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Overview

Garrigues Portugal, S. L. P. - Sucursal, Taxand Portugal

Garrigues Portugal, a law firm headquartered in Spain, with offices in Portugal (Lisboa and Porto), offers a full range of tax and legal advisory services at local, regional and global level. Garrigues Portugal counts with a specialized and experienced transfer pricing "TP" team providing a full-service offer, e.g. advisory services ranging from mere documentation to engaging analysis, strategic planning and addressing disputes and controversies or valuations, as follows:

- Preparation of TP documentation (Master File / Local File / Country-by-Country Reporting "CbCR"); Assisting on the tax returns related with TP policies and transactions; Drafting and review of intercompany agreements (TP aspects)
- Review and design of TP policies, economic analysis / TP benchmarks (e.g., prices, margins, interest rates, royalty rates, valuations); Model intragroup transactions and supply chain
- Preparation and negotiation with the tax authorities of advance pricing agreements "APAs"; Assistance in relation to mutual agreement procedures "MAPs"
- Assisting in TP inspection procedures and litigation.

General: Transfer Pricing Framework

Article 63(1) of Corporate Income Tax Code "CITC" and article 1 of Ministerial Order no. 268/2021, of 26th of November "Ministerial Order no. 268/2021" foresee the arm's length standard by requiring for corporate tax purposes that the terms and conditions practiced, accepted and agreed between related parties in their commercial, financial, restructuring dealings and profit/loss allocations follow those that would have been expected in similar transactions between unrelated parties. The OECD Transfer Pricing Guidelines "OECD Guidelines" are referred in the Portuguese Transfer Pricing legislation "Portuguese TP legislation" as a source of recommended guidance in the application of the arm's length principle, given its complex application and the need to avoid double taxation and litigation.

TP documentation obligations are also in force.

Accepted Transfer Pricing Methodologies

The TP methods stipulated in Portuguese TP legislation - Article 63(3) of CITC and Article 6(1) of Ministerial Order no. 268/2021 - are aligned with those outlined in the OECD Guidelines and can be categorized into two groups: traditional methods and profit-based methods. The Comparable Uncontrolled Price "CUP", Resale Price and Cost-Plus methods are considered traditional methods, while the Transactional Net Margin Method and Profit Split Method fall under the profit-based category. In addition, the Portuguese TP legislation provides the possibility to adopt other generally accepted methods, techniques or models for the economic valuation of assets, whenever the previously mentioned methods cannot be used due to the unique or singular nature of the transactions or the lack of reliable comparable information.

In line with the OECD Guidelines, the Portuguese TP legislation has eliminated any specific reference to a hierarchy in their application, adopting the best method rule. The selection of the most appropriate method depends on the specific characteristics of the transaction under analysis and requires that the selected TP method ensures a reliable assessment of the arm's length principle.

Transfer Pricing Documentation Requirements

Article 17 of Ministerial Order no. 268/2021 states that the obligation to prepare the TP documentation (comprised by both Master File and Local File) applies to any taxpayer registering annual revenues equal to or higher than EUR 10,000,000 during fiscal year to be documented. There is a reporting exemption for controlled transactions in amounts of less than EUR 100,000 (per transaction, per counterparty) and, in globality, of EUR 500,000. These exemptions do not cover controlled transactions carried out with taxpayers resident outside the Portuguese territory and subject to a more favourable tax regime.

Despite being exempt from preparing TP documentation, since the total revenues are lower than the threshold of EUR 10,000,000, the Portuguese taxpayers should be in position to prove the compliance with the arm's length principle regarding the transactions carried out with related entities in case of a potential tax inspection conducted by Portuguese Tax Authorities "PTA".

The Portuguese TP legislation currently in force requires more and more detailed information, when compared with the OECD Guidelines, to be included both in the Master File and Local File, stating in Appendix I of the Ministerial Order no. 268/2021 an exhaustive list of elements which are mandatory to include.

Taxpayers qualified as Small and Medium Enterprises "SME" are allowed to prepare simplified TP documentation.

The TP documentation must be prepared in Portuguese.

Controlled transactions and amounts must be reported in Annex H of the so-called Simplified Business Information "IES", together with other TP relevant information (e.g., the taxpayer should indicate if TP documentation was prepared).

Large Taxpayers are obliged to submit their TP documentation to PTA no later than the 15th day of the 7th month following the fiscal year end. The same deadline applies to the filing of the "IES". For taxpayers not falling under this category, the submission of TP documentation is compulsory upon PTA's request. The usual administrative deadline for submitting the documentation is 10 days.

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CbCR and CbCR notification rules, generally in line with the OECD Guidelines, are also in force. CbCR must be submitted by the ultimate parent entity of the Group until the end of the 12th month after the end of the fiscal year to which it refers. The CbCR notification must be submitted by the Portuguese constituent entities until the end of the 5th month after the closing of the fiscal year to which the CbCR refers.

Local Jurisdiction Benchmarks

There is a tendency to prefer domestic comparables specially in those cases where the controlled transactions under evaluation would involve terms and conditions significantly connected with specific/exclusive characteristics of the domestic market. If necessary, Iberian or European comparables may be used.

The use of both internal and external comparables is accepted.

The criteria used by the taxpayer when preparing benchmarks together with the point of the range used as reference are often scrutinized by PTA in tax inspections.

Domestic legislation allows the use of an arm's length range and statistical measures for its determination. The use of the median as reference value in the context of potential adjustments resulting from a tax inspection is stated in the legislation.

When applying a TP method, and if the terms and conditions of the tested transaction are not fully comparable in any of the relevant aspects required for an arm's length test, comparability adjustments must be performed in order to eliminate the effect of the existing differences. The Portuguese TP legislation is generally in line with the OECD Guidelines regarding comparability adjustments.

The benchmarking searches may remain valid for three years (with a compulsory yearly update of the financials), provided that the facts and circumstances surrounding the transactions have not materially changed.

Another important note to point out is the independence threshold specified in the Portuguese legislation.

In addition, there is a preference for the weighted average three-year approach for benchmark analysis.

Finally, if the TP technical studies are prepared by a third-party expert, a Declaration of Responsibility regarding the methods, information and techniques must be issued.

Advance Pricing Agreement "APA"

Since 2008, Portugal implemented an APA programme that follows the principles set forth by the OECD Guidelines. Taxpayers may apply for a unilateral, bilateral or multilateral APA in Portuguese jurisdiction. The rules on the procedures related with the conclusion of APA are foreseen in Article 138 of CITC and Ministerial Order no. 267/2021, of 26th November which transposes some of the work developed by OECD, recommending and endorsing the use of the OECD Guidelines.

The procedure to request an APA comprises two phases:

- Pre-filing phase, which entails a preliminary evaluation of the initial taxpayer proposal and may involve joint meetings with PTA, and
- Proposal phase, which entails the submission, analysis and negotiation of the APA proposal, that in any case should be presented at least 6 months before the beginning of the applicable tax year.

As regards the time frame to finalize the critical second phase, the law provides that unilateral agreements should be concluded within a maximum of 180 days, whilst a 360-day period applies to bilateral/multilateral APAs.

An APA may not exceed a 4-year period and under certain conditions, rollback provisions are possible.

Upon the implementation of an APA, taxpayers are required to file an annual report on the execution of the agreement, in addition to the general obligation to comply with local TP documentation rules. Failure to comply with this requirement may render the APA invalid.

An APA is subject to a filing fee depending on the taxpayer´s average turnover (reduced by 50% for renewals and by 25% for SME taxpayers).

Transfer Pricing Audits

PTA may adjust prices set in controlled transactions whenever consider that such transactions do not comply with the arm's length principle. The burden of proof for those adjustments rests with PTA as long as the TP documentation requirements are sufficiently met. In Portugal, the statute of limitation on TP assessments is 4 years.

Recent practice and case law unveiled that financial transactions (including cash pooling mechanisms and intercompany guarantees), intangible assets transactions (with special relevance of the Hard To Value Intangibles "HTVI"), intra-group services, recurrent loss-making companies with significant cross-border intercompany transactions, contradictions between the disclosed TP information between the several TP sources and restructuring transactions are most frequent subjects of tax disputes. As referred, benchmarks' criteria are frequently challenged, as well as comparability features, functional analysis/profiles, TP methods selection and application, use of internal versus external comparables, among others.

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Transfer Pricing Penalties

Failure to prepare / submit TP documentation, IES, CbCR report or CbCR notification is subject to a penalty of EUR 500 to EUR 10,000, per fiscal year, per taxpayer, with an additional 5% of the penalty amount for each day of delay.

Failing to comply with the publishment of CbCR information is subject to a penalty of EUR 1,500 to EUR 30,000, applicable to fiscal years starting on or after 22nd June 2024.

Any inaccuracies in the information provided in the documents referred to above will be subject to a penalty of EUR 375 to EUR 22,500, per fiscal year, per taxpayer.

If the taxpayer has stated in the IES that the transfer pricing documentation has been prepared but refuses to submit it upon request of PTA, the applicable penalty can reach EUR 150,000, per fiscal year, per taxpayer.

Local Hot Topics and Recent Updates

Ministerial Order no. 268/2021 introduced significant amendments to Portuguese TP regulations by revising the previously applicable Ministerial Order no. 1446-C/2001, which had been in effect for 20 years. These new provisions aimed to align Portuguese TP regulations with the OECD Guidelines, for example, encompassing the full adoption of the three-tiered OECD documentation approach.

More recently, on 23rd August, Decree-Law no. 73/2023 transposed into Portuguese jurisdiction the public CbCR requirements as outlined in Directive (EU) 2021/2101 of the European Parliament and of the Council from November 2021. This new law, applicable to fiscal years starting on or after 22nd June 2024, introduces fresh provisions concerning the public disclosure of corporate tax information for multinational companies operating in Portugal. In compliance with some specific requirements, CbCR must be made accessible on the parent company's website (or the website of the subsidiary or branch, if the parent company is not based in the EU) in both an official language and one of the official languages of the EU.

Case law

The number of cases related to transfer pricing has surged, both in judicial and in arbitration, with rather interesting rulings. For instance, a trend has emerged in terms of TP case law according to which the burden of proof has become a critical factor, with taxpayers possessing well-structured and technically sound documentation having a higher probability of success in legal disputes, whereas those without such documentation face lower odds. Additionally, the burden of proof itself has been severally disputed in arbitration.

More recently the arbitral court has been issuing decisions regarding the legal strength of the OECD Guidelines in the Portuguese jurisdiction in TP adjustments.

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Documentation threshold

Master file	Annual revenues equal to or higher than EUR 10 million
Local file	Annual revenues equal to or higher than EUR 10 million
CbCR	Consolidated revenues equal to or higher than EUR 750 million

Submission deadline

Master file	Should be available and, only for Large Taxpayers, delivered to PTA, within 15th day of the 7th month after the fiscal year end
Local file	Should be available and, only for Large Taxpayers, delivered to the PTA, within 15th day of the 7th month after the fiscal year end
CbCR	Submission within 12 months after the fiscal year end

Penalty Provisions

<table>
<tr><td>Documentation – late filing provision</td><td rowspan="3">Failure to prepare / submit TP documentation, IES, CbCR report or CbCR notification is subject to a penalty of EUR 500 to EUR 10,000, per fiscal year, per taxpayer, with an additional 5% of the penalty amount for each day of delay.

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<tr><td>Tax return disclosure – late / incomplete / no filing</td></tr>
<tr><td>CbCR – late / incomplete / no filing / no publishment</td></tr>
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CONTACT

Mariana Martins Silva

Garrigues

mariana.martins.silva@garrigues.com

+351 213 821 200