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GLOBAL TRANSFER PRICING SERVICES

# Global Transfer Pricing Review

Austria

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TAX



# Austria



## KPMG observation

On 28 October 2010, the Austrian Federal Ministry of Finance published the Austrian Transfer Pricing Guidelines (TPG). These Guidelines show the importance that the Austrian tax administration is placing on transfer pricing issues and seen in nearly every tax audit. The guidelines state that their purpose is to ensure the uniform application of the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines. It is important to monitor how major amendments of the OECD Guidelines, reflecting the outcome of the Base Erosion and Profit Shifting (BEPS) initiative, will be considered.

## Basic information

### Tax authority name

Bundesministerium für Finanzen (Federal Ministry of Finance).

### Citation for transfer pricing rules

Austrian Transfer Pricing Guidelines (Austrian TPG) 2010 published as administrative guidelines (BMF-GZ 010221/2522-IV/4/2010, 28 October 2010).

OECD Guidelines adopted as administrative guidelines (translated into German; published in Fiscal register of the Austrian fiscal authority (AÖF Nos. 114/1996, 122/1997, 155/1998 and 171/2000).

### Effective date of transfer pricing rules

Date of publication of each of the rules: 1 August 1996, 22 May 1997, 10 September 1998, and 28 October 2010.

### What is the relationship threshold for transfer pricing rules to apply between parties?

Ownership of greater than 25 percent.

### What is the statute of limitations on assessment of transfer pricing adjustments?

Generally, a 6 year limitation from the tax year-end applies, which can be extended under certain circumstances.

## Transfer pricing disclosure overview

### Are disclosures related to transfer pricing required to be prepared or submitted to the revenue authority on an annual basis (e.g. with the tax return)?

There is no requirement to file transfer pricing disclosures with the tax returns. The tax administration, however, is of the opinion that documentation must be prepared contemporaneously and be ready when the tax return is filed.

### What types of transfer pricing information must be disclosed?

Please see Transfer pricing study overview.

### What are the consequences of failure to prepare or submit disclosures?

There is no specific penalty for failure to prepare transfer pricing disclosures. Please see discussion under Transfer pricing study overview.

## Transfer pricing study overview

### Is preparation of a transfer pricing study required – i.e. can the taxpayer be penalized for mere failure to prepare a study?

No.

### Other than complying with a requirement per the previous question, describe the benefits, if any, of preparing and maintaining a transfer pricing study?

In our opinion, Austrian law does not impose specific statutory documentation requirements but there is an expectation of authorities/requirement in practice. Transfer pricing guidelines state that the obligation for a study can be derived from the general provisions of the Austrian Administrative Code, whereas KPMG in Austria believes that these provisions only require the taxpayer to provide factual evidence (invoices, contracts) that prove the agreements/transactions between the related parties. From a legal perspective, guidelines do not bind the taxpayer or a tax court but are binding on the tax auditors/the tax administration.

A transfer pricing study helps defend the transfer pricing vis-à-vis the tax authorities and places the burden of proof also factually on their side.

Further, it should help eliminate/reduce withholding taxes on deemed dividends due to transfer pricing findings.

### To satisfy the requirement and/or obtain the benefits, are there any requirements on when the transfer pricing study must be prepared and submitted?

The tax administration is of the opinion that documentation must be prepared contemporaneously with the filing of the tax return, or might even be required before the transaction is carried out (for withholding tax protection).

### When a transfer pricing study is prepared, should its content follow Chapter V of the OECD Guidelines?

Yes. In addition, the Austrian TPG also declare that documentation prepared in accordance with the European Union (EU) Code of Conduct on transfer pricing documentation for associated enterprises in the EU (EU masterfile concept) fulfils the documentation requirements in Austria. For management fees, the taxpayer must be able to provide a specific, detailed basis for all charges imposed by foreign group companies for services rendered (case law) and a detailed contract should be prepared and signed.

### Does the tax authority require an advisor/tax practitioner to have specific designation in order to prepare or submit a transfer pricing study?

Yes. Only approved tax advisors or lawyers are allowed to perform tax advisory services and to represent taxpayers vis-à-vis the tax authorities. Transfer pricing documentation most likely will qualify as tax advisory services.

## Transfer pricing methods

### Are transfer pricing methods outlined in Chapter II of the OECD Guidelines acceptable?

Yes.

### Is there a priority among the acceptable methods?

Austria follows the OECD Guidelines, whereby the most appropriate method has to be chosen. In practice, the Comparable Uncontrolled Price (CUP) method is preferred over other transaction methods.

### If there is no priority of methods, is there a “best method” rule?

The most appropriate method as described in the OECD Guidelines is to be used.

## Transfer pricing audit and penalties

### When the tax authority requests a taxpayer’s transfer pricing documentation, how long does the taxpayer have to submit its documentation?

Normal administrative procedural rules apply.

### If an adjustment is proposed by the tax authority, are dispute resolution options available to the taxpayer outside of competent authority?

Taxpayers can dispute proposed adjustments according to Austrian appeals procedures, through Mutual Agreement Procedures (MAPs), and under the EU Arbitration Convention.

### If an adjustment is sustained, can penalties be assessed? If so, what rates are applied and under what conditions?

No. However, transfer pricing adjustments have a direct effect on the corporate income tax base and the actual tax burden levied. As with late payments of corporate tax, interest will be levied on any additional prior year’s corporate income tax. The interest is levied for a period starting from October following the assessment year and lasting for a maximum of 48 months. The interest rate is 2 percent above the base interest rate.

### To what extent are transfer pricing penalties enforced?

In cases of tax fraud and wilful and abusive tax evasion according to Fiscal Penal Code.

### What defences are available with respect to penalties?

Penalties can be enforced in cases where there is found to be tax fraud and/or wilful and abusive tax evasion. Appropriate documentation can also help the taxpayer to defend against proceedings according to the Fiscal Penal Code.

### What trends are being observed currently?

As previously noted, transfer pricing is a focus area of the tax authorities. KPMG in Austria observes a variety of factors being taken into account in determining which taxpayers to audit and on what areas during the audits. This can include the existence or evidence of business restructurings, the profitability of the local taxpayer, the nature and volume of related party transactions, and findings from previous audits of the taxpayer. A specific focus is currently on the automotive, consumer products, pharmaceutical and high-tech industries, as well as intra-group financing transactions in general (including guarantee fees).

In a 2012 court decision (30.07.2012, RV/2515-W/09), the court of first instance ruled on specific questions relating to the use of, and the minimum requirements for, benchmarking studies and the entitlement of the tax authorities for adjustments. The specific question ruled was whether adjustments of the tax authorities would be to the median, to the interquartile range or to the total range of the benchmarking study if the actual results achieved by the taxpayer fell out of the range deemed acceptable by the tax authorities during a tax audit. While the circumstances of the case were specific, we anticipate the Austrian tax authorities to seek to adjust to the median during future tax audits. This case also shows the importance of submitting high quality benchmarking studies both in terms of comparability criteria (qualitative search) and documentation.

Generally, we observed that the Austrian tax administration's willingness to start procedures according to the Fiscal Penal Code has increased.

## Special considerations

### Are secret comparables used by tax authorities?

Sometimes they are used in practice, but formally they are not allowed because the tax authorities are barred from publishing such data.

### Is there a preference, or requirement, by the tax authorities for local comparables in a benchmarking set?

No, there is no such requirement due to the size of the Austrian market and missing publicly available data in the past, often no comparables are available – a fact that is recognized by the Austrian tax authorities.

### Do tax authorities have requirements or preferences regarding databases for comparables?

The tax authority uses Orbis. Nevertheless, any publicly available database can be used.

### What level of interaction do tax authorities have with customs authorities?

Low. Customs and tax authorities communicate for VAT purposes. For transfer pricing, there is no interaction known at this time.

### Are management fees deductible?

Yes. Management fees are deductible if a payee can prove benefits from the services and that the fee is at arm's length. It should be noted that a detailed management service contract and comprehensive documentation is required.

### Are management fees subject to withholding?

Withholding of 20 percent according to domestic law for economic and technical advice carried out in Austria and for personnel lease where work is performed in Austria; generally removed by double tax agreements (DTA); otherwise no withholding.

### Are year-end transfer pricing adjustments permitted?

Yes, under certain circumstances. Generally, retroactive agreements are not accepted in tax law. Although neither Austrian tax law nor Austrian TPG specifically regulate year-end adjustments, there is a tendency for the Austrian tax authorities to only accept year-end adjustments if they are common practice amongst third parties. A clear written agreement concluded before the respective fiscal year starts is a prerequisite for acceptance.

### Other unique attributes?

None.

## Other recent developments

The importance of transfer pricing issues is apparent, as can be seen from the publication of the first domestic Austrian TPG in 2010 and provisions for unilateral advance rulings, which entered into force on 1 January 2011. Starting with March 2014, restrictions on the Corporate Income Tax deductibility of interest and license fees paid to related parties (corporate) being subject to low taxation (below 10 percent) in the recipient country apply.

## Tax treaty/double tax resolution

### What is the extent of the double tax treaty network?

Extensive.

### If extensive, is the competent authority effective in obtaining double tax relief?

Frequently.

### When may a taxpayer submit an adjustment to competent authority?

Generally after (revised) assessment notes on tax audit findings are issued.

### May a taxpayer go to competent authority before paying tax?

Yes.

## Advance pricing agreements

### What advance pricing agreement (APA) options are available, if any?

No explanations on APAs are included in the Austrian TPG. Rules on advance rulings (unilateral only) have been included in Article 118 Federal Fiscal Code and entered into force on 1 January 2011.

Bi-or multilateral APAs: No formalized procedure available – they occur in practice based on the competent authority provisions of the DTAs.

### Is there a filing fee for APAs?

Yes, for the formalized advance ruling procedure that became effective in January 2011. Depending on the taxpayers' sales, the filing fee is between 1,500 and 20,000 Euros (EUR). For groups of companies that are required to file consolidated accounts, the fee of EUR20,000 always applies.

### Does the tax authority publish APA data either in the form of an annual report or through the disclosure of data in public forums?

No.

### Please provide some information on how successful the APA program is and whether there are any known difficulties?

In general, the APA program is considered successful. Due to the lack of publicly available data we have no indication that there is a geographic preference or reluctance. Practically, shortages in personnel at the Austrian tax administration can lead to an increase in the duration of such procedures.

## Language

### In which language or languages can documentation be filed?

Formally, if documentation and/or supporting documents are not available in German, the tax authorities have the right to request a translation (at the taxpayer's expense). In practice, documentation is also accepted in English. However, in a written opinion issued by the Ministry of Finance country-specific documentation within the framework of the EU masterfile concept has to be prepared in the language of the Member State and therefore must be in German for Austrian tax purposes.

### KPMG in Austria

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