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Contents

✓ Advance pricing agreements	3
✓ Austria	5
✓ Belgium	8
✓ China	11
✓ France	15
✓ Germany	19
✓ Hungary	23
✓ Italy	27
✓ Maghreb	30
1. Algeria	30
2. Morocco	32
✓ Netherlands	34

▼ Poland	37
▼ Russia	41
▼ Spain	44
▼ Switzerland	47
▼ United Kingdom	50

Advance pricing agreements

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An APA allows a group to confirm with the tax authorities that the prices used for intragroup transactions comply with the arm's length principle: to the extent the terms of the APA are complied with by the taxpayer, the tax authorities cannot reassess the prices used for the intragroup transactions covered by the APA. In other words, this procedure allows a taxpayer to obtain, a priori, tax certainty as regards its transfer pricing policy.

As shown in the attached country specific developments, many European countries have introduced an APA procedure into their legislation since the late 1990s.

Depending on the jurisdiction, taxpayers have the possibility to enter into bilateral (or multilateral) and/or unilateral APAs:

Bilateral (or multilateral APAs) are agreements executed with the local tax authorities and one (or more) foreign tax authorities and cover at least two enterprises. These agreements are based on the mutual agreement procedure clause (such as that set forth in Article 25 of the OECD Model Treaty) of the applicable double tax treaty. Under this procedure, the taxpayer initiates the agreement and defines the scope of the agreement but is not a party to the negotiations between the tax authorities. These agreements provide full security to taxpayers as regards the transfer pricing policy applied to the transactions covered by the APA: indeed, bilateral (or multilateral) APAs imply the agreement of the tax authorities that could reassess a given transaction.

Unilateral APAs are agreements executed only by the local tax authorities. These agreements are not enforceable against tax authorities for another State

‘ Advance pricing agreements:
an overview

and they are therefore not intended to provide full legal certainty to taxpayers with whom they are executed. However, such a practice exists in several countries (in particular, in France, Germany, Spain, the United Kingdom, the Netherlands and Italy) and was introduced because bilateral APAs are cumbersome. Therefore, the main benefit that is clearly sought by these types of agreements is the creation of a procedure that is more streamlined and shorter in principle.

An APA procedure has typically four separate stages:

- Pre-filing stage/informal application.
- Formal application.
- Evaluation and negotiation of the APA.
- Formal agreement.

In general, an APA is concluded for three to five years. Upon expiry of its term, the APA can be renewed. In principle, assuming the case initially presented to the tax authorities is not substantially modified, the renewal of the APA is much less burdensome than the initial APA procedure.

Based on our experience, an APA procedure is particularly appropriate in the following cases:

- where the taxpayer modifies its organisation and consequently its transfer pricing policy;
- where the transfer pricing policy applied by the taxpayer is complex or diverges in certain respects from the methodologies described in the OECD Transfer Pricing Guidelines; or
- where the transactions covered are significant.

The main issue raised by the APA procedure is its length and cost: the negotiation of a bilateral APA lasts generally 18 to 24 months. In addition, this procedure implies a certain transparency and a strong involvement by taxpayers. However, these constraints must be compared to those existing under the other processes available to taxpayers:

In the absence of an APA, a taxpayer may need to defend its transfer pricing policy in the scope of a

tax audit and, in case of reassessment, may need to launch a mutual agreement procedure to cancel the double taxation resulting from such reassessment: these procedures can last several years and also require strong involvement by taxpayers. In a way, a bilateral APA procedure combines these two procedures and, from this perspective, can be viewed as short. In addition, discussions with the tax authorities in the scope of an APA procedure are generally held in a less controversial atmosphere than during a tax audit.

As regards transparency, the documentation requested from taxpayers is generally not far more extensive than requested during tax audits. This is particularly true in jurisdictions where an obligation to document the group's transfer pricing policy exists.

To make APA processes more efficient and quick and consequently encourage the use of APAs in the EU, the EU Joint Transfer Pricing Forum ("EU JTPF") has issued practical guidelines for APAs in the EU. These guidelines were endorsed by the EU Council of Ministers of Economy and Finance ("ECOFIN") on 5 June 2007. The guidelines explain how Member States should conduct the APA process and provide guidance for taxpayers. The guidelines provide a very detailed description of an APA process and how each step of this process could be conducted so that the APA process can be performed as efficiently as possible. They also provide practical information (e.g., potential list of information to be provided with the submission of the APA request or potential list of standard topics covered in the final agreement), which can enable a taxpayer to better approach and prepare an APA process. It can be expected that Member States as well as taxpayers will increasingly refer to these guidelines when conducting the APA processes (see also "Commission proposes guidelines for advance pricing agreements in the European Union" by Bruno Gibert and Xavier Daluzeau in *International Transfer Pricing Journal*, July/August 2007, pp. 228-232).



Austria

Advanced Pricing Agreements (“APA”)

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

No APA system exists in Austria for transfer pricing. However, it is possible to file a ruling request regarding any legal question, including relating to transfer pricing, with the competent tax authorities. Such a ruling is binding provided that:

- the full and correct facts have been presented to the competent tax authorities and also do not change after the ruling request,
 - the ruling request is filed with the competent tax authorities, which are the tax authorities in charge of levying corporate income tax,
 - the taxpayer has carried out considerable financial measures relying upon the ruling,
 - the ruling is not obviously incorrect, i.e. any objective incorrectness of the ruling has not been identified by the taxpayer, and
 - the tax authorities’ ruling can be checked.
- Therefore, a written ruling should be requested instead of simply verbal information.

If a ruling has binding effect and to the extent the ruling is complied with by the taxpayer, the taxpayer may rely on the ruling and the tax authority may not change its legal position.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

In general, a ruling may be obtained within six to 12 weeks. However, a ruling regarding transfer pricing may take longer depending on the respective case at hand.

‘ APA in Austria ’

3. Is it possible to first contact the tax authorities on an anonymous basis?

Yes, it is possible to first contact the tax authorities on an anonymous basis. The Ministry of Finance accepts anonymous requests. However, in order to be binding, the ruling request must be submitted to the competent local tax authorities and all details must be disclosed, including the name of the companies involved.

4. What documents must be produced by the company upon the official filing of the APA request?

No list of documents exists.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

Yes, all documents and information disclosed must be kept confidential by the tax authorities under official secrecy (*Amtsgeheimnis*). However, if there is a mutual agreement procedure with the tax authorities for other states, such documents and information are usually disclosed to the respective tax authorities for the other states involved.

In general, in order for the ruling to have binding effect, a ruling request must be submitted to the competent tax authorities, which are in charge of levying the respective tax. For example, a ruling request regarding transfer prices would have to be filed with the competent tax authorities in charge of corporate income tax.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

N/A

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

In principle, a ruling does not have retroactive effect. However, if a ruling is filed during a tax year, the ruling could be applied to this tax year provided that the ruling is rendered by the competent tax authority before the tax returns for the respective tax year become legally effective.

8. What obligations are incumbent on a company which has obtained an APA?

N/A

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

N/A

10. Is the filing of an APA request subject to a fee?

Ruling requests are not subject to any fee in Austria.

11. What department is in charge of APAs? What are its contact details?

The tax authorities in charge of rendering a ruling are usually the same as the tax authority responsible for inspecting the company.

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

N/A

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Belgium

Advanced Pricing Agreements (“APA”)

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

Two possible procedures may be launched:

- the classic preliminary ruling procedure, which is a unilateral procedure as laid down by law;
- a bilateral or multilateral procedure, which is legally based on the provision relating to the amicable procedure contained in various tax treaties concluded by Belgium.

An APA provides guarantees to a group that its intragroup transactions comply with the arm’s length principle. Therefore, subject to strict compliance with the APA and correct information being provided to the authorities during the negotiations, the APA will be binding on the tax authorities, which may not be able to challenge it on a unilateral basis.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

The various stages of the APA and/or preliminary ruling procedures are as follows:

- Initial meeting with the authorities (pre-filing stage);
- Submission of the official/formal request;
- Negotiation of the terms and conditions of an agreement;
- As regards a bilateral or multilateral APA, a final meeting will theoretically be held with a representative of the various States concerned by the negotiation of the APA.

‘ APAs in Belgium ’

3. Is it possible to first contact the tax authorities on an anonymous basis?

Tax authorities can be contacted on an anonymous basis in relation to a unilateral, bilateral or multilateral procedure.

The tax authorities will inform the taxpayer regarding the chances of his request being successful. The taxpayer may consequently decide whether to launch the formal and official procedure or not.

4. What documents must be produced by the company upon the official filing of the APA request?

The documents to be provided to support the APA request (or preliminary ruling request) are as follows:

- The consolidated financial statements for the taxpayer's group;
- A complete organisation chart for the group, and the structure and internal organisation of the group;
- The contact details of the various entities concerned (and the contact person for entities established in Belgium);
- The description of the goods and services provided and the flows (supply, sales and invoicing channels and the volumes);
- Functional analysis;
- Description of the contractual relations (contracts or draft contracts);
- A description of the group's policy relating to intellectual property management.

This list is simply for information purposes and may be completed or modified during the examination of the APA request.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

Information submitted to the authorities is covered by professional secrecy and is consequently confidential.

However, this shall not prevent the Belgium authorities during the APA procedure from forwarding useful information to foreign authorities (which are also bound by professional secrecy) for the purposes of examining an APA request by a taxpayer.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

In principle, the scope of the request for a preliminary ruling and/or APA is laid down by the taxpayer.

Although the taxpayer is in charge of the timetable for the discussions (he may stop carrying out and/or terminate the procedure), the authorities may extend the scope of the negotiations.

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

An APA and a preliminary ruling will apply at the earliest to the financial year during which the request was made.

In theory, the term of validity of a preliminary ruling is five years. The term of an APA is negotiated and generally varies between three and five years.

8. What obligations are incumbent on a company which has obtained an APA?

A taxpayer who has obtained an APA (or a preliminary ruling) must strictly comply with the terms and conditions set forth in the agreement with the tax authorities.

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

It is possible to renew an APA (and a preliminary ruling) and even renegotiate the APA.

In the first case, the procedure will be far quicker. The taxpayer will only be able to update the file.

10. Is the filing of an APA request subject to a fee?

This procedure is subject to no fee. The costs incurred by the authorities shall not be charged.

11. What department is in charge of APAs? What are its contact details?

The unilateral procedure must be launched by contacting:

Le Service des Décisions Anticipées

Rue Marie-Thérèse 1

B – 1000 Brussels

Tel.: +32 (0)2 579 38 00

The bilateral or multilateral procedure must be launched by contacting:

L'Administration de la Fiscalité des Entreprises et des Revenus

Direction III/1

North Galaxy

Avenue du Roi Albert II, 33

B – 1030 Brussels

Tel.: +32 (0)2 576 24 11

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

The tax authorities provide statistics to the EU Joint Transfer Pricing Forum, which may access and/or publish them.

However, the tax authorities do not publish the APAs concluded. This is not the case for preliminary rulings, which may be published: an extract of the decision will be published on an anonymous basis (in principle - except where the taxpayer makes an objection – at the tax authorities' discretion).

For information purposes, one multilateral APA and four or five bilateral APA were negotiated over the last three years.

However, many (unilateral) preliminary rulings have been issued covering all business sectors.

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China

Advanced Pricing Agreements (“APA”)

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

Chinese APA procedures are primarily based on the tax regulation of “*Implementation Rules for Advanced Pricing Arrangement for the Related Parties’ Transactions (Trial Version)*” issued by State Administration Taxation in 2004.

In China, most arrangements are unilateral and the first arrangement was concluded in 1998. Three bilateral APAs have been concluded to date; the first arrangement with Japan in 2005 and the second two arrangements with the US and Korea in 2007.

An APA allows the taxpayer to confirm with the Chinese tax authorities that the pricing for the related parties’ transactions is at arm’s length basis. The competent tax authorities shall accept the content covered by APA, as long as the taxpayer complies with the articles concluded.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

The main steps of the procedure include:

- Preliminary meeting;
- Official filing of the APA request;
- Examination and evaluation by the competent tax authorities;
- Negotiation between the taxpayer and the tax authorities;
- Involvement of the competent authorities of both states for a bilateral APA; and
- Conclusion of the APA on paper.

APAs in China

Among the above steps, the review of the unilateral application by the tax authorities as required has to be completed within eight months. The bilateral APA is generally subject to the schedule agreed by the competent tax authorities of both countries. In practice, the conclusion of a unilateral APA takes 10 to 12 months, while the conclusion of a bilateral APA takes two years.

3. Is it possible to first contact the tax authorities on an anonymous basis?

The practice varies in different locations in China. In general, the tax authorities do not accept official inquiries or preliminary meetings on an anonymous basis.

4. What documents must be produced by the company upon the official filing of the APA request?

The list of required documents for an APA is set forth in the tax regulation *“Implementation Rules for Advanced Pricing Arrangement for the Related Parties’ Transactions (Trial Version)”*.

The documents to be provided by the taxpayer for the official application shall at least include:

- Group organisation and corporate structure;
- Introduction of the related parties and transactions among related parties;
- Financial statements and audited reports for the last three years;
- Presentation of the products and assets (including tangible and intangible assets);
- Type and period of the related parties’ transactions covered by the application;
- Functional analysis of the related parties covered by the application;
- Description and justification of the proposed transfer pricing method, including a functional and comparability analysis as well as the hypothetical conditions;

- Description of the market, including the development of the industry and competition concerned;

- Forecast of the operation result and business plan for the period covered by the application;

- Legal and tax related issues.

The tax authorities are authorised to request additional documents for the APA.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

The competent tax authorities are obliged to keep confidential the documents and information obtained during the process of APA, in accordance with the Chinese Administration of Tax Collection Law and other regulatory restrictions. In the event where the APA is not concluded, both the tax authority and the taxpayer shall return all the materials provided by the other party during the process.

Although there are separate teams in China responsible for the tax audit and APA, the information will be circulated internally. On the other side, where the competent tax authorities and the taxpayer fail to conclude an arrangement, any information that has been discussed during the process shall not be used in the coming tax audit of the related parties’ transactions, as required by the Chinese APA regulation.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

In general, the scope of the agreements is subject to the request initiated by the taxpayer as well as the subsequent discussion and negotiation between the taxpayer and the competent tax authorities.

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

An APA generally takes effect in the year after the taxpayer submits an official application.

However, subject to the approval by the competent tax authorities, the APA could be rolled back to cover the year of application, if the business operations, the parties' transactions and other conditions concerned of the application year coincide with or are similar to those described in the APA.

An APA could be valid for two to four years.

8. What obligations are incumbent on a company which has obtained an APA?

Within the term of execution of the arrangement, the taxpayer is required to keep a complete set of the documents in relation to the APA, including the accounting records and memoranda. In addition, an annual report shall be prepared and submitted by the taxpayer to the tax authorities within four months after year-end. In general, the annual report shall include the summary of the business operations, description of the compliance with the articles concluded in the arrangement, the request to revise or cancel the APA, if applicable, and the explanation on the issues expected.

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

The taxpayer shall file a renewal application to the competent tax authorities 90 days prior to the expiration of the APA. In addition, the supporting documents shall be provided stating that the taxpayer complies with the articles described in the arrangement and the background of the transactions covered by APA does not have substantial changes.

10. Is the filing of an APA request subject to a fee?

Taxpayers do not need to pay for an APA request to the tax authorities.

11. What department is in charge of APAs? What are its contact details?

APA applications are mainly processed locally. The local tax authorities in charge of the taxpayer are responsible for accepting and evaluating the APA request, and negotiating, concluding and monitoring the APA.

The tax authorities at the level of province, autonomous region or municipality directly under the Central Government where the taxpayer is located are in charge of the APA, in the event where the related parties' transactions covered by APA involve two provinces, autonomous regions or municipalities directly under the Central Government.

The International Tax Office of the State Administration Taxation manages the APA in the following cases:

- The related parties' transactions involve three or more provinces, autonomous regions or municipalities directly under the Central Government;
- The related parties' transactions worth more than RMB10 million per year;
- The types of the transactions are complicated; or
- The APA is a bilateral or multilateral arrangement.

The contact information of International Tax Office of State Tax Authorities is:

No. 5, West Yang Fang Dian Road,
Hai Dian District, Beijing,
Post code: 100038
Tel: +86 10 63417964

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

The Chinese tax authorities do not publish periodic reports on the APA practice and programme. However, the authorities welcome APAs in order to improve the efficiency of tax collection.

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France

Advanced Pricing Agreements (“APA”)

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

The French APA procedure was introduced in 1999 by Administrative Guidelines (Instruction 4 A-8-99 of 7 September 1999). This procedure was legalised by the Amending Finance Act for 2004. It is now codified under Article L 80 B-7 of the French Tax Procedure Code.

It is possible to conclude unilateral (since 1 January 2005), bilateral or multilateral APAs. In line with the OECD Guidelines, the French tax authorities (“FTA”) tend to consider that an APA should in principle be a bilateral (or multilateral) agreement. A unilateral APA can be envisaged if (Instruction 4 A-11-05 of 24 June 2005):

- no APA procedure exists in the other State involved; or
- the transactions covered by the APA request involve a high number of States; or
- the transactions involve specific matters or matters of a limited complexity (e.g., management fees); or
- the French enterprise requesting the APA is a small or medium-size enterprise (“SME”).

An APA allows a group to confirm with the FTA that the prices used for intragroup transactions comply with the arm's length principle: to the extent that the terms of the APA are complied with by the taxpayer, the FTA cannot reassess the prices used for the intragroup transactions covered by the APA.

‘ APAs in France ’

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

The main steps of the procedure are as follows:

- Preliminary meeting with the FTA.
- Official filing of the APA request.
- Review of the case by the FTA. At the end of this phase, the FTA informs the taxpayer of their position on the request and discusses the case / the APA with the taxpayer.
- For a bilateral APA, there is a last phase where the competent authorities of the States involved negotiate the APA
- Drafting and signature of the APA. A unilateral APA is signed only by the FTA and is accepted by the taxpayer. A bilateral APA is signed by the competent authorities involved (in general, exchange of letters) and is accepted by the taxpayer. In both cases, the taxpayer can refuse the APA proposed.

Based on our experience:

- For a unilateral APA, the average duration to negotiate and conclude an APA is six to 18 months.
- For a bilateral APA, the average duration is 18 to 24 months.

3. Is it possible to first contact the tax authorities on an anonymous basis?

It is possible to contact the FTA on an anonymous basis:

- either as an initial contact, to check on the basis of a brief description of the case whether the FTA would in theory accept to review the case;
- or during the first step of the procedure which is the preliminary meeting with the FTA.

4. What documents must be produced by the company upon the official filing of the APA request?

Indicative lists of the documents to produce upon filing of the APA request can be found in the Administrative Guidelines of 7 September 1999 (4 A-8-99).

Based on our experience, upon filing an APA request, the FTA usually request the following information/documentation:

- Corporate structure of the group.
- Presentation of the group: activity, organisation, main transactions of the companies covered by the APA request.
- List of the group's competitors.
- For the French entities covered by the APA request and for the last three tax years: tax returns, auditors' report (*commissaires aux comptes*) and management report (*rappports de gestion*).
- Functional analysis of the entities covered by the request.
- Economic study supporting the proposed transfer pricing methodology.

Please note that a simplified APA procedure exists for SMEs. Under this procedure, the following documents should be provided (Instruction 4 A-13-06 of 28 November 2006):

- Corporate structure of the group.
- List of the transactions performed and prices used with affiliated enterprises.
- Functional analysis.
- Description and justification of the proposed transfer pricing methodology.
- Tax returns of the foreign enterprises involved.

Under the simplified APA procedure, the FTA can, at the request of the SME and in addition to the justifications provided by the enterprise, perform benchmark studies in public databases on behalf of the SME.

Additional information can be requested by the FTA during the procedure.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

Information provided to the FTA are kept confidential (vis-à-vis other authorities or third parties). In the scope of a bilateral or multilateral APA, this information can be disclosed to the other tax authorities involved.

The team in charge of APAs informs the team in charge of auditing the enterprise that this enterprise has filed an APA request. If an APA is concluded, such APA is passed on to the audit team. Unless agreed by the French enterprise, information provided to the APA team shall not be disclosed to the audit team.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

In principle, taxpayers propose the list of transactions which they would like to be covered in the scope of the APA request (the APA can cover all transactions between affiliated enterprises or a part of an activity, a function, one product or one type of transaction).

However, on the basis of the information provided by the taxpayers, the FTA reserve the possibility to extend the scope of the APA. Taxpayers are not obliged to accept such extension and can put an end to the APA procedure at any time.

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

In principle, the APA request must be officially filed with Bureau CF3 at least six months before the beginning of the first financial year during which the agreement should apply for the first time. However, the Administrative Guidelines state that, as an exception and if expressly requested by the taxpayer when filing the APA request, the APA could apply as from the financial year during which the APA request was filed. Therefore, for a company with a financial year ending on 31 December:

- an APA could apply for the first time to financial year from 1 January to 31 December 2009 if the company files the request prior to 1 July 2008;

- if the taxpayer requests makes an express request, the APA could apply for the first time to financial year from 1 January to 31 December 2008 if the request is filed prior to 1 July 2008.

An APA can be valid for three to five years.

In theory, an APA cannot have retroactive effect.

8. What obligations are incumbent on a company which has obtained an APA?

Once the APA is signed, the taxpayer must provide an annual report demonstrating that (i) the transfer pricing methodologies used comply with the agreement and that (ii) the critical assumptions described in the APA are fulfilled. The exact content of the annual report is defined in the APA.

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

The APA can be renewed upon expiry. In principle, assuming the case initially presented to the FTA is not substantially modified, the renewal of the APA should be significantly easier than the initial APA procedure.

10. Is the filing of an APA request subject to a fee?

Taxpayers are not required to pay a fee to the FTA to file an APA request.

11. What department is in charge of APAs? What are its contact details?

The team in charge of the APA programme (Bureau CF3) belongs to the central department of the *Direction Générale des Finances Publiques*. Their contact details are as follows:

Bureau CF3
64-70 allée de Bercy
Télédoc 872
75574 Paris Cedex 12
Telephone: +33 (0)1 53 18 05 76

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

The APA programme is a priority for the FTA.

The FTA do not publish regularly statistics on the APA programme, nor do they give descriptions of the APA concluded. However, to the best of our knowledge, 58 APAs have been signed to date and approximately 40 files are under review.

The signed APAs involve companies operating *inter alia* in the following industries: finance, pharmaceuticals, aeronautics, car, packaging and consumer goods. France has concluded APAs with the following States: the United States of America, Japan, the United Kingdom, the Netherlands, Belgium, Spain, Germany and Switzerland.

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Please note that two articles about APAs in France have been published by Bruno Gibert and Xavier Daluzeau : (i) "Consolidating and developing the French advance pricing agreement procedure" by Bruno Gibert in *European Taxation* (Vol. 45, No. 2, February 2005, pp. 56-63) and (ii) "La sécurisation de la procédure auprès de l'administration : le rescrit" by Bruno Gibert and Xavier Daluzeau in *Lamy "Contrôle et Contentieux Fiscal"*, paragraph 627-25.



Germany

Advanced Pricing Agreements (“APA”)

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

In Germany, an APA procedure was more officially introduced by Administrative Guidelines dated 5 October 2006 (BMF, IV B 4-S 1341-38/06). This procedure is only possible if a double tax treaty exists and the APA can be based on Article 25 of the OECD Model Convention (mutual agreement procedure). Therefore, the typical APA procedure results in a bilateral APA.

However, based on Sec. 89 Para. 2 German General Tax Code (*Abgabenordnung*), a unilateral APA is also possible. According to the Administrative Guidelines, such unilateral APA is only possible if no double tax treaty exists providing for a mutual agreement procedure.

An APA allows a group to confirm with the German Tax Authorities that the transfer pricing method used for specific transactions complies with the arm's length principle. Generally, no further agreement is possible. However, further criteria to be used may be confirmed on a case-by-case basis. A transfer pricing range can generally only be agreed if sufficient and reliable data on third party prices is available.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

The main steps of the procedure are as follows:

- Pre-filing and preliminary meeting at the BZSt.
- Official filing of the APA request. In case of a bilateral APA, an APA filing in the other country concerned should be made at the same time.

‘ APAs in Germany ’

- Review of the case by the BZSt and consulting with the other country involved and the tax authorities for the Länder (and the local tax office/tax auditor).

- The taxpayer may be asked to provide additional information.

- Notification of the taxpayer regarding the position taken by the German tax authorities.

- Drafting and signature of the APA. A unilateral APA is signed only by the tax authorities and is accepted by the taxpayer. A bilateral APA is signed by the competent authorities (in general, exchange of letters) and can be accepted by the taxpayer. At the same time, the taxpayer has to declare to his local tax office that he will not raise any objections against a tax assessment on the results of the APA. Alternatively, the taxpayer can refuse the proposed APA.

The duration of the APA procedure differs from case to case and depends on the complexity and the concrete handling of the request. Furthermore, experience needs to be gained during upcoming years, as APA procedures are a rather new tool in German tax practices.

3. Is it possible to first contact the tax authorities on an anonymous basis?

The case may be preliminarily discussed in order to assess the possibility for an APA procedure. However, this is generally not done on an anonymous basis.

4. What documents must be produced by the company upon the official filing of the APA request?

An indicative list of the documents to be provided to the tax authorities in order to carry out an APA procedure can be found in the Administrative Guidelines of 5 October 2006 (see 3.5). This includes the following, but may have to be supplemented or changed, depending on the actual case.

- Corporate structure of the group.

- Description of the organisational and operative group structure.

- Explanation of the activities which are relevant for the APA procedure.

- Description of intra-group activities and planned contracts.

- Explanation of the functions carried out and risks taken.

- Description of material assets – in particular, intangible assets – required for the intra-group business.

- Description of the relevant market and competitors, including selected business strategies.

- Description and assessment of the intended value production chain and the relevant group entities' contribution to this chain.

- Naming of all open tax questions which have been raised in connection with the transactions to be covered by the APA.

- Economic study supporting the proposed transfer pricing methodology, including a justification for such methodology.

Upon request, the BZSt may agree to exemptions or simplifications for small companies.

However, during the APA procedure, additional information can be requested by the BZSt.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

Information provided to the German tax authorities is generally kept confidential vis-à-vis other authorities or third parties. However, information is disclosed to the relevant authorities, which form part of the APA procedure, i.e. the tax authorities for the Länder, the local tax office (including the tax audit department) and in the event of a bilateral APA to the other country's tax authorities.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

It is the duty of the taxpayer to apply for an APA and to submit the application. Therefore, it is the taxpayer who defines the content of the APA. The APA request may be limited, for instance, to specific transactions or product lines, group entities, etc.

In this context, the tax authorities may raise additional questions at any time and may request further information and documents.

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

An APA is generally intended to cover a future period of time. Therefore, the official request for an APA has to be submitted at the latest during the business year for which it is intended to be first applied.

A prior application for the APA may be accepted by the BZSt if no tax returns have previously been filed and the legal deadline for submitting the tax returns has not expired (generally 31 May of the following year). However, if the tax returns are prepared by a tax advisor, the deadline is delayed until 30 September of the following year.

Furthermore, the relevant authorities of the two countries may agree on a different starting point for a bilateral agreement. In addition, even a retroactive start date may be agreed in specific cases.

The term of validity of an APA is generally three to five years. However, the term of the APA may be extended by carrying out a simplified subsequent APA procedure.

8. What obligations are incumbent on a company which has obtained an APA?

Once the APA has been signed, the taxpayer has to provide an annual compliance report demonstrating that the facts and circumstances have not changed and the critical assumptions described in the APA are satisfied. The exact content of the annual report is defined in the APA.

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

An APA can generally be renewed in Germany. Assuming the case initially presented to the BZSt is not substantially modified, the renewal of the APA should be far simpler than the initial APA procedure.

10. Is the filing of an APA request subject to a fee?

According to Sec. 178a German General Tax Code (*Abgabenordnung*), taxpayers have to pay a fee to the BZSt to file an APA request. The amount of the fee differs in relation to the concrete request and the size of the company:

The basic fee is EUR 20,000 (EUR 10,000 for small entities).

In the event of renewal, a fee of EUR 30,000 (EUR 7,500 for small entities) is charged.

If the request is changed, an additional fee of EUR 10,000 (EUR 5,000 for small entities) becomes due.

Such fees may be reduced by the BZSt further to a request by the taxpayer if, in the specific case, the assessment would result in an unfair amount.

11. What department is in charge of APAs? What are its contact details?

Angelika Thies

CMS Hasche Sigle

angelika.thies@cms-hs.com

The German competent authority for the pre-filing is the BZSt (*Bundeszentralamt für Steuern*), which is part of the German tax authorities. The BZSt deals with the tax authorities for the Länder, i.e. provides information about the APA application and discusses open questions. The result of the discussion and procedure is provided to the taxpayer who must then deal with the responsible local tax authorities.

The contact details of the BZSt are as follows:

Bundeszentralamt für Steuern
Hauptdienstszitz Bonn-Beuel
An der Kuppe 1
53225 Bonn
Germany
Tel.: +49 (0) 228 406-0
Fax: +49 (0) 228 406 2661

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

The APA programme in Germany is a priority for the BZSt. The BZSt does not regularly publish statistics on the APA programme. However, it is known that generally only big German groups have submitted APA requests to date.

Moreover, it should be taken into account that the Administrative Guidelines were only issued in October 2006 and further practical experience has to be gained. At the same time, the Administrative Guidelines provide taxpayers with helpful details regarding the procedure.



Hungary

Advanced Pricing Agreements (“APA”)

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

The Hungarian advance pricing arrangement (“APA”) system was introduced into Hungarian tax law with effect from 1 January 2007 and is regulated by Sections 132/A and 132/B of the Hungarian Tax Procedure Act and Decree No. 38/2006 of the Ministry of Finance. Nonetheless, the maximum price of the APA was initially so high (HUF 50 million, approximately EUR 220,000) that taxpayers were not really willing to make use of it. After a considerable reduction in price as of this year (maximum of HUF 20 million, approximately EUR 82,000), it might be expected that more taxpayers will become interested in making use of this possibility. However, as a result of the recent price reduction, as well as the considerable time that it takes to complete this procedure, practical experience with APAs is currently rather limited in Hungary. In addition, it is likely that taxpayers will not be driven to apply for APAs in large numbers until the Hungarian Tax Authorities’ interest in transfer pricing matters becomes more focused on the substance and less focused on the administrative requirements.

It should be noted that Hungarian APAs are not available to small enterprises, certain not-for-profit entities and similar organisations.

It is possible to apply for all these types of APAs. If a multilateral or bilateral APA is requested and it is not possible to conclude one (due to the rejection by foreign authorities), the taxpayer may request a unilateral APA instead, which is currently possible. In the case of APAs involving foreign tax authorities, either the MAP (included in most double tax treaties), or the EU rules on the exchange of information procedures are invoked.

‘ APAs in Hungary ’

In principle, the APA is binding on the Hungarian Tax Authorities during the term of validity, however, only inasmuch as:

- certain procedural requirements are fulfilled (e.g. regular reporting obligation);
- the taxpayer and its related parties act in good faith (e.g. the data supplied is correct and the parties do not deviate from the APA when determining their transfer prices);
- there is no change to the relevant laws;
- there is no material change to the facts or circumstances, or change in the conditions which were identified in the APA as "essential conditions" (i.e. the core predictions and calculations that were provided in the analysis attached to the request).

In practice, therefore, even the APA could later be challenged by the Authorities if there is a material change to the circumstances affecting it. However, in this case, the taxpayer has the option to ask for a modification/amendment of the APA based on these different circumstances.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

As already mentioned, practical experience with APAs in Hungary is quite limited. Nonetheless, the statutory time limit to obtain an APA is 120 days, which may be extended twice by a maximum of 60 days each. However, in practice, the actual time frame could be significantly longer, as the time which is needed for the Authorities to conclude the MAP with the foreign authorities and carry out on-site audits as well as for the applicant to supplement its request (if required) is not included in the statutory time limit. In addition, the Authorities have the option to further reconsider the request and therefore restart the deadline if there are material changes to the facts and circumstances which affect the case. Therefore, in practice, the overall deadline could be several months in more complicated multilateral matters.

3. Is it possible to first contact the tax authorities on an anonymous basis?

The applicant may launch an informal consultancy procedure prior to formally filing the request for an APA. Although the result of this procedure is not binding on either of the parties (i.e., neither the Hungarian Tax Authorities, nor the applicant), it is not treated as an anonymous process. Although it would generally be possible to contact the Hungarian Tax Authorities on an informal basis (e.g. by requesting a non-binding ruling), the usefulness of the answers received is doubtful.

4. What documents must be produced by the company upon the official filing of the APA request?

The core data to be provided with the request is defined by law and the general requirement is that the request needs to include the same data that would be required for general transfer pricing registers (apart from certain declarations and other formal criteria). However, in practice, the Hungarian Tax Authorities would be free to require further clarifications and information and they are also entitled to conduct an on-site audit to check whether the data that has been included in the request is accurate.

As regards the formal requirements, an official request form needs to be submitted including all relevant details regarding the taxpayer and its related parties. In addition, there are a number of statutory annexes (such as, e.g., company registration certificates, specimen signatures, powers of attorney, etc.), which must be filed with the request. A requirement which could be especially burdensome in the case of lengthy requests is that if a bilateral or multilateral APA is requested, a sworn translation into English of the request is then required. Furthermore, the related entities that are parties to the transaction(s) covered by the APA must give their consent to the APA request being filed. The request needs to be countersigned by a lawyer, a tax advisor or similar professional in three copies.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

The APA and documents connected therewith are subject to the generally applicable strict rules on tax secrecy. An exception is usually only made to courts and various investigative or anti-fraud authorities (e.g. OLAF), or authorities which handle this data in the course of their activities as stipulated by law (please also see below). However, in the case of bilateral or multilateral APAs, the non-Hungarian authorities that are asked to become involved in the procedure are entitled to be given access to at least the part of the documentation that is relevant for their purposes.

The authorities which are in charge of auditing companies in Hungary are informed immediately about the filing of a request, the conclusion of an APA and the rejection of a request. If concluded, the APA itself is sent to the relevant (regional) tax office, if a request is submitted/rejected, they are only informed about this fact (without seeing the request itself or the grounds on which it was rejected). The same applies for the request (and the decision) to amend or extend the term of an APA. Concluded APAs are also passed on to the Hungarian Ministry of Finance.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

In principle, the Hungarian Tax Authorities would conclude the APA on the basis and within the scope of the request. However, the Authorities have the right to inspect (even by conducting an on-site audit) whether the data/information provided by the taxpayer is correct. In particular, to the extent that the Authorities discover that some of the information provided is incorrect, they may alter the contents of the APA, compared to what has been stated in the request.

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

The effective date of the APA is the date when the request was filed with the Authorities. However, a further grace period is granted in relation to agreements which were concluded prior to filing the request, which is 60 days from the date on which the APA becomes legally binding and enforceable. During this period and with regard to such agreements, the Hungarian Tax Authorities may not carry out a tax audit relating to transfer pricing. Furthermore, during the same period and for these agreements, the taxpayer is entitled to carry out a self-review, provided that the parties have made supplies under these agreements following the date of filing the request.

An APA is concluded for a term of between three and five years.

8. What obligations are incumbent on a company which has obtained an APA?

Any company that has obtained an APA must submit a report to the Hungarian Tax Authorities within 150 days from the end of each tax year, including data concerning the status of the conditions that were specified in the APA as being "essential", along with data regarding the status of all other circumstances which could have an effect on the validity of the APA.

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

As mentioned above, an APA is concluded for a period of between three and five years.

This term can be extended once up to a maximum of another three years, upon the joint request of the taxpayer and its related parties, except in the event of a material change to the circumstances affecting the APA which makes the extension impossible. The request to extend the term of validity must be filed no later than six months before the expiry of the original term of validity. The taxpayer may also request that the APA is amended, if required further to changes in circumstances.

10. Is the filing of an APA request subject to a fee?

When introduced, the cost of an APA was much higher than what the “market” (i.e., taxpayers) considered to be realistic for such a request. As of 1 January 2008, the prices were reduced which may incite taxpayers to consider this possibility when planning their transfer pricing structures. As a general rule, the price is 1% of the arm’s length price of the transactions that are covered by the APA, provided that the Authorities were asked to determine the arm’s length price. However, this fee cannot be lower than the minimum and cannot exceed the maximum fee limit for the different kinds of APAs, as follows:

Unilateral APA: minimum HUF 5 million (approximately EUR 20,000) – maximum HUF 10 million (approximately EUR 41,000)

Bilateral APA: minimum HUF 10 million (approximately EUR 41,000) – maximum HUF 17 million (approximately EUR 70,000)

Multilateral APA: minimum HUF 15 million (approximately EUR 61,000) – maximum HUF 20 million (approximately EUR 82,000)

As regards a request to modify or extend the term of validity of an APA, 50% of the above prices apply. As it can be noted, requesting an APA is still quite costly and 25% of the fee paid is lost, even if the Hungarian Tax Authorities reject the request and no APA is concluded. The fee is to be paid prior to launching the procedure. This normally means the payment of the minimum fees, and if any difference is payable based on the actual arm’s length price, then the excess is payable prior to receiving the decision regarding the APA.

11. What department is in charge of APAs? What are its contact details?

The name and contact details of the department of the Hungarian Tax Authorities to which the APA request needs to be filed is:

APEH Központi Hivatala
1054 Budapest
Széchenyi utca 2.
Hungary

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

We are not aware of any published report of the Hungarian Tax Authorities in relation to their existing APA practices. However, the Authorities encourage the conclusion of APAs: in their recent guidelines concerning auditing aims and practices, they highlight the conclusion of more APAs as a key aim for the present year.

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Italy

Advanced Pricing Agreements (“APA”)

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

The Italian APA procedure was introduced in 2003 by specific statutory provisions (Art. 8 of Decree No. 269 of 30 September 2003 converted into Law No. 326 of 24 November 2003) and was implemented through the Decree of 23 July 2004 issued by the Director of the Revenue Agency.

Under the APA procedure, an agreement between the competent office of the Revenue Agency and the taxpayer may be concluded. As a result of the agreement, the Italian tax authorities will not be authorised to carry out audits or issue reassessments on the matters covered by agreement.

One of the possible objects of the agreement might be the transfer pricing method adopted by enterprises with cross-border activities. Therefore, this ruling procedure could be assimilated to an APA to the extent that it covers transfer pricing issues.

The agreement may also relate to cross-border payments of interest, dividends and royalties. However, this ruling procedure is not limited to the matters mentioned above and may concern the interpretation and application of any legal provisions covering items of income paid from or to non-resident persons.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

A preliminary meeting with the ITA is advisable although not expressly provided for by the law or by the Revenue’s instructions.

‘ APAs in Italy ’

After the official filing of the APA request, subsequent meetings and review of the case by the ITA, an APA may be drafted and signed.

There are no mandatory time limits for each step of the procedure although it is expressly provided that the overall procedure should terminate within 180 days from the filing of the application.

Based on our experience, the average duration required to negotiate and conclude an APA on transfer pricing matters may range between six and 24 months.

3. Is it possible to first contact the tax authorities on an anonymous basis?

It is possible to approach the ITA on an anonymous basis and, in some cases of uncertainty with regard to procedural and/or substantive law matters, it is advisable to check whether the ITA would accept to review the ruling request based on a brief description of the case.

4. What documents must be produced by the company upon the official filing of the APA request?

No list of the documents to be submitted upon filing of the APA request exists. Additional information may be requested by the ITA during the procedure.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

Information provided to the ITA is kept confidential vis-à-vis other authorities and third parties.

However, in accordance with European law, the Italian tax authorities send a copy of the agreement to the competent tax authority in the country of residence or establishment, of the enterprises with which the given taxpayers carry out the relevant transactions. The sending of the agreement to the foreign tax authorities is for information purposes only since it is concluded between the competent office of the Italian Revenue Agency and the taxpayer.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

In principle, taxpayers propose the matters or the transactions which should be dealt with during the APA procedure. However, on the basis of the information provided by taxpayers, the ITA may try to extend the scope of the APA with the taxpayer's approval.

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

The agreement is exclusively binding on the ITA for three tax years, i.e. for the tax year in progress at the time of its conclusion and during the following two tax years. Its binding nature will cease if the factual or legal assumptions upon which the agreement was concluded change.

An APA cannot be adopted with retroactive effect apart from the limited retroactive effects from the beginning of the tax year running at the time of its conclusion.

8. What obligations are incumbent on a company which has obtained an APA?

The taxpayers' obligations are to be agreed in the signed APA. Once the APA has been signed, the taxpayer must normally make available all the relevant documentation and data (periodically or upon request) to the competent offices of the Revenue Agency.

Periodic visits by the Revenue Agency's officers to the taxpayer's premises should also be agreed upon.

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

The APA can be renewed. The taxpayer may request the renewal three months before the expiry date of the agreement. Apart from requesting documents, data and information, and possibly organising new meetings and visiting the taxpayer, the Revenue Agency should reply 15 days before the expiry date of the agreement.

10. Is the filing of an APA request subject to a fee?

Taxpayers do not need to pay any fee to the ITA to file an APA request.

11. What department is in charge of APAs? What are its contact details?

The ruling request is submitted to the competent office of the Revenue Agency for Rome or Milan. The two teams in charge of the APA programme belong to the centralised department of the *Direzione Centrale Accertamento*. Their contact details are shown below.

For taxpayers whose tax domicile or permanent establishment is located in one of the following regions: Tuscany, Marche, Umbria, Lazio, Sardinia, Abruzzo, Molise, Campania, Basilicata, Puglia, Calabria and Sicily:

Ufficio Ruling Internazionale Centro-sud
Direzione Centrale Accertamento - Settore
Soggetti di Grandi Dimensioni
Via Cristoforo Colombo n° 426 C/D
00145 Rome

For taxpayers whose tax domicile or permanent establishment is located in in one of the following regions: Valle d'Aosta, Piemonte, Liguria, Lombardia, Emilia Romagna, Veneto, Trentino Alto Adige, Friuli Venezia Giulia:

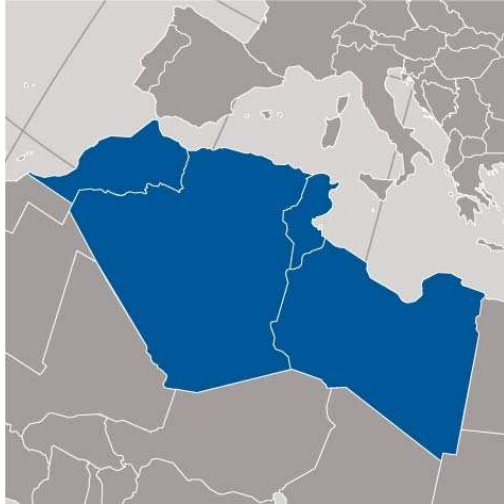
Ufficio Ruling Internazionale Nord
Direzione Centrale Accertamento - Settore Soggetti
di Grandi Dimensioni
Via Ugo Bassi 4
20154 Milan

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

The ITA do not publish statistics on the APA programme, nor do they provide information on the APA concluded.

Carlo Romano

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Maghreb

Advanced Pricing Agreements ("APA")

1. Algeria

Firstly, please note that provisions relating to transfer pricing have recently been introduced by internal tax legislation as Article 141 bis of the Direct Tax Code (equivalent of Article 57 of the French General Tax Code), which were set forth in the Finance Act 2007.

Prior to this reform, a Directive dated 11 May 1999 introduced by the Central Tax Department (relating to the cancellation of the withholding tax applying to immovable works concluded with foreign companies with no fixed permanent establishment in Algeria), provided that "expenses incurred for payment of services or supply of goods by the head office or the parent company must be in line with prices which should have been paid in the absence of such a relationship".

Finally, most tax treaties signed by Algeria provide for the possibility to change the companies' accounting methods to calculate the taxable profit in Algeria if said accounting methods do not show the real profit, which takes into consideration existing relations between the companies that have executed the examined transactions in accordance with the OECD model.

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

Strictly speaking, no APA system exists.

However, the Direct Tax Code provides that the deduction of royalties, management fees, technical assistance fees and the like paid by foreign currency is subject to transfer authorisation by the competent authorities in terms of bank exchange control.

APAs in Algeria and Morocco

In fact, imports of services in Algeria are free inasmuch as they relate to foreign current transactions in the event where the transfer is carried out through a commercial bank. If this is not the case and if the transaction is not current, the Bank of Algeria's preliminary authorisation is consequently required, which is similar to the meaning of an APA.

In this last case, the contract has to be domiciliated at the Bank of Algeria, which may request supporting documents regarding the transaction. Once authorisation has been granted, the transfer should be free.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

N/A

3. Is it possible to first contact the tax authorities on an anonymous basis?

It is possible to introduce the case, meet with the Algerian authorities and receive a written answer based on contractual elements.

However, it does not provide complete legal security because the tax authorities are not always bound by this assessment of the facts. However, it is not sure that the tax authorities will go against the assessment at a later date.

In fact, the tax authorities' answers constitute its interpretation of the regulation and the taxpayer is entitled to refer to these documents to point out his rights since doctrine considers them to be enforceable against the tax authorities.

4. What documents must be produced by the company upon the official filing of the APA request?

No administrative or legal provisions exist regarding this point.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

N/A

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

N/A

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

N/A

8. What obligations are incumbent on a company which has obtained an APA?

N/A

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

N/A

10. Is the filing of an APA request subject to a fee?

N/A

11. What department is in charge of APAs? What are its contact details?

N/A

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

N/A

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2. Morocco

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

No. However, a written reply from the authorities may be referred to the authorities within the scope of a subsequent dispute, even if it has been demonstrated that this is not always evidenced or sufficient.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

N/A

Delays may vary between one month and one year depending on the nature of the case.

3. Is it possible to first contact the tax authorities on an anonymous basis?

Yes. In practice, the authorities may be contacted on an anonymous basis, which may then be completed by providing personal information and supporting documents. The authorities may issue written replies or carry out specific cases studies, which create the authorities' doctrine that can be compared to replies to taxpayers outside of the scope of any specific proceedings.

4. What documents must be produced by the company upon the official filing of the APA request?

No specific list exists, with the exception of all documents, memoranda, explanations, flowcharts, financial statements, tax returns that may support the client's position.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

- Confidentiality towards third parties is guaranteed.

- Confidentiality is not easy to guarantee towards other authorities, although Moroccan authorities do not widely exchange information.

Our experience shows that the departments in charge of audits are not aware of the replies sent by name to some companies and they are informed by the taxpayers thereof.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

N/A

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

N/A

8. What obligations are incumbent on a company which has obtained an APA?

N/A

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

N/A

10. Is the filing of an APA request subject to a fee?

N/A

11. What department is in charge of APAs? What are its contact details?

The General Tax Department (*Direction Générale des Impôts*) is in charge of APAs, which forms part of the Finance and Privatisation Department.

Direction Générale des Impôts

Avenue Mohamed V - Rabat - Chellah

Tel: 037 27 90 60/61/62/27

Fax: 037 77 55 76

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

N/A. There are no statistics available to the public regarding audits, investigations or individual replies sent to taxpayers. However, replies to taxpayers are published on the Finance and Privatisation Department's website with regard to some of the authorities' positions.

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Netherlands

Advanced Pricing Agreements (“APA”)

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

APA procedures have existed for a number of years in the Netherlands.

Unilateral, bilateral and multilateral APAs can be concluded in the Netherlands. Most APAs are unilateral.

An APA is legally binding on the taxpayer and the tax authorities provided all relevant facts and circumstances are provided to them correctly.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

The main steps and procedures are as follows:

- Filing an APA request with the taxpayer’s competent tax inspector.

- The competent tax inspector will forward the request to the APA/ATR team in Rotterdam for binding advice.

- The APA/ATR team concludes a “case-management plan” with the taxpayer in which, *inter alia*, an agreement is made on the realistic time it takes to complete the APA. The APA/ATR team strives to complete the APA as quickly as possible. However, this does not give any guarantee in practice.

- Prior to filing an APA request, it is possible to apply for a pre-filing meeting between the taxpayer and the APA/ATR team. This meeting can reduce the taxpayer’s administrative burden, since as a result of this meeting it is clearer what information needs to be provided to the APA/ATR team.

APAs in the Netherlands

The time required to negotiate and conclude an APA very much depends on the situation (complexity of the case, etc). Generally, for a unilateral APA, the process should be expected to last at least three to six months. Bilateral and multilateral APAs take longer.

3. Is it possible to first contact the tax authorities on an anonymous basis?

In general, the tax authorities are not willing to give any feedback on requests made on an anonymous basis.

4. What documents must be produced by the company upon the official filing of the APA request?

The information that needs to be produced is specified in the "case-management plan", which is concluded between the APA/ATR team and the taxpayer. The following information, *inter alia*, usually needs to be provided:

- Information about the transactions, products or other businesses which are covered by the APA request.
- Information about the entities (and permanent establishments) involved.
- The names of the states which are involved.
- Information about the international organisation structure, corporate history, finance, products, etc.
- Description of the proposed transfer pricing method with a functional analysis and a comparability analysis.
- Assumptions which underline the proposals.
- The relevant accounting years.
- A general description of the market conditions.

During the procedure, additional information can be requested by the APA/ATR team.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

Information provided by the taxpayer to the APA/ATR team is treated as confidential except for use by the tax authorities (all departments). The tax authorities are not allowed to provide taxpayer's information to external parties, except in the scope of an international exchange of information. Generally, the tax authorities are allowed to exchange information with tax authorities in other countries if there is a legal basis for doing so.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

The scope of the APA is agreed upon in the "case-management plan". The "case-management plan" as agreed upon is binding for both the tax authorities as well as the taxpayer. Any deviations from the agreed "case-management plan" must be agreed upon by both parties.

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

The term of an APA depends on the relevant case. Generally, an APA is concluded for a period of four to five years.

An APA can cover the same year in which the agreement is made. It is also possible for an APA to cover previous years, upon request, depending on the situation, so to such extent an APA can be concluded with retroactive effect.

8. What obligations are incumbent on a company which has obtained an APA?

The taxpayer that obtained the APA must satisfy the conditions stipulated in the APA.

The taxpayer is obliged to inform the tax authorities regarding important changes.

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

As a general rule, it is possible to renew an APA. It depends on the situation to what extent the APA can be continued on the same basis or whether new elements are to be added.

10. Is the filing of an APA request subject to a fee?

Taxpayers do not need to pay a fee for an APA.

11. What department is in charge of APAs? What are its contact details?

The local tax inspector responsible for the taxpayer is officially in charge. He needs to consult with the APA/ATR team of the "large entities" section of the tax authorities in Rotterdam. In practice, this APA/ATR team is in charge.

The contact details of the APA/ATR team are:
Belastingdienst / Rijnmond / kantoor Rotterdam
APA/ATR team
Postbus 50960
3007 BB Rotterdam
The Netherlands

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

The Dutch Ministry of Finance regularly publishes statistics on the APA programme, *inter alia*, on its website. No details are provided.

The tax authorities generally and mildly encourage APAs.

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Poland

Advanced Pricing Agreements (“APA”)

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

The APA procedure was introduced by the Polish Tax Ordinance Act (*Ordynacja podatkowa*) in 2006. Pursuant to this Act, it is possible to conclude unilateral, bilateral and multilateral APAs.

Under the Polish tax system, an APA is an administrative decision issued by the Minister of Finance. This decision, known as a decision on agreement, lays down the method for calculating the transfer price which should be used when dealing with related companies. By virtue of this decision, the tax authorities cannot reassess the prices applied by related entities as long as they are in line with the terms of APA.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

The main steps of the procedure are as follows:

- Preliminary meeting with the Ministry of Finance (the “MF”);
- Official filing of the APA request with the MF;
- Review of the case by the MF. Usually this stage is in the form of negotiations between the taxpayer and the MF during which the MF may ask the taxpayer for additional information and explanations;
- For a bilateral and multilateral APA, there is a final phase where the competent authorities of the States involved negotiate the APA;
- Issue of the administrative decision by the Minister of Finance (i.e., a “decision on agreement”) addressed to the taxpayer. For bilateral and multilateral APAs, this decision is also transferred to the competent authorities of the States involved in the negotiation of the APA.

‘ APAs in Poland ’

Pursuant to Polish Tax Ordinance Act, the proceedings for obtaining APA should be conducted without any unnecessary delays and depending on the type of APA, it should not be longer than:

- for a unilateral APA, six months from filing request,
- for a bilateral APA, one year from filing request,
- for a multilateral APA, 18 months from filing request.

In practice, these deadlines are rarely met. It is more realistic to expect that a unilateral APA will take around one year to conclude whereas bilateral and multilateral APAs take 18 to 24 months to conclude. However, this largely depends on the quality of requests and documents filed and the MF's workload. It is advisable to work closely with the MF team designated to review the case as this may speed up the whole process.

3. Is it possible to first contact the tax authorities on an anonymous basis?

Before filing a request to conclude an APA, it is possible to contact the tax authorities in order to acquire more information regarding whether the entity should conclude APA, documents and information that it needs to prepare, probable date of concluding and envisaged terms and conditions of the APA. Usually this contact is made by the way of preliminary meeting with the MF. However, this contact cannot be made on anonymous basis.

4. What documents must be produced by the company upon the official filing of the APA request?

A taxpayer intending to conclude APA has to prepare:

- proposal relating to the transfer price calculation method. In particular, one of the following methods needs to be chosen: (i) comparative non-controlled price, (ii) resell price, (iii) reasonable margin, or (iv) transactional profit;
- description of the application of the proposed method with regard to transactions that

will be the subject to the APA, and, in particular, (i) the rules for calculating the transfer price, (ii) financial forecast on which the rules for calculating the transfer price are based, (iii) comparative data used to calculate the transfer price;

- general description of the transaction, including: (i) description of type, subject and value of the transaction, (ii) analysis of assets, roles and risk of the parties to the transaction (iii) description of expected costs of the transaction, (iv) economic strategy of the parties to the transaction and (v) other circumstances if they could have influence on the transfer price;

- economic study of situation in the entity's field of trade, including data pertaining to economic operations conducted by other not related entities, which were used to prepare the transfer price calculation;

- analysis of organisational and financial structure of the entities that want to conclude an APA and description of the accounting principles used by these entities;

- documents having a substantial impact on the transfer price; especially contracts, agreements and other documents recording the intention of the parties to the transaction;

- proposed term of the APA;

- list of related entities, which will be the parties to the transaction, along with their consent to file all documents relating to the transaction and provide any explanations (if necessary) to the MF.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

The documents provided to the Minister of Finance are kept confidential. The level of protection for these documents is similar to the level applied to information disclosed by banks or tax authorities from other EU Member States.

Generally, information obtained by the tax authorities during the APA conclusion process is covered by treasury secrecy. This means that only one person who is conducting the process, his/her supervisor and the Minister of Finance have access to this information. Documents produced and prepared

during this process are kept in safe and may be disclosed only to authorised entities in certain circumstances, e.g.:

- the Minister of Finance, Director of the Tax Chamber or Director of the Customs Chamber - during tax proceedings, proceedings relating to tax crime or offence, or tax inspections;

- courts or public prosecutors - with respect to pending proceedings;

- ombudsman - with respect to his participation in proceedings before the Administrative Court.

The team in charge of APAs informs the team in charge of auditing the taxpayer that the decision regarding the APA has been issued by the Minister of Finance and this decision is passed on to the audit team. However, the audit team is not informed about the taxpayer's request for an APA.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

It is not possible for the tax authorities to widen the scope of a request filed by the taxpayer because the Minister of Finance is limited in his review and decision to only transactions specified in the request for an APA. However, during the review of the case, the MF may not accept the transfer price calculation method requested by the taxpayer and may propose an alternative method. In this situation, the taxpayer can modify its request or file additional documents and provide necessary explanations. Alternatively, taxpayers can withdraw their APA requests.

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

The decision relating to an APA applies as soon as it is issued by the Minister of Finance and usually covers the financial year in which it is issued.

The term of validity of an APA cannot exceed five years but it can be renewed.

In principle, the APA should cover future transactions. However, the Polish Tax Ordinance Act provides that an APA may be concluded when the transactions are in progress and there are no tax inspections or other tax proceedings pending with respect to such transactions on the date of filing an application for an APA.

8. What obligations are incumbent on a company which has obtained an APA?

Entities that are a party to an APA must append a statement regarding the application of the approved transfer price calculation method to their annual tax returns. A specific model of approved statement must be complied with (contained in the Regulation issued by the Minister of Finance on 31 May 2006 regarding the model statement on the application of the approved transfer price calculation method for corporate tax purposes). In particular, entities have to provide information on: (i) the amount of sales generated using the approved transfer price calculating method, (ii) the prices applied in transactions with related parties and (iii) the period during which the method was a.

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

APAs can be renewed. The taxpayer needs to apply to the Minister of Finance six months before the expiry date of the APA. The request will be approved and the APA will be renewed when the basis for using the selected transfer price calculation method between related entities did not change. Moreover, the entity needs to pay the amounts specified in point 10.

10. Is the filing of an APA request subject to a fee?

Generally, the administrative fee for filling a request for an APA is equal to 1% of the value of transaction at issue. However, there are caps on this amount depending on the type of APA. Those amounts are as follows:

- for unilateral agreements pertaining solely to Polish companies - not lower than PLN 5,000 and not higher than PLN 50,000,

- for unilateral agreements pertaining to foreign entity - not lower than PLN 20,000 and not higher than PLN 100,000,

- for bilateral and multilateral agreements - not lower than PLN 50,000 and not higher than PLN 200,000.

11. What department is in charge of APAs? What are its contact details?

The team in charge of the APA program (Advance Pricing Agreements Division) forms part of the Direct Taxes Department of the Ministry of Finance. Their contact details are as follows:

Ministry of Finance
Direct Taxes Department
Advance Pricing Agreements Division
12 Świętokrzyska Street
00-916 Warsaw
Tel. +48 22 694 4269

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

The MF does not publish any regular statistics on the APA programme, nor do they provide descriptions of the APAs concluded. However, the MF intends to start publishing reports regarding the amount of issued decisions from the beginning of the next year.

The tax authorities argue that the APA programme is important for the MF. However, during the first two years following the introduction of APAs into Polish tax system, only three decisions on APAs have been issued by the Minister of Finance.

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Russia

Advanced Pricing Agreements ("APA")

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

At present, there is no APA system in Russia.

However, a law on transfer pricing is expected to be adopted shortly (most probably to enter into force as from 1 January 2009).

For the time being, two draft laws on transfer pricing are being considered by the Ministry of Finance of the Russian Federation in cooperation with the representative of business and industry associations in order to draw up a consolidated draft law to be submitted to the Government of the Russian Federation.

One of these drafts provides for the possibility to implement an APA procedure. In accordance with this draft law, the taxpayer could request to enter into an APA with respect to one or several transactions having the same subject matter. Only taxpayers qualified as "important taxpayers" are allowed to enter into an APA. Taxpayers with an annual turnover amounting to RUB 20,000,000,000 or the amount of annual Federal tax of RUB 1,000,000,000 are deemed to be "important".

An APA would be a bilateral agreement concluded between the taxpayer and the Ministry of Finance.

An APA would be legally binding on its parties.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

According to the draft law, the Ministry of Finance would have to consider the taxpayer's request within one year from the date of submission of the documents, subject to extension by an additional three months.

APAs in Russia

3. Is it possible to first contact the tax authorities on an anonymous basis?

No.

4. What documents must be produced by the company upon the official filing of the APA request?

The taxpayer interested in concluding an APA would have to submit the following documents to the Ministry of Finance:

- application to conclude an APA;
- draft APA agreement;
- details of the transaction: payment terms and conditions, parties, obligations of the parties and assets involved to perform the transaction;
- methods used to determine the transaction price and its correlation with the market price; amount of profit resulting from the transaction; economic benefit from acquiring trademarks, patents and other intellectual property rights; other factors having an impact on the transaction price;
- payment certificate with respect to stamp duties.

Please note that other documents could be requested by the tax authorities. Additional documents should be presented within five days from the date of the request.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

By law, all documents submitted to the tax authorities must be kept confidential. These documents can never be transferred to third parties.

However, in certain cases laid down by the legislation, the documents can be disclosed to other competent authorities (police, courts, etc.).

If the Ministry of Finance agrees to enter into an APA with the company, a copy of the APA should be sent to the tax inspection where the taxpayer is registered with within three days from the date of conclusion of the APA.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

An APA would be concluded with respect to one transaction or several transactions specified in the agreement. Once the scope of the APA is agreed, the tax authorities should not be able to unilaterally modify the scope thereof.

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

An APA would be valid for three years with the possibility of extension for two more years.

In accordance with the draft law, an APA would become effective from the date of signature unless another date is set forth in the agreement.

8. What obligations are incumbent on a company which has obtained an APA?

The company would have to submit annual reports about the transactions within the scope of an APA together with the profit tax return.

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

As regards extension for a maximum of two years, only compliance with the terms and conditions of an APA would be required. However, extension could be granted according to a decision of the Ministry of Finance.

Upon expiry of five years from the date of conclusion of an APA, the whole procedure should be restarted.

10. Is the filing of an APA request subject to a fee?

State duties amounting to RUB 1,500,000 would be due for consideration by the Ministry of Finance of an APA application.

11. What department is in charge of APAs? What are its contact details?

The body in charge of APA programme would be the Ministry of Finance of the Russian Federation. The department responsible for APA issues will be determined in the future.

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

No practices are available at the moment.

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Spain

Advanced Pricing Agreements (“APA”)

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?

First, please note that the Spanish government has amended the Spanish Transfer Pricing rules to comply with the OECD country guidelines on this matter.

Specifically, the new law has been approved (in force since 1 January 2007) but not the regulations that should develop some issues relating to it and notably specify the documentation obligations for the related party’s transaction. A draft of the developing regulation has been published by the Spanish Tax Authorities (“STA”) but we need to wait until this developing regulation comes into force in order to provide a better analysis on transfer pricing in Spain.

Therefore, this article takes into account the new regulation and the abovementioned draft that must develop the Law.

The Spanish APA procedure was introduced in 1996. It is possible to conclude unilateral, bilateral or multilateral APAs in Spain.

An APA allows a group to confirm with the STA that the prices used for intragroup transactions comply with the arm’s length principle and the STA will consequently not reassess the prices covered by the APA.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

The steps of the procedure are as follows:

- Preliminary meeting with the STA.
- Official filing of the APA request.
- Review of the case by the STA.

‘ APAs in Spain

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- According to the request filed by the taxpayer, the STA may require more information or documentation regarding the transactions covered by the APA request.

- The STA inform the taxpayer of their position and discuss the case with the taxpayer.

- For a bilateral APA, there is a last phase where the competent authorities of the States involved negotiate the APA.

- Drafting and signature the APA. A unilateral APA is signed by the STA and the taxpayer. A bilateral APA is signed by the competent authorities involved and is accepted by the taxpayers.

Based on our experience, the time required to negotiate and conclude an APA under the previous legislation was eight to 12 months. We do not have any experience for the moment with regard to the new regulation.

3. Is it possible to first contact the tax authorities on an anonymous basis?

It is possible to approach the STA on an anonymous basis as a first contact, but unfortunately the taxpayer is not provided with much information during this initial contact.

4. What documents must be produced by the company upon the official filing of the APA request?

The STA usually request the following documentation/information:

- Corporate structure of the group.
- Business analysis: the taxpayer must explain the Spanish company's activity, the group's activity and also the whole business process. It is highly recommended to explain in detail all the facts involved in the transaction.
- Legal and economic description of the transactions covered by the APA request.
- Functional analysis: they must explain the assets included in the transaction, the functions of the mentioned assets and the risks of the transactions.
- Comparable analysis: the taxpayer must analyse the comparable values agreed for the same business transactions by third parties and

explain the method used to obtain such comparable values.

- Method used: the taxpayer has to explain the methodology used in order to calculate the market value requested for the transactions. It is recommended that two different calculation methods are applied to calculate the same market value. Further to the Transfer Pricing methodologies, please note that one important change has been introduced with regard to the Transactional Net Margin Method (TNMM).

The new law also modifies the hierarchy of the transfer pricing methods. In particular, the Comparable Uncontrolled Price (CUP) method will no longer be the only preferred method and will be considered at the same preferential level as the Resale Price Method (RPM) and the Cost Plus Method (CPLM).

Following the line of the OECD, the Profit Split Method (very common in the US) and the TNMM will be considered as possible methods, if the three primary methods (CUP, RPM, and CPLM) are not appropriate for the analysis of a transaction.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

Information provided to the STA is kept confidential and only can be used for the APA purposes.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

The STA can extend the scope of the request made by the Spanish taxpayer. However, the taxpayer is not obliged to accept the proposal by the STA.

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

The new regulation also modifies the previous system, extending the term from three to four years and possibly allowing for the so-called “roll-back” by applying the APA to both the tax year of the request and the previous tax year.

8. What obligations are incumbent on a company which has obtained an APA?

If the economics terms covered by the APA change, the taxpayer must inform the STA regarding these changes.

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

Yes, it is possible to renew an APA with the STA. The Spanish taxpayer must request the renewal of the APA within six months before the expiry of the initially approved APA. In principle, if the economic conditions do not change, the APA will be renewed.

10. Is the filing of an APA request subject to a fee?

Taxpayers do not need to pay a fee to the STA to file an APA request.

11. What department is in charge of APAs? What are its contact details?

The Audit Department of the Spanish Tax Authorities (Departamento de Inspección Financiera y Tributaria de la Agencia Estatal de la Administración Tributaria) is in charge of the APA programme.

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

The STA do not publish reports on the APA programme.

In our opinion, the tax authorities do not encourage this kind of agreement in Spain.

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Switzerland

Advanced Pricing Agreements (“APA”)

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded unilateral, bilateral or multilateral? What is the legal force of an APA?

As an introduction, it seems fitting to make a few remarks on the Swiss tax authorities’ practice regarding granting so-called tax rulings. It is standard practice in Switzerland to allow the taxpayer to formally submit a question regarding his tax affairs in advance to the tax authorities. The competent authorities will then review this application and, if in agreement with the proposed legal assessment of the matter in question, give their consent which in turn constitutes a legally binding precedent for the applying taxpayer.

The availability of the ruling procedure also for transactions with related parties means that a separate APA procedure is neither provided for nor necessary in Switzerland. When obtaining a tax ruling regarding transfer prices, the taxpayer is obliged to provide information to support the chosen transfer pricing method, such as copies of relevant agreements, an analysis of the organisational structure as well as financial statements and even forecasts.

Moreover, the Swiss tax authorities have considerable experience in converting unilateral APAs (originating from a foreign country) into bilateral agreements. Upon notification by the foreign tax authorities, the Swiss tax authorities will deal with entering into negotiations (if necessary). The Swiss procedure will usually not amount to much more than the notification of the Swiss Federal Tax Authorities and their written consent regarding the extension of the foreign APA to encompass Switzerland. This consent will have the same legal force as a tax ruling.

‘ APAs in Switzerland ’

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

The main steps of the procedure are as follows:

- Notification of the FTA
- Review of the case by the FTA
- If necessary, bilateral negotiation between the states involved
- Confirmation of the APA application by the FTA

According to information provided by the FTA, the bilateral extension of an APA is in most cases implemented on receipt of a simple letter. If negotiations become necessary (which is rarely the case), the time required will be considerably longer.

3. Is it possible to first contact the tax authorities on an anonymous basis?

Approaching the FTA on an anonymous basis is possible, but their answers will not be legally binding in terms of protection of confidentiality.

4. What documents must be produced by the company upon the official filing of the APA request?

The documentation requirements are not more extensive than those of any other ordinary taxpayer. No templates or official form requests exist.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

In general, all tax information is kept confidential but may be disclosed to other authorities involved with the consent of the applying party. An exchange between the Swiss tax authorities cannot be excluded.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

Yes.

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

No practise exists on this matter but past tax assessments may be altered as long as the company is not definitively assessed.

8. What obligations are incumbent on a company which has obtained an APA?

No general obligations apply, but the tax authorities may impose a reporting obligation on a case by case basis.

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

Not applicable.

10. Is the filing of an APA request subject to a fee?

Taxpayers do not need to pay a fee to the FTA when notifying them of a unilateral APA and requesting the extension thereof to Switzerland.

11. What department is in charge of APAs? What are its contact details?

Due to the procedural separation of cantonal and federal taxation, two authorities are involved with transfer pricing matters. However, the cantonal authorities will regularly refer to the Federal Tax Authorities for more extensive expertise when dealing with a foreign APA. The international department of the Swiss Federal Tax Authorities (FTA) may be contacted at the following address:

Eidgenössische Steuerverwaltung
Abteilung für Internationales
Eigerstrasse 65
3003 Bern
Tel.: 031 322 71 29 Fax: 031 324 83 71

12. Do the tax authorities publish reports on their APA programme? Do the tax authorities encourage APAs?

To the best of our knowledge, no published reports exist. Foreign unilateral APAs will be extended to become bilateral by applying an informal procedure as significant tax issues rarely arise in Switzerland.

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United Kingdom

Advanced Pricing Agreements (“APA”)

1. Does an APA procedure exist in your jurisdiction? If so, are the APAs which can be concluded unilateral, bilateral or multilateral? What is the legal force of an APA?

The Finance Act 1999 makes provision for written agreements to be made between HM Revenue and Customs (“HMRC”) and a taxpayer to determine a method for resolving transfer pricing issues before the taxpayer submits a tax return. Statement of Practice 3/99 (SP 3/99) provides guidance about how HMRC applies the legislation and deals with various practical issues involved in the process of applying for an APA. APAs are reserved for the more complex transactions and are not available for routine matters.

An APA can be unilateral (between the taxpayer and HMRC), bilateral (between the taxpayer, HMRC and an overseas tax authority) or multilateral (between the taxpayer, HMRC and more than one overseas tax authority). Multilateral APAs are strictly multiple bilateral APAs (rather than one single agreement). However, HMRC encourages applications for bilateral/multilateral APAs wherever possible, as unilateral APAs do not guarantee the elimination of double taxation. Where an application affects a country with which the UK has a DTA containing a mutual agreement procedure article, HMRC will usually invite the treaty partner to participate under that procedure in an attempt to resolve potential differences as to the interpretation or application of the DTA by mutual agreement. However, if the treaty partner shows no interest in participating, or is unable to do so within a reasonable timescale, or for some other reason it is not possible to reach agreement on a bilateral process, HMRC will consider a unilateral APA.

HMRC will take into account the taxpayer’s wish to proceed with a unilateral APA. In particular, HMRC may accept a unilateral APA where the taxpayer considers that a bilateral APA would unnecessarily complicate and delay the process. For example, this might be the case where it is shown that the most pressing need to determine transfer pricing methodology is in the UK because, say, the UK business is at the centre of arrangements with associated enterprises in many different countries and the amounts at stake for any one country are relatively small.

APAs in the United Kingdom

An APA is a binding agreement between the taxpayer and HMRC. Statute provides that questions relating to the transfer pricing issues covered by the APA shall be determined by the terms of the agreement rather than the transfer pricing legislation that would apply in the absence of the APA. The APA will contain compliance obligations so as to demonstrate that the agreed transfer methodologies have been applied and the assumptions (set out in the agreement) remain the same. An APA may be nullified if the information provided by the taxpayer was false or misleading and it can be revoked where the assumptions are no longer valid.

A unilateral APA will be subject to an agreement made between HMRC and another so that where a mutual agreement is made under a DTA that is inconsistent with the APA, HMRC is required to amend the APA so as to give effect to the mutual agreement.

2. What are the main steps of the procedure? What is the average time required to negotiate and conclude an APA?

Typically, the APA process comprises four stages: expression of interest, formal application, evaluation, and agreement. The details of each stage may vary according to the particular circumstances of the case. In relation to expressions of interest see question 3 and in relation to the formal application see question 4.

On receipt of an application HMRC will evaluate its contents and seek clarification and further information where necessary. This stage should be a co-operative process in which the transfer pricing issues are discussed openly. A lack of co-operation may result in HMRC declining the application. Where a bilateral APA is being sought, HMRC will expect the taxpayer to make relevant information available at the same time to each tax authority involved, and HMRC will keep the treaty partner informed about progress made, will discuss with the treaty partner the issues arising at an early stage, and will keep the taxpayer informed about progress with the treaty partner.

The terms of an agreement with HMRC will include a commitment from the taxpayer to demonstrate adherence to the agreed method for dealing with the transfer pricing issues during the

term of the APA in the form of a regular compliance report and the identification of critical assumptions bearing materially on the reliability of the method and which, if subject to change, would render the agreement invalid. Where agreement cannot be reached, HMRC will issue a formal statement recording the reasons. HMRC is not required to continue discussion beyond the point at which it has determined that agreement cannot be reached.

HMRC aims to complete APA agreements within 18 to 21 months of receipt of the formal application.

3. Is it possible to first contact the tax authorities on an anonymous basis?

A taxpayer may register an expression of interest before making a formal application for an APA. This would allow the taxpayer to attempt to clarify in advance various aspects of a potential application, including its scope and term, and to discuss informally the proposed method for dealing with the transfer pricing issues, the presentation of the formal submission, the extent of the documentation requirements, and other related matters. Although expressions of interest may be made on an anonymous basis, HMRC does say that an evaluation can best be made when the identity of the business is known.

4. What documents must be produced by the company upon the official filing of the APA request?

A formal written application should be submitted to HMRC (four copies are required).

The application must set out:

- the taxpayer's understanding of the effect of the relevant legislation including the effect of any DTA in relation to the transfer pricing issues under consideration;
- the areas where, because of the complexity of the transfer pricing issues, clarification of that effect is required; and
- a proposal for clarifying the effect of the legislation in accordance with the taxpayer's understanding.

The centrepiece of the proposal will be a description of the method by which it is proposed to determine the transfer pricing issues in accordance with the

arm's length principle, and an analysis demonstrating how the application of that method satisfies the terms of the UK's legislation and the OECD Transfer Pricing Guidelines. The nature of the detailed information supporting the proposal should be tailored to the specific features of the taxpayer and of the transfer pricing issues and should take into account discussions with HMRC during any expression of interest stage. Most of the following will be required:

- the identification of the parties and details of their historical financial data (the period may vary, but generally for the previous 3 years);

- a description of the transfer pricing issues proposed to be covered in the APA and analysis of the functions and risks of the parties and projected financial data of the parties in relation to the issues;

- a description of the world-wide organisational structure, ownership, and business operations of the group to which the taxpayer belongs, the place or places where such operations are conducted, and all the major transaction flows of the parties to whom the APA is intended to apply;

- a description of the records which will be maintained to support the transfer pricing method proposed for adoption in the APA and the information which it is proposed will be supplied each year to demonstrate that the tax return conforms to the terms of the APA;

- a description of any current tax enquiries or competent authority claims that are relevant to the issues covered by the proposed APA;

- the periods to be covered by the APA;

- the identification of assumptions made in developing the proposed transfer pricing method which are critical to the reliability of its application under the arm's length standard; and

- in the case of a cross-border transfer pricing issue, a request for a bilateral APA or, representations that HMRC should exercise its discretion to refrain from exchanging particular information under a DTA (for example, on the grounds that the information would reveal trade secrets).

In the case of a bilateral APA the taxpayer will be asked to ensure that all information supplied to one tax administration is made available at the same time to the other tax administration involved.

5. Are the documents produced to the tax authorities kept confidential? What is the situation with regard to other authorities and third parties? Are the tax authorities which are responsible for auditing companies informed regarding APA requests and the conclusion of APAs?

Information supplied by the taxpayer to HMRC during an APA procedure will be kept confidential in accordance with Tax legislation and the terms of any relevant DTA (and in particular the exchange of information article).

The tax authorities, which are responsible for inspecting companies, are informed regarding APA requests and the conclusion of APAs.

6. Can the tax authorities widen the scope of the request filed by the taxpayer?

The potential scope of an APA is flexible. It may involve transfer pricing methods covering many different types of related party transactions and arrangements, including transfers of tangible or intangible property and the provision of services. The APA may relate to all of a taxpayer's transfer pricing issues or be limited to one or more specific issues. The APA may apply to pre-existing issues and there is no requirement that the commencement of an APA should coincide with the commencement of the arrangements that it addresses.

Following an announcement in Budget 2007, HMRC published Statement of Practice 4/07 dealing with thin capitalisation advance pricing agreements. In the past thin capitalisation issues have tended to be dealt with under withholding tax clearances in DTAs. However, the thin capitalisation APA is a separate procedure from the APA procedure.

7. What is the first financial year which can be covered by an APA? What is the term of validity of an APA? Can an APA be adopted with retroactive effect?

An APA will normally operate in relation to periods beginning after the time the application is made (formal applications should normally be made before the start of the period for which the APA is to apply). The APA will set out the periods for which it is to have effect.

An APA will be operative for a specified number of years from the date of entry into force as set out in the agreement. The taxpayer should propose an initial term for the APA taking into account the period over which it is reasonable to assume that the method for dealing with the relevant transfer pricing issues will remain appropriate. It is expected that the term is likely to be for a minimum of three, and a maximum of five years. The formal submission of an APA request should normally be made no later than six months before the start of the first period to be covered by the APA.

Although an APA will not strictly be retrospective, if the agreed transfer pricing methodology is relevant to an earlier period and to the resolution of any transfer pricing enquiries raised for earlier periods the taxpayer may consider using the agreement as a basis for amending a previous return and may request its use for resolving any transfer pricing enquiries to which it is relevant for earlier years. Indeed, HMRC may instigate this.

8. What obligations are incumbent on a company which has obtained an APA?

The taxpayer will usually be required to prepare an annual compliance report. The compliance report has to demonstrate that:

- the agreed method was applied during the year;
- the financial result of the taxpayer is consistent with application of the method;
- any compensating adjustments have been made if prices fluctuate from the agreed method; and
- the critical assumptions are still valid.

Failure to provide annual reports can lead to a penalty.

9. Is it possible to renew an APA? If so, what are the conditions relating to such renewal?

The taxpayer may request renewal of an APA normally not later than 6 months before the expiry of its current term.

The renewal application should expressly consider any changes or anticipated changes in facts and circumstances since the existing agreement was

reached, whether any amendments are required to the APA on renewal as a result, and should demonstrate how the proposed methodology accords with the arm's length principle. HMRC will conduct a review of the renewal application, taking into account whatever revisions to the existing APA are necessary and appropriate in the light of any changed facts and circumstances.

Where it is agreed that the transfer pricing issues under consideration remain the same and the existing transfer pricing methodology can continue as before but with details updated to ensure continued adherence to the arm's length principle, the APA will simply be amended and extended for a further term.

Where, however, the transfer pricing issues have changed, or a different method is being proposed, the taxpayer will be required to make a fresh APA application.

In the case of a bilateral APA the taxpayer should ensure that the information contained in the renewal application is submitted at the same time to the other tax administration involved.

10. Is the filing of an APA request subject to a fee?

HMRC does not charge any entry or expenses fees.

11. What department is in charge of APAs? What are its contact details?

Ian Wood.
CT & VAT (International CT),
HMRC,
100 Parliament Street,
London,
SW1A 2BQ

For APAs involving oil taxation:

Alan Tume or Malcolm Phelps,
Large Business Service Oil & Gas (APAs),
HMRC,
2nd Floor,
22 Kingsway,
London WC2B 6NR

12. Do the tax authorities publish reports on the practice and its programme relating to APAs? Do the tax authorities encourage APAs?

Statement of Practice 3/99 sets out its guidance in relation to applications for an APA. Applications are instigated at the option of the taxpayer and HMRC regard even the fact that a taxpayer has entered into an APA as confidential. HMRC encourages applications for bilateral APAs for complex transfer pricing issues.

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