrect or misleading information to the tax administration. Certain Member States (e.g., Italy, Greece and Spain) require the amount of the adjustment or the taxes evaded to exceed a certain minimum threshold before criminal penalties can be imposed. These criminal penalties imposed upon a transfer pricing adjustment can either have the form of (i) a variable monetary fine that may amount up to 1000% of the unpaid tax, (ii) a fixed monetary fine up to a maximum amount of € 15,977,912 or (iii) an imprisonment that can amount up to 10 years.

#### 2.4 **Administrative Penalties on Transfer Pricing Adjustments**

Nearly all 25 Member States can impose administrative penalties on transfer pricing adjustments (see Table 3)<sup>10</sup>. Luxembourg, however, does not impose an administrative penalty upon a transfer pricing adjustment.

Germany only imposes an administrative penalty in case of non-compliance with its transfer pricing documentation requirements. The penalty imposed, however, is related to the amount of the adjustment with a minimum of Euro 5,000. In almost all 25 Member States administrative penalties upon transfer pricing adjustments should only be imposed in cases of bad faith, negligence or the taxpayer's deliberate intention to evade taxes. In practice, however, tax authorities in some Member States presume negligence in case a transfer pricing adjustment is made. As a result, a penalty is almost automatically imposed when a transfer pricing adjustment is made. Greece, Italy, Poland, Slovak Republic and Czech Republic do generally not take into account the behaviour of the taxpayer for the imposition of penalties (see above under 2.2).

All Member States calculate penalties upon transfer pricing adjustments in relation to the amount of tax unpaid or to the amount of the profit adjustment made<sup>11</sup>. The amount of the penalty generally not only depends on the amount of the adjustment but also on the gravity of the offence, the level of the taxpayer's cooperation and recidivism. The penalties imposed generally range between 10% and 200% of the tax unpaid or between 5% and 30% of the profit

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<sup>10</sup> Note, however, that based on the case law of the Spanish Constitutional Court (194/2000 of June 19, 2000) it is quite unlikely that the Spanish tax administration can impose an administrative penalty upon a transfer pricing adjustment.

<sup>11</sup> In Estonia, the amount of the penalty does not have a fixed relation to the amount of tax unpaid or the profit adjustment made, but is left for the tax authorities and courts to decide based on the facts and circumstances of the case, subject to the maximum amount set forth by law.

adjustment made. In addition to these penalties, most Member States impose an interest charge for late payment of the additional tax due.

## **2.5 Administrative Penalties on cross- border transfer pricing transactions vs. on domestic transfer pricing transactions**

In all but two of the 25 Member States, the penalty regime does not make a difference between a cross-border transaction and a domestic transaction (see Table 4). Note, however, that as many Member States limit the applicability of their transfer pricing provisions to cross border transactions, in practice their penalty regime only applies to cross-border transactions and as such differences do exist. This discrepancy between domestic and cross-border transactions raises the issue of compatibility with EU law which, however, falls outside the scope of this study.

Germany and France have specific penalty regimes for cross-border transactions. As such, domestic transactions do not fall within the scope of these penalty regimes. As a consequence, only cross-border transactions are penalized. Note that none of the penalty regimes in the 25 Member States take, upon imposing a penalty, into account whether or not penalties are imposed to the counterpart in the adjusted transaction.

## **2.6 Administrative penalties on Transfer Pricing documentation**

All 25 EU Member States can impose penalties in case of non-compliance with transfer pricing documentation requirements<sup>12</sup> (See Table 5). In most of these Member States the penalty can have the form of either a monetary penalty or a non-monetary sanction (i.e., reversal of the burden of proof to the taxpayer). In addition, Italy imposes an indirect penalty by way of not allowing, in any future administrative or judicial procedure, documentation that has not been provided to the competent tax authorities upon request. However, said documentation is allowed when the taxpayer, who produces it at the launching of the administrative or judicial procedure, states that he is not responsible for non-compliance with the requests by the competent tax authorities. The amounts of

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<sup>12</sup> A considerable number of Member States do not apply specific statutory transfer pricing documentation requirements. However, they generally do have provisions obligating the taxpayer to provide their tax administration with all relevant information in order to determine the taxpayer's taxable base as well as provisions requiring a taxpayer to keep all documents and records for certain period of time.

the administrative penalties imposed are generally determined taking into account the gravity of the offence, the amounts involved, the behaviour of the taxpayer, the degree of cooperation and recidivism. In the United Kingdom, Ireland, France, Germany and Poland, however, they are also determined on basis of the delay of the taxpayer's responses. Most Member States impose flat rate penalties for minor defects and continuing penalties in case of deliberate non-compliance. The flat rate penalties imposed can range from Euro 14.5 in case of a minor defect to Euro 100,000 in case of a deliberate refusal to provide the requested information. The continuing penalties can range from 10% of the unpaid tax to 300% of the unpaid tax. Instead of imposing a penalty related to the unpaid tax, some Member States impose penalties either related to the taxpayer's undisclosed income or its turnover in previous years.

## **2.7 Administrative discretion**

In most of the 25 EU Member States tax authorities have discretion whether to impose administrative penalties and/or to reduce and/or to waive them. In this respect a distinction should be made between administrative penalties regarding transfer pricing documentation requirements and administrative penalties upon a transfer pricing adjustment. In all EU Member States the tax authorities have discretion in respect of administrative penalties on inadequate transfer pricing documentation (See Table 6). For administrative penalties upon a transfer pricing adjustment, Denmark and Finland are the only countries that do not grant discretionary powers to Tax Authorities to reduce or waive administrative penalties (See Table 7).

## **2.8 Difference in penalties upon an adjustment in case of a settlement, a competent authority's procedure or the procedure as covered in the EU Arbitration Convention ("AC")**

Whether or not a transfer pricing adjustment is made via a competent authority's procedure or a procedure according to the AC, will not make a difference in all 25 Member States for the determination of the imposed penalty (See Table 8). This is certainly contrary to the OECD Guidelines that state "If a mutual agreement between two countries results in a withdrawal or reduction of an adjustment, it is important that there exist possibilities to cancel or mitigate a penalty imposed by the tax administrations".

In Greece, Italy and Spain it does make a difference for the penalty imposed whether or not a transfer pricing adjustment is made on basis of a settlement between the taxpayer and the tax authorities. Italy, for instance, reduces the imposed penalty to an amount equal to 25% of the minimum applicable penalty in case the Italian tax authorities reach a settlement with the taxpayer. The discrepancy between the effect of this type of settlement, on the one hand, and of the competent authority's procedure or AC procedure, on the other hand, raises the issue of compatibility with EU law.

## 2.9 **Applicability of Article 6 of the ECHR**

Whether or not administrative penalties imposed in connection with either non-compliance of transfer pricing documentation or transfer pricing adjustments should be considered as a Criminal Charge as defined in Article 6 of the ECHR is still a debated issue in many Member States. However, the general opinion in most Member States is that based on the generality, severity and ultimate aim pursued by most administrative penalties, these administrative penalties should not be regarded as a criminal charge within the meaning of Article 6 ECHR (See Table 9). An exception to the above is the Netherlands (also Estonia for certain penalties, and Lithuania even though no case law exists on this point in the latter country). Dutch case law and public guidelines<sup>13</sup> explicitly acknowledge that all administrative penalties imposed (i.e., the omission penalty and the offence penalty) should be regarded as Criminal Charges within the meaning of article 6 of the ECHR. As for criminal penalties, nearly in all Member States, criminal penalties imposed in connection with either non-compliance of transfer pricing documentation or transfer pricing adjustments are considered to fall within scope of article 6 of the ECHR (see Table 10).

## 2.10 **Penalty regimes on transfer pricing adjustment as applicable in Switzerland and the United States of America at the level of local taxes**

Switzerland has no specific transfer pricing regulations although the federal, cantonal and communal tax authorities follow the OECD transfer pricing guidelines and generally apply the arm's length principle to related party transactions. The same principles are applied for federal, cantonal and communal purposes, irrespective of whether the transaction is domestic or

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<sup>13</sup> Resolution Administrative Penalties Tax Authorities 1998 (*Besluit Bestuurlijke Boeten Belastingdienst 1998*), December 11, 2001, nr. DGB2001/1528M

international. The Swiss tax authorities at federal, cantonal and communal level do not apply formal documentation requirements or a specific penalty regime for transfer pricing adjustments. In practice, no penalties are generally imposed upon a transfer pricing adjustment made with respect to an inter-cantonal transaction.

In the United States of America, each of the States generally applies its own transfer pricing regulations and penalty regime for local tax purposes. Most of the States use the so-called Formula apportionment method in order to determine the taxpayer's taxable base for local tax purposes. Pursuant to this method, the taxpayer's overall taxable income is generally allocated to a particular State on the basis of the taxpayer's property, payroll and sales in that particular State (i.e., the so-called apportionment factors) compared to its overall property, payroll and sales. As the determination of the taxpayer's overall taxable income as well as the apportionment factors may differ from State to State, the formula apportionment method by no means ensures the avoidance of either double taxation or non-taxation. Each State generally can impose accuracy or negligence penalties. In practice, however, no penalties are imposed in case the taxpayer has taken a position that can be considered as reasonable under the applicable tax laws of that particular State.

### **III CONCLUSION AND RECOMMENDATION**

The survey of the penalty regimes on transfer pricing in the 25 EU Member States indicates a certain level of variety of regimes. Such variety is mainly caused by the differences in the overall tax systems and/or judicial systems maintained in these 25 Member States for which these penalty regimes have been designed. Apart from these differences, the applicable penalty regimes also have some common features. Indeed, almost all States rely on some common fundamental principles which may be helpful to reach consensus on the subject matter.

Particularly, as penalties have the function to ensure and encourage compliance, they have to be commensurate to the level of negligence or wilful conduct by the taxpayer. It is generally acknowledged that transfer pricing rules have a fair level of complexity which needs to be reflected at the time the imposition of penalties comes into play. Thus, relying on the principle of proportionality, certain factors are taken into account in order to establish the imposition of penalties; such factors include: good faith, transparency, cooperation, condition of the taxpayer, and frequency of violations over time.

Furthermore, nearly all tax authorities have the discretion to impose and/or to reduce and/or to waive penalties although the magnitude of such discretion may vary from Member State to Member State. This feature indicates that a recommendation made by the JTPF that is subsequently endorsed by the EU Council may be followed by most Member States without requiring the amendment of their domestic legislation.

#### **R E C O M M E N D A T I O N**

There appears to be a strong consensus within the 25 Member States under review as to the non-applicability of penalties solely because of an adjustment. In most Member States, the failure to establish the proper arm's length price is either viewed as (i) a conduct that does not give rise to negligence or wilful conduct, which is normally considered to be the basis for imposing penalties or (ii) negligence that is excusable and therefore justifies the immediate non application of penalties<sup>14</sup>. In most Member States, the existence of the negligence justifying the imposition of penalties is to be demonstrated by the tax authorities.

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<sup>14</sup> Most of the 25 Member States reviewed in this survey apply the first approach.

Particularly, the few Member States (such as Greece, Poland, Slovak Republic and Czech Republic) that impose penalties in the event of an adjustment – regardless of the taxpayer’s negligence or wilful conduct and/or requiring the taxpayer to demonstrate the absence of negligence – should adopt administrative guidelines under the discretionary powers of their tax authorities to ensure that penalties upon transfer pricing adjustments can be waived and as such the principle of proportionality be affirmed. These administrative guidelines should provide for a penalty regime on transfer pricing along the following lines:

1. No penalties on transfer pricing adjustments - either direct or indirect - should be imposed in the absence of negligence or wilful conduct;
2. Failure to meet the arm’s length standard should not *per se* give rise to negligence as the facts and circumstances need to show additional elements leading to the evidence of negligence;
3. Negligence or wilful conduct should not be presumed so that no penalties should be automatically imposed in case of transfer pricing adjustment by virtue of such presumptions (no “objective penalty”);
4. Penalties upon a transfer pricing adjustment can, therefore, only be imposed if the tax authorities can demonstrate the existence of additional elements giving rise to either negligence or wilful conduct;
5. In case of an adjustment, no negligence can be alleged in the event that a “reasonable documentation test” has been met. Such reasonable documentation test is met if (i) the taxpayer has collected the essential information regarding the disputed related party transaction and (ii) such information is collected and available as from the date of filing the tax return for the relevant tax period. Such essential information is limited to the intercompany agreement and a short description of the applied arm’s length methodology;
6. Satisfaction of the essential reasonable documentation test will, therefore, limit the scope for the tax authorities to impose penalties on transfer pricing adjustments only to situations in which the taxpayer’s wilful conduct is proven;

7. Furthermore, satisfaction of the essential reasonable documentation test will also prevent the tax authorities from imposing penalties on transfer pricing documentation unless the taxpayer either (i) does not provide the relevant transfer pricing information requested by the tax authorities within a reasonable period of time after the receipt of the request or (ii) provides information that can reasonably not be considered adequate.

**Table 1**

<b>Penalty regime different for Transfer Pricing</b>		
<b>Country</b>	<b>Specific penalty regime for late submission / omission of information different for TP?</b>	<b>Specific penalty regime for profit adjustments TP?</b>
<b>Austria</b>	<b>No</b>	<b>No</b>
<b>Belgium</b>	<b>No</b>	<b>No</b>
<b>Cyprus</b>	<b>No</b>	<b>No</b>
<b>Denmark</b>	<b>Yes<sup>15</sup></b>	<b>No</b>
<b>Czech Republic</b>	<b>No</b>	<b>No</b>
<b>Estonia</b>	<b>No</b>	<b>No</b>
<b>Finland</b>	<b>No</b>	<b>No</b>
<b>France</b>	<b>Yes<sup>16</sup></b>	<b>No</b>
<b>Germany</b>	<b>Yes<sup>17</sup></b>	<b>No<sup>18</sup></b>
<b>Greece</b>	<b>No</b>	<b>Yes<sup>19</sup></b>
<b>Hungary</b>	<b>No<sup>20</sup></b>	<b>No</b>
<b>Ireland</b>	<b>No</b>	<b>No</b>
<b>Italy</b>	<b>No</b>	<b>No</b>
<b>Latvia</b>	<b>No</b>	<b>No</b>
<b>Lithuania</b>	<b>No</b>	<b>No</b>
<b>Luxembourg</b>	<b>No</b>	<b>No</b>
<b>Malta</b>	<b>No</b>	<b>No</b>
<b>Netherlands</b>	<b>No<sup>21</sup></b>	<b>No<sup>22</sup></b>
<b>Poland</b>	<b>No</b>	<b>No<sup>23</sup></b>
<b>Portugal</b>	<b>No</b>	<b>No</b>
<b>Spain</b>	<b>No</b>	<b>No</b>
<b>Slovak Republic</b>	<b>No</b>	<b>No</b>
<b>Slovenia</b>	<b>No</b>	<b>No</b>
<b>Sweden</b>	<b>No</b>	<b>No</b>
<b>United Kingdom</b>	<b>No</b>	<b>No</b>

<sup>15</sup> Denmark has in May 2005 adopted specific penalties concerning transfer pricing documentation. Penalties apply if non-compliance is intentional or due to gross negligence. As of 25 August 2005 no revised guidelines were published on the website of the Danish ministry of taxation. Until such guidelines are published the penalty regime cannot be applied.

<sup>16</sup> France has a specific procedure for cross-border transactions Art. L 13 B of the FTPC

<sup>17</sup> Germany has introduced specific penalties re transfer pricing documentation the purpose of which is to provide an incentive to the taxpayer to prepare and present transfer pricing documentation in a timely manner.

<sup>18</sup> The specific penalty regime in Germany is only applicable in case of substantial non-compliance with transfer pricing documentation requirements or in case of late submission. However, the penalty imposed in case of substantial non-compliance will relate to the amount of the transfer pricing adjustment made by estimation.

<sup>19</sup> Article 39 par. 4 ITC provides for an additional penalty to be imposed that is equal to 10% of the amount of the adjustment.

<sup>20</sup> However, in case of lack of transfer pricing documentation higher penalties apply [Section 172(14) Taxation Act].

<sup>21</sup> Note, however, that based on an announcement made by the Under Minister of Finance (parl. documents, 28 034, no. 3 pag. 22) reversal of burden of proof will only be invoked in transfer pricing situations in case of evident shortcomings in documentation.

<sup>22</sup> Based on an announcement made by the Under Minister of Finance (parl. documents, 28 034, no. 5 pag. 48), the imposition of a penalty based on an incorrect tax return will be limited to cases where it is plausible that a non-arm's length price results from an intentional act.

<sup>23</sup> However, in case of lack of transfer pricing documentation higher rates apply.

**Summary:** almost all Member States do not have specific transfer pricing penalty provisions. The only exceptions are (i) for TP documentation penalties Denmark, France and Germany, and (ii) for TP adjustments Greece.

**Table 2**

<b>Criminal Penalties</b>		
<b>Country</b>	<b>Can a criminal penalty be imposed for late submission / omission of TP information?</b>	<b>Can a criminal penalty be imposed for TP profit adjustments?</b>
<b>Austria<sup>24</sup></b>	<p><b>Yes</b>, in case of intentional non-compliance with statutory information/documentation obligations under general procedural law (Sec 51 FinStrG)</p> <p><b>Amount:</b> Penalty can range up to € 3,625</p>	<p><b>Yes</b>, may be imposed in case of negligent<sup>25</sup> or wilful tax evasion.</p> <p><b>Amount:</b> Up to 200% of the unpaid tax and an imprisonment of up to 2 years in case of wilful tax evasion (Sec 33 FinStrG)</p> <p>Up to 100% of the unpaid tax in case of negligent conduct (Sec 34 FinStrG)</p>
<b>Belgium</b>	<p><b>Yes</b>, in case of non-compliance with info. request with fraudulent intent or an intent to cause damage</p> <p><b>Amount:</b> Penalty can range between €250 to €12,500 and/or imprisonment of 8 days up to 2 years</p>	<p><b>Yes</b>, in case of fraudulent intent or intent to cause damage.</p> <p><b>Amount:</b> Penalty consists of a fine ranging between €250 and €12,500 and/or an imprisonment of 8 days up to 2 years</p>
<b>Cyprus</b>	<p><b>Yes</b>, if criminal proceedings are taken against the taxpayer for non submission of information; the Court orders the submission of such information and imposes a monetary penalty or imprisonment or both.</p>	<p><b>Yes</b>, where criminal proceedings are taken against a taxpayer for fraud or wilful conduct.</p>
<b>Czech Republic</b>	<p><b>No</b></p>	<p><b>Yes</b>, in case of deliberate actions only.</p> <p><b>Amount:</b> Fine of up to EUR 170,000 or imprisonment up to 12 years.</p>
<b>Denmark</b>	<p><b>Yes</b>, in case of knowingly filing incorrect/misleading info (i.e. in case of wilful intent)</p> <p><b>Amount:</b> Fine can range between 100% and 200% of the tax evaded and/or imprisonment of up to 4 years</p> <p>Note that the Danish Tax Authorities take the view that no criminal penalties apply.</p>	<p><b>Yes</b>, in case of knowingly filing incorrect/misleading info (i.e. in case of wilful intent)</p> <p><b>Amount:</b> Fine up to 200 % of the tax evaded and/or imprisonment of up to 8 years</p>

<sup>24</sup> In the following tables with the exception of tables 9 and 10 which refer to the definition of criminal charges under Article 6 of the ECHR, criminal penalties refer to all penalties covered under the Fiscal Penalty Act (Finanzstrafgesetz, FinStrG), whereas administrative penalties refer to those penalties covered by the Federal Fiscal Code (Bundesabgabenordnung, BAO).

<sup>25</sup> According to the legal definition, the taxpayer acts negligent if he does not exercise such degree of due care on diligence as he may have been able or reasonably expected to do so. The taxpayer is not aware of his offence due to his negligence or he considers an offence as possible but does not want to conduct it (see Sec 8 (2) FinStrG).

<b>Criminal Penalties</b>		
<b>Country</b>	<b>Can a criminal penalty be imposed for late submission / omission of TP information?</b>	<b>Can a criminal penalty be imposed for TP profit adjustments?</b>
<b>Estonia</b>	<p><b>Yes</b>, in case of at least indirect intent<sup>26</sup> if the violation results in a tax underpayment of more than € 31,956 or the person has previously been punished for the same act in a misdemeanor procedure.</p> <p><b>Amount:</b> The penalty can be, for legal persons, a fine ranging between € 3,196 and € 15,977,912.</p>	<p><b>Yes</b>, in case of at least indirect intent<sup>27</sup> if the violation results in a tax underpayment of more than € 31,956 or the person has previously been punished for the same act in a misdemeanor procedure.</p> <p><b>Amount:</b> The penalty can be, for legal persons, a fine ranging between € 3,196 and € 15,977,912.</p>
<b>Finland</b>	<b>No</b>	<b>Yes</b> , if the violation is regarded as serious (i.e., tax fraud)
<b>France</b>	<b>No</b>	<b>Yes</b> , if the violation constitute a tax fraud
<b>Germany</b>	<p><b>Yes</b>, in case of intentional or negligent non-compliance with the obligation to provide tax authorities with tax relevant information provided such non-compliance caused deficiency in taxes</p> <p><b>Amount:</b> (i) monetary penalty up to € 50,000 (in case of negligence); (ii) imprisonment of up to 10 years (in case of intent)</p>	<p><b>Yes</b> in case of intentional or negligent tax evasion.</p> <p><b>Amount:</b> (i) monetary penalty up to € 50,000 (in case of negligence); (ii) imprisonment of up to 10 years (in case of intent)</p>
<b>Greece</b>	<b>No</b>	<b>Yes</b> , if the tax avoided exceeds € 15,000
<b>Hungary</b>	<b>No</b>	<p><b>Yes</b>, in case of willful evasion.</p> <p><b>Amount</b> Fine ranging between EUR 12 and EUR 45,000, labor in the public interest, or imprisonment up to eight years.</p>
<b>Ireland</b>	<p><b>Yes</b>, in case of knowingly, wilfully delivering an incorrect return or failing without reasonable cause to produce docs/info when requested</p> <p><b>Amount:</b> Penalty ranges between €3,000 and/or 1 year imprisonment and €126,970 and/or 5 years imprisonment</p>	<b>Yes</b> , in case of knowingly, wilfully delivering an incorrect return or failing without reasonable cause to produce docs/info when requested

<sup>26</sup> *I.e.* the person foresees the occurrence of circumstances which constitute the necessary elements of an offence and tacitly accepts that such circumstance may occur.

<sup>27</sup> See preceding footnote.

<b>Criminal Penalties</b>		
<b>Country</b>	<b>Can a criminal penalty be imposed for late submission / omission of TP information?</b>	<b>Can a criminal penalty be imposed for TP profit adjustments?</b>
<b>Italy</b>	<p><b>No</b></p> <p>Criminal penalties for late submission/ omission of TP information are applied only when concerning fraudulent tax returns i.e. based on false invoices/documents for not existing transactions or based on the falsification of statutory book-keeping entries and making use of fraudulent means for the purposes of hindering the tax assessment.</p> <p><b>Amount:</b> Penalty ranges in an imprisonment between 6 months and 6 years</p>	<p><b>Yes</b>, in case of filing unfaithfully a tax return by reporting items of income of an amount lower than real / fictitious expenses if 2 conditions are met:</p> <p>(i) evaded tax exceeds €103,291.38; and</p> <p>(ii) overall amount of positive components (even fictitious) exceeds either 10% of the overall amount of positive components in the return or €2,065,827.60</p> <p>According to general principles, criminal penalties may be levied only in case of wilful intent to evade taxes.</p> <p><b>Amount:</b> Penalty ranges between an imprisonment of 1 to 3 years (plus ancillary penalties<sup>28</sup>)</p>
<b>Latvia</b>	<p><b>No</b></p>	<p><b>Yes</b>, in case of tax evasion (which requires a deliberate action)</p> <p><b>Amount:</b> Imprisonment up to 5 years, or forced labour, or fine up to € 13660 with/without confiscation of property, with/without deprivation of the right to engage in commercial activities, depending on the gravity of the offence.</p>
<b>Lithuania</b>	<p><b>Yes</b></p> <p><b>Amount:</b> For individuals:</p> <ul style="list-style-type: none"> <li>- public works;</li> <li>- fine up to € 1,810;</li> <li>- arrest.</li> </ul> <p>For legal entities, fine up to € 362,025.</p> <p><b>In case of tax evasion</b> For individuals fine up to € 3,620 or imprisonment up to 3 years. For legal entities, fine up to € 362,025.</p>	<p><b>Yes</b>, in case of tax evasion</p> <p><b>Amount:</b> For individuals:</p> <ol style="list-style-type: none"> <li>1. public works or</li> <li>2. deprivation of the right to perform certain job or carry out certain activity or</li> <li>3. fine up to € 3,620 or</li> <li>4. imprisonment up to 3 years.</li> </ol> <p>For legal entities, fine up to € 362,025.</p>

<sup>28</sup> Penalties like prohibition of being appointed director of companies for 3 years

<b>Criminal Penalties</b>		
<b>Country</b>	<b>Can a criminal penalty be imposed for late submission / omission of TP information?</b>	<b>Can a criminal penalty be imposed for TP profit adjustments?</b>
<b>Luxembourg</b>	<b>No</b>	<p><b>Yes</b>, in case of a tax fraud or aggravated tax fraud (<i>“escroquerie fiscale”</i>)</p> <p><b>Amount:</b> Penalty can amount up to 400% of the evaded tax (in case of tax fraud) and an imprisonment from 1 month up to 5 years as well as an monetary penalty between €1,250 and 1000% of the evaded tax (in case of aggravated tax fraud)</p>
<b>Malta</b>	<b>Yes, Lm10 to Lm50 plus Lm2 per day from conviction until return is filed</b>	<p><b>Yes. Minimum: Lm25 plus twice the endangered tax. Maximum: Lm200 + treble the tax + 6 months imprisonment</b></p>
<b>Netherlands</b>	<p><b>Yes</b>, in case of deliberate/gross negligence non-compliance with information request or non-fulfilment of maintaining books and records (Art. 68/ Art. 69 GTA)</p> <p><b>Amount:</b> Penalty can amount to:</p> <p>(i) up to 6 months of imprisonment or a penalty of €4,500 (in case of gross negligence); and</p> <p>(ii) up to 6 years imprisonment or a penalty ranging between €45,000 and 100% of the unpaid tax (in case of deliberate intention).</p>	<p><b>Yes</b>, in case of deliberate/gross negligence (i) filing of an incomplete or not accurate tax return or (ii) not sufficient tax paid (Art. 68/ Art. 69 GTA)</p> <p><b>Amount:</b> Penalty can amount to:</p> <p>(i) up to 6 months of imprisonment or a penalty of €4,500 (in case of gross negligence); and</p> <p>(ii) up to 6 years imprisonment or a penalty ranging between €45,000 and 100% of the unpaid tax (in case of deliberate intention).</p>
<b>Poland</b>	<p><b>Yes</b>, in case of gross negligence<sup>29</sup> or fraud.</p> <p><b>Amount:</b> Fine can range between 10 and 120 daily base rates, increased to 240 daily base rates in case of submission of false information. Daily base rates currently range between € 6 and € 2,600<sup>30</sup>.</p>	<p><b>Yes</b>, in case of gross negligence<sup>31</sup> or fraud.</p> <p><b>Amount:</b> Fine can range between 10 and 720 daily base rates, or imprisonment up to 3 years. Daily base rates currently range between € 6 and € 2,500<sup>32</sup>.</p>

<sup>29</sup> In particular, criminal penalties may be applied in case of negligence, i.e. in case violation of Polish tax regulations. However, the court may withdraw the punishment, if it comes to conclusion that the

<b>Criminal Penalties</b>		
<b>Country</b>	<b>Can a criminal penalty be imposed for late submission / omission of TP information?</b>	<b>Can a criminal penalty be imposed for TP profit adjustments?</b>
<b>Portugal</b>	<b>No</b>	<b>Yes</b> , in case of non-compliance with the obligation to produce the relevant documentation and information with fraudulent intent provided such non-compliance causes deficiency in taxes above of a certain amount fixed by law
<b>Slovak Republic</b>	<b>No</b>	<b>Yes</b> , may be imposed in case of willful evasion and if the evaded amount exceeds 6 times minimum wage (currently € 1,000. )  <b>Amount:</b> Fine ranges between EUR 128 to EUR 128,200, or prohibition to undertake professional activities, or imprisonment of up to 12 years.
<b>Slovenia</b>	<b>No</b>	<b>Yes</b> , in case of misleading of the tax authorities or intentional tax evasion.  <b>Amount:</b> Fine can range up to € 37,500 or imprisonment of up to 8 years.
<b>Spain</b>	<b>No</b>	<b>Yes</b> , in case of tax fraud and provided the amount of tax avoided exceeds €120,000.  <b>Amount:</b> Penalty can range between: i) the amount of the tax due; ii) 600% of the tax due plus imprisonment charges

violation of the law is not significant and the taxpayer should not be punished: the court assesses the amount of due taxes, behavior of the taxpayer, its motivation, personal conditions, lifestyle conducted before the violation as well as the behavior after the violation).

<sup>30</sup> The exact amounts in Euro depend on the exchange rate (rates currently range between PLN 25,33 and PLN 10.132,00).

<sup>31</sup> See footnote 29.

<sup>32</sup> See footnote 30.

<b>Criminal Penalties</b>		
<b>Country</b>	<b>Can a criminal penalty be imposed for late submission / omission of TP information?</b>	<b>Can a criminal penalty be imposed for TP profit adjustments?</b>
<b>Sweden</b>	<b>No</b>	<b>Yes</b> , in case of tax fraud
<b>United Kingdom</b>	<b>Yes</b> , in case of tax fraud	<b>Yes</b> , in case of tax fraud
<p><b>Summary:</b> In all Member States, criminal penalties may be levied provided that certain requirements are met. In very general terms, the relevant factors for the application of criminal penalties may be classified as follows: wilful intent of the taxpayer (Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom), negligence of the taxpayer (Austria, Germany and Poland), or a certain amount of tax underpayment (Estonia, Greece, Italy<sup>33</sup>, Slovak Republic and Spain<sup>34</sup>).</p>		

<sup>33</sup> Provided that also the intentional element is satisfied

<sup>34</sup> Provided that also the intentional element is satisfied

**Table 3**

<b>Administrative Penalties upon Transfer Pricing Adjustments</b>	
<b>Country</b>	<b>Are Administrative penalties imposed upon a transfer pricing adjustment?</b>
<b>Austria</b> <sup>35</sup>	<p><b>Yes</b>, if transfer pricing adjustment result in unpaid withholding tax on deemed hidden profit distributions and the delay in payment of the withholding tax is not excusable (i.e., gross negligence) (Sec 217 BAO)</p> <p><b>Amount</b><sup>36</sup>: Penalty depends on period of delay in payment with a maximum of 4% of the unpaid withholding tax.</p>
<b>Belgium</b>	<p><b>Yes</b>,</p> <p><b>i) Tax increase</b>, in case non-declared profits exceed €620. However, no tax increase applies in case of incorrect declaration resulting from circumstances independent from the intention of the taxpayer.</p> <p><b>Amount</b><sup>37</sup>: Tax increase ranges between 10% and 200% of the unpaid tax but the aggregate of the unpaid tax and the tax increase cannot exceed the non-declared profit.</p> <p><b>ii) Administrative penalty</b>, (rarely used, in principle only if the tax increase would be less than the administrative penalty)</p> <p><b>Amount</b>: Penalty can range between €50 to €1,250</p>
<b>Cyprus</b>	<p><b>Yes</b><sup>38</sup>,</p> <p><b>i)</b> if the provisional income declared during the tax year is less than <math>\frac{3}{4}</math> of the taxable income as finally assessed for that year, a penalty amounting to 10% of the additional tax payable is imposed.</p> <p><b>Amount</b>: A 10% penalty on additional tax payable</p> <p><b>ii)</b> in case of unjustifiable omission on the part of the taxpayer a 5% is imposed on tax due.</p> <p><b>Amount</b>: A 5% penalty on additional tax payable.</p>
<b>Czech Republic</b>	<p><b>Yes</b>, irrespective of whether the taxpayer acted in good faith or not</p> <p><b>Amount</b>: Penalty is calculated at a rate of 0.2% (0.05% in case of acquiescence) per day of taxes assessed for the first 500 days of underpayment and 140% of the Czech National Bank's discount rate for the rest of the underpayment period. In case of non-compliance by the taxpayer, the tax authorities may calculate taxes based on other information.</p>

<sup>35</sup> In the following tables with the exception of tables 9 and 10 which refer to the definition of criminal charges under Article 6 of the ECHR, criminal penalties refer to all penalties covered under the Fiscal Penalty Act (Finanzstrafgesetz, FinStrG), whereas administrative penalties refer to those penalties covered by the Federal Fiscal Code (Bundesabgabenordnung, BAO).

<sup>36</sup> Interest will be charged on the amount of unpaid tax up to 42 months at a rate of official borrowing of the ECB. Such interest also applies in case of a tax refund. Interest is not deductible for tax purposes.

<sup>37</sup> Note that also non-deductible interest will be charged due to insufficient pre-payment of tax.

<sup>38</sup> Note that non-deductible interest for late payment are charged.

<b>Administrative Penalties upon Transfer Pricing Adjustments</b>	
<b>Country</b>	<b>Are Administrative penalties imposed upon a transfer pricing adjustment?</b>
<b>Denmark</b>	<p><b>Yes</b>, in case the adjustment results in an increase of the taxpayer's taxes and the adjustment was caused by gross negligence or wilful intent by the taxpayer<sup>39 40</sup></p> <p><b>Amount</b>            Fine up to 100 pct. of the tax evaded - in case of gross negligence.            Fine up to 200 pct. of the tax evaded - in case of wilful intent.</p>
<b>Estonia</b>	<p><b>Yes</b>, in case of negligence or willful misconduct</p> <p><b>Amount<sup>41</sup>:</b>            A fine in a misdemeanor procedure is up to EUR 3,196.</p>
<b>Finland</b>	<p><b>Yes</b>, if gross negligence or wilful intent</p> <p><b>Amount<sup>42</sup>:</b>            Penalty can range between 5% and 30% of the adjustment</p>
<b>France</b>	<p><b>Yes</b>,</p> <p><b>Amount<sup>43</sup>:</b>            Penalty amounts to 40% of the tax reassessed in case of bad faith</p> <p>Penalty can be increased to 80% of the tax reassessed in case of abuse of law or fraudulent man oeuvres.</p>
<b>Germany</b>	<p><b>Yes</b>, in case of substantial non-compliance with the transfer pricing documentation requirements.</p> <p><b>Amount<sup>44</sup>:</b>            Penalty ranges between 5% and 10% of the adjustment made (with a minimum of € 5,000)</p>
<b>Greece</b>	<p><b>Yes</b>, a penalty equal to 10% of the adjustment is imposed.</p> <p><b>Amount<sup>45</sup>:</b>            Penalty is 10% of the adjustment made. Penalty is in addition to any other penalty provided in Greek law</p>
<b>Hungary</b>	<p><b>Yes</b>, but can be reduced if it is evident that the taxpayer has acted in due care in the given circumstances.</p> <p><b>Amount<sup>46</sup>:</b>            Penalty is 50% of the additional tax payable.</p> <p><b>Reversal of burden of proof.</b></p>

<sup>39</sup> Tax surcharge. In case the adjustment results in an increase of the taxpayer's taxable base, a surcharge of 5,4% of the additional tax triggered is imposed. The application of the surcharge depends on the date of payment of tax. The tax surcharge is non-deductible and applies regardless of negligence and intent.

<sup>40</sup> Note that also non-deductible interest will be charged due to insufficient pre-payment of tax.

<sup>41</sup> Interest on late payments is payable at the rate of 0.06% per day of delay. Such interest is not deductible for tax purposes.

<sup>42</sup> As a rule, 9.5% non-deductible interest is charged if taxes are reassessed.

<sup>43</sup> A reassessment results in principle in late interest at the rate of 0.75% per month (Art. 1727 FTC). Such interest is non-deductible.

<sup>44</sup> Note that non-deductible interest for late payment are charged at a rate 6% per year.

<sup>45</sup> Please note that, even though there is no interest on late payments in the strict sense, an additional tax applies. Such additional tax equals to 2% monthly, and up to 200%, of the tax reassessed and is not deductible.

<b>Administrative Penalties upon Transfer Pricing Adjustments</b>	
<b>Country</b>	<b>Are Administrative penalties imposed upon a transfer pricing adjustment?</b>
<b>Ireland</b>	<b>Yes</b> , where the taxpayer has fraudulently or negligently made an incorrect return. <sup>47</sup>
<b>Italy</b>	<b>Yes</b>  <b>Amount:</b> Between 100% and 200% of the unpaid tax. Penalty can be increased with 1/3 (i.e., 130% – 260%) in case of undeclared income sourced abroad.
<b>Latvia</b>	<b>Yes</b> , but can be decreased  <b>Amount<sup>48</sup>:</b> Penalty is 100% of the additional tax payable.
<b>Lithuania</b>	<b>Yes</b> , but possible mitigation or waive.  <b>Amount<sup>49</sup>:</b> Penalty ranges between 10 and 50% of the additional tax payable.
<b>Luxembourg</b>	<b>No</b> (administrative penalties are never applicable. In case of tax fraud, criminal penalties apply) <sup>50</sup>
<b>Malta</b>	<b>Yes</b> but possible mitigation or waive. An administrative penalty for “omission” is imposed where declared income is less than chargeable income. This can be waived at the discretion of the tax authorities.  <b>Amount<sup>51</sup>:</b> 3% (increased to up to 6% in the case of recurring omissions) per month of endangered tax up to a maximum basis of 60 months. Reduced rates in the case of voluntary disclosure.
<b>Netherlands</b>	Depends whether the taxpayer’s position is considered defensible <sup>52</sup> .  (i) <b>Administrative penalty</b> in case of (i) a deliberate filing of an incomplete or not accurate return or (ii) not sufficient tax paid due to a deliberate action or gross negligence. (Art. 67d and Art. 67e GTA)  <b>Amount<sup>53 54</sup></b> Penalty ranges between:  (ii) 25% of the unpaid tax if first offence and not more than 50% of the unpaid tax if similar offence occurred more than once in 5 previous years in cases of <u>gross negligence</u> .  (iii) 50% of the unpaid tax if first offence and not more than 100% of the unpaid tax if similar offence occurred more than once in 5 previous years in cases of <u>deliberate intention</u>  <b>ii) Reversal of Burden of Proof</b>

<sup>46</sup> Interest on late payments is payable at an annual rate equal to double the prime rate provided by the National Bank of Hungary (currently 6.25%). Such interest is not deductible for tax purposes.

<sup>47</sup> Note that also non-deductible interest will be charged.

<sup>48</sup> Note that also non-deductible interest for late payment are charged.

<sup>49</sup> Note that also non-deductible interest for late payment are charged.

<sup>50</sup> Note that also non-deductible interest for late payment are charged.

<sup>51</sup> Note that also interest for late payment are charged. Such interest should not be deductible.

<b>Administrative Penalties upon Transfer Pricing Adjustments</b>	
<b>Country</b>	<b>Are Administrative penalties imposed upon a transfer pricing adjustment?</b>
<b>Poland</b>	<p><b>Yes</b>, irrespective of whether the taxpayer acted in good faith or not</p> <p><b>Amount<sup>55</sup>:</b> In case of lack of the required documentation, 50% income tax rate is applied on transfer pricing adjustment instead of the standard 19% rate.</p>
<b>Portugal</b>	<p><b>Yes<sup>56</sup>,</b> In case of deliberate violation or a violation due to negligence of the substantive tax law.</p>
<b>Slovak Republic</b>	<p><b>Yes</b>, the reason does not impact on the level of penalties</p> <p><b>Amount:</b> The penalty is calculated by multiplying the adjusted amount by three times the discount rate of the Slovak National Bank, which is currently 3% (in case of self-adjustment, penalties are reduced to 50%).</p>
<b>Slovenia</b>	<p><b>Yes</b>, in case of intention to evade or negligence</p> <p><b>Amount<sup>57</sup>:</b> Penalty is:</p> <ul style="list-style-type: none"> <li>- 20% of additional tax if underpaid tax is not higher than € 420;</li> <li>- 40% of additional tax if underpaid tax exceeds € 420 but is not higher than € 4,200;</li> <li>- 60% of additional tax if underpaid tax exceeds € 4,200.</li> </ul> <p>Responsible individuals may be charged with a penalty ranging from normally € 100 to 2,500 and above.</p>
<b>Spain</b>	<p><b>Yes<sup>58,59</sup></b>, only if the tax administration can show that the adjustment is caused by negligence or wilful conduct by the taxpayer.</p>
<b>Sweden</b>	<p><b>Yes</b>, only if such adjustment is caused by the taxpayer by way of submitting either incorrect info or not disclosing info. in its tax return<sup>60</sup></p> <p><b>Amount<sup>61</sup>:</b> penalty can range up to 40% of the additional tax</p>

<sup>52</sup> A taxpayer's position is considered to be defensible if the taxpayer could reasonably have believed that filing the tax return the way he did was in accordance with the law.

<sup>53</sup> Based on an announcement made by the Under Minister of Finance (parl. documents, 28 034, no. 5 pag. 48), the imposition of a penalty based on an incorrect tax return will be limited to cases where it is plausible that a non-arm's length price results from an intentional act.

<sup>54</sup> Note that also non-deductible interest will be charged.

<sup>55</sup> Note that also non-deductible interest will be charged.

<sup>56</sup> Late payment interest penalty is also applicable upon a TP adjustment. Interest rate on late payments is now 4% a year and is not deductible for tax purposes.

<sup>57</sup> Note that also deductible interest will be charged.

<sup>58</sup> Note, however, that it is quite unlikely that an administrative penalty upon a transfer pricing adjustment can be imposed.

<sup>59</sup> Note that also interest for late payment are charged. Such interest are deductible.

<sup>60</sup> A penalty will not be imposed in case of e.g., (i) a difference in valuation or (ii) it can be considered "excusable" that the taxpayer gave incorrect or omitted information, or (iii) it would be considered "unreasonable" to impose such penalty.

<sup>61</sup> Note that also non-deductible interest for late payment are charged.

<b>Administrative Penalties upon Transfer Pricing Adjustments</b>	
<b>Country</b>	<b>Are Administrative penalties imposed upon a transfer pricing adjustment?</b>
<b>United Kingdom</b>	<b>Yes, in cases of negligence or fraud<sup>62</sup></b>
<p><b>Summary:</b> in case of TP adjustment administrative penalties are always levied in Greece, Poland, Slovak Republic and Czech Republic. In the other Member States penalties are only imposed upon certain circumstances (such as wilful intent, negligence, amount of the tax adjustment) and/or may be mitigated/waived. Luxembourg almost never imposes penalties.</p> <p>Note: the Danish tax surcharge applies regardless of negligence and intent.</p>	

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<sup>62</sup> Note that also interest for late payment are charged. Such interest are deductible.

**Table 4**

<b>Is penalty regime different for cross-border transaction than for domestic transactions?</b>		
<b>Country</b>	<b>Penalties upon TP adjustments</b>	<b>Penalties upon late submission / Omission of TP information</b>
<b>Austria</b>	<b>No</b>	<b>No</b> <sup>63</sup>
<b>Belgium</b>	<b>No</b>	<b>No</b>
<b>Cyprus</b>	<b>No</b>	<b>No</b>
<b>Czech Republic</b>	<b>No</b>	<b>No</b>
<b>Denmark</b>	<b>No</b>	<b>No</b>
<b>Estonia</b>	<b>No</b>	<b>No</b>
<b>Finland</b>	<b>No</b>	<b>No</b>
<b>France</b>	<b>No</b>	<b>Yes</b> , specific penalties apply with respect to cross-border transactions.
<b>Germany</b>	<b>Yes</b> , specific transfer pricing penalties calculated on the basis of the TP adjustments <sup>64</sup> are only imposed with respect to cross border transactions	<b>Yes</b> , specific transfer pricing penalties are only imposed with respect to cross border transactions
<b>Greece</b>	<b>No</b>	<b>No</b>
<b>Hungary</b>	<b>No</b>	<b>No</b>
<b>Ireland</b>	<b>No</b>	<b>No</b>
<b>Italy</b>	<b>No</b>	<b>No</b>
<b>Latvia</b>	<b>No</b>	<b>No</b>
<b>Lithuania</b>	<b>No</b>	<b>No</b>
<b>Luxembourg</b>	<b>No</b>	<b>No</b>
<b>Malta</b>	<b>No</b>	<b>No</b>
<b>Netherlands</b>	<b>No</b>	<b>No</b>
<b>Poland</b>	<b>No</b>	<b>No</b>
<b>Portugal</b>	<b>No</b>	<b>No</b>
<b>Slovak Republic</b>	<b>No</b>	<b>No</b>
<b>Slovenia</b>	<b>No</b>	<b>No</b>
<b>Spain</b>	<b>No</b>	<b>No</b>
<b>Sweden</b>	<b>No</b>	<b>No</b>
<b>United Kingdom</b>	<b>No</b>	<b>No</b>
<b>Summary:</b> in all Member States except Germany and France, the penalty regime does not make a difference between a cross-border transaction and a domestic transaction.		

<sup>63</sup> Note, that the taxpayer's duty to co-operate increases in case of cross-border transactions and therefore the burden of proof may be shifted easier to the taxpayer.

<sup>64</sup> See footnote 18.

**Table 5**

<b>Administrative Penalties upon Transfer Pricing Documentation</b>	
<b>Country</b>	<b>Are Administrative penalties imposed upon late submission / omission of transfer pricing information?</b>
<b>Austria</b>	<p><b>Yes</b>, in case of (i) non-compliance info. request or (ii) non-compliance relevant docs for the assessment of the tax base (Sec 111 BAO)</p> <p><b>Amount:</b> Penalty can range up to € 2,200</p> <p><b>ii) Reversal of burden of proof</b>, in case of non-compliance with providing the correctness of statements made in the tax returns</p>
<b>Belgium</b>	<p><b>Yes</b>, in case of non-compliance with info. request</p> <p><b>Amount:</b> Penalty can range between €50 to €1,250</p> <p><b>Tax assessment ex officio</b> (implying a reversal of burden of proof) in case of non-compliance to request of documents/ information</p>
<b>Cyprus</b>	Failure to comply with information request may trigger tax assessment based on indirect method of computation of the taxable income (implying a reversal of burden of proof)
<b>Czech Republic</b>	<p><b>Yes</b>, in case of non-compliance with info. request.</p> <p><b>Amount:</b> Penalty can range up to € 67,000.</p>
<b>Denmark</b>	<p><b>Yes</b>, in case of an omission (i.e. wilful intent or gross negligence) with the transfer pricing documentation requirements.</p> <p><b>Amount:</b> Fine - minimum of 2 times the expenses saved. In case of adjustment the amount is increased by 10 % of the adjustment.</p> <p><b>ii) Reversal of burden of proof</b>, in case of omission to provide necessary information requested by the tax authorities.</p>
<b>Estonia</b>	<p><b>Yes</b></p> <p><b>Amount:</b> In a misdemeanor procedure, penalty can range EUR 3,196.</p>
<b>Finland</b>	<p><b>Yes</b>, in case of a minor defect in the response on an info request.</p> <p><b>Amount:</b> Penalty can range up to €150</p> <p><b>(ii) Administrative Penalty</b>, in case of a substantial incomplete or defective response on an info. request</p> <p><b>Amount:</b> Penalty can range up to €800</p> <p><b>(iii) Administrative Penalty</b>, in case of an intentional or with gross negligence provided substantially defective response</p> <p><b>Amount:</b> Penalty can range between 5% and 30% of the added income (min. at least €800).</p> <p><b>(iv) Reversal of burden of proof</b> in case of omission to file information/or filed info. Cannot be used as basis for taxation</p>

<b>Administrative Penalties upon Transfer Pricing Documentation</b>	
<b>Country</b>	<b>Are Administrative penalties imposed upon late submission / omission of transfer pricing information?</b>
<b>France</b>	<p><b>Yes, in case of non-compliance with info. request</b></p> <p><b>Amount:</b> Penalty amounts to €7,500 for each fiscal year under audit if not sufficiently answered after 1<sup>st</sup> reminder.</p>
<b>Germany</b>	<p><b>i) Yes, in case of non-compliance with info request and the obligation to cooperate with the tax authorities (not limited to transfer pricing matters)</b></p> <p><b>Amount:</b> Penalty ranges up to € 25,000.</p> <p><b>ii) Administrative penalty in case of non-compliance with TP documentation and no documentation is provided or a documentation that is in substance not useful.</b></p> <p><b>Amount:</b> Penalty ranges between 5% and 10% of the adjustment made (with a minimum of € 5,000)</p> <p><b>iii) Administrative penalty in case of late submission of TP documentation</b></p> <p><b>Amount:</b> At least € 100 per day with a maximum penalty of € 1 million per tax year</p> <p><b>iv) Refutable assumption that the income is reduced, in case of substantial non-compliance with TP documentation and no documentation is provided or a documentation that is to a large extent not useful. Estimation to the unfavourable point of a range looking from the perspective of the taxpayer</b></p>
<b>Greece</b>	<b>Yes, in case of non-compliance with info<sup>65</sup>. request</b>
<b>Hungary</b>	<p><b>Yes, in case of lack of transfer pricing documentation.</b></p> <p><b>Amount:</b> Penalty can range up to € 8,160 (supposing an exchange rate of 245 HUF/EUR).</p>
<b>Ireland</b>	<p><b>Yes, in the case of failure to comply with a request to provide documents/information. In this case, the tax return is deemed not to be submitted until the information is provided.</b></p> <p><b>Amount:</b></p> <ul style="list-style-type: none"> <li>- Failure to furnish info - €950 to €1,900;</li> <li>- Surcharge for late submission of return <ul style="list-style-type: none"> <li>- up to 2 months late – 5% of tax (max €12,695),</li> <li>- more than 2 months – 10% of tax (max €63,485);</li> </ul> </li> <li>- Restriction of certain loss and group reliefs where return is <ul style="list-style-type: none"> <li>- up to 2 months late – by 25% of loss (max €31,740),</li> <li>- more than 2 months – by 50% of loss (max €158,715).</li> </ul> </li> </ul>

<sup>65</sup> The term information only refers to supporting documentation. The term does not include books and records which have to be maintained compulsorily by express provisions of the law.

<b>Administrative Penalties upon Transfer Pricing Documentation</b>	
<b>Country</b>	<b>Are Administrative penalties imposed upon late submission / omission of transfer pricing information?</b>
<b>Italy</b>	<p><b>Yes</b>, in case of non-compliance or insufficient response to requests of information. Only applicable in cases of negligence or fraud</p> <p><b>Amount:</b> Penalty ranges between €258 and €2,065</p> <p><b>i) Indirect penalty</b> Information not shown/provided upon request or upon a tax audit is not allowed in future administrative /judicial proceedings<sup>66</sup>.</p> <p><b>ii) Reversal of burden of proof</b> In case of lack of proper documentation supporting the existence of certain transactions.</p>
<b>Latvia</b>	<p><b>Yes</b>,</p> <p><b>Amount:</b> Penalty can range between € 140 and € 210.</p>
<b>Lithuania</b>	<p><b>Yes</b>,</p> <p><b>Amount:</b> Penalty can range between € 14.5 and €1,159 (the penalty applies to the individual committing the violation).</p> <p><b>ii) Reversal of burden of proof</b> In case of no cooperation.</p>
<b>Luxembourg</b>	<p><b>Yes</b>, in case of non-compliance to requests of information.</p> <p><b>Amount:</b> Penalty of up to €1,250</p>
<b>Malta</b>	<p><b>Yes</b>, to the extent that the late submission / omission constitutes a default / omission as stated in Table 3.</p>
<b>Netherlands</b>	<p><b>Yes</b>, in case the deliberate non-compliance with info. request results in a too low tax assessment (“<i>offence penalty</i>”) (Art 67e GTA)</p> <p><b>Amount:</b> Penalty ranges between 50% of the unpaid tax if first offence and not more than 100% of the unpaid tax if the same offence occurred more than once in 5 previous years.</p> <p><b>ii) Reversal of the burden of proof</b>, in case of non-compliance with information request or non-fulfillment of maintaining books and records</p>
<b>Poland</b>	<p><b>Yes</b></p> <p><b>Amount:</b> Late submission / omission of transfer pricing information allows to impose corporate income tax at the rate of 50% on the adjustment instead of the standard 19% rate.</p>
<b>Portugal</b>	<p><b>Yes</b>, in case of non-compliance with requested information or non-fulfillment of maintaining documents</p> <p><b>Amount:</b> Penalty may reach up to €100,000 in case of deliberate refusal of providing requested information that does not qualify as tax fraud</p>

<sup>66</sup> However, said documentation is allowed when the taxpayer, who produces it at the launching of the administrative or judicial procedure, states that he is not responsible for non-compliance with the requests by the competent tax authorities.

<b>Administrative Penalties upon Transfer Pricing Documentation</b>	
<b>Country</b>	<b>Are Administrative penalties imposed upon late submission / omission of transfer pricing information?</b>
<b>Slovak Republic</b>	<b>Yes</b> , in case of non-compliance with information request. <b>Amount:</b> Penalty can range up to € 25,900.
<b>Slovenia</b>	<b>Yes</b> <b>Amount:</b> Penalty can range between € 1,600 and € 25,000. The individual committing the violation may be charged with a penalty ranging between € 420 and € 4,200 (only in case of negligence or intentional act)
<b>Spain<sup>67</sup></b>	<b>Yes</b> (i) in case of non-compliance with info. request to the extent it entails resistance or obstruction to the activities of the tax administration  <b>Amount<sup>68</sup>:</b> Penalty can generally range between €300 and €400,000.  (ii) in case of submission of incomplete, inaccurate or false data.  <b>Amount:</b> Penalty can generally range between €200 and 2% of the transactions involved. .
<b>Sweden</b>	<b>Yes<sup>69</sup></b>  <b>Amount:</b> No fixed amount. Amount depends on taxpayer's financial position and other circumstances
<b>United Kingdom</b>	<b>Yes</b> , in the case of failure to deliver a company tax return, failure to keep and preserve records, or failure to comply with an information request.  <b>Amount:</b> In the case of the failure to deliver a company tax return, penalties can be flat rate penalties up to £1,000. If the delay is excessive (i.e., exceeding 18 months or more) additional continuing penalties can be imposed (i.e., 10% to 20% of tax unpaid); in the case of the failure to keep and preserve records, a company is liable to a penalty not exceeding £ 3,000; in cases of failing to comply with an information request, £50 initially and daily for a continued failure of up to £150 a day.

<sup>67</sup> Note that all references are made to the new "Ley General Tributaria", which was enacted in December 2003 and entered into effect on July 1, 2004.

<sup>68</sup> However if, before the infringement procedure is finally closed by the Tax administration, the taxpayer has fulfilled all info. requests, the administrative penalty will be reduced to €6,000.

<sup>69</sup> Non-compliance of an info. request does not per se lead to the imposition of an administrative penalty. Only if the tax authorities explicitly make request for information an administrative penalty can be imposed.

**Table 6**

**Discretionary Powers of Tax Administrations to impose Administrative Penalties with respect to Late Submission / Omission of Transfer Pricing information**

Country	Administrative penalties upon LS / Omission of Transfer Pricing information requested by the tax authorities?	What authority is competent to impose a penalty?	Is there the possibility that (part of) the administrative penalty is reduced / waived?	If penalties can be waived what authority is competent to do so?
Austria	Yes	Competent tax authorities	Yes, Administrative penalties can either be waived in first appeal or in second appeal	<b>Independent Fiscal Senate</b> for appeal in first instance and the <b>Supreme Administrative Court</b> or the <b>Supreme Constitutional Court</b> for appeal in second instance
Belgium	Yes	Competent tax authorities	Yes, if the taxpayer demonstrates that no violation of the ITC occurred.	<b>Regional Director of the tax administration</b> in first instance.  Subsequently, (in the rare case that such case is brought before Court), the <b>Tribunal of first instance</b> and thereafter <b>the Court of Appeal</b> . As a last resort the <b>Court of Cassation</b> .  In rather exceptional cases the penalty may be waived by ministerial decree in accordance with the Decree of the Regent of March 18 <sup>th</sup> , 1831
Cyprus	No monetary penalty applies (see Table 5)	N/A	N/A	N/A
Czech Republic	Yes	Competent tax authorities	Yes, in case of inconsistencies ensuing from the tax legislation or to eliminate rigor.	Ministry of Finance or the competent tax authorities <sup>70</sup>

<sup>70</sup> Within certain limits

<b>Country</b>	<b>Administrative penalties upon LS / Omission of Transfer Pricing information requested by the tax authorities?</b>	<b>What authority is competent to impose a penalty?</b>	<b>Is there the possibility that (part of) the administrative penalty is reduced / waived?</b>	<b>If penalties can be waived what authority is competent to do so?</b>
<b>Denmark</b>	<b>Yes</b>	The tax administration	<b>Yes</b>	<b>Competent tax authorities</b>
<b>Estonia</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b> , in case of appeal in court or cooperation by the taxpayer.	<b>Competent tax authorities or Courts.</b>
<b>Finland</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b> , except for an administrative penalty in case of reassessment. Such penalty is obligatory.	<b>Tax administration.</b> In first instance. Subsequently, the <b>Administrative Court</b> and on certain qualified grounds the <b>Supreme Administrative Court</b>
<b>France</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b> , in the context of a settlement with the FTA	<b>Competent tax authorities.</b>
<b>Germany</b>	<b>Yes</b>	<b>Competent local tax authorities</b>	<b>Yes</b> , if non-compliance is excusable or caused by a minor offence	<b>Competent local tax authorities</b> in first instance. Subsequently, the <b>German Tax Courts</b> in an appeal
<b>Greece</b>	<b>Yes</b>	<b>The director of the Tax Audit Centre</b>	<b>Yes</b> , in case of settlement the penalties are reduced to 1/3.  TP adjustment penalty may be fully waived if taxpayer proves that TP used was not intended to avoid direct/indirect taxes (Art. 34 par. 5 b ITC)	The director of the <b>Tax Audit Centre</b> in first instance. Subsequently, the <b>Tax court</b>
<b>Hungary</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b> , under special and equitable circumstances if the payment of the penalty would make it impossible for the taxpayer to conduct business.	<b>Competent tax authorities</b>

<b>Country</b>	<b>Administrative penalties upon LS / Omission of Transfer Pricing information requested by the tax authorities?</b>	<b>What authority is competent to impose a penalty?</b>	<b>Is there the possibility that (part of) the administrative penalty is reduced / waived?</b>	<b>If penalties can be waived what authority is competent to do so?</b>
<b>Ireland</b>	<b>Yes</b>	Technically the court. However, in practice, the <b>Revenue Commissioners</b>	<b>Yes, Revenue Commissioners</b> have a general discretion to mitigate penalties.	<b>Revenue Commissioners</b>
<b>Italy</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b> , in case of a lack of negligence <sup>71</sup>	<b>Competent tax authorities</b> in first instance. Subsequently, the <b>Tax Court</b> .
<b>Latvia</b>	<b>Yes</b>	<b>State Revenue Service</b>	<b>Yes</b> , based on a number of indexes (e.g. recurrence of violations, etc.) the penalty can be reduced by 70% but not more frequently than once per annum.	<b>Competent tax authorities or Courts.</b>
<b>Lithuania</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b> , depending on a character of violation, the personality and mitigating or aggravating circumstances.	<b>Competent tax authorities or Courts.</b>
<b>Luxembourg</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes.</b>	<b>The head of the tax administration in first instance, subsequently the administrative court finally the administrative court of appeal.</b>

<sup>71</sup> Lack of negligence is considered to exist in case of objectively uncertainty, legitimate assurance or valuations not exceeding five per cent of the value assessed by the tax administration.

<b>Country</b>	<b>Administrative penalties upon LS / Omission of Transfer Pricing information requested by the tax authorities?</b>	<b>What authority is competent to impose a penalty?</b>	<b>Is there the possibility that (part of) the administrative penalty is reduced / waived?</b>	<b>If penalties can be waived what authority is competent to do so?</b>
<b>Malta</b>	<b>Administrative penalties are due in terms of the law.</b>	<b>N/A</b>	<b>The penalty for a default may be waived in the case of a reasonable excuse. The penalty for an omission may be waived in case the taxpayer exercised reasonable care where technical interpretations were involved, or reduced where the omission was not due to fraud or gross or willful negligence..</b>	<b>Commissioner of the Inland Revenue</b>
<b>Netherlands</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b>	<b>The competent tax authorities in first instance. Subsequently, the tax Court.</b>
<b>Poland</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes, in case of appeals.</b>	<b>Competent tax authorities or tax courts.</b>
<b>Portugal</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes<sup>72</sup></b>	<b>The competent authorities in first instance. Subsequently, the Tax Courts</b>
<b>Slovak Republic</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes, based on a number of indexes (e.g. financial difficulties, incorrect application of legislation, etc.).</b>	<b>Ministry of Finance or the competent tax authorities</b>
<b>Slovenia</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes.</b>	<b>Competent tax authorities or Courts.</b>
<b>Spain</b>	<b>Yes</b>	<b>The competent administrative tax authority.</b>	<b>Yes<sup>73</sup></b>	<b>Administrative (regional and central) and judicial courts at all levels.</b>

<sup>72</sup> Penalties can be reduced or waived upon a request made by the taxpayer provided that such request could meet the circumstances as established by law regularizing the non-compliance situation.

<sup>73</sup> Administrative penalties can be reduced by settlement between the tax authorities and the taxpayer (in order to reduce litigation), provided that a number of legal requirements are met, based on the following 2 procedures:

<b>Country</b>	<b>Administrative penalties upon LS / Omission of Transfer Pricing information requested by the tax authorities?</b>	<b>What authority is competent to impose a penalty?</b>	<b>Is there the possibility that (part of) the administrative penalty is reduced / waived?</b>	<b>If penalties can be waived what authority is competent to do so?</b>
<b>Sweden</b>	<b>Yes<sup>74</sup></b>	<b>Competent tax authorities</b>	<b>Yes</b> , if omission or failure is excusable or unreasonable (e.g., good faith, misinterpretation)	The <b>Tax Authorities</b> are competent to waive a penalty.  On appeal, an <b>Administrative Court</b> is also competent
<b>United Kingdom</b>	<b>Yes</b>	<b>H.M. Revenue &amp; Customs</b>	<b>Yes<sup>75</sup></b>	<b>H.M. Revenue &amp; Customs</b> in first instance. Subsequently, <b>the Court</b>
<b>Summary:</b> in all EU Member States the tax authorities are entitled to waive or reduce administrative penalties on transfer pricing documentation.				

**Settlement reached with the taxpayer** (“actas con acuerdo”) and **Taxpayer confirms the adjustment** (“Acta de conformidad”).

<sup>74</sup> Non-compliance of an info. request does not per se lead to the imposition of an administrative penalty. Only if the tax authorities explicitly make request for information an administrative penalty can be imposed.

<sup>75</sup> Penalties can be mitigated based on (i) gravity of the offences, (ii) the taxpayer’s co-operation and (iii) taxpayer’s disclosure.

**Table 7**

**Discretionary Powers of Tax Administrations to impose Administrative Penalties with respect to Transfer Pricing Adjustments**

<b>Country</b>	<b>Administrative penalties imposed on Transfer Pricing Adjustments?</b>	<b>What authority is competent to impose a penalty?</b>	<b>Is there a possibility that (part of) the penalty is waived?</b>	<b>If penalties can be waived what authority is competent to do so?</b>
<b>Austria</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b> , in first appeal or in second appeal.	<b>Independent Fiscal Senate</b> for appeal in first instance and <b>Supreme Administrative Court</b> or the <b>Supreme Constitutional Court</b> for appeal in second instance.
<b>Belgium</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b> , if the taxpayer demonstrates that no violation of the ITC occurred, the fine can be waived.  The application of the 10% tax increase can be renounced if taxpayer is bona fide. In general, the tax administration holds that the opportunity of the tax increase cannot be challenged and that the increase cannot be lowered on the basis of mitigating circumstances <sup>76</sup> .	<b>Regional Director of the tax administration</b> in first instance. Subsequently the <b>Tribunal of first instance</b> and thereafter <b>the Court of Appeal</b> . As a last resort the <b>Court of Cassation</b> .  In rather exceptional cases the penalty may be waived by ministerial decree in accordance with the Decree of the Regent of March 18 <sup>th</sup> , 1831
<b>Cyprus</b>	<b>Yes</b>	<b>Director of the Inland Revenue</b>	<b>No</b> . however, in case the taxpayer disputes before the court the assessment raised by the tax authorities, on a legal point not yet decided the 10% penalty referred to in table 3 may be waived.	<b>Director of the Inland Revenue</b>

<sup>76</sup> If the tax increase could be qualified as a criminal charge under art. 6 ECHR, the Courts could however make such assessment.

Country	Administrative penalties imposed on Transfer Pricing Adjustments?	What authority is competent to impose a penalty?	Is there a possibility that (part of) the penalty is waived?	If penalties can be waived what authority is competent to do so?
Czech Republic	Yes	Competent tax authorities	Yes, in case of inconsistencies ensuing from the tax legislation or to eliminate rigor.	Ministry of Finance or the competent tax authorities <sup>77</sup>
Denmark	Yes <sup>78 79</sup>	Competent tax authorities	No	Competent tax authorities
Estonia	Yes	Competent tax authorities	Yes, in case of appeal in court or in case of cooperation by the taxpayer.	Competent tax authorities or Courts.
Finland	Yes	Competent tax authorities	No, an administrative penalty is always imposed in case of an adjustment.	Competent tax authorities in first instance. Subsequently, the Administrative Court and certain qualified grounds the Supreme Administrative Court
France	Yes	Competent tax authorities	Yes, in the context of a settlement with the FTA.	Competent tax authorities
Germany	Yes <sup>80</sup>	Competent local tax authorities	Yes	Competent local tax authorities in first instance. Subsequently, the German Tax Court in appeal.
Greece	Yes.	The director of the Tax Audit Centre.	Yes, in case of settlement the penalties are reduced to 1/3. TP adjustment penalty may be fully waived if taxpayer proves that TP used was not intended to avoid direct/indirect taxes	The director of the Tax Audit Centre in first instance. Subsequently, the Tax Court. Taxpayer can appeal the imposed penalty in front of a tax court that can waive the penalty

<sup>77</sup> Within certain limits

<sup>78</sup> In case of non-compliance with transfer pricing documentation requirements

<sup>79</sup> Please note that, in case the adjustment results in an increase of the taxpayer's taxable base, a surcharge of 5,4% of the additional tax triggered is imposed (see Table 3).

<sup>80</sup> Penalties are only imposed if the adjustment (estimation) was caused by substantial non-compliance of the taxpayer with the transfer pricing documentation requirements.

<b>Country</b>	<b>Administrative penalties imposed on Transfer Pricing Adjustments?</b>	<b>What authority is competent to impose a penalty?</b>	<b>Is there a possibility that (part of) the penalty is waived?</b>	<b>If penalties can be waived what authority is competent to do so?</b>
<b>Hungary</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b> , under special and equitable circumstances if the payment of the penalty would make it impossible for the taxpayer to conduct business.	<b>Competent tax authorities</b>
<b>Ireland</b>	<b>Yes</b>	Technically the court. However, in practice, the <b>Revenue Commissioners</b>	<b>Yes</b>	<b>Revenue Commissioners</b>
<b>Italy</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b> , in case of a lack of negligence <sup>81</sup>	<b>Competent tax authorities</b> in first instance. Subsequently, the <b>Tax Court</b> .
<b>Latvia</b>	<b>Yes</b>	<b>State Revenue Service</b>	<b>Yes</b> , based on a number of indexes (e.g. recurrence of violations, etc.) the penalty can be reduced by 70% but not more frequently than once per annum.	<b>Competent tax authorities or Courts.</b>
<b>Lithuania</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b> , in case of lack of guilt, of absence of damage for the State budget or in case of violation committed due to a wrong advance ruling issued by the tax authorities.	<b>Competent tax authorities or Courts.</b>
<b>Luxembourg</b>	<b>No</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>

<sup>81</sup> Lack of negligence is considered to exist in case of objectively uncertainty, legitimate assurance, or valuations not exceeding five per cent of the value assessed by the tax administration..

<b>Country</b>	<b>Administrative penalties imposed on Transfer Pricing Adjustments?</b>	<b>What authority is competent to impose a penalty?</b>	<b>Is there a possibility that (part of) the penalty is waived?</b>	<b>If penalties can be waived what authority is competent to do so?</b>
<b>Malta</b>	<b>To the extent that the adjustment amounts to an omission, administrative penalties are due in terms of the law</b>	N/A	<b>Yes</b> , , the penalty for an omission may be waived in case the taxpayer exercised reasonable care where technical interpretations were involved, or reduced where the omission was not due to fraud or gross or willful negligence.	<b>Commissioner of the Inland Revenue</b>
<b>Netherlands</b>	<b>Yes<sup>82</sup></b>	<b>Competent tax authorities</b>	<b>Yes</b>	<b>Competent tax authorities</b> in first instance. Subsequently, the <b>Court</b> .
<b>Poland</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes</b> , in case of appeal.	<b>Tax authorities or tax courts.</b>
<b>Portugal</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes<sup>83</sup></b>	<b>The competent authorities</b> in first instance. Subsequently, the <b>Tax Courts</b>
<b>Slovak Republic</b>	<b>Yes</b>	<b>Competent tax authorities</b>	Yes. An administrative penalty is always imposed in case of adjustment. After the penalty was imposed, the taxpayer is allowed to submit the request in order to reduce the penalty.	<b>Ministry of Finance or the competent tax authorities</b>
<b>Slovenia</b>	<b>Yes</b>	<b>Competent tax authorities</b>	<b>Yes.</b>	<b>Competent tax authorities or Courts</b>
<b>Spain</b>	<b>Yes<sup>84</sup></b>	<b>The competent administrative tax authority.</b>	<b>Yes<sup>85</sup></b>	<b>Administrative (regional and central) and judicial courts at all levels.</b>

<sup>82</sup> Based on the announcement of the Under Minister of Finance (i.e., Parliamentary documents II, 28034, No. 5 pag. 48) the imposition of a penalty based on an incorrect tax return will be limited to cases where it is plausible that a non-arm's length price results from an intentional act.

<sup>83</sup> Penalties can be reduced or waived upon a request made by the taxpayer provided that such request could meet the circumstances as established by law regularizing the non-compliance situation.

Country	Administrative penalties imposed on Transfer Pricing Adjustments?	What authority is competent to impose a penalty?	Is there a possibility that (part of) the penalty is waived?	If penalties can be waived what authority is competent to do so?
Sweden	Yes <sup>86</sup>	Competent Tax Authorities	Yes	The Tax Authorities are competent to waive a penalty . On appeal, an Administrative Court is also competent.
United Kingdom	Yes <sup>87</sup>	H.M. Revenue & Customs	Yes <sup>88</sup>	H.M. Revenue & Customs in first instance. Subsequently, the Court.
<b>Summary:</b> in all EU Member States except for Denmark and Finland the tax authorities are entitled to waive or reduce administrative penalties upon a transfer pricing adjustment.				

<sup>84</sup> Note, however, that it is quite unlikely that an administrative penalty upon a transfer pricing adjustment can be imposed. Penalties can only be imposed when the tax administration can show that the adjustment is caused by negligence or wilful conduct by the taxpayer.

<sup>85</sup> Administrative penalties can be reduced by settlement between the tax authorities and the taxpayer (in order to reduce litigation), provided that a number of legal requirements are met, based on the following 2 procedures: **Settlement reached with the taxpayer** (“actas con acuerdo”) and **Taxpayer confirms the adjustment** (“Acta de conformidad”).

<sup>86</sup> Only if such adjustment is caused by the taxpayer by way of submitting either incorrect info or not disclosing info. in its tax return

<sup>87</sup> However, penalties can only be imposed if the Inland Revenue can show that tax has been lost through negligent or fraudulent conduct

<sup>88</sup> Penalty can be mitigated based on (i) gravity of the offences (ii) the taxpayer’s co-operation., and (iii) taxpayer’s disclosure.

**Table 8**

Country	Relevant for penalty whether a TP adjustment is made via ...,		
	a settlement <sup>89</sup> ?	A competent authority's procedure?	a procedure covered in the EU Arbitration Convention ("AC")?
<b>Austria</b>	No	No	No
<b>Belgium</b>	No	No	No
<b>Cyprus</b>	No	No	No
<b>Czech Republic</b>	No	No	No
<b>Denmark</b>	No	No	No
<b>Estonia</b>	No	No	No
<b>Finland</b>	No	No	No
<b>France</b>	No	No	No
<b>Germany</b>	No, in case of late submission In case of non-compliance a settlement is not likely	No, in case of late submission In case of non-compliance the penalty may be changed to one because of late submission (reduction likely) if sufficient documentation becomes available for the tax administration during the procedure	No, in case of late submission In case of non-compliance the penalty may be changed to one because of late submission (reduction likely) if sufficient documentation becomes available for the tax administration during the procedure
<b>Greece</b>	Yes, penalties are reduced in case of settlement procedure	No	No
<b>Hungary</b>	No	No	No
<b>Ireland</b>	No	No	No
<b>Italy</b>	Yes, administrative penalties are reduced to 25% of the min. applicable penalty in case of a settlement	No	No
<b>Latvia</b>	No	No	No
<b>Lithuania</b>	No	No	No
<b>Luxembourg</b>	No	No	No
<b>Malta</b>	No	No	No

<sup>89</sup> *I.e.* an agreement reached by the Tax Authorities and the taxpayer either upon completion of a tax audit or immediately after a tax assessment or in substantially similar or equivalent circumstances

Country	Relevant for penalty whether a TP adjustment is made via ...,		
	a settlement?	A competent authority's procedure?	a procedure covered in the EU Arbitration Convention ("AC")?
Netherlands	No	No	No
Poland	No	No	No
Portugal	No	No	No
Slovak Republic	No	No	No
Slovenia	No	No	No
Spain	Yes, administrative penalties are reduced by 50% in case of a settlement ("acta con acuerdo")	No	No
Sweden	No	No	No
United Kingdom	No	No	No

**Table 9**  
**Administrative penalty regarded as a Criminal Charge in the meaning of Article 6 of the ECHR<sup>90</sup>**

	<b>Administrative Penalties on TP documentation requirements</b>	<b>Administrative Penalties on TP adjustments</b>
<b>Austria</b>	<b>No</b>	<b>No</b>
<b>Belgium</b>	<b>No</b>	<b>No</b> , however it could be argued that the <b>tax increase</b> can be considered to fall within the scope of Art. 6 ECHR
<b>Cyprus</b>	<b>No</b>	<b>No</b>
<b>Czech Republic</b>	<b>Not clear</b> , no specific case law	<b>Not clear</b> , no specific case law
<b>Denmark</b>	<b>No</b>	<b>No</b>
<b>Estonia</b>	<b>Yes</b> for misdemeanor charges <b>No</b> for other administrative remedies	<b>Yes</b> for misdemeanor charges <b>No</b> for other administrative remedies.
<b>Finland</b>	<b>No</b>	<b>No</b>
<b>France</b>	<b>No</b>	<b>Yes</b>
<b>Germany</b>	<b>No</b>	<b>No</b>
<b>Greece</b>	<b>No</b> <sup>91</sup>	<b>No</b> <sup>92</sup>
<b>Hungary</b>	<b>No</b>	<b>Yes</b>
<b>Ireland</b>	<b>No</b>	<b>No</b>
<b>Italy</b>	<b>No</b>	<b>Yes</b> (but no specific case law)
<b>Latvia</b>	<b>No</b> (but no specific case law)	<b>Yes</b> (but no specific case law)
<b>Lithuania</b>	<b>Yes</b> (but no specific case law)	<b>Yes</b> (but no specific case law)
<b>Luxembourg</b>	<b>No</b>	<b>N/A</b>
<b>Malta</b>	<b>No (but no specific case law)</b>	<b>No (but no specific case law)</b>
<b>Netherlands</b>	<b>Yes</b> , administrative penalties are considered to fall within the scope of Article 6 ECHR. The reversal of the burden of proof is considered an “administrative penalty”; however, it is not considered a “criminal charge” ex art. 6 ECHR.	<b>Yes</b> . However, the reversal of the burden of proof, despite being considered an “administrative penalty”, is not considered a “criminal charge” ex art. 6 ECHR.

<sup>90</sup> The analysis has been conducted either based on the domestic qualification of the penalties as criminal charges falling within the scope of Article 6 ECHR or in light of the principle whereby a criminal charge under the ECHR exists when the domestic legal system provides for the liability to pay substantial tax-geared penalties, if such penalty amounts to more than 25 per cent of the tax (e.g. *Lechaczynski vs. France*, *Bendenoun v. France*, etc.).

<sup>91</sup> However, in administrative court decision (no. 53/99) the administrative penalty was considered to fall within the scope of Article 6 ECHR

<sup>92</sup> See footnote 91.

	<b>Administrative Penalties on TP documentation requirements</b>	<b>Administrative Penalties on TP adjustments</b>
<b>Poland</b>	<b>No</b> (but no specific case law)	<b>No</b> (but no specific case law)
<b>Portugal</b>	<b>No</b>	<b>No</b>
<b>Slovak Republic</b>	<b>Not clear</b> , no specific case law	<b>Not clear</b> , no specific case law
<b>Slovenia</b>	<b>No</b>	<b>Yes (no specific case law)</b>
<b>Spain</b>	<b>Not in general terms.</b> However, certain administrative penalties may be considered to fall within the scope of Article 6 ECHR.	<b>Very unlikely</b> , certain administrative penalties may be considered to fall within the scope of Article 6 ECHR.
<b>Sweden</b>	<b>No</b> , not likely	<b>Yes</b>
<b>United Kingdom</b>	Some penalties are considered to be criminal for the purposes of Article 6 ECHR.	Some penalties are considered to be criminal for the purposes of Article 6 ECHR.

**Table 10****Criminal Penalties regarded as a Criminal Charge in the meaning of Article of the 6 ECHR**

	<b>Criminal Penalties on TP documentation requirements</b>	<b>Criminal Penalties on TP adjustments</b>
<b>Austria</b>	Yes, no case law	Yes
<b>Belgium</b>	Yes	Yes
<b>Cyprus</b>	Yes	Yes
<b>Czech Republic</b>	Not clear, no specific case law	Not clear, no specific case law
<b>Denmark</b>	No	No
<b>Estonia</b>	Yes	Yes
<b>Finland</b>	Yes (but no specific case law)	Yes (but no specific case law)
<b>France</b>	N/A	N/A
<b>Germany</b>	Yes	Yes
<b>Greece</b>	N/A	Yes.
<b>Hungary</b>	N/A	Yes
<b>Ireland</b>	Yes, (but no specific case law)	Yes, (but no specific case law)
<b>Italy</b>	Yes	Yes
<b>Latvia</b>	N/A	Yes
<b>Lithuania</b>	Yes (but no specific case law)	Yes (but no specific case law)
<b>Luxembourg</b>	N/A	Yes
<b>Malta</b>	N/A	N/A
<b>Netherlands</b>	Yes	Yes
<b>Poland</b>	Yes	Yes
<b>Portugal</b>	Yes, no case law	Yes, no case law
<b>Slovak Republic</b>	Not clear, no specific case law	Not clear, no specific case law
<b>Slovenia</b>	Yes	Yes

	<b>Criminal Penalties on TP documentation requirements</b>	<b>Criminal Penalties on TP adjustments</b>
<b>Spain</b>	N/A	<b>Yes</b>
<b>Sweden</b>	N/A	<b>Yes</b>
<b>United Kingdom</b>	<b>Yes</b>	<b>Yes</b>