

AUSTRIA

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TRANSFER PRICING: GENERAL OVERVIEW

1. WHAT ARE THE MAIN CHARACTERISTICS OF TRANSFER PRICING LAW AND POLICY IN YOUR JURISDICTION?

In Austria, transfer pricing is seen as an international issue, where measures decided by the Organisation for Economic Co-operation and Development (OECD) and the EU are converted into national law. What is missing are voices arguing in the Austrian national interest to establish legal entities belonging to foreign investors. Austria has corporate taxes below the European average and a highly functioning e-government system, predictable tax planning and a very efficient judiciary.

For national entities dealing with foreign subsidiaries, section 6, paragraph 6 of the Income Tax Code 1988 (*Einkommensteuergesetz 1988*) sets out that these dealings, under certain conditions, must be carried out according to the arm's length principle (as if taking place on the open market). This is based on the OECD Model Double Taxation Convention on Income and on Capital 1977 (OECD Model Tax Convention 1977) which is used to determine the scope of the provision. The tax authority has also published the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2001 as an official regulation in its Gazette.

The Ministry of Finance published its Transfer Pricing Directive 2010 (*Verrechnungspreisrichtlinie 2010*). The directive, along with the OECD guidelines, function as an interpretation aid to ensure that national law is applied in accordance with international tax standards. In addition, the Transfer Pricing Documentation Act (*Verrechnungspreisdokumentationsgesetz*) (VPDG) was passed in July 2016 and will apply for the fiscal year commencing 1 January 2016.

The VPDG contains extensive automatic exchange of information provisions between international tax authorities. The Federal Ministry passed a tax ordinance on the automatic exchange of information about rulings and advanced pricing agreements for transfer pricing purposes. It remains to be seen how confidentiality issues will be dealt with when detailed company information is widely shared between a diverse set of jurisdictions.

2. WHAT HAVE BEEN THE MAIN DEVELOPMENTS OF SIGNIFICANCE FOR TRANSFER PRICING LAW AND PRACTICE IN YOUR JURISDICTION IN THE PAST 12 MONTHS?

The main development in Austria in the past 12 months was the Transfer Pricing Documentation Act (*see Question 1*), which applies to large multinational entities. Whereas documentation requirements were previously not specific, relying on the company's duty to co-operate with the tax authorities in cross-border transactions and largely left to the companies to figure out, the Transfer Pricing Documentation Act follows the OECD's three-tiered approach. Companies must provide tax authorities with a master file, a local file and a country-by-country report.

Where an Austrian company has an annual turnover of more than EUR50 million in two consecutive years, it must prepare a master file and a local file. The files need only be submitted if the Austrian tax authority request them, but the short filing period (30 days) means that the files will have to be prepared in any event. Even if these requirements are not fulfilled in Austria, the tax authorities can request the submission of a foreign master file if the company was required to submit it in the country where the business took place (*section 3, para 3, Transfer Pricing Documentation Act*).

The Master file must provide a description of the:

- Structure of the group.
- Nature of the business.
- Non-material assets.
- Business transactions.
- Group finances.
- Taxes paid.

The local file must contain a detailed description of the Austrian entity and its finances. Companies with an aggregated turnover of more than EUR750 million must file a country-by-country report at the seat of its parent entity. Generally, the report must contain a list of countries in which the group is active, the business activities carried out by each entity, their individual profits and actual tax burden. Specific details on what to include in the master file, the local file and the country-by-country report are detailed in a government ordinance implementing the Transfer Pricing Documentation Act (*Verrechnungspreisdokumentationsgesetz-Durchführungsverordnung*). The Ministry of Finance published a web form to facilitate filing country by-country reports (<https://formulare.bmf.gv.at/service/formulare/inter-Steuern/pdfs/9999/VPDG1.pdf>), which must be filed 12 months after the end of the fiscal year.

At the same time, the automatic exchange of rulings and advance pricing agreements between governments has become a reality that companies must be aware of.

TRANSFER PRICING LEGISLATION

FEDERAL OR NATIONAL LEGISLATION

3. WHAT IS THE MAIN FEDERAL (NATIONAL) LEGISLATION REGULATING TRANSFER PRICING IN YOUR JURISDICTION?

Primary legislation

The main provision on transfer pricing adjustments is contained in section 6 of the Income Tax Code 1988. It sets out that intra-company dealings must be governed by the arm's length principle. Since the statute itself does not define the arm's-length principle, this must be done in accordance with other sources and these depend on the company's turnover. The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations apply to small companies and the Transfer Pricing Documentation Act applies to larger multinational entities. Even if the Transfer Pricing Documentation Act does not apply because the

company turnover is below the threshold, companies must present the Austrian authorities with increasing documentation to justify their transfer pricing assumptions. Even if the tax authority will probably not require small and medium-sized companies to present extensive information, the new Transfer Pricing Documentation Act will provide a guideline with regard to the quality and structure of information the tax authority will come to expect.

Double non-taxation issues may also be relevant with regard to hidden capital contributions and constructive dividends regulated under section 8 of the Corporate Income Tax Code 1988 (*Körperschaftsteuergesetz 1988*). Maybe the most important of them all is section 21 of the Federal Fiscal Code (*Bundesabgabenordnung*) which codifies the principle of “substance over form”, allowing the tax authority to look at the actual content of a transaction and its economic intent and apply the tax code accordingly.

There are also criminal provisions in the Criminal Fiscal Code (*Finanzstrafgesetz*) on offences involving transfer pricing. Failure to submit the country-by-country report, or submitting a report with incorrect information (whether through gross negligence or intentionally) can be subject to a fine up to EUR50,000. The possibility to inform the tax authority of any failure to report correctly on transfer prices to avoid criminal liability is not explicitly granted (*section 49b, para 3, Criminal Fiscal Code*).

Secondary legislation

The Austrian legislature has adopted the OECD transfer pricing guidelines. They are not Austrian law but with their publication in the official law gazette, they have law-like status. In addition, the tax authority will seek reference from the Transfer Pricing Directive 2010.

STATE OR LOCAL TRANSFER PRICING LEGISLATION

4. WHAT ADDITIONAL REGIONAL (LOCAL STATE) LEGISLATION AND REVENUE AUTHORITIES ARE RELEVANT TO TRANSFER PRICING IN YOUR JURISDICTION?

Legislation

Not applicable.

Revenue authorities

Not applicable.

INTERNATIONAL TRANSFER PRICING TREATIES AND AGREEMENTS

5. WHAT ARE THE MAIN INTERNATIONAL TREATIES AND AGREEMENTS THAT APPLY IN YOUR JURISDICTION?

Double taxation treaties exist with numerous countries. Some agreements, like the double taxation agreement with Liechtenstein, date back to the first half of the 20th century and are therefore well established. Most agreements are based on the OECD Model Tax Convention which has been evolving into an Austrian model since 1998.

There have been problems when profit adjustments, based on transfer pricing considerations by foreign revenue services, have led to a heavier tax burden on the Austrian taxpayer (effectively, double taxation). However, if presented with proper documentation, the Austrian Revenue Service can make the correlative adjustment retrospectively and has done so in the past. So far, the application has not given rise to concerns and the number of audits performed by the Austrian Revenue Service is more or less stable.

6. WHAT IMPACT DO INTERNATIONAL TREATIES AND AGREEMENTS HAVE IN YOUR JURISDICTION?

International treaties (mainly the Organisation for Economic Co-operation and Development treaties) are the driving force behind Austrian double taxation policies.

TRANSFER PRICING POLICY

7. WHAT IS THE OVERALL NATIONAL TRANSFER PRICING POLICY IN YOUR JURISDICTION?

The policy can be summarised as not having a national policy but reacting to international challenges and developments.

8. WHAT ARE THE MAIN TRANSFER PRICING METHODOLOGIES THAT ARE USED TO DETERMINE AN ARM'S LENGTH PRICE IN YOUR JURISDICTION?

The main transfer pricing methodologies include:

- Comparable uncontrolled price method.
- Resale price method.
- Cost plus method.
- Profit split method.
- Transactional net margin method.

There is no preference for any one method and the methods can be combined.

9. TO WHAT EXTENT, IF ANY, DOES YOUR JURISDICTION FOLLOW THE OECD TRANSFER PRICING GUIDELINES?

Austria has published the Organisation for Economic Co-operation and Development (OECD) transfer pricing guidelines in the official gazette and they have the status of aids to official interpretation. However, individuals have no rights deriving directly from the OECD transfer pricing guidelines.

10. IS IT POSSIBLE TO OBTAIN ANY CLEARANCES OR ADVANCE PRICING AGREEMENTS FROM THE REVENUE AUTHORITIES IN RESPECT OF TRANSACTIONS?

Clearances

If a question of transfer pricing arises in a particular context, it is possible to request an express answering service (EAS). However, the EAS can only answer simple transfer pricing questions and it is neither binding nor co-ordinated with other governments. Interested parties can also separately or in addition request an administrative statement for information purposes (*Auskunftsbescheid*) (section 118, *Federal Fiscal Code*). This can be done if the taxpayer can prove that due to significant fiscal consequences there is a legal interest in a decision before action is taken. With regard to transfer prices, these decisions are binding. The question underlining the request must be very precise since only the facts presented to the Federal Ministry of Finance are covered by the statement. Unsatisfactory statements can be appealed and subsequently changed. It makes sense to request a statement with regard to the choice of the proper transfer pricing method, its application (for example, actual or planned costs) and the necessary documentation.

Advance pricing agreements

Advanced pricing agreements (APAs) are possible. Traditionally, companies have shied away from them because it meant disclosing their business practices. However, since the companies for which APAs are relevant will need to prepare a local file, master file and in some cases a country-by-country report, to be exchanged between different tax authorities, companies will probably reconsider the advantages of APAs.

11. WHERE THE REVENUE AUTHORITIES MAKE A TRANSFER PRICING ADJUSTMENT, WHAT IS THE EFFECT OF THAT ADJUSTMENT ON THE OTHER PARTY TO THE TRANSACTION?

If the Austrian Revenue Service or a foreign revenue service takes action that leads to a transfer price adjustment, a party can (under Article 25 of the OECD Model Tax Convention), initiate a mutual agreement procedure (MAP). The procedure must be started in the country of residence of the taxpayer, that is, the seat of the corporation whose pricing is subject to primary adjustment under the OECD Model Tax Convention. The Austrian procedure is conducted by the Ministry of Finance. It can use administrative discretion to decide whether to open proceedings. Proceedings are conducted under the general provisions of the Federal Fiscal Code.

MAPs can also be started on an EU level under Article 6 of Convention 90/436/EEC on the elimination of double taxation in connection with transfer pricing (Tax Arbitration Convention). In these cases, the agency involved must present the case to an arbitration committee if the responsible administrative bodies are unable to reach an agreement within two years on the question of double taxation.

12. WHAT ARE THE REPORTING AND OTHER ADMINISTRATIVE OBLIGATIONS THAT APPLY TO HELP THE AUTHORITIES EVALUATE TRANSFER PRICES?

Depending on its annual turnover, a multinational entity must prepare a master file, a local file and a country-by-country report to help the tax authorities evaluate their transfer prices and assess the company. All companies have a duty to aid the authorities by providing them with documentation about any material transactions. This duty is based on the general duty of record keeping regulated in sections 124 to 132 of the Federal Fiscal Code, which is intended to provide the authorities with a basis on which they can levy taxes. When it comes to documenting transfer pricing, it is important that written documentation is completed before the transaction takes place or the transaction will be presumed not to be at arm's length.

As a general principle, the tax subject has a heightened duty of co-operation when it comes to cross-border transactions. Small companies can provide documentation in any modern language. However, if the authorities request it, a translation must be provided. The master file and the country-by-country report can be submitted in German or English.

TRANSFER PRICING COURTS AND DISPUTE RESOLUTION

NATIONAL COURTS AND TRANSFER PRICING DISPUTE RESOLUTION

13. WHAT ARE THE RELEVANT NATIONAL COURTS AND WHAT DISPUTE RESOLUTION MECHANISMS EXIST FOR TRANSFER PRICING ISSUES IN YOUR JURISDICTION?

Apart from the mutual agreement procedure (*see Question 11*) which is conducted through the Ministry of Finance, there is also the possibility to challenge a transfer pricing adjustment in court. Jurisdiction lies with the Federal Fiscal Court (*Bundesfinanzgericht*).

INTERNATIONAL COURTS AND TRANSFER PRICING DISPUTE RESOLUTION

14. WHAT INTERNATIONAL DISPUTE RESOLUTION METHODS ARE AVAILABLE IN YOUR JURISDICTION, AND WHICH ARE PREFERRED FOR TRANSFER PRICING ISSUES?

The mutual agreement procedure (MAP) exists alongside the EU arbitral procedure. So far the EU arbitral procedure has not played a significant role, mainly due to the fact that nobody seems sure how it should be properly applied. The EU issued a press release proposing a code of conduct (IP/04/542) in which it freely admitted that the effectiveness of the Tax Arbitration Convention lags behind expectations since its application has proved difficult. Disputes are therefore typically resolved under the MAP.

TRANSFER PRICING CASE LAW

15. WHAT ARE THE MOST SIGNIFICANT CASE LAW DEVELOPMENTS ON TRANSFER PRICING IN YOUR JURISDICTION?

The Federal Ministry of Finance started a “horizontal monitoring programme” in 2011. The programme ensures that participating companies work together with the ministry on transfer pricing issues and tackle them proactively. The idea behind it is that both sides win if there is clarity with regard to transfer pricing issues from a very early stage. Therefore, many issues do not enter the court system and case law is scarce.

In a recent decision (*RV/4100044/2011*) by the Federal Court for Finance, on 16 August 2016, the court found that independent parties would not enter a contract where the party buying the goods makes a profit from resale and at the same time receives reimbursement for expenses from the original seller. The tax base was therefore adjusted.

Another decision (*RV/7100052/2012*) by the Federal Court for Finance, on 7 May 2014, dealt with a case where the prices charged to the Austrian subsidiary were underpinned with documentation evidencing an arm’s length transaction. However, the subsidiary had such a number of outstanding receivables that it had to make value adjustments in its annual accounts. The Austrian Revenue Service argued that this was clearly a sign of intra-company dealing in violation of the arm’s length principle because independent entities would work for profit. Nevertheless, the court concluded that it was not uncommon to make adjustments with large clients and that depreciation in itself does not mean that the companies will not demand settlement at some point in the future. Thus, the court rejected an adjustment to the Austrian tax base.

In a ruling (*RV/0514 – F/10*) handed down on 6 December 2013, the court of appeal overturned a decision by the Austrian Revenue Service. It had argued that it was imperative for a dependant subsidiary (sales company) to make a profit. Hence the resale price method, as used by the company, was to be rejected and prices were to be set at the level of cost plus 10%. The court rejected the argument that the company had presented insufficient documentation and in particular, that it had failed in its duty to co-operate by not submitting the annual accounts of the parent company and that the fact that the company generated losses for three years was in itself an indicator that its transfer pricing was wrong. The court determined that, as the same prices had produced profit in other years, they should have let the Austrian Revenue Service look at other reasons to justify the losses. Since prices were determined according to the prevailing resale method and the documentation supported the calculation according to this method, this should have been recognised by Austrian Revenue Service. Since the annual accounts of the parent company were not needed to support the calculation, there was no obligation to submit it and the Austrian Revenue Service had exceeded its powers by requesting it. The court’s conclusion was that if a standard method is used to calculate transfer prices, and if the method is supported by proper documentation, if the Austrian Revenue Service wants to assume a different tax base to calculate prices, they have the burden of proof. The court was very explicit in stating that the Austrian Revenue Service cannot wilfully set a desired tax base without legal justification.

TRANSFER PRICING ADJUSTMENTS

ADJUSTMENTS AND PENALTIES

16. WHERE THE REVENUE AUTHORITIES MAKE AN ADJUSTMENT OF TRANSFER PRICES FOR TAX PURPOSES, CAN ANY OTHER PENALTIES ALSO BE IMPOSED IN ADDITION TO THAT ADJUSTMENT?

The company and its officers can face criminal liability under the Criminal Fiscal Code (*Finanzstrafgesetz*). Transfer prices in violation of the arm's length principle can constitute intentional or negligent tax fraud (*sections 33 and 34, Criminal Fiscal Code*). Even though the taxpayer need not be incriminated in the criminal proceeding, the provision is unlikely to help in criminal proceedings since the evidence was, in all likelihood, gathered in the administrative proceedings under the taxpayer's duty to co-operate (*section 115, Austrian Fiscal Code*). (In the Supreme Court decision of 23 April 2014 (13 Os 40/13a), the court confirmed its opinion that there is an assumption that the facts gathered in the administrative decision were professionally scrutinised and can therefore be used as facts for the criminal proceedings. Hence, these facts only need to be verified by an expert if they are still unclear.)

TRANSFER PRICING DEVELOPMENT AND REFORM

17. ARE THERE ANY CURRENT TRENDS, DEVELOPMENTS OR REFORM PROPOSALS THAT HAVE OR WILL AFFECT THE AREA OF TRANSFER PRICING IN YOUR JURISDICTION?

The Austria Government announced that apart from the international measures against base erosion and profit shifting, it will ensure that companies who make profits in Austria will pay their fair share of taxes. As a national measure the Austrian government will introduce an advertising tax for online transactions. However, so far this has not exceeded the stage of a general announcement with no precise details.

TAX AVOIDANCE: GENERAL OVERVIEW

18. WHAT HAVE BEEN THE MAIN NATIONAL AND INTERNATIONAL TRENDS AFFECTING TAX ENFORCEMENT AND ANTI-AVOIDANCE PRACTICE IN YOUR JURISDICTION IN THE PAST 12 MONTHS?

Based on the Organisation for Economic Co-operation and Development (OECD) Action Plans as well as several OECD guidelines, the main trend in tax enforcement is the automatic exchange of information between tax authorities. This is seen as the most effective way to ensure that tax avoidance is prevented. At the same time, the Transfer Pricing Documentation Act requires an ever increasing amount of documentation to be prepared for the tax authorities.

19. HOW DOES YOUR JURISDICTION MAKE THE DISTINCTION BETWEEN ABUSIVE TAX AVOIDANCE AND LEGITIMATE TAX PLANNING?

If a transaction is unusual and seems inappropriate with regard to its economic intent and can only be explained by avoiding taxes, it is abusive tax planning. It is not sufficient to look at one action, the entire transaction must be examined. However, it is still permitted to structure a business so it will not incur high taxes as long as it makes economic sense.

20. DO THE REVENUE AUTHORITIES IN YOUR JURISDICTION OFFER ANY GUIDANCE ON THE DISTINCTION BETWEEN LEGITIMATE TAX PLANNING MECHANISMS AND ABUSIVE OR AGGRESSIVE TAX AVOIDANCE?

There is an extensive body of case law defining what constitutes abusive tax planning and taxpayers have pretty clear guidelines as to what is permitted and what is not. In the context of transfer pricing, there is also (when general tax planning) always the possibility of obtaining an advanced ruling (*section 118, Federal Fiscal Code*).

With regard to advanced rulings, the Federal Ministry of Finance released an information memo detailing circumstances under which no advanced ruling will be provided because the circumstances constitute abusive tax planning, the most obvious being a “straw-man” business.

TAX ANTI-AVOIDANCE PROVISIONS

21. CAN YOU IDENTIFY ANY DIRECT OR INDIRECT IMPACT IN YOUR JURISDICTION OF THE OECD OR OTHER RECENT INTERNATIONAL INITIATIVES TO COMBAT ABUSIVE TAX AVOIDANCE?

The Transfer Pricing Documentation Act was a direct result of Organisation for Economic Co-operation and Development (OECD) Action 13 of the base erosion and profit shifting project.

22. DOES YOUR JURISDICTION HAVE GAAR DESIGNED TO PREVENT OR REDUCE ABUSIVE TAX AVOIDANCE?

The authorities follow a “substance over form” approach, meaning that it does not matter how the tax subject describes a transaction, or which legal form is chosen, it is the economic content that is taxed.

23. WHAT ARE THE LEGISLATIVE PROVISIONS THAT ARE DESIGNED TO REINFORCE GAAR AND ANY OTHER ABUSIVE TAX AVOIDANCE PROVISIONS?

Section 22 of the Federal Fiscal Code is designed to reinforce abusive tax avoidance provisions.

24. IDENTIFY AND DISCUSS ANY CASE LAW OF INTEREST CONCERNING GAAR AND ANY OTHER CASES DEALING WITH ABUSIVE TAX AVOIDANCE IN YOUR JURISDICTION.

Current case law relevant to abusive tax avoidance

The case law deals mostly with the arm’s length principle, artificial business structures and evaluation schemes.

Historic case law relevant to abusive tax avoidance

The courts have stated (*VwGH October 18, 2012, 2010/15/0010*) that if the taxpayer can show important reasons for a transaction, even if the transaction itself is unusual, this will rule out a misuse of form and must be recognised by the Austrian Revenue Service. However, where the company uses an intermediate corporation in a jurisdiction with low taxation, this is automatically deemed to be abusive tax planning (*VwGH April 26, 2012, 2009/15/0220*).

There are also four noteworthy cases from the European Court of Justice (ECJ):

- *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt Case C-324/00.*
- *Test Claimants in the thin Cap Group Litigation v Commissioners of Inland Revenue Case C-524/00.*
- *NV Lammers & Van Cleef v Belgischer Staat Case C-105/07.*
- *Société de Gestion Industrielle SA (SGI) v Belgischer Staat Case C-311/08.*

In these cases, the ECJ affirms a member state's right not to recognise certain business structures if they are wholly artificial arrangements and not in compliance with the arms length-principle as long as the national rules and regulations are applied equally to nationals and EU member states. The court also held that the taxpayer must be allowed to present evidence that there is an economic reason for the transaction.

TAX AVOIDANCE PENALTIES

CIVIL AND ADMINISTRATIVE PENALTIES FOR ABUSIVE TAX AVOIDANCE

25. WHAT CIVIL AND ADMINISTRATIVE PENALTIES CAN BE IMPOSED IN ABUSIVE TAX AVOIDANCE CASES IN YOUR JURISDICTION?

Administrative penalties for tax avoidance can be up to half the amount of tax that should have been paid. If there is no other offence involved the maximum penalty is EUR5,000.

CRIMINAL PENALTIES FOR ABUSIVE TAX AVOIDANCE

26. WHAT CRIMINAL PENALTIES CAN BE IMPOSED IN ABUSIVE TAX AVOIDANCE CASES IN YOUR JURISDICTION?

For a business transaction to constitute abusive tax avoidance, the authorities must assume intent which will result in criminal liability under section 33 of the Criminal Fiscal Code. The penalty is a fine of up to twice what the taxpayer would have owed without the abusive tax avoidance scheme, and up to two years in prison.

TAX AVOIDANCE DEVELOPMENTS AND REFORM

27. ARE THERE ANY CURRENT TRENDS, DEVELOPMENTS OR REFORM PROPOSALS THAT HAVE OR WILL AFFECT THE AREA OF TAX AVOIDANCE IN YOUR JURISDICTION?

There are no reforms currently proposed.

THE REGULATORY AUTHORITY

FEDERAL MINISTRY OF FINANCE (*BUNDESMINISTERIUM FÜR FINANZEN*)

T See website

F See website

E See website

W <https://english.bmf.gv.at/>

Outline structure. The Federal Ministry of Finance in Austria is responsible for tax administration. The ministry includes the Tax and Customs Co-ordination Office divided into five regions, plus 40 tax offices in 80 locations.

Responsibilities. Tax administration, customs, negotiating double taxation agreements.

Procedure for obtaining documents. See website.

ONLINE RESOURCES

LEGAL INFORMATION SYSTEM

W www.ris.bka.gv.at

Description. Official website by the Austrian government containing up to date legislation as well as case law.

FEDERAL MINISTRY OF FINANCE (*BUNDESMINISTERIUM FÜR FINANZEN*)

W www.bmf.gv.at

Description. Official website of the Federal Ministry of Finance. They provide some information in English.

