

Transfer Pricing 2021

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Drew A Cummings**
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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Transfer Pricing*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Canada, Israel and Japan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Wendy Abkin, Barton WS Bassett, Sanford W Stark and Drew A Cummings of Morgan, Lewis & Bockius LLP, for their continued assistance with this volume.



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Contents

Albania	3	Israel	61
Genc Boga and Andi Pacani Boga & Associates		Eyal Bar-Zvi Herzog Fox & Neeman	
Brazil	8	Italy	68
Clarissa Giannetti Machado and Luiz Felipe de Camargo Silva Trench Rossi Watanabe		Paolo Tognolo and Francesco Spurio Studio Tributario Tognolo	
Canada	17	Japan	75
Christian Meighen, Salvatore Mirandola, Quentin Lageix and Anthony Sylvain McCarthy Tétrault LLP		Hiroyuki Yoshioka TMI Associates	
Germany	26	Netherlands	82
Oliver Rosenberg and Kirsten Placke Linklaters LLP		Jimmie van der Zwaan and Thomas Dijkstra Taxand	
Greece	33	Switzerland	89
Fotodotis Malamas Bernitsas Law		Susanne Schreiber and Raoul Stocker Bär & Karrer	
Indonesia	43	United Kingdom	96
Lilik Fitrianta Pracaya, Asman, M Farkhan Supriyadi and M Naufal Afif Fadhillah Taxindo Prime Consulting		Gregory Price and Andrea Leho Macfarlanes LLP	
Ireland	52	United States	104
Joe Duffy and Tomás Bailey Matheson		Wendy Abkin, Barton WS Bassett, Sanford W Stark and Drew A Cummings Morgan, Lewis & Bockius LLP	

Albania

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OVERVIEW

Principal legislation

1 | Identify the principal transfer pricing legislation.

Albanian transfer pricing legislation is covered by article 2 (for the definitions) and articles 36–36/7 of the Income Tax Law (ITL). The Minister of Finance has further issued Instruction No. 16, dated 18 June 2014, on transfer pricing, concerning general rules on transfer pricing, and Instruction No. 9, dated 27 February 2015, on advance pricing agreements.

Enforcement agency

2 | Which central government agency has primary responsibility for enforcing the transfer pricing rules?

The responsibility for the enforcement of transfer pricing rules lies with the General Tax Directorate.

OECD guidelines

3 | What is the role of the OECD Transfer Pricing Guidelines?

Instruction Nos. 16 and 9 are based on the principles of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TPG 2010). However, in the case of differences or conflicts between the TPG 2010 and the Albanian ITL and Instructions, the Albanian legislation prevails.

Covered transactions

4 | To what types of transactions do the transfer pricing rules apply?

As defined by the ITL, transfer pricing rules will apply to all types of transactions between associated parties that may impact the taxable income of a taxpayer, including transactions involving:

- tangible goods, such as raw materials;
- finished goods;
- services transactions;
- transactions involving intangible property, such as:
 - royalties;
 - licences;
 - payments for the use of patents, trademarks, know-how, etc; and
 - any other intellectual properties;
- financial transactions;
- capital transactions, including the purchase or sale of shares or other investments; and
- the purchase or sale of long-term tangible and intangible assets.

Associated parties are deemed to be two persons where one of them is considered to 'effectively control the business decisions of the other person'. Namely, the term 'associated parties' will apply if the first-mentioned person:

- holds, or can control, 50 per cent or more of the voting rights of the other (legal) person;
- can control the composition of the board of directors of the other (legal) person;
- has the right to share in 50 per cent or more of the profits of the other person; or
- based on evidenced facts and circumstances, controls the business decisions of the other person.

The term also applies if the other person is a relative, or associated party of a relative, or the first-mentioned person. The burden of proof for demonstrating that a person 'effectively controls the business decisions of the other person' falls on the tax administration.

Arm's-length principle

5 | Do the relevant transfer pricing rules adhere to the arm's-length principle?

Yes.

Base erosion and profit shifting

6 | How has the OECD's project on base erosion and profit shifting (BEPS) affected the applicable transfer pricing rules?

Albanian legislation on transfer pricing makes reference to the TPG 2010. No automatic application of the revisions to the OECD Transfer Pricing Guidelines made by the final reports on BEPS Actions 8 to 10 is possible. For the new rules to be applicable, Albanian law must be amended accordingly.

PRICING METHODS

Accepted methods

7 | What transfer pricing methods are acceptable? What are the pros and cons of each method?

The law provides for an approved list of methods, namely:

- the comparable uncontrolled price method;
- the resale price method;
- the cost-plus method;
- the transactional net margin method; and
- the transactional profit split method.

However, taxpayers are allowed to apply a transfer pricing method other than the above-mentioned ones in the case that it can be proved

that none of the above methods can be reasonably applied to determine consistency with the market principle for the controlled transaction, and the other method yields a better result.

Cost-sharing

8 | Are cost-sharing arrangements permitted? Describe the acceptable cost-sharing pricing methods.

There are no special provisions regarding the cost-sharing arrangements. However, those between the non-resident and its permanent establishment in Albania are considered controlled transactions.

Best method

9 | What are the rules for selecting a transfer pricing method?

The legislation does not provide for any hierarchy of the methods. However, taxpayers using a method other than the approved methods bear the burden of demonstrating that the method used yields a result consistent with the market principles.

Taxpayer-initiated adjustments

10 | Can a taxpayer make transfer pricing adjustments?

Pursuant to the Tax Procedure Law, taxpayers are allowed to adjust any tax return within 36 months of the initial filing. The specific transfer pricing legislation provides for two types of adjustments related to transfer pricing:

- where the financial indicators derived from the controlled transactions fall outside the market range (as defined in the Tax Procedure Law), the tax authority (with the written approval of the General Tax Director) may make an adjustment to the taxable income of the taxpayer; and
- where an adjustment related to the conditions of a controlled transaction is made by a tax administration in another country with which Albania has a double tax treaty, an adjustment to reflect the conditions may be made by the taxpayer with the written approval of the General Tax Director.

Safe harbours

11 | Are special 'safe harbour' methods available for certain types of related-party transactions? What are these methods and what types of transactions do they apply to?

There is no safe harbour method available.

DISCLOSURES AND DOCUMENTATION

Documentation

12 | Does the tax authority require taxpayers to submit transfer pricing documentation? Regardless of whether transfer pricing documentation is required, does preparing documentation confer any other benefits?

All taxpayers should submit to the Regional Tax Directorate before or on 31 March of each year (starting from 2015) the annual controlled transactions form for the transactions of the previous year. Subject to this requirement are taxpayers engaged in controlled transactions (including loan balances) that, in aggregate, within the reporting period, exceed 50 million leke.

In the form, the taxpayer must disclose:

- the amount of controlled transactions for each associated party;
- the classification of transactions;
- the residency of the associated parties;

- the method used for transfer pricing; and
- a simple confirmation of whether the transfer pricing documentation has been prepared.

Failure to submit the annual controlled transactions form on time is subject to a penalty of 10,000 leke per month. In the case that the tax obligations are reassessed by the tax authority, but the taxpayer has complied with the transfer pricing documentation, there will be no penalty (ie, the taxpayer must pay only the additional tax obligation and interest).

Transfer pricing documentation should be provided to the tax administration at its request within 30 days of receiving the request. The documentation should be prepared based on the approach detailed in the Code of Conduct on transfer pricing documentation for associated enterprises in the European Union and the Annex thereof, approved by Resolution 2006/c176/01 of 27 June 2006 from the EU council and government representatives of member states.

The taxpayer should submit the transfer pricing documentation within 30 days (which is 10 days more than the general rule for submission of information required from the tax authorities). Failure to submit the documentation gives the tax authorities the right to reassess the taxable base of the taxpayer using alternative methods. Given that the transfer pricing legislation is relatively new, no practice has yet been established in this regard. The transfer pricing documentation should include the following information:

- an overview of the taxpayer's business operations (history, recent evolution and general overview of the relevant markets of reference) and organisational chart (details of business units or departments and organisational structure);
- a description of the corporate organisational structure of the group that the taxpayer is a member of (including details of all group members, their legal form and their shareholding percentages) and the group's operational structure (including a general description of each group member's role in respect of the group's activities, as relevant to the controlled transaction or transactions);
- a description of the controlled transaction or transactions, including analysis of the comparability factors, explanation of the selection of the most appropriate transfer pricing method or methods, and comparability analysis, including a description of the process undertaken to identify comparable uncontrolled transactions;
- an explanation of the basis for the rejection of any potential internal comparable uncontrolled transactions (where applicable);
- a description of the comparable uncontrolled transactions;
- analysis of comparability of the controlled transaction or transactions and the comparable uncontrolled transactions, and explanation of any economic analysis and projections relied on; and
- a conclusion on the consistency of the conditions of the controlled transactions with the market principle, including details of any adjustment made to ensure compliance and any other information that may have a material impact on the determination of the taxpayer's compliance with the market principle in respect of controlled transactions.

The above-mentioned information should be presented in two separate files: a master file and a local file.

Transfer pricing documentation may be submitted in the Albanian or English language. However, the tax authority may require the translation of documents, even if prepared in English. An additional 30 days is given to the taxpayer to translate the documentation.

The preparation and submission of the transfer pricing documentation will prevent penalties (the taxpayer will pay only the tax obligation assessed and the respective interest) in the case of price adjustments.

Country-by-country reporting

- 13 | Has the tax authority proposed or adopted country-by-country reporting? What are the differences between the local country-by-country reporting rules and the consensus framework of Chapter 5 of the OECD Transfer Pricing Guidelines?

There is no country-by-country reporting in place.

Timing of documentation

- 14 | When must a taxpayer prepare and submit transfer pricing documentation?

Transfer pricing documentation is submitted upon request of the tax authorities. Alternatively, the annual controlled transactions form should be filed before or on 31 March of the next year.

Failure to document

- 15 | What are the consequences for failing to submit documentation?

Taxpayers failing to submit the annual controlled transactions form are subject to a penalty of 10,000 leke for each month of delay. Failure to submitted the transfer pricing documentation when required by the tax authorities will waive the protection from penalties in case of price adjustments.

ADJUSTMENTS AND SETTLEMENT

Limitation period for authority review

- 16 | How long does the tax authority have to review an income tax return?

There is no deadline for reviewing the transfer pricing filing. However, the statute of limitation generally is five years, so no reassessment can be enforced after that time.

Rules and standards

- 17 | What rules, standards or procedures govern the tax authorities' review of companies' compliance with transfer pricing rules? Does the tax authority or the taxpayer have the burden of proof?

General rules on the tax review apply for compliance with transfer pricing. However, any adjustment can be performed only upon written confirmation from the General Tax Director. The tax authorities have the burden of proof if they have required the adjustments. Conversely, the burden is shifted to the taxpayer if the latter requires the adjustment.

Disputing adjustments

- 18 | If the tax authority asserts a transfer pricing adjustment, what options does the taxpayer have to dispute the adjustment?

Any adjustment that will result in a tax obligation increase may be challenged in administrative proceedings within the General Tax Directorate, and if the decision is not accepted, it may be challenged in an administrative court.

RELIEF FROM DOUBLE TAXATION

Tax-treaty network

- 19 | Does the country have a comprehensive income tax treaty network? Do these treaties have effective mutual agreement procedures?

Albania does not have a wide tax treaty network; only 40 are in force. The treaties are based on the OECD model and generally have a mutual agreement procedure (MAP).

Requesting relief

- 20 | How can a taxpayer request relief from double taxation under the mutual agreement procedure of a tax treaty? Are there published procedures?

There are no procedures yet published or set by practice on how a taxpayer can request relief under a MAP.

When relief is available

- 21 | When may a taxpayer request assistance from the competent authority?

Generally, taxpayers may request assistance at any time from the tax authorities.

Limits on relief

- 22 | Are there limitations on the type of relief that the competent authority will seek, both generally and in specific cases?

There are no limitations under domestic law. Double tax treaties will set out time limits for making a claim (these usually provide for three years).

Success rate

- 23 | How effective is the competent authority in obtaining relief from double taxation?

The effectiveness of the General Tax Directorate has not been tested in practice. There has not yet been case of a MAP being used for transfer pricing issues.

ADVANCE PRICING AGREEMENTS

Availability

- 24 | Does the country have an advance pricing agreement (APA) programme? If so, is the programme widely used? Are unilateral, bilateral and multilateral APAs available?

In February 2015, the Minister of Finance released an instruction governing the APA process. Based on the instruction, unilateral, bilateral and multilateral APAs are possible. However, at present, no such programme is used in practice.

Process

- 25 | Describe the process for obtaining an APA, including a brief description of the submission requirements and any applicable user fees.

The process is structured in six phases:

- pre-filing meeting;
- APA application;
- assessment;
- negotiation;

- drafting and execution; and
- annual compliance reporting.

An initial non-refundable fee of 50,000 leke is paid before the pre-filing phase and, after that, 300,000 leke for unilateral APAs and 1.2 million leke for bilateral and multilateral APAs.

Time frame

26 | How long does it typically take to obtain a unilateral and a bilateral APA?

There is no official practice showing how long it takes; however, based on the time limits for each phase of the process, it should take between 260 and 350 days.

Duration

27 | How many years can an APA cover prospectively? Are rollbacks available?

An APA may cover a maximum of five years, with the exception of APAs related to the application of agreements ratified by the Albanian parliament. No rollbacks are allowed. In addition, only requests for controlled transactions exceeding €30 million will be considered.

Scope

28 | What types of related-party transactions or issues can be covered by APAs?

There are no limitations based on the type of transactions. All types of controlled transactions may be subject to an APA.

Independence

29 | Is the APA programme independent from the tax authority's examination function? Is it independent from the competent authority staff that handle other double tax cases?

The APA programme is handled within the General Tax Directorate under the Transfer Pricing Sector as part of the Operational Directorate. The staff who handle double tax treaties report to the Technical Director.

Advantages and disadvantages

30 | What are the key advantages and disadvantages to obtaining an APA with the tax authority?

The advantages of an APA have not yet been tested in practice. Theoretically, the advantage will be clarity on applying transfer pricing.

SPECIAL TOPICS

Recharacterisation

31 | Is the tax authority generally required to respect the form of related-party transactions as actually structured? In what circumstances can the tax authority disregard or recharacterise related-party transactions?

There is no official practice, but it is expected that the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TPG 2010) will apply.

Selecting comparables

32 | What are some of the important factors that the tax authority takes into account in selecting and evaluating comparables? In particular, does the tax authority require the use of country-specific comparable companies, or are comparables from several jurisdictions acceptable?

Theoretically, the following factors should be considered important factors:

- the characteristics of the property or services transferred;
- the functions undertaken by each party in respect of the transactions, taking into account the assets used and the risks assumed;
- the contractual terms of the transactions;
- the economic circumstances in which the transactions take place; and
- the business strategies pursued by parties in relation to the transactions.

Secret comparables

33 | What is the tax authority's position and practice with respect to secret comparables? If secret comparables are ever used, what procedures are in place to allow a taxpayer to defend its own transfer pricing position against the tax authority's position based on secret comparables?

There is no practice, but it is expected that the TPG 2010 will apply.

Secondary adjustments

34 | Are secondary transfer pricing adjustments required? What form do they take and what are their tax consequences? Are procedures available to obtain relief from the adverse tax consequences of certain secondary adjustments?

There are no requirements regarding secondary adjustments. In addition, current tax legislation does not provide for any special relief or penalties in this regard.

Non-deductible intercompany payments

35 | Are any categories of intercompany payments non-deductible?

Only the payment of interest has a different treatment if paid to related parties.

Interest payments from related parties are considered non-deductible if they exceed 30 per cent of the earnings before interest, taxes and amortisation (this rule applies to banks and other financial institutions).

For other payments (eg, management fees and royalties), whether they are deductible depends on general rules, without taking into consideration the beneficiary status.

Anti-avoidance

36 | What legislative and regulatory initiatives (besides transfer pricing rules) have the government taken to combat tax avoidance with respect to related-party transactions? What are the penalties or other consequences for non-compliance with these anti-avoidance provisions?

Apart from the general anti-abuse rule introduced in 2019, a thin capitalisation rule especially designed for related parties has been in place since January 2018. For loans and funding from related parties, the net interest expense will be considered deductible up to 30 per cent of earnings before interest, taxes, depreciation and amortisation. The taxpayer has the right to carry forward the non-deducted part of the interest and claim its tax deductibility in subsequent periods, except when the taxpayer's ownership has changed by more than 50 per cent.

Location savings

- 37 | How are location savings and other location-specific attributes treated under the applicable transfer pricing rules? How are they treated by the tax authority in practice?

There are no location savings incentives per se, but the new incentives granted to economic zones aim, inter alia, to create an effective administrative process to provide essential government services and provide tax incentives.

Branches and permanent establishments

- 38 | How are profits attributed to a branch or permanent establishment (PE)? Does the tax authority treat the branch or PE as a functionally separate enterprise and apply arm's-length principles? If not, what other approach is applied?

In practice, branches (which are the only possible way to register a PE) are considered as a separate enterprise, and the tax authority applies the arm's-length principles.

Exit charges

- 39 | Are any exit charges imposed on restructurings? How are they determined?

No, there are no such regulations. Albania is usually a host country, and no exit charges are seen as necessary.

Temporary exemptions and reductions

- 40 | Are temporary special tax exemptions or rate reductions provided through government bodies such as local industrial development boards?

Other than the tax incentives granted to economic zones, there are no tax exemptions or reductions available.

UPDATE AND TRENDS**Tax authority focus and BEPS**

- 41 | What are the current issues of note and trends relating to transfer pricing in your country? Are there particular areas on which the taxing authority is focused? Have there been any notable legislative, administrative, enforcement or judicial developments? In particular, how is the OECD's project on base erosion and profit shifting affecting both policymakers and tax administrators?

Currently, the government is focusing on profit shifting and is making progression on BEPS. The Council of Ministers has approved joining the OECD BEPS inclusive framework.

On 28 May 2019, Albania signed the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). Albania's provisional list of reservations and notifications to the MLI (ie, its MLI position) identifies 43 tax treaties that it wishes to be covered by the Convention.

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Coronavirus

- 42 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The programmes introduced by the government are based on two pillars:

- financial assistance for employees and individuals who have lost their jobs; and
- introduction of a guarantee scheme that provides lending to companies for which activity has been closed or their turnover has been reduced because of the covid-19 pandemic.

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