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ROMANIA

TRANSFER PRICING COUNTRY PROFILE

1. Reference to the Arm's Length Principle

The arm's length principle was introduced in the domestic tax law in 1994 and is applicable to all related party transactions, including those taking place between a non-resident legal entity and its Romanian permanent establishment. Starting with 2010, related party transactions carried out between two Romanian legal entities also fall within the scope of transfer pricing investigations, whereas previously only transactions with non-resident related parties were investigated by the tax authority.

Art. 19 of the Romanian Fiscal Code (Law no. 227/2015) as later amended and supplemented, establishes the general rule that transactions between related persons or entities must be valued at normal market value.

According to art. 7 point 33 of the Fiscal Code, as later amended and supplemented, the market value principle is defined as following: *"when the conditions established or imposed in the trading or commercial relations between two affiliated persons are different from those that would have existed between independent persons, any profits which in the absence of those conditions would have been realized by one of the persons, but have not been realized by this person due to those conditions, may be included in the profits of that person and taxed accordingly".*

In order to determine the related parties' fiscal results, transfer pricing provisions in Fiscal Procedure Code (Law no. 207/2015) will apply. In case such differences are met, that cannot be properly explained or documented by the audited taxpayer, it may concluded that transfer prices are not set at arm's length and the tax authorities can adjust the taxpayers' revenues and expenses so as to reflect the market value. Currently, this approach applies both in purely domestic and in cross-border situations.

2. Reference to the OECD Transfer Pricing Guidelines

Although Romania is not a member of the OECD, domestic legislation expressly stipulates that in the application of transfer pricing rules, the Romanian tax authorities will also consider the OECD Transfer Pricing Guidelines.

3. Definition of related parties

According to art. 7 point 26 of the Fiscal Code, as later amended and supplemented, a person is affiliated if the relation between such person and another person is defined by at least one of the following cases:

- a natural person is affiliated with another natural person if such persons are spouses or relatives up to the 3rd degree inclusive;
- a person is affiliated with a legal person if the person owns, directly or indirectly, the holdings of the affiliated persons, representing minimum 25% of the value/number of the participation titles or of the voting rights held in the legal person, or if it actually controls the legal person;
- a legal person is affiliated with another legal person if at least the former holds, directly or indirectly, the holdings of the affiliated persons, representing minimum 25% of the value/number of the participation titles or of the voting rights held in the other legal person, or if it actually controls the legal person;

- a legal person is affiliated with another person if a person holds, directly or indirectly, the holdings of the affiliated persons inclusive, representing minimum 25% of the value/number of the participation titles or of the voting rights held in the other legal person or if it actually controls that person;

Between affiliated persons, the price for which the tangible and intangible assets are transferred or for which services are supplied represents a transfer price.

4. Transfer pricing methods

Domestic legislation provides that taxpayers may use traditional transfer pricing methods (comparable uncontrolled price, cost plus and resale price), as well as any other method that is in line with the OECD Guidelines (transactional net margin and profit split). In order to determine the most appropriate method, the following elements are considered:

- the approach which is most closely related to the circumstances in which prices subject to free competition are established in commercially comparable markets;
- the method for which data from the effective operation of affiliated persons involved in transactions subject to free competition are available;
- the degree of precision with which adjustments may be made to achieve comparability;
- any specific circumstances of the individual case;
- activities actually carried out by the various affiliated persons;
- the method used must correspond to the market circumstances and the activity of the taxpayer;
- any further information/documents that can be provided by the taxpayer.

5. Transfer pricing documentation requirements

In line with the Fiscal Procedure Code (Law no. 207/2015, as amended), taxpayers engaged in related party transactions are required to prepare a transfer pricing file. Taxpayer is required to prepare a transfer pricing file upon request of the tax authorities. The transactions for which the taxpayer is required to prepare a transfer pricing file, the deadlines, the content of the transfer pricing file, when this is requested, are all published in Order of the President of the National Agency for Fiscal Administration no. 442/2016 on the amount of transactions, deadlines, content of the transfer pricing file, conditions for requesting, and the adjustment and estimation procedure (hereinafter Order no. 442/2016).

Detailed regulations regarding the content of the transfer pricing file were published in 2016 (Order no. 442/2016), which is replacing the initial existing provisions that is Order of the President of the National Agency for Fiscal Administration no. 222/2008 on the content of the transfer pricing file. The provisions of Order no. 442/2016 are in line with OECD Transfer Pricing Guidelines and Code of Conduct on Transfer Pricing Documentation Associated Enterprises in the European Union (EUTPD), published in the Official Journal of the European Union No. C176/1 of 28th of July 2006.

Generally, the transfer price file shall include information about the group (legal, operational and organizational structure, general description of group's activity, business strategies, transfer pricing methodology at group level, overview on the transactions between related parties, intangible assets' holders within the group, general description of functions and risks assumed by the related parties, etc.), information about the audited taxpayer (detailed presentation of controlled transactions, functional analysis, contractual terms, economic circumstances, specific business strategies, use of internal or external comparables,

documented description of the transfer pricing method), description of other conditions deemed relevant for the taxpayer.

6. Specific transfer pricing audit procedures and / or specific transfer pricing penalties

Burden of proof

The primary burden of proof is on the taxpayer, by way of the transfer pricing documentation that needs to be prepared according to national legislation requirements. On the other hand, where a transfer pricing file is not presented, upon request, or is incomplete (a failure to provide the information required by tax inspector in order to determine whether or not relevant transfer prices as charged in inter-company transactions are of an arm's length nature), the tax authority is likely to assume that transactions are not at arm's length and impose adequate corrections to the taxable income. Also, in the event the prices applied in a transaction with a related party are challenged, the tax administration should determine the market value based on the available information on similar transactions.

Statute of limitation

Profit adjustments on transactions between related parties can be performed within the domestic statute of limitation period of 5 years. By means of exception, the right to assess tax obligations shall be limited to 10 years, provided that such obligations are likely to result from fiscal fraud, falling under the provisions of criminal law.

Desk and field audits

Generally, the procedural rules for transfer pricing audits are the same as those applicable to ordinary examinations. The audits are initiated by a notification sent to the taxpayer, which will detail the nature and scope of the audit. The audit is closed by issuing a draft report that the taxpayers may oppose. After preliminary hearings granted to the taxpayer, the tax auditors may issue the final report, which can include adjustments.

Similar to ordinary tax audits, the transfer pricing audit might be initiated by selecting taxpayers as audit targets, based on various data, such as:

- significant related parties transactions;
- consistent losses;
- payment of minimal taxes;
- taxpayers' past behavior: compliant or non-compliant etc.

The formal request for transfer pricing file is generally preceded by preliminary inquiries into related parties' transactions, such as requests for inter-company agreements or explanations of related parties' transactions as disclosed in the financial statements or accounting documents.

Penalties

Failure to present the transfer pricing file may result in fines ranging from LEI 12,000 up to LEI 14.000 (i.e. approx. EUR 2.700 to EUR 3.000 at the current foreign exchange rate) for medium and large taxpayers, or from LEI 2.000 up to LEI 3.500 (i.e. approx EUR 430 to EUR 750 at the foreign exchange rate) for the other categories of taxpayers; followed by an estimation of transfer prices by the tax authorities based on generally available information on similar transactions, as the arithmetic mean of prices on three similar transactions. The additional taxable profits resulting from this estimation or any transfer pricing adjustments are subject to the general 16% profit tax rate and corresponding late payment interest and

penalties. Under Romanian legislation, interest and penalties in case of late payment are non-deductible.

7. Information for Small and Medium Enterprises on TP

Currently, there are specific transfer pricing rules and regulations or procedures for small and medium size taxpayers, compared to large taxpayers. Thus, according to the provisions of Order no. 442/2016, in case of small and medium-sized taxpayers, the applicable values of a materiality threshold are, as follows:

- EUR 50.000 in case of interest costs incurred for financial services, to be determined based on the exchange rate announced by the National Bank of Romania prevailing at the last date of the relevant fiscal year;
- EUR 50.000 in case of provisions of services, to be determined based on the exchange rate announced by the National Bank of Romania prevailing at the last date of the relevant fiscal year;
- EUR 100.000 in case of transaction involving purchases/sales of tangible or intangible assets, to be determined based on the exchange rate announced by the National Bank of Romania prevailing at the last date of the relevant fiscal year.

Thus, according to the provisions of Order no. 442/2016, large taxpayers (as established by Order of the President of the Agency National Tax Administration), which carries out transactions with affiliated persons with a total annual value, calculated by summing the value of transactions performed with all affiliated persons, excluding VAT, greater than or equal to any of the following thresholds, have the obligation to prepare the transfer pricing file annually:

- EUR 200.000 in case of interest costs incurred for financial services, to be determined based on the exchange rate announced by the National Bank of Romania prevailing at the last date of the relevant fiscal year;
- EUR 250.000 in case of provisions of services, to be determined based on the exchange rate announced by the National Bank of Romania prevailing at the last date of the relevant fiscal year;
- EUR 350.000 in case of transaction involving purchases/sales of tangible or intangible assets, to be determined based on the exchange rate announced by the National Bank of Romania prevailing at the last date of the relevant fiscal year.

Taxpayers/payers qualifying for the above mentioned provisions that conduct inter-company transactions of an aggregate annual value reached by adding up the values of transactions with all their related parties, exclusive of VAT, which is lower than the materiality thresholds mentioned above, must prepare documents that attest to the compliance with the arm's length principle, in case of a tax inspection, according to the effective provisions of the general tax regulations.

The transfer pricing documentation file can also be requested by the tax authority outside of a fiscal inspection, based on art. 58 and 64 of Law no. 207/2015 on the Fiscal Procedure Code, as subsequently amended and supplemented.

Large taxpayers/payers who do not meet the above criteria have the obligation to prepare and present the transfer pricing file only at the request of the tax authority in the framework of a tax inspection.

8. Information on dispute resolution

Currently, the legislation foresees two possible forms of Mutual Agreement Procedures (MAPs):

- MAPs, as provided by bilateral tax treaties concluded by Romania with other countries; and

- MAPs under the EU Arbitration Convention for EU Member States.

Dispute resolution under the Arbitration Convention does not need to be initiated and may be suspended if one of the enterprises involved is subject to a "*serious penalty*" for the transactions giving rise to the profit adjustment (Article 8).

The declaration of Romania on the definition of "serious penalty" (Official Journal L 174, 03/07/2008 P. 0001 – 0005) is:

"*The term 'serious penalty' includes the commission of any criminal act provided by the tax evasion law or the accountancy law or the company law or the tax legislation. It also includes administrative penalties in regard to:*

- *refusal to submit the tax statements (declarations) or the informative statements at the request of the tax bodies;*
- *refusal to supply documents and records requested by the tax inspection authorities;*
- *failing to submit the periodical financial documents and the accounting reports or, submitting such documents or reports which include incorrect data;*
- *actions included in the tax record, according to the legislation in force."*

The taxpayer can request a mutual agreement procedure based on tax treaty, if the treaty provides for a MAP. In accordance with the OECD Model Tax Convention and EU Arbitration Convention, the MAP can be initiated at the taxpayer request, within 3 years from the first notification of the action resulting in double taxation. However, in case the bilateral tax treaties contain previsions which are different from the 3 years deadline (from the first notification of the action resulting in double taxation), those provisions shall prevail.

The request to start the mutual agreement procedure may be presented irrespective of whether the person affected or to be affected by double taxation has recourse to the remedies available under national law by means of administrative and judicial proceedings directly linked to the situation which is subject to double taxation.

In all situations of double taxation in which the taxpayer has requested the initiation of the mutual agreement procedure under the provisions of the Arbitration Convention, if the tax administrations concerned do not reach a solution within 2 years of the initiation of the case, the person affected by the double taxation may request the initiation of the arbitration procedure.

Where the concerned person has recourse at the same time to the remedies available under national law, the period for conducting the mutual agreement procedure shall be suspended during the administrative or judicial proceeding in question, pending a final and irrevocable decision. The decision issued in final and irrevocable form in an administrative or judicial proceeding initiated in respect to the situation which is the subject of the mutual agreement procedure is binding to the person concerned and to the tax authority.

In initiating and conducting a mutual agreement procedure it is recommended for the taxpayers to consider the information contained in the following documents:

- the O.E.C.D. Model tax convention on income and on capital, respectively the commentaries on the Model tax convention, as later amended and supplemented;

- Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises(2009/C322/01);
- Manual on Effective Implementation of the Mutual Agreement Procedure – MEMAP;
- O.E.C.D. Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations as later amended and supplemented.

The request and documentation submitted for the initiation of the mutual agreement procedure under the bilateral Conventions shall be submitted within the time limit provided in the "*mutual agreement*" Article of the Convention, irrespective of whether the person affected or to be affected by double taxation has recourse to the remedies available under national law, through administrative and judicial proceedings, directly related to the case of double taxation.

A request to start a mutual agreement procedure may not be accepted in the following situations:

a. where the double taxation which is the subject of the mutual agreement procedure has been settled through other fiscal, administrative or judicial proceeding;
b. when the mutual agreement procedure request has been filed by a person who is not eligible within the meaning of the provisions of the bilateral conventions/arbitration convention;
c. in the case of requests submitted under bilateral Conventions, when they are not filed within the time limit set out in the *"mutual agreement procedure"* Article of the bilateral conventions concerned;
d. in the case of requests filed under the Arbitration Convention, when they are not filed within the time limit provided in Article 6 paragraph (1) of the Convention;
e. in the case of requests submitted under the Arbitration Convention when the person concerned is subject to a severe penalty as defined in the Arbitration Convention;
f. the affected person does not respond to the requests of the competent fiscal authority for additional information/data/ documents necessary for the case in a reasonable amount of time.

The affected person may withdraw the request for conducting the mutual agreement procedure. The notification has the effect of immediately ceasing all steps taken by the two tax authorities to eliminate double taxation. The time limit for solving the case by a mutual agreement with the fiscal authority of any other Contracting State concerned, in order to eliminate double taxation is that provided in the *"mutual agreement procedure"* Article of the bilateral convention in question or, in the case of the Arbitration Convention, in article 7 paragraph (1).

In all cases where the bilateral tax treaties, respectively the Arbitration Convention, provide this also in the case of the arbitration convention, considering the provisions of Art. 1 par. (3) of the Law no. 227/2015 on the Fiscal Code, as subsequently amended and supplemented, any mutual agreement reached by the tax authorities shall be implemented irrespective of the time limits provided by the national law of the Contracting States concerned.

In all cases where the bilateral conventions do not contain explicit provisions on the timelines for the implementation of a mutual agreement, the timelines provided by the national law of the Contracting States concerned shall apply.

In all cases where tax authorities do not reach a mutual agreement within the timeframe set for this purpose in Art. *"mutual agreement procedure"* of the bilateral convention or art. 7 par. (1) of the Arbitration Convention, and that Convention contains provisions on the possibility of initiating the mutual agreement procedure, the affected person may request the tax authority to do so.

The request, accompanied by the documentation for conducting the mutual agreement procedure should contain the following information:

1. the subject of the mutual agreement procedure, namely the fiscal obligation that is the subject of the request as well as the fiscal identification data of the affected person;
2. to the extent possible, the identification data of the other tax administration involved and/or taxpayers/residents in the other State;
3. the article/articles of the bilateral tax treaties/Arbitration Convention that are considered to be violated, respectively the interpretation of the affected person in this respect;
4. the opinion of the person affected on how to solve the double taxation;
5. fiscal years and amounts subject to the double taxation;
6. in all cases where double taxation is generated by transfer pricing adjustments, a detailed description of the structure of the transactions subject to the double taxation, the related persons involved and the manner in which the double taxation has been generated, with the presentation of the transfer pricing file for those transactions, if available;
7. a summary of the facts and an analysis of the issues for which competent authority assistance is requested, with the submission of supporting documents, as appropriate, respectively details of the facts and circumstances relevant to the case;
8. a copy of any other relevant competent authority request and the associated documents filed, or to be filed, with the competent authority of the other contracting state, including copies of correspondence from the other tax administration, copies of briefs, objections/complaints submitted in response to the action that generated the double taxation;
9. a statement regarding the existence/non-existence of a prior request to the competent authority of either contracting state on the same or related issue;
10. information on the legislation of the other State regarding prescription periods or other particularities of tax legislation that may affect the implementation of any commonly agreed decisions between the two tax administrations, if available;
11. details of legal remedies and procedures initiated by the person concerned with respect to relevant transactions and court decisions on the subject of the mutual agreement procedure;
12. in all cases where a person to act as an authorized representative is appointed, the presentation in original of a document, drawn up according to the legal provisions, indicating the quality of the designated person(s) and the limits of the power of attorney;
13. the submission of other data/information or documents considered relevant by the person affected, including a copy of any arrangements or an agreement reached with the other Contracting State that might affect the conduct of the mutual agreement procedure, if applicable;

14. any other specific additional information requested in writing by the tax authorities involved that are considered necessary to carry out the substantive examination of the case in question.

The payment of tax and interests will not be suspended by the MAP. The authority to which a MAP request may be addressed is the Romanian National Agency for Fiscal Administration.

9. Relevant regulations on Advance Pricing Arrangements

Taxpayers engaged in related party transactions have the option to apply for advance pricing agreements (APAs). Information on the application procedure and the supporting documentation by a taxpayer intending to request the issuance of a APA are contained in Order of the N.A.F.A. President no. 3735/2015 on the approval of the procedure of issuing and modifying an advance pricing agreement, as well as the contents of the application for issuing and modifying an advance pricing agreement.

The APA is defined as an administrative act issued by the tax authority in the view of addressing a taxpayers' formal request in the scope of establishing the conditions and methodology to set up transfer prices in related party transactions for a determined period of time.

The procedure is initiated by the taxpayer through the submission of a formal request for an APA that can be preceded, if requested by the taxpayer, by a pre-filing meeting with the tax authority representatives. The content of documentation that needs to be provided for issuing an APA is similar to the content of the transfer pricing file, only it refers to future controlled transactions.

APAs can be unilateral, bilateral or multilateral and may be issued for a period of up to 5 years. By means of exception, its validity may be longer in case of long-term agreements. The APA is opposable and binding on the tax authorities as long as its terms and conditions are fully observed by the taxpayer. Also, it is mandatory for the taxpayer to submit an annual report detailing on the fulfillment of the terms and conditions of the agreement, by the deadline for submitting the statutory financial statements.

If a taxpayer does not agree with the APA, a notification may be sent to the issuing tax authority, within 30 days from the communication date and the APA will no longer produces legal effects. The deadline for issuing APAs is 12 months in case of unilateral APAs and 18 months in case of bilateral or multilateral APAs. In case of large taxpayers and for transactions included in the agreement with an annual consolidated value exceeding EUR 4 million, a fee of EUR 20.000 is to be paid, whereas for amending it the fee amounts to EUR 15.000. For the rest of the taxpayers (small and medium size enterprises), the fee for issuing an APA is EUR 10.000, and the fee for amending it is EUR 6.000.

10. Links to relevant government websites/European Union/OECD

Romanian Government: www.gov.ro

Ministry of Public Finance: www.mfp.ro

Romanian National Agency for Fiscal Administration: www.anaf.ro

European Commission: www.ec.europa.eu

Organization for Economic Co-operation and Development (OECD) – www.oecd.org

11. Other relevant information

Secondary and compensating year-end adjustments may result in double taxation.