
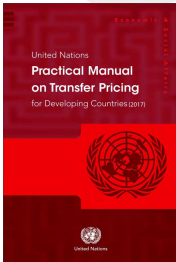

**UN-ATAF Workshop on Transfer Pricing
Administrative Aspects and Recent Developments**
 Ezulwini, Swaziland
 4-8 December 2017


**AFRICAN TAX
ADMINISTRATION FORUM**



**TRANSFER PRICING
DOCUMENTATION**

Monday, 4 December 2017
 11.00am – 1.00pm

LEARNING OBJECTIVES

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Fundamentals of Transfer Pricing Documentation

AGENDA

1. The role of Transfer Pricing Documentation “TPD”
2. Recent international developments in the demand for TPD
 - The Organization for Economic Co-operation and Development – Implementation of BEPS Proposals
 - 2017 UN TP Manual Section C.2
3. What information should be included in TPD
4. Practical Guidance

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THE ROLE OF TPD Showing Compliance

A taxpayer should make reasonable efforts to undertake an adequate transfer pricing analysis: pursuant to Article 9 of the UN Model Convention, taxpayers must report transactions they conduct with Associated Enterprises on an arm’s length basis. To show compliance, taxpayers with transactions with Associated Enterprises should:

- Conduct a Transfer Pricing analysis
- Prepare and maintain appropriate TPD
- The TPD should be prepared in a timely manner and be submitted to the government in accordance with local law

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INTERNATIONAL DEVELOPMENTS OF TPD OECD TPD guidance

The OECD TPD guidance:

- Taxpayers should make reasonable efforts at the time of the transaction to prepare and maintain TPD;
- Tax administrations have the right to obtain taxpayer's TPD. Local law should specifically require preparation and submission of TPD;
- The tax administration need for documentation should be balanced by the administrative cost of preparing the documentation for taxpayers;
- Taxpayer and tax administration cooperation is required in this field;
- Exchange of information should be used by tax administrations in appropriate situations

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INTERNATIONAL DEVELOPMENTS OF TPD OECD developments

The OECD TP Guidelines were first issued in 1979 and revised in 1995, 2010, and 2017:

- The necessity of documentation was recognized already in 1979 suggesting that taxpayers provide sufficient information to allow the tax authorities to arrive at an informed judgment on the matter of whether prices were at arm's length.
- In 1995, guidance for tax administrations was provided for developing rules and/or procedures on documentation to be obtained from taxpayers in connection with transfer pricing, as was guidance to assist taxpayers in identifying documentation that would be helpful to show that their controlled transactions satisfy the arm's length principle.

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INTERNATIONAL DEVELOPMENTS OF TPD BEPS developments

The OECD BEPS Report: The OECD BEPS report proposed major changes in transfer pricing documentation. In February 2015, an implementation package was issued and implementation guidance has subsequently been issued. The TPD-specific changes are expected to start in 2016 / 2017.

The OECD BEPS Report indicates under Action item 13 that to counter Base Erosion and Profit Shifting ("BEPS"), it is required to "Develop rules on TP documentation to enhance transparency for tax administrations, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNCs provide "all relevant governments with needed information on the global allocation of income, economic activity and taxes paid among countries according to a common template."

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INTERNATIONAL DEVELOPMENTS OF TPD OECD developments

The OECD BEPS Report: Action 13 of the OECD BEPS project describes a 3-tier approach to TPD to be adopted in the OECD Transfer Pricing Guidelines and introduces a new Chapter 5 of the Transfer Pricing Guidelines:

- a "master file" that provides a high-level overview of an MNC's global business operations and transfer pricing policies;
- A "local file" that provides detailed information on all relevant material intercompany transactions associated with a particular country; and
- A country-by-country (CbC) reporting template that discloses specified financial metrics of an MNC for each taxing jurisdiction in which it operates and business activities information of each entity. This information is to be made available to the tax authorities in all jurisdictions in which the MNE operates.

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INTERNATIONAL DEVELOPMENTS OF TPD OECD developments

The OECD BEPS Report: the CbC report serves as a Risk Assessment tool. It serves to enhance transparency for tax administrations by providing them with adequate information to assess high-level transfer pricing and other BEPS-related risks.

- The country-by-country template requires MNEs to provide information on revenues, profits, taxes accrued and paid and some activity indicators. It only applies to MNEs with a group level turnover above EUR 750 million, however.
- To protect confidentiality, the CbC Report will need to be filed in the country of residence of the MNE parent company and will be automatically exchanged with countries meeting a number of conditions (i.e. confidentiality and proper use of the information); and
- Local filing of the CbC Report will be appropriate only in a limited number of cases.

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OECD ACTION 13 TPD CBC REPORT INFORMATION

Annex III to Chapter V

A model template for the Country-by-Country Report

Table 1. Overview of allocation of income, taxes and business activities by tax jurisdiction

Name of the MNE group: Fiscal year concerned:										
Tax Jurisdiction	Revenues			Profit (Loss) before Income Tax	Income Tax Paid (on cash basis)	Income Tax Accrued – Current Year	Stated capital	Accumulated earnings	Number of Employees	Tangible Assets other than Cash and Cash Equivalents
	Unrelated Party	Related Party	Total							

GUIDANCE ON TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING © OECD 2014

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OECD COUNTRY-BY-COUNTRY REPORTING TEMPLATE

Table 2. List of all the Constituent Entities of the MNE group included in each aggregation per tax jurisdiction

Name of the MNE group: Fiscal year concerned:																	
Tax Jurisdiction	Constituent Entities resident in the Tax Jurisdiction	Tax Jurisdiction of organisation or incorporation if different from Tax Jurisdiction of Residence	Main business activity(ies)														
			Research and Development	Holding or Managing intellectual property	Financing or Investment	Manufacturing or Production	Sales, Marketing or Distribution	Administrative, Management or Support Services	Provision of Services to unrelated parties	Internal Group Finance	Regulated Financial Services	Insurance	Holding shares or other equity instruments	Donor	Other ²		
	1.																
	2.																
	3.																
	1.																
	2.																
	3.																

² Please specify the nature of the activity of the Constituent Entity in the "Additional Information" section.

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INTERNATIONAL DEVELOPMENTS OF TPD OECD TPD guidance

The OECD TPD guidance: information required in master file and local file:

- the associated enterprises involved in controlled transactions;
- the nature and terms of the controlled transactions;
- a description of transactions between the taxpayer and unrelated parties that are similar to those with associated enterprises and that may function as comparison;
- an outline of the business structure;
- information on the amount of sales and operating results of the associated enterprise;
- information on pricing including business strategies/special circumstances (set-off arrangements etc.).

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Relevant Items for Inclusion in Transfer Pricing Documentation

Information to be included

- An outline of the overall business with transaction parties;
- The structure of the business organization;
- Ownership linkage within the MNE group;
- The amount of sales and operation income from the last few years preceding the transaction;
- The level of the taxpayer's transactions with foreign related parties, for example the amount of inventory sales, value of services rendered, rent for tangible assets, the use and transfer of intangible property, and interest on loans etc. Information relevant to the FAR analysis would be important for documentation;

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Relevant Items for Inclusion in Transfer Pricing Documentation

Information to be included

- The current business environment and forecasted changes or commercial and industry conditions affecting the taxpayer;
- An explanation of the selection, application and consistency with the arm's length principle of the TP method used;
- Supporting documentation explaining how the comparables are arrived at and the arm's length range of the comparables. Documentation of each step of the comparable search allowing for a review of the quality of the analysis;
- Details on intentional set-offs and description of relevant facts.

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OECD ACTION 13 TPD MASTER FILE INFORMATION

Organizational structure	Business description	Intangibles	Intercompany financial activities	Financial and tax positions
Structure chart: • Legal ownership • Geographic location	Important drivers of business profit	Overall strategy description	Financing arrangements for (related and unrelated) lenders	Annual consolidated financial statements
	Supply chain of: • Five largest products/ services by turnover • Products/services generating more than 5% of sales	List of important intangibles and legal owners	Identification of financing entities	List and description of existing unilateral APAs and other tax rulings
	Main geographic markets of above products	List of important intangible agreements	Details of financial transfer pricing policies	
	List and brief description of important service arrangements	R&D and intangible transfer pricing policies		
	Functional analysis of principal contributions to value creation by individual entities	Details of important transfers		
	Business restructuring/ acquisitions/divestitures during fiscal year			

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OECD ACTION 13 TPD LOCAL FILE INFORMATION

Local entity	Controlled transactions	Financial information
Management structure Local organization chart Details on individuals to whom local management reports	Description of material-controlled transactions and context in which they take place • Identification of associated enterprises party to controlled transactions and relationship • Functional analysis • Transfer pricing methods used • Comparables and details of methodology	Local entity financial statements
Description of business and business strategy pursued	Amounts of intra-group payments and receipts for controlled transactions (e.g., products, services, royalties, interest)	Reconciliation to show how financial data used in applying the transfer pricing method ties to the financial statements
Details of business restructurings and/or intangible transfers	Unilateral and bilateral/multilateral APAs and other tax rulings related to the controlled transactions	Summary of relevant financial data for comparables and sources from which data was obtained
Key competitors		R&D and intangible transfer pricing policies
		Details of important transfers

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PRACTICAL GUIDANCE

Burden of Proof

- The burden of proof whether a company's transfer pricing is conducted at arm's length or not is important to consider when auditing a company's transfer pricing.
- The burden of proof rules may be different for transfer pricing matters than for other matters, depending on domestic law.
- TPD rules may (or may not) affect the legal/procedural burden of proof. In some countries, where the burden of proof is on the tax administration to demonstrate that tax assessments are correct, the burden of proof shifts to the taxpayer in case the taxpayer has not provided for adequate TPD.
- In a controversy setting, the party that has the burden of proof has the more challenging position.

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PRACTICAL GUIDANCE

Timeframe to produce TPD

- The timing of TPD can be broken down in:
 - (i) timing for preparation of the documentation and
 - (ii) timing for filing the documentation

- (i) TPD can be prepared contemporaneously, i.e. at the time of the (initial) transactions/when the transaction is put in place; or at the time the TPD needs to be filed or requested;

- (ii) TPD can be requested (a) annually at the time of the filing of the company's tax returns or (b) exclusively in case of an audit.

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PRACTICAL GUIDANCE

Timeframe to produce TPD

- Some countries may require "contemporaneous documentation." This is interpreted differently in different countries. It can refer to using comparables contemporaneous with the transaction. Or it can regard comparables *available* at the time of the transaction.
- Often, the more time passes since the actual transaction is put in place, the more difficult it becomes to get information on the thinking and considerations that took place at that time;
- Data on comparables may not be available for the relevant time period until at year-end or at the time of filing, however;
- Contemporaneous documenting and filing may be a significant (and costly) compliance burden.

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PRACTICAL GUIDANCE

Penalties

- Penalties in relation to transfer pricing can generally be divided in 2 groups, depending on domestic law:
 - Underpayment penalties
 - Non-compliance penalties
- Underpayment penalties may be waived in certain countries in case a taxpayer has complied with its documentation requirements. This is the no-fault no penalty principle.
- Penalties may in general invoke civil/administrative or criminal sanctions. Failure-to-comply penalties tend to be monetary sanctions.

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PRACTICAL GUIDANCE

Penalties

- If taxpayers make reasonable efforts to document their transfer pricing and use a sound transfer pricing analysis, applying large penalties may be overly harsh/unfair. In particular if it regards a penalty for information the taxpayer does not have access to or for failure to use a transfer pricing method for which it does not have the relevant data;
- Taxpayers may be disproportionately disadvantaged by penalties. See also Article 9(3) of the UN Model Convention:
3. "The provisions of paragraph 2 shall not apply where judicial, administrative or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under paragraph 1, one of the enterprises concerned is liable to penalty with respect to fraud, gross negligence or willful default."

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PRACTICAL GUIDANCE

SMEs

- Transfer pricing documentation rules may be disproportionately burdensome for Small and Medium Enterprises as they may have relatively few cross border transactions and the cost for compliance at the level applied to large MNEs may be disproportionately high. Comparable studies tend to be elaborate and costly in practice;
- Several countries have therefore introduced reduced transfer pricing documentation requirements by law or in practice: France; Germany; Netherlands; Poland; Spain; China; Korea; India;
- These reduced requirements are often based on turnover size.

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PRACTICAL GUIDANCE

TPD language

- MNEs generally prefer to prepare their (global or local) transfer pricing documentation in one and the same language. This may lead to practical challenges in some countries if the tax authorities and in particular the competent local tax inspector responsible for auditing the taxpayer does not master that particular language.
- Therefore, many countries will maintain the right that a MNEs transfer pricing documentation be translated in the local language if such is required. It should be considered that such a translation may require some time to prepare if it is not readily available.

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ARE THERE ANY...



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