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GLOBAL TRANSFER PRICING SERVICES

# Global Transfer Pricing Review

Romania

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TAX



# Romania



## KPMG observation

With respect to the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) work plan/initiative, and the United Nations (UN) Practical Transfer Pricing Manual for Developing Countries issued October 2012, it is unlikely that the Romanian tax authorities would accept the subtleties of the commentaries. The Romanian tax authorities tend to keep a simple approach when it comes to transfer pricing topics. Cases arise where the tax authorities challenge various approaches and the only way to resolve disputes arising in this respect is in court.

Although transfer pricing documentation requirements were introduced some time ago, there are many cases when Romanian taxpayers prefer to wait for a specific request issued by the Romanian tax authorities in order to start preparing their transfer pricing documentation.

The Romanian legislation on transfer pricing documentation follows the principles of the European Union (EU) regulations on transfer pricing (e.g. the EU Code of Conduct on Transfer Pricing). Transfer pricing has become increasingly a hot topic for multinationals having a business presence in Romania, as the number of transfer pricing audits have increased significantly since 2008.

## Basic information

### Tax authority name

Ministry of Public Finances; National Agency for Fiscal Administration (ANAF).

### Citation for transfer pricing rules

- Article 7 of the Romanian Fiscal Code – defining “related parties.”
- Article 11 (2) of the Romanian Fiscal Code and its application Norms – providing for the arm’s length principles and transfer pricing methods.
- Article 42 and article 79 of the Romanian Fiscal Procedure Code approved by Government Ordinance no. 92/2003, as further amended and completed – requiring the preparation of a transfer pricing file.
- Government Decision no. 529/2007, regarding the procedure of issuing the advance tax rulings and Advanced Pricing Agreements (APAs).

- Order of the President of National Agency for Fiscal Administration no. 222/2008, regarding the content of the transfer pricing documentation file, as well as the postponement of the control until the transfer pricing file is ready.

### Effective date of transfer pricing rules

1 January 2004, the obligation to comply with transfer pricing principles was reinforced.

In May 2007, the procedure to be followed by taxpayers in order to obtain an APA ruling from the Romanian tax authorities was enforced. In July 2007, the obligation to have transfer pricing documentation files available was enforced. In February 2008, the obligation to have specific transfer pricing documentation available was enforced, thus creating a more stable regulatory environment for transfer pricing purposes.

Although the obligation to document domestic intra-group transactions for Romanian transfer pricing purposes was clearly stated in the Fiscal Code as of May-June 2010, there is still a risk that the previous text of the relevant provision of the Fiscal Code could be interpreted in a way that such documentation obligation was also applicable in the past.

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

Direct or indirect ownership of a minimum of 25 percent of the participation titles or voting rights or effective control.

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

Five years from filing date.

Also, a tax audit can be performed for tax liabilities arising in the last 10 years in case of a fiscal evasion.

## 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)?

No. There is no specific transfer pricing disclosure is required in the annual corporate tax return. A summary of transactions carried out with related parties must be disclosed when preparing the financial statements, but there is no disclosure requirement on the tax return.

What types of transfer pricing information must be disclosed?

Not applicable.

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

Not applicable.

## 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?

Yes, for all transactions.

The content of the transfer pricing documentation file is required by Order of the President of National Agency for Fiscal Administration no. 222/2008, regarding the content of the transfer pricing documentation file. Failure to comply with the transfer pricing documentation requirements is punished with a fine that currently amounts between 12,000 and 14,000 Romanian leu (RON) (approximately 3,000 to 3,500 Euros (EUR)).

If the transfer pricing documentation file is incomplete, the tax authorities may establish by their own means the arm's length prices and adjust the taxable profit of the taxpayer accordingly.

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

If the taxpayer does not submit the transfer pricing documentation file to the authorities within the provided term, or if the file is incomplete, the tax authorities may then establish by their own means the arm's length prices and adjust the taxable profit of the taxpayer accordingly for the audited period (16 percent tax will apply to the additional taxable profit). Interest and late payment penalties may also apply to the additional corporate tax due.

Performing a transfer pricing study offers taxpayers the possibility to observe the market level for similar comparable companies and thus to correct its prices if any advantages are noted.

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 transfer pricing documentation file must be drafted and submitted to the tax authorities upon their written request. If the taxpayer does not have the transfer pricing documentation file available at the moment when the tax authorities request it, a period of up to 3 months can be granted by the tax authorities and an extension may be requested for a period equal to the one initially established.

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

Yes.

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

No.

## 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?

According to the local legislation, Comparable Uncontrolled Price (CUP) is the first method to be considered. However, in practice, the trend is to recognize the appropriateness of the profit-based methods.

If there is no priority of methods, is there a "best method" rule?

No.

## 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?

Based on the local legislation, the transfer pricing documentation file needs to be submitted to the tax authorities upon their written request. From the date of the official request, the taxpayer has up to 3 months to submit its documentation, with the possibility of an extension equal to the initial period granted within the tax authorities' official request.

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

Yes.

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

Starting from 1 March 2014 the late payment interest decreased from 0.04 percent per day to 0.03 percent per day, while another late payment penalty of 0.02 percent per day of delay may also be added to such upward adjustments.

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

Always.

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

Comprehensive and proper transfer pricing documentation.

### What trends are being observed currently?

Currently, the strategy of the Romanian tax authorities is to focus on loss-making companies and on companies with high turnover.

## Special considerations

### Are secret comparables used by tax authorities?

As a matter of principle, Romanian tax authorities use public information and databases. Additional information may be found via exchange of information with other states.

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

Yes. For Romanian transfer pricing purposes, in order to determine the arm's length character of prices charged between a Romanian entity and its related parties, a local market benchmark study has to be carried out first. It is only in the case of insufficiently available information regarding local comparables that Romanian tax authorities will accept a pan-European search. Nevertheless, the search for comparables on the local market has to be documented and justified as "not possible." In practice, we noticed that the Romanian tax authorities are asking for Romanian comparables, and other benchmarks (on the EU market or on extended markets) are usually rejected by the Romanian tax authorities.

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

No. However, the Amadeus database is most commonly accepted by the Romanian tax authorities.

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

The exchange of information with the customs authorities on transfer pricing adjustments is increasing. Customs base adjustments are also made in accordance with the General Agreement for Trade and Tariffs (GATT).

### Are management fees deductible?

General corporate conditions must be cumulatively met: the service is actually rendered; the taxpayer can provide supporting documents attesting that the service was provided (that is, written agreement, timesheets, reports, etc.); and the service is rendered for the benefit of the taxpayer's business.

In the absence of such supporting documents, tax inspectors may deny the deductibility of these service fees. Management services are often scrutinized by tax inspectors trying to question their deductibility.

Also, management fees should be priced at the market-price level.

### Are management fees subject to withholding?

Yes, if there is no protection of a double tax treaty. According to Romanian legislation, a 16 percent withholding tax applies on payments made to foreign service suppliers, and there is only an override if the relevant treaty has a business profits article and the fees are within that article. Starting 1 February 2013, a 50 percent withholding tax is applied for income derived rendering

services in or outside Romania, including management services, if this income is paid in a state with which Romania has not concluded a treaty for the exchange of information. Note that the Romanian authorities often seek to classify certain fees as royalties and therefore exclude them from the business profits article.

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

Yes. There is nothing in the Romanian legislation to prohibit year-end adjustments, which may be subject to other tax consequences depending on the nature of the underlying transaction.

### Other unique attributes?

If a transfer pricing documentation file does not include all the sections required by the legislation, there is a risk that the file may be considered as incomplete, which gives the right to the tax authorities to make adjustments.

Transfer pricing adjustments may be made by the tax authorities based on three independent transactions (qualifying as similar with the one that is being analyzed). The simple average will be used.

In practice, the Romanian tax authorities do not accept loss-making companies to be included in benchmark studies.

## Other recent developments

Although the obligation to document domestic intra-group transactions for Romanian transfer pricing purposes was clearly stated in the Fiscal Code as of May-June 2010, there is still a risk that the previous text of the relevant provision of the Fiscal Code could be interpreted in a way that the documentation obligation was also applicable in prior periods.

## 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?

No specific provision.

May a taxpayer go to competent authority before paying tax?

No formal rules.

## Advance pricing agreements

What APA options are available, if any?

In line with the provisions of the Fiscal Procedure Code, taxpayers who carry out transactions with related parties may address the tax authorities in order to obtain an APA regarding the conditions and methods of determining the transfer pricing within a given period of time. The APA can be either unilateral (concluded with the Romanian tax authorities) or bilateral (involving at least two or more tax authorities).

Is there a filing fee for APAs?

The tariff which would be charged for releasing the APA is EUR10,000 up to EUR20,000 (in the case of large taxpayers, as well as in the case of other categories of taxpayers of which the consolidated value of transactions exceeds EUR4 million). The tariff for amendments of an already-released APA is EUR6,000 up to EUR15,000 (in the case of large taxpayers, as well as in the case of other categories of taxpayers of which the consolidated value of transactions exceeds EUR4 million). It is payable in RON at the National Bank of Romania's foreign exchange rate, valid at the date of payment.

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?

The APA program is developing slowly. So far, it seems that only four APAs have been concluded between the Romanian tax authorities and taxpayers.

## Language

In which language or languages can documentation be filed?

Romanian only.

### KPMG in Romania

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