TRANSFER PRICING DOCUMENTATION

by

Ezgi Arık

A thesis submitted to the

Graduate School of Social Sciences and Humanities

for the degree of

LL.M. in Private Law

Koç University

Fall 2016

Abstract

Transfer pricing is the price determined for the sale of goods and services realized between associated enterprises. Recently, the process for determining the terms and conditions for transfer pricing is being manipulated by companies to minimize their overall tax burden. For this reason, the legislatures of a number of countries intend to introduce, revise or govern their transfer pricing requirements, especially in the transfer pricing documentation area, to prevent taxation base erosion in their jurisdictions. These reforms require careful legal consideration. This thesis aims to analyze and highlight the legal deliberations currently being undertaken in relation to transfer pricing documentation, rather than economical aspects. It examines the transfer pricing documentation requirements, burden of proof and penalty provisions and their legal considerations at the international, supranational and different national practice levels with a specific focus on Turkey. Within the scope of the current worldwide transfer pricing documentation requirements, this thesis first examines the OECD and PATA at the international level, the EU as a supranational practice and the United States, Germany and Sweden at the national level. This thesis then conducts a detailed study of current Turkish transfer pricing documentation practices. The findings of this study indicate that current Turkish transfer pricing documentation legislation is unconstitutional. In response to these findings, this thesis makes recommendations to constitutionalize the Turkish transfer pricing documentation legislation. Finally, this thesis includes the future transfer pricing documentation practices within the scope of the OECD BEPS Action Plan. Therefore, this thesis is not limited to current transfer pricing documentation practices, but also applies to future legal practice.

Keywords: Transfer pricing, transfer pricing documentation, burden of proof, unconstitutionality, Turkey, OECD, BEPS Action Plan

Öz

Transfer fiyatlandırması, ilişkili kişiler arasında gerçekleştirilen mal ve hizmet satışları için belirlenen fiyat olarak tanımlanmaktadır. Transfer fiyatlandırmasının belirlenmesi süreci, son zamanlarda, toplam vergi yükünün azaltılması amacıyla daha fazla manipüle edilmektedir. İşte bu sebeple, ülkeler egemenlik alanlarında vergi matrahının aşındırılmasını önlemek amacıyla transfer fiyatlandırmasına ve özellikle transfer fiyatlandırmasında belgelendirme yükümlülüklerine ilişkin hukuki düzenlemeleri iç hukuklarına dahil etme, var olan düzenlemeleri yeniden gözden geçirme ya da yönetme eğilimi göstermektedirler. Bu eğilim ise hukuki bir değerlendirme yapmayı gerekli kılmaktadır. Dolayısıyla, bu tez transfer fiyatlandırmasında belgelendirme konusunda ekonomik bir değerlendirmeden ziyade, transfer fiyatlandırmasında belgelendirme konusundaki hukuki müzakereleri analiz etmeyi ve bu konuları vurgulamayı amaçlamaktadır. Bu çalışma, transfer fiyatlandırmasında belgelendirme yükümlülükleri, ispat yükü ve cezai hükümleri ve bunların gerek uluslararası, gerek ulusüstü ve gerekse yerel uygulamalarda özellikle Türkiye kapsamındaki hukuki değerlendirmelerini içermektedir. Öncelikle, dünya çapındaki mevcut transfer fiyatlandırmasında belgelendirme yükümlülüklerine ilişkin olarak uluslararası düzlemde OECD ve PATA, ulusüstü düzlemde Avrupa Birliği ve ulusal düzlemde Amerika, Almanya ve İsviçre incelenmektedir. İkinci olarak, bu tez mevcut Türk transfer fiyatlandırmasında belgelendirme uygulaması kapsamında oldukça detaylı bir çalışma gerçekleştirmektedir. Bu çalışma neticesinde, Türk transfer fiyatlandırmasında belgelendirme mevzuatına ilişkin oldukça ciddi görülen anayasaya aykırılık problemleri tespit edilmektedir. Bu tez, mevcut Türk transfer fiyatlandırmasında belgelendirme mevzuatının anayasaya aykırı hükümler içerdiğini ileri sürmekte ve bu anayasaya aykırılığı vurgulamaktadır. Öte yandan, bu tez Türk transfer fiyatlandırmasında belgelendirme mevzuatının nasıl anayasaya uygun hale getirilebileceğine ilişkin öneriler içermektedir. Son olarak, OECD Matrah Aşındırma ve Kar Aktarımı (BEPS) Aksiyon Planı çerçevesinde transfer fiyatlandırmasında belgelendirmenin gelecek uygulamaları da tezin içeriğine dahil edilmiştir. Böylelikle, bu tez salt transfer fiyatlandırmasında belgelendirme konusunda mevcut uygulamalar ile sınırlandırılmamış gelecek uygulamalar da kapsam içine almıştır.

Anahtar kelimeler: Transfer fiyatlandırması, transfer fiyatlandırmasında belgelendirme, ispat yükü, anayasaya aykırılık, Türkiye, OECD, BEPS Aksiyon Planı

Table of Content

Abbreviations

abrogated CTC	:	Corporate Tax Code No. 5422
Administration Principles	:	Administration Principles for Transfer Pricing and Documentation
Art.	:	Article
ATO	:	Australian Tax Office
AO	:	Abgabenordnung
BEPS	:	Base Erosion and Profit Shifting
CBC	:	Country by Country
CCP	:	Code of Civil Procedure No. 6100
Communication	:	Communication Towards an Internal Market without tax obstacles and A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities
Communique No.1	:	General Communique on Disguised Profit Distribution through Transfer Pricing (Serial No:1)
Communique No.3	:	draft General Communique on Disguised Profit Distribution through Transfer Pricing Serial No:3
Constitution	:	Constitution of the Turkish Republic
CRA	:	Canadian Revenue Agency
Criminal Code	:	Turkish Criminal Code No. 5237
CTC	:	Corporate Tax Code No. 5520S
Decree	:	Decree on Disguised Profit Distribution through Transfer Pricing
Discussion Draft	:	Discussion Draft on Transfer Pricing Documentation and Country by Country Reporting
Draft Law	:	Draft Law on the Amendments on Certain Laws with the Purpose of Improving Investment Environment
e.g.	:	For example
ECHR	:	European Convention on Human Rights

ECJ	:	European Court of Justice
ECtHR	:	European Court of Human Rights
EC Treaty	:	European Community Treaty
eds.	:	editors
EEC Treaty	:	Treaty establishing the European Economic Community
et.al.	:	and others
EU	:	European Union
EU TPD	:	European Union Transfer Pricing Documentation
Final Report	:	Final Report on Transfer Pricing Documentation and Country-by-Country Reporting
HGB	:	Handelsgesetzbuch
ICC	:	International Chamber of Commerce
IL	:	Swedish Income Tax Law
IP	:	Intellectual Property
IRC	:	Internal Revenue Code
IRS	:	Internal Revenue Service
ITAA	:	Income Tax Assessment Act 1997
i.e.	:	that is
id.	:	the same
JTPF	:	European Union Joint Transfer Pricing Forum
LCG	:	Law Companion Guidelines
MNE's	:	Multinational Enterprise
OECD	:	Organisation for Economic Co-operation and Development
OECD Model Convention	:	Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital

OECD Model Tax Convention	:	OECD Model Tax Convention on Income and on Capital
OECD TP Guidelines	:	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
PATA	:	Pacific Association of Tax Administrators
SME	:	Small and Medium Enterprises
STA	:	Swedish Tax Agency
TCC	:	Turkish Civil Code No. 4721
TEI	:	Tax Executives Institute
TFEU	:	Treaty on the Functioning of the European Union
TPC	:	Tax Procedural Code No. 213
Transfer Pricing Form	:	Transfer Pricing, Controlled Foreign Corporation and Disguised Capital
Treasury Regulation	:	Code of Federal Regulations
US	:	United States
VAT	:	Value Added Tax
Vol.	:	Volume

TRANSFER PRICING DOCUMENTATION

§1. INTRODUCTION

I. The Basic Features Of Transfer Pricing: Definitions And Scope

Globalization has many significant consequences that affect the global economy. As stated in the Organisation for Economic Co-operation and Development ("OECD") Handbook on Economic Globalization Indicators *"the term globalization has been widely used to describe the increasing internationalization of financial markets and of markets for goods and services*[1]*".* Also noted in the Handbook, financial markets and markets for trade in goods and services are growing and internationalizing together with the increase in number of international transactions.

As a result of these developments, the OECD has considered that regulatory guidelines should be prepared for multinational enterprises ("MNE's") based on the Declaration on International Investment and Multinational Enterprises ("the Declaration")[2]. The Declaration was adopted firstly by the Governments of OECD Member countries on 21 June 1976. Since then the Declaration had been reviewed on several occasions on 1979, 1984, 1991, 2000 and 2011. The most recent version of Declaration is published on 25 May 2011[3].

Based on the Declaration, the OECD published the OECD Guidelines for Multinational to provide recommendations and standards for MNE's with respect to their businesses and its primary aim to make sure that MNE's operate their activities in line with the governmental policies and laws as well as improve foreign investment in the host countries[4]. In the

---

[1] OECD, *Measuring Globalisation: OECD Handbook on Economic Globalisation Indicators,* OECD Doc. ISBN 92-64-10808-4 (2005).

[2] OECD, *The OECD Declaration and Decisions on International Investment and Multinational Enterprises,* (2012), http://www.oecd.org/daf/inv/investment-policy/ConsolidatedDeclarationTexts.pdf.

[3] *Id.* at 4; The Declaration is endorsed by the OECD considering;

-That international investment is of major importance to the world economy, and has considerably contributed to the development of their countries;

-That multinational enterprises play an important role in this investment process;

-That international co-operation can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic, social and environmental progress, and minimise and resolve difficulties which may arise from their operations;

-That the benefits of international co-operation are enhanced by addressing issues relating to international investment and multinational enterprises through a balanced framework of inter-related instruments.

[4]OECD, *OECD Guidelines for Multinational Enterprises,* 13, (2011), http://dx.doi.org/10.1787/9789264115415-en, [hereinafter *OECD Multinational Enterprises]*.

Guidelines, MNE's are defined as *"companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways"*[5].

MNE's have a key role in the globalization of the economy as they hold a large share of world trade[6]. The number of MNE's was 103, 786 and the number of its affiliates operating in the global economy was 892, 114 in 2010 based on the World Investment Report 2012[7]. It should also be noted that MNE's also have an important role in Turkey. As a matter of fact, there were 42,150 MNE's operating in Turkey in 2014[8]. Further increase in the number of MNE's has resulted in further increases in intercompany transfers of goods and services as well as financial instruments across international borders.

As a result of globalization and due to the position of MNE's in the globalized economy, international transactions are increasing, such as the sale of goods and services, from the parent company to its affiliates, branches or vice versa. Naturally, a price is determined for all the transactions realized between the parent companies and its affiliates or branches affecting the profits derived from those transactions. MNE's can generate significant income in one jurisdiction through these international transactions and company taxation becomes a main topic for consideration.

As a matter of fact, MNE's gain income from transactions realized in different country jurisdictions and they have to pay their corporate income tax over their tax base. Taxation of MNE's is a crucial issue for host countries and MNE's have the obligation to pay their taxes in order to contribute to the public finance of host countries[9]. While paying the taxes in the host countries, MNE's should comply with tax laws and regulations of the countries in which they operate. However, paying taxes in a timely manner is not only the only issue for compliance with the tax law of the host country. For total tax compliance, the determination of the price applied on transactions realized within MNE's and the calculation of the taxable income of MNE's are arguably more important.

---

[5] *Id.* at 17.

[6] OECD, Lanz, R. and S. Miroudot, "Intra-Firm Trade:Patterns, Determinants and Policy Implications", Trade Policy Papers, No. 114 (2011), http://dx.doi.org/10.1787/5kg9p39lrwnn-en.

[7] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2012, TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, 2012, at 168, U.N. Sales No. E.12.II.D.3 (2012).

[8] T.C. EKONOMİ BAKANLIĞI, ULUSLARARASI DOĞRUDAN YATIRIMLAR 2014 YILI RAPORU (2014), http://www.ekonomi.gov.tr/portal/content/conn/UCM/uuid/dDocName:EK-212362 (last visited Jan. 16, 2017).

[9] *OECD Multinational Enterprises, supra* note 4, at 60.

1. Transfer Pricing

a. Definition

As a natural function of business life, a price should be determined for all sales of goods and services realized between companies or persons, as long as no one is willing to sell their goods for free or underprice. This also applies to MNE's and the price determined for the sale of goods and services realized between associated enterprises is referred to as the "transfer price".[10]

Transfer price is defined under the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD TP Guidelines") as *"the prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises[11]".* As understood from the definition, there should be a price determined for the transactions realized between associated enterprises. The OECD TP Guidelines also gives the definition of the associated enterprises so that the concept of the transfer pricing can be clearly understood. According to the OECD TP Guideline *"two enterprises are associated if one of the enterprises participated directly or indirectly in the management, control, or capital of the other or if"the same persons participate directly or indirectly in the management, control or capital" of both enterprises[12]."*

b. The Purpose of Transfer Pricing

In the current economic structure, MNE's do not only participate directly or indirectly in the management and control of capital of the other related companies carrying on business in the same jurisdiction, but they also participate in related companies located in different jurisdictions. Within this business practice, companies establish branches or subsidiaries in different jurisdictions to realize more international transactions.

Therefore, both tax payers and tax administrations consider transfer pricing as an important issue. In case that the different jurisdictions become an issue, an adjustment of the transfer price in one jurisdiction should lead to an adjustment in the other jurisdiction accordingly. However, if the other jurisdiction does not agree to make such an adjustment, the MNE group

---

[10] TUNCAY KAPUSUZOĞLU, VERGISEL YÖNDEN TRANSFER FIYATLANDIRMASI, 3, (2003).
[11] OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations,* 19 (2010), http://www.oecd.org/publications/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm, [hereinafter *OECD TP Guideline]*.
[12] *Id.*

may be taxed twice over the same income[13]. Consequently, for international transactions realized by MNE's, there is always the possibility of double taxation over the same profits[14].

As an example of transfer pricing causing double taxation, assume that a German chair manufacturer distributes its products through a French subsidiary. In this case, the transfer price is determined between the different companies of the MNE as 500 Euros. Each chair costs 400 Euros to manufacture (for the manufacturer) and 100 Euros to distribute (for the distributor). Each chair is sold for 600 Euros by the French distributor. As a result of the chain transaction, the French distributor makes no profit, while the German distributor gains 100 Euros profit by selling the chairs to its subsidiary French distributor. While there is no problem with this transaction for the MNE, the French Tax Administration can criticize the transaction on the grounds that the French subsidiary gains no profit as a result of the transaction, although it should have from a business practice perspective. Therefore, the French Tax Administration may claim re-determination of the transfer price realized within the MNE.

If the transfer price is adjusted by the French Tax Administration in a way that the French distributor makes profit as a result of the transaction, the transfer price will be considered as 400 Euros instead of 500 Euros. The other facts remain the same with the transaction example above; when each chair is sold at 600 Euros by the French distributor, the French distributor makes 100 Euros profit at the end of the transaction. Therefore, the MNE will be taxed on a profit of 100 Euros in Germany and 100 Euros in France even though the MNE makes profit of only 100 Euros at the end of the transaction calculated over the transfer price of 500 Euros.

With respect to the above-mentioned example, under certain circumstances the profit of the MNE derived from the same transaction can be taxed twice which causes double taxation. In this case, the main purpose of the transfer price is to prevent double taxation. The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD TP Guideline") is designed to guide both tax payers and tax administrations to reach mutually-beneficial solutions with respect to the transfer pricing cases[15].

[13] *OECD TP Guideline*, *supra* note 11, at 20.
[14] John Neighbour, Jeffrey Owens, *Tax Council Policy Institute Symposium: The Future of International Transfer Pricing: Practical and Policy Opportunities: Article: Transfer Pricing In the New Millennium: Will The Arm's LengthPrinciple Survive,* 10 GEO. MASON L. REV. 951 (2002), at 2.
[15] *OECD TP Guideline*, *supra* note 11, at 20.

Although the primary objective of transfer pricing is to prevent double taxation by determining the price realized between MNE members for the sale of goods and services, in practice, transfer pricing is used for different purposes. In today's globalized word, transfer pricing is used for managing the total tax burden of MNE's. Therefore, MNE's try to minimize the total taxable income, if possible, rather than its primary objective which is preventing double taxation[16].

The number of transactions realized by the MNE's is remarkably high. Consequently, the most part of the taxable income of the affiliate companies consists of incomes derived from intra-company transactions. Although the affiliates depend on the parent company, each affiliate company is regarded as a separate entity[17] for tax purposes and is taxed according to the corporate income tax rate of the country in which the affiliate is incorporated.

As long as transfer pricing is determined by the affiliates themselves, the affiliates may easily change their taxable income amount, and consequently their corporate income tax base, through creating subsidiaries in countries which apply lower tax rate. Due to different corporate income tax rates applied in different jurisdictions, transfer pricing becomes a strategic tool to minimize the overall tax burden of the MNE's[18]. Under these circumstances, the determination of transfer prices can be manipulated with the purpose of minimizing the overall taxation of MNE's.

Therefore, it is important to distinguish between transfer pricing and transfer pricing manipulation.[19] Transfer pricing is a legitimate and required activity for MNE's to determine the price for the transactions realized between their affiliates. On the other hand, transfer pricing manipulation is the determination of a price paid from MNE's to their affiliates incorporated in another tax jurisdiction for the purpose of reducing the total tax burden of MNE's[20]. For this purpose, MNE's engage in aggressive tax planning at a global level by structuring and implementing abusive tax avoidance plans[21].

---

[16] J. Philip van Hilten, *Transfer Pricing Policy in the International Tax System-Past And Present and a Quick Look in the Fiscal Crystal Ball,* 10 GEO. MASON L. REV. 709, at 2 (2002).
[17] *OECD TP Guideline, supra* note 11, at 33.
[18] Soren Bo Nielsen, *Transfer Pricing: Roles and Regimes,* 37 REVISTA DE ECONOMIA MUNDIAL 103, 105 (2014).
[19] Ufuk Olcay Tokay Acar, Transfer Fiyatlandırması, 45-54 (2013).
[20] LORRAINE EDEN, TAXING MULTINATIONALS: TRANSFER PRICING AND CORPORATE INCOME TAXATION IN NORTH AMERICA, 20 (1998).
[21] Thomas C. Pearson, *Proposed International Legal Reforms For Reducing Transfer Pricing Manipulation of Intellectual Property,* 40 N.Y.U. J. INT'L L. & POL. 541, 542 (2008).

c. Transfer Pricing Manipulation

Currently, MNE's that mainly operate in technology or internet-related areas of business obtain intellectual property ("IP") rights for their technological developments or inventions. Among the transactions realized between MNE members, the most common transactions amenable to transfer price manipulation are IP transactions for various reasons[22]. First of all, IP can easily be moved via the internet from one jurisdiction to others[23] unlike other kinds of physical assets. Secondly, it is practically impossible to determine the fair market price for IP due to the unique structure of each IP[24].

As a concrete example, the Google transfer pricing case emphasizes the importance and consequences of transfer pricing manipulation by reducing the total global tax burden of an MNE. Google uses complicated company structures and realizes various transactions among its affiliates incorporated in different tax jurisdictions.

Google Inc., incorporated in the U.S., develops mainly intangible technological inventions such as search engine software or advertisement systems[25]. Google Inc. has established subsidiaries in different, low-tax jurisdictions. One of its main subsidiaries is Google Ireland Holdings established in Ireland. At this point, Google Inc. licenses its intellectual property rights to its Irish subsidiary Google Ireland Holdings, which enables Google Inc. to make profits by using its proprietary software outside of the U.S. More specifically, Google Inc. determines a low transfer price for the licensing agreements concluded with its Irish subsidiary to allocate its profit from high-tax jurisdictions[26] to law-tax jurisdictions[27].

---

[22] E.g., Andrew Blair-Stanek, *Intellectual Property Law Solutions to Tax Avoidance*, 62 UCLA L. REV. 2 (2015); Thomas C. Pearson, *Proposed International Legal Reforms For Reducing Transfer Pricing Manipulation of Intellectual Property*, 40 N.Y.U. J. INT'L L. & POL. 541, 542 (2008).

[23] E.g. Through licensing from high corporate income tax jurisdictions to low tax corporate income tax jurisdictions.

[24] Andrew Blair-Stanek, *Intellectual Property Law Solutions to Tax Avoidance*, 62 UCLA L. REV. 2, 5 (2015).

[25] John Sokatch, *Transfer-Pricing with Software Allows for Effective Circumvention of Subpart F Income: Google's "Sandwich" Costs Taxpayers Million,* INT'L L., Summer 2011, Vol.45, No.2, at 725.

[26] I.R.C. &Sect; 11(b)(1) indicates that "*In general. The amount of the tax imposed by subsection (a) shall be the sum of— (A) 15 percent of so much of the taxable income as does not exceed $50,000,*
(B) 25 percent of so much of the taxable income as exceeds $50,000 but does not exceed $75,000,
(C) 34 percent of so much of the taxable income as exceeds $75,000 but does not exceed $10,000,000, and
(D) 35 percent of so much of the taxable income as exceeds $10,000,000".

[27] Erik Sherman, *How Google Hides its Profits from the Tax Man*, BNET, (Oct. 21, 2010), http://www.bnet.com/blog/technology-business/how-google-hides-its-profits-from-the-tax-man/6296.

Google Inc. does not obtain any profit from transactions realized between Google Ireland Holdings and other Google subsidiaries and non-associated companies. Google Ireland Holdings also does not derive all the profits directly; instead, they establish a money transfer facility through tax havens. As a result, Google Ireland Holdings obtains all the international profits, while Google Inc. continues its software research and development activities[28]. Therefore, Google Inc. avoids high corporate tax and pays corporate tax only over the license fees incurred by its subsidiary Google Ireland Holdings which is remarkably lower.

This strategy of Google Inc. to help allocate profits to foreign subsidiaries enabled it to cut its taxes by US$3.1 billion and reduce its overseas tax rate to 2.4 percent between the years 2007 and 2010[29]. However, it should be noted that not only Google uses complicated structures in order to allocate its profits to low tax jurisdictions. Other multinational companies such as Apple, Oracle, Microsoft and IBM[30] also use similar strategies to manipulate transfer pricing.

Transfer pricing is a legitimate and required activity for MNE's, on the other hand, transfer pricing manipulation is a way of tax avoidance. Transfer pricing manipulation has negative consequences for both tax administrations and other MNE's which do not allocate their profits to low tax jurisdictions. An analysis realized by Kimberly A. Clausing, an economics professor at Reed College in Portland, regarding to the effects of tax avoidance activity on tax revenues shows that such profit shifting strategies realized by MNE's cost U.S. for $60 billion annually[31].

As experienced by the U.S. administration, tax revenues in different jurisdictions may face the same transfer pricing problem. For example, in the Google case the transfer price for the patent right licensed to affiliate companies was determined low in order to avoid the high corporate tax rate through transfer pricing manipulation. The same transfer pricing manipulation strategy is used all around the world by MNE's in order to decrease their overall tax burden. However, according to the OECD TP Guideline, the tax administrations should not directly assume that associated enterprises manipulate transfer pricing through their transactions. Instead, tax administrations should take into consideration that determining

[28] Jesse Drucker, *Google 2.4% Rate Shows how $60 Billion Lost to Tax Loopholes*, BLOOMBERG, (Oct. 21, 2010), http://www.bloomberg.com/news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html.

[29] *Id.*

[30] Jesse Drucker, *Google Has Made $11.1 Billion Overseas Since 2007. It Paid Just 2.4% in Taxes. And That's Legal*, 4201 BLOOMBERG BUS. WK. 43 (2010).

[31] Kimberly A. Clausing, *The Revenue Effects of Multinational Firm Income Shifting*, TAX NOTES, March 28, 2011, at 1580-1586.

transfer price may be difficult, because of the absence of market force in the mentioned transactions[32].

Due to the susceptibility of transfer pricing to manipulation, analysis should be undertaken to determine whether the transfer price for a certain transaction is in line with the "arm's length principle".

2. The Arm's Length Principle

The arm's length principle has great importance in the transfer pricing area[33] and is defined under OECD TP Guideline as *"the international transfer pricing standard that OECD member countries have agreed should be used for tax purposes by MNE groups and tax administrations[34]".* Prices used in transactions realized between independent parties are customarily based on market forces, while transfer prices determined for transactions between associated enterprises do not have any external forces. However, this lack of market forces for a specific transaction does not mean that the transfer price is determined arbitrarily. The transfer price must still be determined in line with the arm's length principle. If the transfer price determined for the sale of goods or services realized between associated enterprises do not reflect the market price, it is accepted that the determined transfer prices are not in line with the arm's length principle.[35]

In the event that the transfer price is not influenced by market forces, the tax liabilities of associated enterprises can be easily manipulated. In order to prevent this undesirable consequence, OECD member countries have agreed that the arm's length principle should be followed for determining transfer prices. Therefore, OECD member countries have agreed that transfer prices, which are determined for each transaction between associated enterprises, should be compared with the prices determined between independent enterprises in comparable transactions under comparable circumstances[36].

As mentioned in the above section, MNE's intend to shift their profits from high tax jurisdictions to low tax jurisdictions.[37] For this purpose, MNE's that are incorporated in high

[32] *OECD TP Guideline*, *supra* note 11, at 31.
[33] YASEMİN TAŞKIN, TRANSFER FİYATLANDIRMASINDA EMSALLERE UYGUNLUK İLKESİ, 2 (2012).
[34] *OECD TP Guideline*, *supra* note 11, at 31.
[35] SERKAN AĞAR, TRANSFER FIYATLANDIRMASI ÖRTÜLÜ KAZANÇ DAĞITIMI 55 (2011).
[36] *OECD TP Guideline*, *supra* note 11, at 31.
[37] LEYLA ATEŞ, TRANSFER FIYATLANDIRMASI VE VERGILENDIRME, 2 (2011).

tax jurisdictions tend to overprice their buying from low tax jurisdictions and underprice their selling. To prevent such profit shifting action, tax administrations in OECD countries use the arm's length principle for the determination of transfer prices[38]. Therefore, the tax-paying MNEs should also use the same principle for determination of the transfer price to avoid possible tax criticism.

Paragraph 1 of Article 9 titled "Associated Enterprises" of OECD Model Tax Convention on Income and on Capital ("OECD Model Tax Convention") states:

> *"Where*
>
> *a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or*
>
> *b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,*
>
> *and in either case conditions are made or imposed between two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued may be included in the profits of that enterprise and taxed accordingly.*[39]*"*

Within the scope of Article 9, transactions should be compared between independent enterprises in comparable transactions, under comparable circumstances ("comparable controlled transaction"), while determining the transfer price[40]. Therefore, the arm's length principle accepts the approach of separate entity which treats the members of an MNE group as if they are separate entities for tax purposes rather than accepting the members of a MNE as a unified business in the MNE group[41].

In relation to the process of determining transfer pricing, analysis should be undertaken to determine whether the transaction at issue is realized in line with the arm's length principle.

---

[38] Christian Keuschnigg and Michael P. Devereux, *The arm's length principle to multinational firm organization*, 89 J. INT'L ECON. 432, 432 (2013).
[39] OECD, *Model Tax Convention on Income and on Capital 2014 (Full Version)*, (2015), I-2, http://dx.doi.org/10.1787/9789264239081-en, [hereinafter *OECD Model Tax Convention]*.
[40] *OECD TP Guideline*, *supra* note 11, at 33.
[41] *OECD TP Guideline*, *supra* note 11, at 33.

Such analysis of the controlled and uncontrolled transactions is defined as "comparability analysis" under the OECD TP Guideline[42].

3. Comparability Analysis

The arm's length principle is based on the comparison between transactions realized between related parties and unrelated parties. However, it should be noted that every transaction has its own unique features and it is almost impossible to find exactly the same transactions. The comparison of transfer pricing is not only a comparison between the prices or the price ranges, but is also a comparison of the contextual conditions in a broader sense.[43]

The OECD TP Guideline defines comparable as none of the differences between situations being compared could materially affect the condition being examined or the differences may be eliminated with certain adjustments[44].

It is usually difficult to find exactly the same uncontrolled transaction in order to compare with the controlled transaction. For instance, some products or services are so uniquely structured that it is almost impossible to find similar products or services to be compared for the determination of transfer pricing. Therefore, each transaction should be examined separately by taking into consideration different factors in every concrete case. Additionally, it should be considered that the scope of interpretation and the importance of these factors varies from jurisdiction to jurisdiction[45].

The OECD TP Guideline provides some explanations regarding five factors of comparability which are (i) the characteristics of the property or services transferred; (ii) the functions performed by the parties; (iii) the contractual terms; (iv) the economic circumstances of the parties; and (v) the business strategies pursued by the parties[46].

a. Characteristics of Property or Services

The value of the property or services differs in the open market according to their characteristics. It is important to compare the characteristics of the controlled and

[42] *Id.*
[43] Billur Yaltı, *Transfer Fiyatlandırmasında "Gizli Emsal",* 251 VSD 2 (2009) (Turk.); Billur Yaltı, *Transfer Fiyatlandırmasında Bağımsız ve Açık Emsal,* 275 VSD 3 (2011) (Turk.).
[44] *Id.* at 41.
[45] J. Philip van Hilten, *Transfer Pricing Policy in the International Tax System-Past And Present and a Quick Look in the Fiscal Crystal Ball*, 10 GEO. MASON L. REV.709, 713 (2002).
[46] *OECD TP Guideline*, *supra* note 11, at 43.

uncontrolled transactions in order to define whether the mentioned transactions are comparable[47]. Otherwise, comparing the uncontrolled and controlled transactions which have different characteristics will not have a valid comparability analysis. Consequently, any determination for transfer pricing for that transaction will be negligent.

In relation to the transfer of tangible property, its physical characteristics, quality etc. should be considered before any determination of transfer price according to the arm's length principle[48]. For example, an MNE ("Company A") incorporated in a low corporate tax jurisdiction manufactures and sells silk dresses to its subsidiary ("Company B") incorporated in a high corporate tax jurisdiction. Company A determines the price as 200 Euros per dress. In this case, in order to determine the transfer price of silk dress in line with arm's length principle the transaction should be compared with other uncontrolled comparable transactions.

If the above-mentioned transaction is compared with a transaction realized between unrelated companies incorporated in the same jurisdictions with Company A and B, however, this time the exact same looking dress is made of cotton instead of silk and is sold at the price of 100 Euros. Due to different characteristics of the dresses, the compared transaction is not eligible for comparability analysis.

b. Functional Analysis

To determine whether controlled and uncontrolled transactions are comparable, functional analysis should be undertaken. Functional analysis basically aims to identify the economic activities and responsibilities, assets used and risks undertaken by the parties.

If we refer our silk dress example, Company A manufactures the silk dresses and sells to Company B. In this case, Company A bears the manufacturing function, while Company B bears distribution function. Therefore, in order to find a comparable transaction to determine the arm's length price of the silk dresses, the companies which are compared should have similar functions. If the compared unrelated companies have materially different functions, the transactions cannot be determined as comparable. In addition to this, the risks that are assumed between the companies should also be considered[49].

[47] *Id.*
[48] *Id.*
[49] *Id.* at 46.

c. Contractual Terms

For transactions realized between independent enterprises, the contractual terms are determined according to the interests of both parties. However, for controlled transactions realized between associated enterprises, the interests in the transactions may not be equally vested to the parties[50]. Therefore, it should be analyzed whether the uncontrolled transaction provides a reliable comparison for the controlled transaction in terms of the contractual terms of the transaction.

d. Economic Circumstances

Due to market differences, the arm's length prices of exactly the same products or services may vary[51]. For this reason, the comparable uncontrolled transactions should be realized in a market in which the differences do not affect the price. For instance, taking into account the above mentioned silk dress transaction; Company B operates in a market in which silk dresses are rarely found and therefore the silk dresses are valuable in that market. For this reason, the transfer price is determined as 200 Euros.

On the other hand, in circumstances where the exact same silk dress is bought by another company at the price of 100 Euros, in this uncontrolled transaction realized between independent enterprises, the silk dresses could be easily found and they are of a kind daily worn by women in this market. For this reason, the value and the price of the silk dresses are lesser than the above mentioned market in which Company B operates. Under these circumstances, the uncontrolled transaction could not be taken as comparable, because the markets have differences that materially affect the prices of the products.

e. Business Strategies

The last factor of the comparability analysis, i.e. the business strategies should also be examined for determination of the comparability for transfer pricing. In certain occasions, a company may seek to enter a new market or expand its market share[52]. For this reason, companies may determine higher prices for their transactions in order to eliminate their higher costs occurred during their business strategies.

[50] *Id.* at 48.
[51] *Id.*
[52] *Id.* at 50.

For instance, in the silk dress example, Company A seeks to expand its market share and for this reason it determines the transfer price of the silk dress as 200 Euros. Therefore, Company A sells the silk dress to its affiliates Company B over 200 Euros which is higher than the market value. In this case, by determining whether the uncontrolled transaction is in line with the arm's length principle, the business strategies of the companies should be examined.

4. Transfer Pricing Documentation

The concept of "documentation" is defined in Oxford Dictionary as *"material that provides official information or evidence or that serves as a record*[53]. Thus, documentation is used as an official way of proving something. In line with this general definition, *"the phrase transfer pricing documentation generally refers to a study or report that justifies the manner in which a company prices its intercompany transactions for a particular fiscal year.*[54]*"*

Transfer pricing documentation includes all necessary documents, reports or studies showing that the affiliated enterprises have determined the transfer price of the goods or services in accordance with the arm's length price. The companies prepare transfer pricing documentation with the primary purpose of avoiding possible tax penalties due to improper documentation or to avoid the transfer pricing adjustments proving that the company acts in line with the transfer pricing requirements[55].

It should be noted here that the analytical focus of this thesis is on transfer pricing documentation and the following Chapters examine transfer pricing documentation requirements for international, supranational and national practices. For this reason, this Chapter only provides the basic definition of the transfer pricing documentation.

[53] "documentation", Oxford Dictionary, 2016, http://www.oxforddictionaries.com/ 09 Mar. 2016.

[54] Mark Bronson, Michelle Johnson & Kate Sullivan, *Overview/Best Practices in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 6 (A. Michael Heimert & Michelle Johnson eds., 2010).

[55] *Id.* at 51.

II. Purpose of this Thesis

MNE's tend to realize most of their transactions in different jurisdictions in the most advantageous way for taxation purposes. In this way, MNE's usually allocate some of their global profits to group members which are incorporated in low tax jurisdictions[56].

Under these circumstances, there is no doubt that transfer pricing is one of the most important international tax issue for MNE's[57]. For instance, 44 % of the parent companies among MNE's reported that the transfer pricing of intra-group financial arrangements is the most important tax issue during the past three years[58]. It is important for MNEs to comply with all transfer pricing documentation requirements in the different jurisdictions they operate. Otherwise, in case of non-compliance with documentation requirements showing that their transfer pricing is in line with the arm's length principle, they may face a tax adjustment as a result of a tax audit[59]. For this reason, documentation has vital importance for MNE's.

It should be noted that transfer pricing is an important issue not only for MNE's, but also for the tax administrations in the jurisdictions that MNE's are incorporated. As long as the majority of the transactions are realized among MNE's, the majority of the income of MNE's consists of the income derived from the transactions realized among MNE members. Tax administrations have the right to collect taxes on that income gained in their jurisdictions. However, due to the allocation of profit to other jurisdictions in which the corporate income tax rate is lower, the source jurisdictions which have higher corporate income tax rate can suffer due to less tax collection.

In response to this ability of MNE's to manipulate the allocation of income and avoid paying high tax, countries intend to introduce, revise or govern the transfer pricing requirements especially in the transfer pricing documentation area (e.g. penalty provisions as a result of non-compliance) to prevent the base erosion of tax revenue in their jurisdictions. As a matter

---

[56] OECD, *Dealing Effectively with the Challenges of Transfer Pricing*, OECD Publishing, 14 (2012) http://dx.doi.org/10.1787/9789264169463-en.

[57] Int'l Monetary Fund [IMF], *Spillovers in International Corporate Taxation*, IMF Policy Paper, 32, (May 9, 2014), http://www.imf.org/external/np/pp/eng/2014/050914.pdf; Transfer Pricing History, State of Art, Perspectives, Sept. 10-14, 2001, *Ad Hoc Group of Experts on International Cooperation in Tax Matters Tenth Meeting*, 2, U.N. Doc. ST/SG/AC.8/2001/CRP.6 (June 6, 2001), http://unpan1.un.org/intradoc/groups/public/documents/un/unpan004399.pdf.

[58] EY's Navigating the Choppy Waters of International Tax, 2013 Global Transfer Pricing Survey, 25, available at http://www.ey.com/Publication/vwLUAssets/EY-2013_Global_Transfer_Pricing_Survey/$FILE/EY-2013-GTP-Survey.pdf.

[59] PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 15 (2009).

of fact, the number of countries which have transfer pricing documentation guidelines and regulations are increasing exponentially[60].

Considering the tendency of countries to introduce transfer pricing documentation requirements, transfer pricing documentation requires legal consideration. Until recently transfer pricing documentation had been considered only as an economical issue and the legal scope of it was not considered. However, the development of regulations and cases with respect to transfer pricing documentation now requires systematic legal consideration.

Therefore, my primary purpose in this thesis is to analyze and highlight the legal deliberations of transfer pricing documentation, rather than the economical ones. In order to accomplish the purpose of this thesis, it seeks to provide responses to the following research question: What are the transfer pricing documentation requirements and the burden of proof and penalty provisions for international, supranational and different national practices and what are their legal considerations such as the legislation, literature and case law?

III. Research Limitations and Thesis Outline

1. Research Limitations

Transfer pricing is a dynamic area of taxation that has a four-stage lifecycle[61] of planning, monitoring, documentation/compliance and audit defense. Companies should determine and develop their transfer pricing methods applicable to their international transactions in the planning phase. During the second phase to implement the chosen transfer pricing methods within the international company structure, MNE's then apply the transfer prices to the international transactions. During the third phase, MNE's must document their determinations for transfer pricing for compliance with the relevant country tax laws. During the final phase, MNE's must defend their determinations for transfer pricing in the event they are audited.

Although there are four different phases, this thesis is limited to analysis of the third phase of transfer pricing pertaining to documentation. Nevertheless, this thesis also first examines some broader concepts relating to documentation, such as transfer pricing, the arm's length principle, comparability analysis. It should be noted that transfer pricing is such a broad

[60] U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS, U.N. PRACTICAL MANUEL ON TRANSFER PRICING, at 269, U.N. Doc. ST/ESA/347 (2013).

[61] Mark Bronson, Michelle Johnson & Kate Sullivan, *Overview/Best Practices in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 6 (A. Michael Heimert & Michelle Johnson eds., 2010).

concept that the economic and technical part of the transfer pricing will not be examined within the scope of this thesis. For this reason, other concepts defined under the Introduction section of this thesis will not be explained in the following chapters unless it is necessary.

As already discussed above, the international, supranational and national transfer pricing documentation practices will be examined in this thesis. Examination of international practices is limited to the OECD and PATA, because both of them are adhered to by considerably important countries. For example, Member States of PATA are U.S., Australia, Japan, Canada and the OECD has 35 Member States. Additionally, the OECD has recently developed action plans to address tax base erosion and profit shifting and one of the action plans is to re-examine transfer pricing documentation. Therefore, the most recent development in the international area on transfer pricing documentation will be included in this thesis.

As a supranational practice, the EU transfer pricing documentation rules are examined because they have crucial importance for both the EU Member States and also non-Member States as long as it offers a two-tiered documentation system similar to the newly finalized transfer pricing guidance prepared by the OECD. This thesis argues that EU transfer pricing documentation rules may have effect on the OECD transfer pricing documentation guidance.

Different national transfer pricing documentation practices are also examined in this thesis, but limited to the U.S., Germany and Sweden. I included the U.S. in my thesis, because transfer pricing documentation historically developed in the US. Germany is also included in this thesis because of the important court decision with respect to transfer pricing documentation which caused amendment to transfer pricing documentation legislation in Germany, as well as the great influence that German taxation legislation has had on the implementation of Turkish tax laws. Finally, I also include Sweden in the scope of this thesis because of the similarity of its regulatory provisions and delegation of powers for transfer pricing documentation with Turkey.

I would like to clarify that I have separated my analysis of transfer pricing documentation practices in Turkey from the other national practices in a separate chapter, because I this thesis is mainly concerned with relevant Turkish legislation and literature. If Turkey were also included in the national practices chapter, it would be non-consistent with the structural organization of other analytical content. For this reason, I have decided to examine Turkey in more detail in a separate chapter.

During the course of my research, I did not encounter any literature on the legal grounds of transfer pricing documentation in Turkey. In order to fill this significant gap in the literature, this thesis discusses in detail the legal nature of transfer pricing documentation under Turkish legislation. Based on this new research, this thesis highlights some serious constitutional concerns about Turkish transfer pricing documentation legislation by identifying the unconstitutionality of certain rules.

2. Outline

This thesis is divided into six main chapters: (1) Introduction, (2) Historical Background, (3) Current Worldwide Transfer Pricing Documentation Practices, (4) Current Turkish Transfer Pricing Documentation Practice, (5) Future Practices on Transfer Pricing Documentation: BEPS Action Plan and (6) Conclusion. In the Introduction chapter, descriptive information is given so that the reader will have better understanding of the subject matter of transfer pricing. The Introduction Chapter 1 includes discussion of the OECD Guidelines, statistics and hypothetical examples to clarify the basics of transfer pricing. The purpose, research limitations, methods and materials are also discussed in the Introduction.

In the Historical Background Chapter 2, I discuss the inception of transfer pricing documentation legislation in the U.S., the development of relevant case law and legislation in Germany and finally the internationalization of transfer pricing documentation requirements by the OECD. Essentially, the Historical Background chapter explores the evolution process of the transfer pricing documentation requirements.

The current worldwide transfer pricing documentation practices are then examined in Chapter 3. This chapter is divided to three parts. The first part examines international transfer pricing documentation practices, especially relating to the OECD and PATA. The second part examines the supranational transfer pricing documentation practice of the EU. The last part focuses on the national practices of the U.S. and Sweden. In all three parts, the general issues of transfer pricing documentation, documentation requirements, the burden of proof and penalties are examined within the scope of the research objectives of this thesis.

In Chapter 4, current Turkish transfer pricing documentation legislation is examined in detail. I first examine the legal nature of transfer pricing documentation under Turkish legislation before focusing on the general issues of transfer pricing documentation, documentation requirements, the burden of proof and penalties. Based on this analysis I then discuss the

unconstitutionality concerns about current rules and the current draft amendments to the legislation. Chapter 4 concludes with my proposals for more effective and standardized transfer pricing documentation requirements under Turkish tax legislation.

In Chapter 5 I examine the new transfer pricing documentation report finalized by the OECD within the scope of BEPS Action Plan 13. I discuss the development process of the BEPS Action Plan 13 until the report was finalized. Under the development process, I introduce the comments on the Discussion Draft on Transfer Pricing Documentation and Country by Country ("CBC") Reporting ("Discussion Draft") and also the countries' implementations of the newly finalized transfer pricing documentation guideline.

IV. Methods and Materials

I encountered some difficulties to find published materials directly relevant to transfer pricing documentation. I therefore focused my research on the documentation sections in the transfer pricing materials. During this research, I conducted a literature review for each country included in my thesis to understand the basis of transfer pricing documentation.. I also conducted research on all relevant legislation and case-law. For countries where English is not a first or official language (such as Germany and Sweden), I used the transfer pricing reports and other materials translated into English.

Due to the research focus on the OECD guidance and action plan on transfer pricing documentation, this thesis relies heavily on OECD publications such as reports, guidelines, etc. For example, analysis of the Turkish transfer pricing legislation makes reference to the OECD guidelines. Therefore, without including the OECD guidelines, this Thesis would be incomplete.

As a comparative study, this thesis includes extensive cross-references between chapters to discuss the similarities and differences between legislations in different country jurisdictions with respect to the transfer pricing documentation.

§2. HISTORICAL BACKGROUND

I. The Birth of Transfer Pricing in 1917: The United States

Transfer pricing is one of the oldest tax issues for international companies and has been used for manipulative purposes to avoid taxation since modern income tax systems were established[62]. For this reason, countries are committed to regulate this area to avoid tax base erosion occurring in their jurisdictions. The early transfer pricing regulation was enacted by the U.S. in Regulation 41, Articles 77 and 78 of the War Revenue Act of 1917[63]. These Articles state that companies must submit information related to transactions realized by their affiliates to the Commissioner of Internal Revenue in order to prove that the tax amount is proper on the basis of equitable and lawful accounting. It also gave the Commissioner of Internal Revenue the authority to require related companies to file consolidated returns *"whenever necessary to more equitably determine the invested capital or taxable income"*[64].

A few years later, the earliest direct predecessor of Section 482 of Internal Revenue Code was enacted in 1921 and gave the authority to the Commissioner of Internal Revenue "*for the purpose of making an accurate distribution or appointment of gains, profits, income, deductions or capital between or among such related trades or business*[65]*"*. In 1928, the mentioned provision was moved to the Section 45 of the Revenue Act[66]. Although the wording of the provision remained unchanged, in 1954, Section 45 was moved to Section 482 of Internal Revenue Code[67].

Before the U.S. enacted any specific transfer pricing documentation requirements, the very first transfer pricing documentation case was decided in 1983 referred to as the Toyota case[68]. The Internal Revenue Service ("IRS") audited Toyota Motor Sales, U.S.A., Inc. ("Toyota U.S.A.") with respect to the transfer pricing legislation for transactions realized with Toyota

---

[62] REUVEN S. AVI-YONAH, *The Rise And Fall Of Arms's Length: A Study In The Evolution Of U.S. International Taxation*, (Law&Economics Working Papers Archive: 2003-2009), 3, available at http://repository.law.umich.edu/law econ archive/art73 [hereinafter *The Rise And Fall Of Arms's Length*].
[63] *Id.*
[64] War Revenue Act, U.S.C.(1917), available at *The Rise And Fall Of Arms's Length,* 3.
[65] *The Rise And Fall Of Arms's Length*, *supra* note 62, at 3.
[66] JENS WITTENDORFF, TRANSFER PRICING AND THE ARM'S LENGTH PRINCIPLE IN INTERNATIONAL TAX LAW, (Richard Doernberg et al. eds., 2010) Vol.35, at 13. [hereinafter TRANSFER PRICING AND THE ARM'S LENGTH PRINCIPLE].
[67] *Id.*
[68] United States v. Toyota Motor Corporation, et al., No. CV 83-0687-CHH, 1983 U.S. Dist. LEXIS 17859 (Apr. 8, 1983), *in* Robert Feinschreiber&Margaret Kent, *Pacific Tax Administrators Coordinate Transfer Pricing Documentation*, 9 CORP. BUS. TAX'N MONTHLY 23 (2007).

Motor Corporation ("Toyota Japan"). The IRS agreed that Toyota U.S.A. shifted its profits to Toyota Japan without providing necessary documents to substantiate the assertions of the IRS. For this reason, the IRS issued court summons to both Toyota U.S.A. and Toyota Japan to obtain the transfer pricing documentations. Toyota Japan raised several objections and primarily argued that the IRS did not have jurisdiction over Toyota Japan. Finally, the court decided as follows: *"In this case, Toyota U.S.A is the managing agent of Toyota Japan, as it has full marketing responsibility for sales of Toyota Japan's products in the United States. In general, the managing agent for this purposes of service of process is that person or entity in charge of those activities within the state which justify the exercise of personal jurisdiction over the defendant. Accordingly, the enforcement petition was validly served on Toyota Japan through its marketing subsidiary"*[69]. As a result, the summons was upheld to compel Toyota U.S.A. and Toyota Japan to attend court[70].

Following the above mentioned case[71] the IRS brought a second case to determine whether this decision to uphold the summons was enforceable by the IRS. The court held in its decision that the summons was enforceable and the IRS requested the related transfer pricing documents. However, Toyota Japan did not submit the documents on the grounds that the documents had already been destroyed. Despite the favorable court decisions, the IRS did not receive sufficient information as well as spending considerable amount of time and money for the proceedings[72]. As a result, the IRS needed a legislative solution on the transfer pricing documentation issues with respect to cross-border transactions[73].

In 1992, the IRS initiated its "Compliance 2000" strategy which aimed to improve the voluntarily compliance of tax payers rather than focusing on tax audits in order to increase U.S. revenue for a short term[74]. Within the scope of the Compliance 2000 strategy, an amendment was made to Section 482 regulations to consider the enactment of documentation

[69] United States v. Toyota Motor Corporation, et al., No. CV 83-0687-CHH, 561 F. Supp. 354, 1983 U.S. Dist. LEXIS 1785, at 8 (Apr. 8, 1983), see *in* Robert Feinschreiber&Margaret Kent, *Pacific Tax Administrators Coordinate Transfer Pricing Documentation,* 9 CORP. BUS. TAX'N MONTHLY 23 (2007).
[70] Robert Feinschreiber&Margaret Kent, *Pacific Tax Administrators Coordinate Transfer Pricing Documentation,* 9 CORP. BUS. TAX'N MONTHLY 23, 24 (2007).
[71] United States v. Toyota Motor Corporation, et al., No. CV 83-0687-CHH, 569 F. Supp. 1158, 1983 U.S. Dist. LEXIS 16085, (June 21, 1983), see *in* Robert Feinschreiber&Margaret Kent, *Pacific Tax Administrators Coordinate Transfer Pricing Documentation,* 9 CORP. BUS. TAX'N MONTHLY 23 (2007).
[72] Robert Feinschreiber&Margaret Kent, *Pacific Tax Administrators Coordinate Transfer Pricing Documentation,* 9 CORP. BUS. TAX'N MONTHLY 23, 24 (2007).
[73] *Id.*
[74] IRS News Releases, IR-92-71, http://www.unclefed.com/Tax-News/1992/Nr92-71.html.

requirements for transfer pricing [75]. It should be noted that the documentation requirements became a legal issue for consideration as a result of the Toyota cases[76].

In 1993, the proposed Section 6662 of Internal Revenue Code regarding circumstances of non-compliance with Section 482 was introduced to U.S. tax law and enacted in 1996[77]. Section 6662 regulated the first transfer pricing documentation requirements in U.S. tax law in history and introduced penalty rules, documentation requirements and rights to relief from such penalties in case of compliance with the documentation rules[78].

Interestingly, although transfer pricing legislation had been enacted in the U.S. legal since 1917, no documentation legislation was introduced until 1996, i.e. any transfer pricing documentation rules had not been enacted nearly for 80 years. This fact shows that the evolution of transfer pricing documentation did not develop in line with the evolution of transfer pricing legislation.

II. Follow up in 1925: Germany

After the first transfer pricing regulation was introduced by the U.S. in 1917, Germany was the second country to enact transfer pricing regulation in the German Income Tax Act in 1925[79]. The primary purpose of Germany was considerably the same as the U.S which was to prevent profit shifting to abroad[80]. For that purpose, Germany introduced Section 33 to the Income Tax Act in 1925, which states that the profits derived from a transaction realized under special agreements should be in line with the profits as if it was derived from transactions comparable or similar in nature[81].

However, Section 33 did not include any provisions for transfer pricing documentation requirements. After the very first transfer pricing regulation, several amendments were subsequently made in German tax legislation and transfer pricing provisions were added to

[75] TRANSFER PRICING AND THE ARM'S LENGTH PRINCIPLE, *supra* note 66, at 49.
[76] Robert Feinschreiber & Margaret Kent, *Pacific Tax Administrators Coordinate Transfer Pricing Documentation,* 9 CORP. BUS. TAX'N MONTHLY 23, 24 (2007).
[77] Mark Madrian, *United States in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 6 (A. Michael Heimert & Michelle Johnson eds., 2010).
[78] *Id.*
[79] Andreas Oestreicher, *Transfer Pricing in Germany in* RESOLVING TRANSFER PRICING DISPUTES A GLOBAL ANALYSIS, (Eduardo Baistrocchi & Ian Roxan eds., 2015), at 194.
[80] *Id.*
[81] *Id.* at 194-195.

German General Tax Code. Despite these amendments and addendums, Germany did not introduce any transfer pricing documentation regulations until recently.

German tax authorities issued draft transfer pricing documentation regulations in 2000 to strengthen the transfer pricing requirements[82]. The German Federal Tax Court then ruled[83] in 2001 that the burden of proof for tax payers' failure to prove that they acted in line with arm's length principle was on the tax authority unlike draft German transfer pricing documentation regulation suggested[84]. Therefore, the draft regulations were not enacted until 2003, when the transfer pricing documentation regulations were introduced by Section 90(3) of the German General Tax Code[85]. Consequently, the need for transfer pricing documentation legislation was finally triggered by the decision of German Federal Tax Court.

III. Internationalization in the 1960's: The OECD

The OECD was established in 1961 to form strong economic relationships among its Member States and contribute the development of both industrialized and developing countries[86]. In 1963, the OECD published the Draft Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital[87] (the "OECD Model Convention"). With this Draft Convention, the OECD introduced several Articles in order to prevent double taxation and one of those articles was Article 9 concerning associated enterprises. Article 9 of the Draft Convention, which incorporates the arm's length principle for transactions realized between associated enterprises, has remained unchanged and stands identically in the current OECD Model Convention.

The OECD finalized the Draft Convention in 1977 and published the OECD Model Convention [88] with the contribution of the U.S. As being the first country which adopted transfer pricing regulations, the U.S. targeted a campaign to internationalize transfer pricing

---

[82] Sven C. Bremer and Gerhard Engler, *Tightening of the German Transfer Pricing Documentation Requirements*, INT'L L. J., Vol. 30 Issue 2, March 2004, at 17, 17.

[83] Judgement of Oct. 17, 2001, BFH [Supreme Tax Court], IR 103/00 (F.R.G.) *in* Alexander Vögele&William Bader, *New Deal For German Transfer Pricing*, 13 INT'L TAX REV. 22 (2002).

[84] Angelika Thies, *Germany in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 8 (A. Michael Heimert & Michelle Johnson eds., 2010).

[85] *Id.*

[86] Jonathan Lubick, *OECD Guidelines in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 3 (A. Michael Heimert & Michelle Johnson eds., 2010).

[87] TRANSFER PRICING AND THE ARM'S LENGTH PRINCIPLE, *supra* note 66, at 96.

[88], I-2.

regulations and supported the OECD to adopt regulations in line with the U.S. regulation[89]. Although transfer pricing issues were not directly mentioned in the Articles of the OECD Model Convention, the Committee on Fiscal Affairs wanted to focus on transfer pricing issues and therefore the Commentary of Article 9 of OECD Model Convention states the following:

> "*The Committee has also studied the transfer pricing of goods, technology, trademarks and services between associated enterprises and the methodologies which may be applied for determining correct prices where transfers have been made on other than arm's length terms, its conclusions, which are set out in the report entitled "Transfer Pricing and Multinational Enterprises", represent internationally agreed principles and provide valid guidelines for the application of the arm's length principle which underlines the Article*[90]*."*

Although transfer pricing was discussed in the OECD Model Convention Commentary, there were not any guidelines or requirements with respect to transfer pricing documentation until the OECD TP Guideline was issued in 1995. The OECD TP Guideline mainly focused on the operation of the arm's length principle with regard to transfer pricing of MNE's. In addition, the OECD TP Guideline aimed to help both tax administrations and MNE's in terms of transfer pricing[91].

Following the first introduction of the transfer pricing requirements by the U.S., those requirements have spread around the world rapidly including the adoption by the OECD. Not only in the OECD, but also in different jurisdictions, transfer pricing documentation requirements became one of the most important tax issues for both tax payers and tax administrations[92]. In fact, due to the existence of MNE relations, the issue became a global one. For that reason, the OECD published the OECD TP Guideline to enable the enforcement of uniformed international transfer pricing documentation requirements at least for the Member States.

The OECD also regulated the subject of documentation in Chapter V of the OECD TP Guideline. This section includes general information regarding transfer pricing documentation, explanations on the burden of proof, general guidance on transfer pricing

---

[89] J.H. Guttentag & T. Miyatake, *in* ESSAYS ON INTERNATIONAL TAXATION, (H.H. Alpert & K. Van Raad eds., 1993) 166, 169.
[90] *OECD Model Tax Convention*, *supra* note 39, at C(9)-6.
[91] *OECD TP Guideline*, *supra* note 11, at Preface.
[92] *Public Consultation White Paper On Transfer Pricing Documentation*, OECD (2013), 4, http://www.oecd.org/ctp/transfer-pricing/white-paper-transfer-pricing-documentation.pdf [hereinafter *OECD Transfer Pricing Documentation White Paper]*.

documentation requirements and a summary of the transfer pricing documentation recommendations. However, current documentation requirements in the OECD TP Guideline are not sufficient to meet the expectations of the rapidly globalized economy. If it is considered that the first OECD TP Guideline was issued 20 years ago, the inefficiency of current transfer pricing documentation requirements is evident. There is no doubt that 20 years ago both tax administrations and tax payers had less experience than today regarding the requirement of transfer pricing documentation[93.]

In 2010, the Committee on Fiscal Affairs revised the OECD TP Guideline, however, did not revise Chapter V of the Guideline. Nevertheless, in the last sentence of Chapter V it is stated that *"the Committee on Fiscal Affairs intends to study the issue of documentation further to develop additional guidance that might be given to assist tax payers and tax administrations[94]".* Therefore, even though Chapter V was not revised in 2010, it was stated that the revision of the documentation provisions would be considered.

In November 2011, the Working Party No.6 of the Committee on Fiscal Affairs approved a program which focused on simplifying transfer pricing including the documentation requirements[95].

In addition, the G20 finance ministers called on the OECD to develop an action plan to address the Base Erosion and Profit Shifting ("BEPS") including but not limited to transfer pricing documentation. For this reason, the OECD published the BEPS Action Plan on 19 July 2013 to identify actions needed to address BEPS, set deadlines to implement these actions and identify the resources needed and the methodology to implement these actions[96]. BEPS Action Plan includes 15 different Action Plans to be taken in order to prevent BEPS. One of those Actions is Action 13 on transfer pricing documentation. Action 13 states that *" (...) develop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNE's provide all relevant governments with*

[93] *Id.*
[94] *OECD TP Guideline*, *supra* note 11, at 189.
[95] *OECD Transfer Pricing Documentation White Paper*, *supra* note 92, at 1.
[96]OECD, *Action Plan on Base Erosion and Profit Shifting*, (2013), 11, https://www.oecd.org/ctp/BEPSActionPlan.pdf [hereinafter *OECD BEPS Action Plan]*.

needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template[97].

Following the publication of the BEPS Action Plan, the Working Party No. 6 prepared a White Paper on Transfer Pricing Documentation and published it on 30 July 2013 to discuss the current transfer pricing documentation requirements, consider their purposes and objectives, provide suggestions regarding to transfer pricing documentation requirements to be modified in order to make transfer pricing compliance easier and more direct, as well as provide useful information for tax administrations[98]. The White Paper on Transfer Pricing Documentation was published as open to public consultation in order to enable global conversation on how transfer pricing documentation rules could be improved, standardized and simplified[99].

After detailed studies, the OECD published a Discussion Draft[100] on 30 January 2014. In the Discussion Draft, it was proposed to delete the current transfer pricing documentation requirements entirely and replace them with the drafted transfer pricing documentation requirements. The Discussion Draft was also published as open to public consultation. In the Discussion Draft the most recognizable change was a two-tiered approach to transfer pricing documentation as master file and local file. However, after considering public comments and discussions, the OECD finally published the Guidance on Transfer Pricing Documentation and Country-by-Country Reporting[101] on 16 September 2014 and introduced a three-tiered approach on transfer pricing documentation as master file, local file and country-by-country reporting.

In 2015, the OECD published implementation guidance regarding transfer pricing documentation. The Guidance on the Implementation of Transfer Pricing Documentation and Country-by Country Reporting was published on 6 February 2015 and Country-by-Country Reporting Implementation Package was published on 8 June 2015. As a result of 2 years of work, the OECD published its Final Report on Transfer Pricing Documentation and Country-by-Country Reporting ("Final Report") on 5 October 2015.

---

[97] *Id.*, at 23.
[98] *OECD Transfer Pricing Documentation White Paper*, *supra* note 92, at 1-4.
[99] *Id.*
[100] OECD, *Discussion Draft On Transfer Pricing Documentation and CbC Reporting* (2014), https://www.oecd.org/tax/transfer-pricing/discussion-draft-transfer-pricing-documentation.pdf [hereinafter *Discussion Draft]*.
[101] OECD, *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*, OECD/G20 Base Erosion and Profit Shifting Project (2014), https://www.oecd.org/ctp/beps-action-13-guidance-implementation-tp-documentation-cbc-reporting.pdf *[hereinafter Guidance on Transfer Pricing Documentation]*.

§3. CURRENT WORLDWIDE TRANSFER PRICING DOCUMENTATION PRACTICES

As discussed above, transfer pricing is one of the oldest tax issues for MNE's that has been regulated since 1917. Therefore, since the beginning of the 1900's almost all major economies have implemented transfer pricing regulations in order to prevent base erosion in their tax jurisdictions[102]. In addition to transfer pricing regulations, countries also began to adopt transfer pricing documentation rules as a way of proving that MNE's determine their transfer prices in line with the arm's length principle. For cases of non-compliance, countries also intend to adopt adjustment and penalty provisions. Despite some similarities, each country has its own transfer pricing and transfer pricing documentation requirements. In the following section of this thesis, the differences and similarities of the current transfer pricing documentation requirements of different tax jurisdictions will be examined.

I. International Practices

1. The OECD

a. In General

Chapter V of the OECD TP Guideline provides general guidance regarding transfer pricing documentation for both tax administrations and tax payers to minimize conflicts and compliance costs. For this reason, Chapter V provides guidance to tax administrations while developing transfer pricing documentation rules which will be obtained from tax payers during a tax inspection. On the other hand, Chapter V also shows guidance to tax payers in order to prepare necessary documents to show that they act in line with the arm's length principle in their transactions realized with their associated enterprises[103]. With this guidance, the goal of the OECD is to create a level of cooperation between tax administrations and tax payers[104].

The OECD TP Guideline clarifies that Chapter V does provide a minimum compliance requirement nor an exhaustive list of information that a tax administration may request[105]. It should be noted that the documents and information which should be provided may depend on

[102] PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 20 (2009).
[103] *OECD TP Guideline*, *supra* note 11, at 181.
[104] PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 14 (2009).
[105] *Id.*, at 186.

each concrete case. Therefore, it is not possible to define general documentation which will be suitable for all cases and may be provided to tax administrations in the event of a tax inspection. Nonetheless, the OECD TP Guideline accepts that there are certain common features in transfer pricing cases[106]. Thus, Chapter V intends to give general guidance both to tax administration and tax payers.

Throughout Chapter V, the OECD follows "the prudent business principle". According to that principle, the right of the tax authorities to require certain information with regard to the transfer pricing documentation should be balanced with the compliance costs of the tax payers by producing the documentation[107]". Therefore, the OECD insists that documentation requirements should be balanced by the costs and administrative burdens imposed by tax administrations.

b. Documentation Requirements

The OECD TP Guideline emphasizes that a tax payer should determine transfer pricing in line with the arm's length principle based on the information *"reasonably available"* at the time of the determination of the transfer price[108]. However, the OECD TP Guideline does not provide any definition as to what "*reasonably available"* means; instead it gives practical examples to clarify the requirements. It is stated that it would be reasonable for a tax payer if he/she tries to make a determination on whether comparable data from uncontrolled transactions are available[109]. However, the OECD TP Guideline underlines that the documents which are not available at the time the transfer pricing was established, cannot be requested from the tax payer[110]. In addition, tax payers should not be obliged to provide documents which are not in their possession[111]. For example, where the tax payer is only a minority shareholder of its foreign affiliate, the document which is requested should be in the possession of the tax payer, or at least it should be provided by its affiliate.

The documentation storage process and language preferences are left to the tax payers' decision in the OECD TP Guideline[112]. Moreover, the OECD TP Guideline suggests that whichever language is preferred by the tax payer, the documents should be translated upon

[106] *Id.*
[107] PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 20 (2009).
[108] *OECD TP Guideline*, *supra* note 11, at 181.
[109] *Id.*, at 182.
[110] *Id.*, at 184.
[111] *Id.*
[112] *Id.*, at 182.

reasonable request of the tax administration[113]. However, the operational meaning of *"reasonable request"* is not clarified by the OECD TP Guideline and interpretation is left to the tax administrations.

The OECD's concern is focused on the timely submission of the documents when requested by the tax administration. The OECD suggests, however, that there should be no contemporaneous documentation obligation at the time of the transfer price is determined or the tax return is filed[114]. The OECD believes that requiring all documents at the stage of all realizing transactions between associated enterprises would be burdensome and it may have negative effects on international trade and foreign investment[115].

Regarding the retention period of the documents, the OECD suggests that the retention of transfer pricing documents should be consistent with retention requirements for other similar type of documents in domestic law[116]. In addition, the OECD states that even if such documents are retained by the tax payer after the retention period, those documents should not be subject to request by the tax administrations.

Within the scope of this general guidance, the OECD identifies which documents are useful for determining the transfer price. First of all, information regarding the transactions realized between associated enterprises should be included, such as "*the nature and terms of the transaction, economic conditions and property involved in the transactions, how the product or service that is subject of the controlled transaction in question flows among the associated enterprises and changes in trading conditions or negotiations of existing arrangements*[117]". The OECD states that information regarding the associated enterprises involved in the transactions may also be useful. This information is defined as follows[118]:

a) *An outline of the business,*
b) *The structure of the organization,*
c) *Ownership linkages within the MNE group,*
d) *The amount of sales and operating results from the last few years preceding the transaction,*

[113] *Id.*, at 183.
[114] *Id.*, at 182.
[115] *Id.*
[116] *Id.*, at 183.
[117] *Id.*, at 186.
[118] *Id.*

e) *The level of the taxpayer's transactions with foreign associated enterprises, for example the amount of sales of inventory assets, the rendering of services, the rent of tangible assets, the use and transfer of intangible property, and interest on loans.*

It should be noted that this is the only list provided by the OECD TP Guideline for transfer price documentation. The OECD also recommends that the taxpayer should provide information about business strategies and special circumstances, such as details of set-off transactions, management strategies[119]. In addition, the OECD TP Guideline recommends that tax payers provide information on functions performed, risk assumed, financial information, information in the possession of the foreign associated enterprise, and documents that show the negotiation process[120].

c. Burden of Proof

Burden of proof is an important element for both tax administrations and tax payers with respect to transfer pricing documentation obligations. Each jurisdiction may have their own burden of proof rules and therefore documentation obligations in the respective jurisdiction may be affected accordingly. In most jurisdictions the tax administration bears the burden of proof[121]. It means that tax administrations have the obligation to prove that the tax payer's transfer pricing is not in line with the arm's length principle. In other words, the tax payer does not have to prove the correctness of the documents submitted to the tax administration with regard to their transfer pricing determination. However, even though the OECD TP Guideline states that the burden of proof is on the tax administration, the tax payer should prove the correctness of documentation when there is a *prima facie* indication showing that the transfer pricing is inconsistent with the arm's length principle [122].

In addition, if the tax payer does not provide adequate documentation, the burden of proof may shift from the tax administration to the tax payer[123]. In any case, the OECD TP Guideline states that both tax administrations and tax payers should act in good faith proving that the determination of the transfer price is in line with the arm's length principle.

[119] *Id.*, at 187.
[120] *Id.*, at 187-188.
[121] *Id.*, at 181.
[122] *Id.*
[123] *Id.*

In terms of case law precedent, the Netherlands Supreme Court Decision and the decree issued upon the decision are proper examples that support the view that the burden of proof may shift under the OECD TP Guideline.

In the Dutch Supreme Court Case[124], a Japanese parent company sold its products to its subsidiary operating in the Netherlands which distributed those products. The Dutch subsidiary sold certain products with a loss while the other products were sold with profit. The transfer pricing determined for transactions realized with the Dutch subsidiary was set by the Japanese parent company without open negotiation. The Dutch tax administration challenged the arm's length nature of the transfer pricing on the grounds that by selling those products, the Dutch subsidiary made no profit and a third party would not accept such transactions under those circumstances. The High Court held that the tax administration had the burden of proof and it failed to prove that third party distributors would not enter into such transactions under review. The Supreme Court upheld the decision of the High Court and emphasized that the burden of proof is on the tax administration even if the tax payer reports a profit margin that is relatively low and different from the market average[125]. Therefore, the case was resolved in favor of the tax payer.

Following the Supreme Court Decision, in 13 September 2002, the State Secretary of Finance issued a decree. The Decree[126] stipulated that tax payers had the obligation to maintain certain transfer pricing documentation requirements and if these requirements were not met by the tax payer, the burden of proof on the tax administration was ultimately shifted to the taxpayer. Therefore, the Dutch transfer pricing case law and tax legislation show that the OECD TP Guideline is properly adhered to regarding the transfer pricing documentation requirements.

d. Penalties

Under Chapter V of the OECD TP Guideline, the penalties for non-compliance are not stated specifically. However, Chapter IV titled "Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes" considers the administrative procedures that can be

[124] Supreme Court, 28 June 2002, No:36 446 (Neth.) *in* PWC, International Transfer Pricing 2013/14 Report, 2013, at 625, http://www.pwc.com/gx/en/international-transfer-pricing/assets/itp-2013-final.pdf.
[125] PWC, International Transfer Pricing 2013/14 Report, 2013.
[126] IFZ 2002/830M *in* PWC, International Transfer Pricing 2013/14 Report, 2013.

applied to minimize the transfer pricing disputes and to resolve any disputes between tax payers and tax administrations[127]. Chapter IV also stipulates the penalty provisions.

The OECD TP Guideline ensures that non-compliance is more costly than compliance[128]. Therefore, the primary purpose of the penalties can be considered as promoting compliance with the transfer pricing requirements. It should be noted that each country has its own penalty practices and policies and for this reason, special care should be taken in comparing different national penalty practices and policies. First of all, in different countries there may be different wording to express the exact same penalty. Secondly, each country has its own overall compliance measures[129].

Countries have number of different types of penalties. Penalties can be classified as either civil or administrative penalties. Civil or administrative penalties are more common across different jurisdictions and they typically function as monetary sanctions. In addition, countries may adopt non-monetary sanctions such as shifting the burden of proof in cases of the non-compliance with the transfer pricing requirements. As discussed above, Chapter V of the OECD TP Guideline states that the burden of proof can shift from tax administrations to tax payers under some circumstances. This provision can be classified as a non-monetary penalty provision.

The OECD TP Guideline recommends several times to tax administrations that the penalty imposed should be proportional with the non-compliance act[130]. It means that the penalty imposed on the tax payer should neither be inadequate nor excessive. The OECD TP Guideline also recommends that the good faith of the tax payer should always be considered if the tax payer shows reasonable effort to determine the transfer pricing in line with the arm's length principle[131].

Although the OECD TP Guideline does not include special penalty provisions, Chapter IV includes a type of penalty "road map" for both tax administrations and tax payer about the recommended penalty provision.

[127] *OECD TP Guideline*, *supra* note 11, at 131.
[128] *Id.*, at 136.
[129] *Id.*, at 137.
[130] *Id.*, at 138.
[131] *Id.* at 139.

2. Pacific Association of Tax Administrators ("PATA")

a. In General

PATA was established as an inter-governmental tax organization in 1980 to prevent the base erosion of transnational corporations ("TNCs") through transfer pricing and tax havens[132]. The members of PATA are Australia, Canada, Japan and the United States. Although the primary purpose of PATA at the time of its establishment was to prevent the base erosion, in recent years the aim of PATA has changed and focused more on providing guidance to TNCs[133]. Therefore, within the scope of the updated aim of PATA, it released a draft on the Transfer Pricing Documentation Package in 2002 open to comments from interested parties. Upon receiving comments from the related parties, PATA released the final version of the Transfer Pricing Documentation Package on 12 March 2003. On the same day, the IRS, which is the tax administration of the United States, announced that PATA finalized a Transfer Pricing Documentation Package ("PATA Documentation Package") to reduce the taxpayer's documentation burden and prevent the imposition of documentation-related penalties[134].

The PATA Documentation Package prevents the imposition of documentation-related penalties and provides for uniform transfer pricing documentation requirements. Meeting the requirements provided by the PATA Documentation Package also means meeting the domestic documentation requirements in Australia, Canada, Japan and the United States at the same time[135]. In other words, if a tax payer in one of the Member States meets all the requirements provided by the PATA Documentation Package, the tax payer will be deemed to satisfy the transfer pricing documentation requirements in all other Member States. As a result of compliance with the PATA Documentation Package requirements, MNE's will avoid the documentation-related penalties which could be imposed in PATA Member States[136]. However, meeting these uniform requirements does not prevent transfer pricing adjustments being made by the tax administrations of the Member States.

---

[132] Susan C. Borkowski, *The history of PATA and its effect on advance pricing arrangements and mutual agreement procedures*, J. INT'L ACCT., AUDITING & TAX'N 17, 31 (2008) [hereinafter *History of PATA]*.
[133] *Id.* at 32.
[134] I.R.S. News Release IR-2003-32 (Mar. 12, 2003), https://www.irs.gov/uac/pacific-association-of-tax-administrators-finalizes-transfer-pricing-documentation.
[135] *Transfer Pricing Documentation Package*, PAC. ASS'N TAX ADMIN. (Mar. 12, 2003), https://www.nta.go.jp/kohyo/katsudou/shingi-kenkyu/kokusai020617/pdf/01.pdf [hereinafter *Documentation Package*].
[136] *Id.*

It is stated that the PATA Documentation Package is not intended to impose greater documentation requirements than those applied in local laws of the Member States. As a matter of fact, the PATA Documentation Package aims to prevent the documentation difficulties faced by MNE's which operate in different jurisdictions[137]. Therefore, by preparing only one uniform set of documents for Australia, Canada, Japan and the United States, MNE's will not face *"potentially costly duplicative requirements[138]"*.

PATA states that the PATA Documentation Package is deemed to be consistent with Chapter V of the OECD TP Guideline[139]. Whether the PATA Documentation Package is consistent with the OECD TP Guideline or not will be discussed in §3.I.2.b of this thesis.

According to a study conducted by Ernst & Young in 2003 regarding awareness of the PATA Documentation Package, only one-half of parent companies and one-third of subsidiaries in PATA Member States were aware of the PATA Documentation Package[140]. Although they were aware of the PATA Documentation Package, only 9% of American parent companies, 16% of Canadian parent companies, 28% of Australian parent companies and 4% of Japanese parent companies were planning to use the Package[141]. According to another study undertaken in 2006 regarding awareness of the PATA Documentation Package, the increase was only marginal for Australian MNE's (5.3%) and Japanese MNE's (1%)[142]. On the other hand, awareness by Canadian MNE's had decreased significantly by 16% and 5.4% by American MNE's[143].

It should be noted that although there was official recognition of the PATA Documentation Package by the Canadian Revenue Agency ("CRA") with the transfer-pricing memorandum (TPM)-07[144], a decrease in the adoption of the PATA Documentation Package by Canadian MNE's could not be prevented. The memorandum states that *"When considering the application of transfer pricing penalties, auditors should be aware that taxpayers may choose to use the Pacific Association of Tax Administrators (PATA) Transfer Pricing Documentation Package in order to avoid the imposition of PATA member transfer pricing penalties with*

---

[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] Ernst&Young, *Transfer Pricing 2003 Global Survey: Practices, Perceptions, and Trends in 22 Countries Plus Tax Authority Approaches in 44 Countries*, 30 INT'L TAX J. 17 (2004).
[141] *Id.*
[142] *History of PATA, supra* note 132, at 44.
[143] *Id.*
[144] Canada Revenue Agency, Referrals to the Transfer Pricing Review Committee, TPM-07 (2005), http://www.transferpricing.com/pdf/CRA%20TPM-07.pdf.

respect to a transaction.[145]*"* Despite the encouragement of the CRA, the adoption of the PATA Documentation Package did not reach an adequate number due to the lengthy requirements[146].

b. Documentation Requirements

The PATA Documentation Package consists of three main operative principles which should be met in order to avoid transfer pricing documentation-related penalties in PATA Member State jurisdictions. *"First, MNE's need to make reasonable efforts, as determined by each PATA member tax administration, to establish transfer prices in compliance with the arm's length principle. Second, MNE's need to maintain contemporaneous documentation of their efforts to comply with the arm's length principle. Third, MNE's need to produce, in a timely manner, that documentation upon request by a PATA member tax administrator.*[147]*"*

According to the first principle, the tax payers should make *"reasonable efforts"* while determining their transfer pricing in line with the arm's length principle. It should be noted that the concept of *"reasonable effort"* is not defined under the PATA Documentation Package so that each tax administration of the PATA Member States can determine what the *"reasonable efforts"* mean according to their local laws. The efforts to determine the transfer prices should include analysis of controlled transactions and searches for comparable transactions between independent enterprises dealing at arm's length. In addition to these requirements, the tax payer can also undertake analysis of other studies, but the former analysis is deemed to be obligatory. Each transfer pricing method chosen by the tax payer should be consistent with each PATA Member State's transfer pricing rules as well as the OECD TP Guidelines[148].

The second principle states that the tax payer should contemporaneously document its efforts to comply with the arm's length principle. This provides the tax administrations with the ability to examine each transaction and consequently minimize tax controversies in transfer pricing area[149].

The PATA Documentation Package provides a list of documents that should be prepared and submitted by tax payers to the tax administration showing that their transfer prices are in line

[145] *Id.*
[146] *History of PATA, supra* note 132, at 44.
[147] *Documentation Package, supra* note 135, at 2.
[148] *Id.*
[149] *Id.*

with the arm's length principle. In order to avoid possible PATA member transfer pricing documentation-related penalties, the tax payer needs to maintain and timely submit upon request the documents covering; *"organizational structure, nature of the business/industry and market conditions, controlled transactions, assumptions, strategies, policies, cost contribution agreements, comparability, functional and risk analysis, comparability, selection of the transfer pricing method, application of the transfer pricing method, background documents, index to documents*[150]. Note that these 9 main types of documentation include subtitles, and in order to comply with the PATA Documentation Package, tax payers should prepare 48 sets of documents. In addition to these documents, the tax administration may also request additional documents than those listed if necessary. According to the PATA Documentation Package, it is stated that tax administrations should take into account the principles of the OECD Guidelines. For instance tax administration should not request a document which could be not reasonably be available at the time of the transfer pricing arrangement[151].

As the second principle requires contemporaneous documentation, it is stated that the documentation is contemporaneous if the tax payer prepares all of the stated 48 documents at the same time of the tax return submission[152].

The third and last principle regulates the timely production of documents that support compliance with the arm's length principle in determining the transfer pricing. Tax payers should timely prepare the documentation in accordance with the respective PATA Member States' tax laws. The timely production of documentation at the beginning of the tax audit is considered to be in the best interests of the tax payer, because it will assist the tax payer to prepare appropriate documentation[153].

The aim of PATA to unify the transfer pricing documentation requirements seems effective to reduce the burden of MNE's to prepare different set of documents in each jurisdiction that they operate. However, this is a simplistic view and there has been significant criticism and concerns that the Documentation Package actually increases the burden of MNE's due to heavy documentation requirements instead of reducing their burden.

[150] *Id.*
[151] *Id.* at 3.
[152] *Id.*
[153] *Id.* at 3.

When PATA released its draft on Documentation Package to receive comments from interested parties, they received some concerns. As one of the most influential groups, the Tax Executives Institute ("TEI") raised several concerns about the PATA Documentation Package. First of all, the TEI stated that although the PATA Documentation Package stated that the requirements were consistent with Chapter V of the OECD TP Guideline, it did not provide the same balance between the interest of tax administrations and the tax payer's cost burden of documentation requirements[154].

Another concern raised by the TEI related to the arm's length standards which were different in each PATA member jurisdictions. For example, a transfer pricing method may not be acceptable in Canada, while it was acceptable in Japan. Therefore, as long as there was no harmonization of transfer pricing rules for PATA members, uniform transfer pricing documentation rules were neither beneficial to tax payers nor did they reduce their documentation burdens[155]. The tax payer would still have to comply with all the different standards for the arm's length principle in different jurisdictions. For this reason, the TEI suggested to the PATA that they should emphasize the need for standardization of transfer pricing rules among PATA Member States and also coordination with the OECD Guidelines[156].

The PATA Documentation Package states that *"This PATA Documentation Package is not intended to impose legal requirements greater than those imposed under the local laws of PATA member."* In the draft PATA Documentation Package, tax payers were required to prepare 53 documents in total to satisfy the requirements, whereas this number was reduced to 48 documents in the final version of the PATA Documentation Package. This number of documents is still more extensive than the requirements in PATA Member States. For example, the Australian Taxation Office ("ATO") provides a list of 10 documents that should be prepared by the tax payer and the list is not exhaustive[157]. Similarly, U.S. regulation

[154] Tax Executive Institute, *Pacific Association of Tax Administrators' Transfer Pricing Documentation Package*, 54 THE TAX EXECUTIVE, Sept.-Oct. 2002, 464, 464 [hereinafter *TEI Comments*].
[155] *Id.* at 465.
[156] *Id.*
[157] AUSTRALIAN TAX OFFICE, TAX RULING, TR 98/11, par. 2.2., https://www.ato.gov.au/law/view/document?DocID=TXR/TR9811/NAT/ATO/00001.
Without attempting to be exhaustive or prescriptive, some of the documentation and records which have been relied on by taxpayers and to which the ATO has given weight include:
(1) budgets, business plans and financial projections;
(2) pricing policies, documents relating to product profitability, relevant market information and profit contributions of each party;

requires 10 principal documents that should be prepared by the tax payer[158]. Canadian transfer pricing rules require six non-compulsory information requirements[159]. Finally, Japan transfer pricing documentation rules require two main types of documents that provide details of the taxpayer's foreign affiliated transactions and documents used by the taxpayer for the calculation of arm's-length prices[160].

Therefore, although PATA intended not to impose greater requirements, the draft PATA Documentation Package actually did impose greater requirements. The TEI comments on this issue and recommended PATA to explicitly state that the 53 documentation requirement was not obligatory, but rather illustrative for the tax payers because not all of the 53 documents may be required in each transaction[161].

The TEI was joined by other critics to complain that the draft PATA Documentation Package did not offer specific requirements for the small and medium enterprises ("SME's") such as fewer burdens on documentation requirements[162]. This issue also contradicted with Chapter V of the OECD TP Guideline, which states that the facts and circumstances of each case should be considered when the transfer pricing documentation requirements are determined[163]. It should be noted that as long as SMEs generally realize limited international transactions, if they choose to comply with the PATA Documentation Package, they will have to comply with heavy requirements. Additionally, the EU Joint Transfer Pricing Forum ("JTPF") stated

---

(3) documents establishing the reasons for entering into significant international dealings with associated enterprises;
(4) documents establishing the reasons for the taxpayer's selection of a particular pricing methodology or methodologies;
(5) where other methodologies have been considered and rejected, details of these other methodologies, including reasons for their rejection. Ideally, these documents should be created contemporaneously with the decision-making;
(6) documentation establishing the structure and nature of the company and the MNE group to which it belongs;
(7) documentation establishing the taxpayer's sales and operating results and the nature of its dealings with associated enterprises;
(8) documentation setting out the taxpayer's business strategies and the reasons for their adoption;
(9) documents evidencing the negotiating positions taken by taxpayers in relation to their international dealings with associated enterprises and the basis for those negotiating positions; and
(10) documents created at the time of preparing the relevant tax return and taken into account in determining arm's length consideration for tax purposes.

[158] 26 C.F.R. § 1.6662-6(d)(2)(iii)(A) (1996), https://www.irs.gov/pub/irs-apa/treas_reg_1.6662-6.pdf.
[159] Income Tax Act, R.S.C. c. 1 §247(4) (1985)(Can.), http://laws-lois.justice.gc.ca/eng/acts/i-3.3/page-271.html#h-158.
[160] PWC, International Transfer Pricing Report, 2015/16, at 624, http://www.pwc.com/gx/en/services/tax/transfer-pricing/itp-download.html.
[161] *TEI Comments*, *supra* note 154, at 467.
[162] *Id.* at 465; *See also* Hendrik Swaneveld and Martin Przysuski, *PATA and Transfer Pricing*, 10 CANADIAN TAX HIGHLIGHTS, Oct. 29, 2002, at 75, 76.
[163] *OECD TP Guideline*, *supra* note 11, at 185.

that the PATA Documentation Package required more specific requirements than PATA member countries and therefore SME's may face greater burden of documentation requirements[164].

Another criticism raised by the TEI was that the PATA Documentation Package requirements for contemporaneous documentation also contradicted with the OECD TP Guideline. The TEI insisted that the information required in the PATA Documentation Package could not all be available at the time of the submission of the tax return[165].

After all comments were received from interested parties, PATA finalized the PATA Documentation Package on 12 March 2003. However, almost none of the criticisms were taken into consideration by PATA. The only amendment was to reduce the 53 documentation requirement to 48 documents. Other criticized sections of the PATA Documentation Package were left the same. For example, the PATA Documentation Package still requests contemporaneous documentation and imposes a greater burden than those imposed by PATA Member States.

After the finalization of the PATA Documentation Package, the criticisms continued. For example, the International Chamber of Commerce ("ICC") published a policy statement stating that although the initiative of PATA was welcomed, the PATA Documentation Package was not consistent with the objectives of unified documentation rules[166].

It could be asserted that although the PATA Documentation Package was a good initiative to unify the set of documentation requirements, it has extensive shortcomings that tax payers are not willing to follow the requirements.

c. Burden of Proof

The PATA Documentation Package does not provide any explanation for the burden of proof. Therefore, I think that the PATA Documentation Package does have a very important loophole. Under these circumstances, each PATA Member State will apply their domestic tax laws in relation to the burden of proof which will enable MNE's to circumvent the PATA Documentation Package. In other words, MNE's will still have to check and comply with the

[164] Report on the Activities of the EU Joint Transfer Pricing Forum in the Field of Documentation Requirements Report prepared by the EU Joint Transfer Pricing Forum (COM(2005)543 final), SEC(2005) 1677, at 8, http://ec.europa.eu/transparency/regdoc/rep/2/2005/EN/2-2005-1477-EN-1-0.Pdf.
[165] *TEI Comments*, *supra* note 154, at 468.
[166] *Transfer Pricing Documentation: A case for international cooperation*, ICC Doc. 180-46/1rev.9 FINAL (Oct. 30, 2003), http://www.uscib.org/docs/icc_transfer_pricing.pdf.

domestic laws of each Member State, but the PATA Documentation Package does not have any unified regulatory power.

The ICC states in its policy statement that a common set of rules regulating the burden of proof should be adopted and the burden of proof should be applicable for tax administrations until proven otherwise[167]. The ICC also recommends that under the PATA Documentation Package, if tax payers consistently comply with the documentation requirements, they should be exempt from any shift in the burden of proof and imposition of the penalties[168]. However, because the PATA Documentation Package does not provide any provisions for burden of proof, the provision of all PATA Member States for burden of proof must be examined separately.

Accordingly, tax payers must adhere to the burden of proof provision under Australian tax legislation[169] and case law[170]. In Japan, transfer pricing legislation was enacted in 2011 and the burden of proof is vested to the tax administrations.[171] However, tax payers still have to provide documents and other evidence in order to avoid tax assessments and penalties.[172] Even prior to this amendment, the allocation of the burden of proof were vested to the tax administrations by court decisions.[173] Under Canadian tax law, tax payers bear the burden of proof, because all the necessary information to determine the assessment is in the possession of the tax payer.[174] Additionally, tax payers must show their reasonable efforts in

---

[167] *Id.*
[168] *Id.*
[169] Taxation Administration Act, §8K (1953)(Austl.), Taxation Administration Act, §8Y (1953)(Austl.), Taxation Administration Act, §14ZZK (1953)(Austl.), Taxation Administration Act, §14ZZO (1953)(Austl.), http://www.austlii.edu.au/.
[170] a) Vale Press Pty Ltd. v. Commissioner of Taxation, 53 F.C.R. 92 (1994) (Austl.) *see in* Karen Wheelwright, *Tax Payers' Rights in Australia,* 7 REVENUE L. J. 226, 228 (1997); Maria Italia, *Taxpayers' in Australia Bear the Burden of Persuasion and Burden of Production,* 7 INT'L REV. OF BUS. RES. PAPERS 231, 234 (2011).

b) Karen Wheelwright, *Tax Payers' Rights in Australia,* 7 REVENUE L. J. 226, 228 (1997); Maria Italia, *Taxpayers' in Australia Bear the Burden of Persuasion and Burden of Production,* 7 INT'L REV. OF BUS. RES. PAPERS 231, 234 (2011).
[171] Akihiro Hironaka and Masaki Iwasaki, *Assessing Burden of Proof in Transfer Pricing Disputes*, INT'L L. OFF. (2012).
[172] Kiyokazu Iida, *Japan,* TRANSFER PRICING INT'L J. 2 (2012).
[173] Judgement of October 30, 2008 (Adobe Systems Inc v. Japan), Kösai [High Court] (Japan), *see in* Akihiro Hironaka and Masaki Iwasaki, *Assessing Burden of Proof in Transfer Pricing Disputes*, INT'L L. OFF. (2012).
[174] Canada Revenue Agency, Verifying Income Tax Returns Of Individuals And Trusts 3 (2005), http://www.oag-bvg.gc.ca/internet/English/parl_oag_200511_03_e_14941.html; *see* Anderson Logging Company v. Canada, S.C.R. (1925) (Can.), Hickman Motors Limited v. Canada, 2 S.C.R. (1997) (Can.), Donna McMillan v. Canada, 2012 F.C.A. 126 (2012) (Can.) *see in* William Innes and Hemamalini Moorthy, *Onus of Proof and Ministerial Assumptions: The Role and Evolution of Burden of Proof in Income Tax Appeals*, 46 CANADIAN TAX J. 1187 (1998).

determination of their transfer prices in line with the arm's length principle.[175] Finally, in the U.S., tax payers must document all transactions because the burden of proof is on the tax payer.[176]

d. Penalties

The main objective of the PATA Documentation Package is to prevent the imposition of transfer pricing documentation-related penalties and therefore encourage compliance with the requirements provided in the PATA Documentation Package[177]. What this means for Member States of the PATA is that tax administrations will not be able to impose documentation related penalties if the tax payers comply with all the requirements in the PATA Documentation Package. However, it should be noted that the PATA Documentation Package does not protect the tax payers from transfer pricing adjustments and transfer pricing adjustment-related penalties.

There are also some criticisms regarding the penalty relief provisions of the PATA Documentation Package. For example, where the tax payer is not able to determine transfer prices in line with the arm's length principle, the PATA Documentation Package does not provide penalty reductions just because all documentation requirements in the Package have been met[178]. Therefore, when an MNE incorporated in Canada properly prepares all the documentation listed in PATA Documentation Package and determines the transfer prices in line with the arm's length principle according to a method applicable in Canada, while not applicable in the United States, the IRS will not accept its transfer pricing determination and probably make adjustments and impose penalties. In this case, it could be said that the MNE prepares 48 documents for nothing. Within this scope, the PATA Documentation Package does not provide a safe-harbor for MNE's[179] and this may be the reason why many MNE's are not willing to adopt the PATA Documentation Package.

---

[175] Canada Revenue Agency, Reasonable efforts under section 247 of the Income Tax Act,, TPM-09 (2006), http://www.transferpricing.com/pdf/CRA%20TPM-09.pdf.
[176] *See infra* Part §3.III.1.c.
[177] *Documentation Package*, *supra* note 135, at 1.
[178] Philip Anderson, *PATA Transfer Pricing Documentation Package,* ASIA PACIFIC TAX BULL., 199, 202 (2003).
[179] PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 33 (2009).

II. Supranational Practices: the European Union

1. In General

As explained above, the OECD published the TP Guideline for guidance to the OECD Member States when drafting their transfer pricing documentation principles. However, it is known that the OECD Member States do not have to implement those principles into their domestic laws since they are only recommendations in nature. As a matter of fact, some European Union Member States do not follow the OECD Guidelines and therefore there are quite significant differences regarding the documentation requirements among the EU Member States.

The Commission of the European Communities ("Commission") states that although the OECD has published guidance on international taxation issues, including documentation requirements, these requirements do not seem to provide solutions in the growing integration of the internal market[180]. In addition, business representatives agree that the transfer pricing documentation requirements create high compliance costs for MNE's and the Commission believes that the compliance costs and uncertainty could be reduced by better coordination between Member States with respect to the documentation requirements[181].

For these reasons, the Commission established a Joint Forum to find a balanced solution with regard to the taxation issues, with a particular focus on transfer pricing documentation within the EU.

The Commission also published Communication Towards an Internal Market without tax obstacles and A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities ("Communication"). In this Communication, the Commission focuses on what can be done regarding company taxation in the EU within the next few years in order to *"adapt company taxation in the EU to the new economic framework and to achieve a more efficient Internal Market without internal tax obstacles"*[182].

---

[180] Company Taxation in the Internal Market: Commission Staff Working Paper, SEC(01) 1681 at 8-9, https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/company_tax_study_en.pdf [hereinafter Company Taxation in the Internal Market].

[181] *Id.* at 356.

[182] Towards an Internal Market without tax obstacles A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities: Communication From the Commission to the Council, the European Parliament and the Economic and Social Committee, COM(2001) 582 Final at 3, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0582:FIN:EN:PDF.

The Communication identified a number of different obstacles and problems in the transfer pricing area that need to be urgently taken into account. In order to foster the co-ordination between Member States to solve these obstacles and problems, the Communication states that, *"The Commission will in the first half of 2002 convene a standing "**Joint Forum on Transfer Pricing"** with Member States and business representatives in order to examine the issues which can be addressed without legislative initiatives, e.g. develop and exchange best practice on Advance Pricing Agreements and documentation requirements"*[183].

Consequently, the Commission established the EU Joint Transfer Pricing Forum ("JTPF") in June 2002. The JTPF consists of one tax expert from each Member States' tax administration and 10 high-level experts from the business community, together with the Chairman[184]. As discussed above, one reason for the establishment of the JTPF is to focus on transfer pricing documentation requirements. For this purpose, the Commission presented the Communication to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU JTPF on transfer pricing documentation for associated enterprises in the EU and proposed a Code of Conduct on transfer pricing documentation[185].

The JTPF adopted a common EU-wide approach to transfer pricing documentation requirements on the basis it was beneficial for both tax payers and tax administrations. For this reason, the JTPF argued that compliance costs and transfer pricing documentation penalties should be reduced for tax payers and transparency and consistency should be enhanced for the tax administrations[186].

Several different approaches to transfer pricing documentation were examined by the JTPF in order to find best approach for EU Member States. In addition, the JTPF discussed the issue subject to both PATA and the OECD TP Guideline to maintain a balance between the obligations of tax payers to provide necessary documentation and the rights of tax administrations to obtain necessary information[187].

---

[183] *Id.* at 14.
[184] Commission Press Release, IP/02/1105, (July 19, 2002), http://europa.eu/rapid/press-release_IP-02-1105_en.htm?locale=en.
[185] On the work of the EU Joint Transfer Pricing Forum on transfer pricing documentation for associated enterprises in the EU: Communication From the Commission to the Council, the European Parliament and the Economic and Social Committee, Proposal for a Code of Conduct on transfer pricing documentation for associated enterprises, COM(2005) 543 Final, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005PC0543&from=EN [hereinafter Proposal for a Code of Conduct].
[186] *Id.* at 5.
[187] *Id.*

By examining both the positive and negative sides of standardized and centralized approaches, the JTPF developed a new approach called the EU Transfer Pricing Documentation ("EU TPD") which combined both approaches[188]. The JTPF developed a set of documentation containing common standardized information for MNE's called the "master file" and several sets of standardized documentation requirements each containing specific information for each Member State called the "country-specific documentation"[189].

The EU TPD consists of optional documentation requirements for Member States, which can decide not to adopt the EU TPD requirements if their national law requires less information than required by the EU TPD. If Member States decide to implement the EU TPD requirements, they have to decide how to implement the requirements at a national level, for example, through domestic legislation, guidance or administrative practices[190].

The Commission developed a Code of Conduct, which included an attachment to explain the contents of the EU TPD, general application rules and requirements for MNE's, general application rules and requirements for Member States, general application rules and requirements applicable to MNE's and Member States. The Code of Conduct drafted by the JTPF was finalized and published in the Official Journal of the European Union on 28 July 2006[191].

2. Documentation Requirements

The Code of Conduct aims to simplify transfer pricing requirements for cross-border activities. For this purpose, the Code of Conduct provides guidance to both tax administrations and tax payers regarding the implementation of standardized and partially centralized transfer pricing documentation in the EU[192]. The Code of Conduct stipulates the following:

> *"1. Member States will accept standardised and partially centralized transfer pricing documentation for associated enterprises in the European Union (EU TPD), as set out*

[188] *Id.*
[189] *Id.*
[190] *Id.*, at 6.
[191] Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD), 2006 O.J. (C 176/01), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42006X0728(01)&from=EN [hereinafter Code of Conduct].
[192] *Id.* at 2.

in the Annex, and consider it as a basic set of information for the assessment of a multinational enterprise group's transfer prices.

2. The use of the EU TPD will be optional for a multinational enterprise group.

3. Member States will apply similar considerations to documentation requirements for the attribution of profits to a permanent establishment as apply to transfer pricing documentation.

4. Member States will, wherever necessary, take duly into account and be guided by the general principles and requirements referred to in the Annex.

5. Member States undertake not to require smaller and less complex enterprises (including small and medium-sized enterprises) to produce the amount or complexity of documentation that might be expected from larger and more complex enterprises.

6. Member States should:

(a) not impose unreasonable compliance costs or administrative burden on enterprises in requesting documentation to be created or obtained;

(b) not request documentation that has no bearing on transaction under review;

(c) ensure that there is no public disclosure of confidential information contained in documentation.

7. Member States should not impose a documentation-related penalty where taxpayers comply in good faith, in a reasonable manner and within a reasonable time with standardized and consistent documentation as described in the Annex or with a Member State's domestic documentation requirements, and apply their documentation properly to determine their arm's length transfer prices.

8. In order to ensure the even and effective application of this Code, Member States should report annually to the Commission on any measures they have taken further to this Code and its practical functioning.[193] ,,

The EU TPD is attached to the Code of Conduct as an Annex and Section 1 states that the EU TPD consists of a two-tiered documentation system. The first tier is "the master file" and the second tier contains "country-specific documentation". The master file provides the "blue print" for an MNE group and regulates information regarding the general description of the

[193] *Id.* at 2.

business and business strategies, organizational, legal, operational structure of the MNE, general identification of associated enterprises engaged in the controlled transaction, functions performed, risk assumed, ownership of intangibles, royalties paid or received, and the MNE's intercompany transfer pricing policy[194].

According to the EU TPD, the master file should be prepared in a language that is commonly understood by the EU Member States and only upon a translation request should the master file be translated into the requested language. The master file should be submitted only at the beginning of a tax audit or upon a special request[195].

The second documentation requirement in the EU TPD is for "country-specific documentation", which is a type of supplement to the master file. The country-specific documentation should contain a detailed description of the businesses and business strategies, information on the controlled transactions such as flows of transaction, invoice flows, the detailed information on the comparability analysis made for the determination of transfer prices, explanation regarding to the choice of the specific transfer pricing method and a description of the implementation of the group's intercompany transfer pricing policy[196]. The country-specific documentation should be prepared according to the language determined by the specific Member State[197].

The EU TPD recommends that country-specific documentation could be included in the master file if chosen by the MNE. However, in such a case, the information available in the country-specific documentation should also be included in the master file[198].

Additionally, Member States should not oblige tax payers to retain the documents beyond a reasonable time and the retention period should also be consistent with the retention period which is required under domestic laws.

It should be noted that the JTPF designed the implementation of the EU TPD to be flexible in recognizing the particular circumstances of the smaller and lesser complex businesses such as

[194] *Id.* at 3-4.
[195] *Id.* at 6.
[196] *Id.* at 4.
[197] *Id.*
[198] *Id.*

SME's. In other words, SME's should not be expected to produce the same amount and complexity of documentation that is expected from larger enterprises[199].

3. Burden of Proof

In addition to the documentation requirements, it is stated in the Communication that the issue of the burden of proof was also been discussed. However, the outcomes of these discussions were not included in the text of the Communication.

As a general rule, the claimant party must bear the burden of proof[200]. Therefore, specifically in tax cases, the tax administration bears the burden of proof. As a matter of fact, it is stated in the Transfer Pricing Documentation Discussion Paper of the Business Representatives that the burden of proof on transfer pricing should be on the tax administration at first instance[201]. However, the burden of proof can shift to the tax payer in the event that the tax payer abuses this general rule or fails to prove their transactions are in line with the arm's length principle.

In most EU Member States, the tax administration bears the burden of proof at first instance, while in some EU Member States the tax payer bears the burden of proof. For example in the UK, the tax payer bear the burden of proof in transfer pricing cases and therefore they have to show reasonable evidence that the tax payer acted in line with the arm's length principle when determining the transfer prices[202].

On the other hand, even if in most EU Member States the burden of proof is on the tax administration, in some European Court of Justice ("ECJ") cases on transfer pricing, the ECJ ruled that *"...national legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents a purely artificial arrangement, entered into for tax reasons alone, is to be considered as not going beyond what is necessary to prevent abusive practices where, in the first place, on each occasion on which the existence of such an arrangement cannot be ruled out, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of*

---

[199] *Id.* at 2.
[200] Giuseppe Marino, *The burden of proof in cross-border situations (international tax law) in* THE BURDEN OF PROOF IN TAX LAW, 2011 EATLP CONGRESS, UPPSALA 2-3 JUNE 2011, at 39 (Gerard Meussen ed. 2013).
[201] *EU Joint Transfer Pricing Forum-Business Representatives, Transfer Pricing Documentation Discussion Paper,* Doc.JTPF/014/BACK/2003/EN, at 2, http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/forum5/documentation_requirements_business_view.pdf.
[202] *Id.* at 12.

any commercial justification that there may have been for that arrangement[203]." Although it is accepted that at first instance the burden of proof is on the tax administration, tax payers should also provide evidence of the commercial justification in relation to the transaction at issue. Therefore, in ECJ cases the burden of proof is proportionally attributed to tax administrations and tax payers.[204]

Similarly, in the Société de Gestion Industrielle ("SGI") v. Belgian State case[205], SGI a company incorporated under Belgian law granted an interest free loan to its subsidiary Recydem SA ("Recydem") incorporated under French law and paid the director's remuneration to Cobelpin SA ("Cobelpin"), which was one of the shareholders of SGI and incorporated under Luxembourg law. The Belgian Tax Administration regarded these transactions as non-deductible expenses, because the amounts were disproportionate and unrelated to the economic benefit of the services in question. The ECJ stated that *"According to the Belgian Government, the burden of proof as to the existence of an 'unusual' or 'gratuitous' advantage within the meaning of the legislation at issue in the main proceeding rests with the national tax authorities. It states that when those authorities apply that legislation, the taxpayer is given an opportunity to provide evidence of any commercial justification that there may have been for the transaction in question. The taxpayer has a month, a period which may be extended, within which to establish that no unusual or gratuitous advantage is involved, having regard to the circumstances in which the transaction was effected.*[206]"

As mentioned above, although the tax payers do not bear the burden of proof at first instance, they should provide the related documents to support the facts of the case at issue. It should be noted that the approach of the ECJ regarding the burden of proof does support the Communication from the Commission Paper on the application of anti-abuse measures in the area of direct taxation-within the EU or in relation to third countries in which it is stated that

[203] Case C-524/04, Test Claimants in the Thin Cap Group Litigation v. Comm'rs of Inland Revenue, 2007 E.C.J. par. 82, http://curia.europa.eu/juris/liste.jsf?language=en&num=c-524/04, *see also in* Dejan Jelic, Allocation of burden of proof that the arm's length principle was (not) breached under the TFEU Fundamental Freedoms 8 (2013) (unpublished master thesis, Lund University).

[204] *Id.* ; Case C-311/08, Société de Gestion Industrielle (SGI) v. Belgian State, 2010 E.C.J., par. 73 http://curia.europa.eu/juris/liste.jsf?language=en&num=C-311/08, *see also in* Dejan Jelic, Allocation of burden of proof that the arm's length principle was (not) breached under the TFEU Fundamental Freedoms 6 (2013) (unpublished master thesis, Lund University).

[205] Case C-311/08, Société de Gestion Industrielle (SGI) v. Belgian State, 2010 E.C.J., par. 2, *see also in* Dejan Jelic, Allocation of burden of proof that the arm's length principle was (not) breached under the TFEU Fundamental Freedoms 6 (2013) (unpublished master thesis, Lund University).

[206] *Id.* at par. 73.

the burden of proof should be proportionate and neither tax payer nor tax administration solely bear the burden of proof[207].

As an example from a local tax court in a EU Member States, the Italian Supreme Court[208] dealt with the arm's length price value of the transaction realized between associated enterprises to determine which party bears the burden of proof. In the respective case, an Italian company operated in the automotive sector which had a U.S. parent company. The Italian company operated as a distributor by purchasing the vehicles from its affiliated companies. In 1967, the U.S. parent company issued a directive and within the scope of the directive, the expenses related to maintenance, repairs and liability for the damages remained with the Italian company. Thus, the tax administration challenged the issue that the price paid by the Italian Company to its affiliates was not in line with the arm's length principle. The Italian Supreme Court ruled in favor of the tax payer giving reference to both previous Judgements and the OECD TP Guideline that the tax administration should bear the burden of proof and had to prove that the transaction realized by the tax payer was not in line with the arm's length principle.

To sum up, the general practice in the EU Member States in transfer pricing cases is that the burden of proof is on the tax administration at first instance. However, in accordance with ECJ case law discussed above, it does not mean that the tax administration should solely bear the burden of proof, and that tax payers should also provide the supportive documentation that they act in line with the arm's length principle.

4. Penalties

The EU JTPF considered three types of penalties for inclusion in the Code of Conduct presented by the Commission as follows[209]:

> *"DOCUMENTATION-RELATED PENALTY*
>
> *An administrative (or civil) penalty imposed for failure to comply with the EU TPD or the domestic documentation requirements of a Member State (depending on which*

[207] Communication From the Commission to the Council, the European Parliament and the Economic and Social Committee, The application of anti-abuse measures in the area of direct taxation-within the EU and in relation to third countries, COM(2007) 785 Final, 5, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0785:FIN:en:PDF.

[208] Judgement of October 13, 2006, Cass. [Italian Supreme Court], (It.), *see in* Giovanna Chiesa & Giammarco Cottani, *Supreme Court Decision on Transfer Pricing: Burden of Proof, Anti-Avoidance Interpretation and Abuse of Law Principle,* INT'L TRANSFER PRICING J. May-June 2007, at 192-197.

[209] Code of Conduct, *supra* note 191, at 7.

requirements the MNE has chosen to comply with) at the time the EU TPD or the domestic documentation required by a Member State was due to be submitted to the tax administration.

COOPERATION-RELATED PENALTY

An administrative (or civil) penalty imposed for failure to comply in a timely manner with a specific request of a tax administration to submit additional information or documents going beyond the EU TPD or the domestic documentation requirements of a Member State (depending on which requirements the MNE has chosen to comply with).

ADJUSTMENT-RELATED PENALTY

A penalty imposed for failure to comply with the arm's length principle usually levied in the form of a surcharge at a fixed amount or a certain percentage of the transfer pricing adjustment or the tax understatement."

Although three different types of penalties were considered by the EU TPD, this thesis is limited to discussion of documentation-related penalties imposed for non-compliance with the EU TPD or the domestic documentation requirements. Penalties for non-compliance either due to late submission or negligence to provide the transfer pricing information are usually in the form of a monetary penalty or non-monetary penalty such as shifting the burden of proof to the tax payer. In addition to those administrative penalties, a criminal penalty is usually applied when the tax payer deliberately does not comply with the documentation requirements.

In the EU TPD, it is suggested that Member States should not impose a documentation related penalty if the tax payer acts in good faith, in a reasonable manner and within a reasonable time with the EU TPD or with a Member State's domestic documentation requirements as well as providing proper documentation for determining the arm's length transfer prices[210]. However, the EU TPD only functions is a guide for EU Member States for determining their domestic transfer pricing documentation requirements, and each EU Member States maintains different transfer pricing documentation penalties in practice. Therefore, while some of the EU Member States follow the suggestions of the EU TPD, others do not.

[210] *Id.* at 2.

In the document prepared by Professor Maisto for the EU JTPF, a country survey was made among 25 Member States[211] regarding penalty provisions. The survey identifies that most Member States do not have special provisions with respect to non-compliance with the transfer pricing documentation requirements. Instead, they apply a general penalty regime. Among 25 Member States only Denmark, France and Germany have special penalty provisions regarding non-compliance[212].

For example under Danish tax legislation, Section 17 of the Danish Tax Control Act provides penalty provisions explicitly in cases of documentation non-compliance[213]. According to Section 17, if tax payers do not prepare the transfer pricing documentation or prepare inadequate documentation, a two-tiered penalty provision is applied[214];

> *"Failure to submit compliant TP documentation within 60 days of request from the DTA, or failure to submit an independent auditor's statement may result in a fixed penalty of DKK 250,000 (approximately EUR 35,000) per company, per year. The DKK 250,000 fine can be reduced by 50% if compliant TP documentation is subsequently submitted.*
>
> *In addition to the lack of documentation or inadequate documentation, if an income adjustment is issued (i.e. the arm's-length principle has not been observed), the minimum penalty may be increased with an amount of 10% of an upward adjustment."*

Regardless of whether Member States have special penalty provision, all 25 Member States impose penalties for late submission or omission of transfer pricing information[215]. However, 13[216] of the 25 EU Member States do not impose criminal penalties in case of non-compliance with transfer pricing documentation requirements[217].

---

[211] Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom.
[212] EU Joint Transfer Pricing Forum Contribution by Prof. Maisto on Penalties, DOC.JTPF/011/BACK/2005/EN at 7, http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/13th-maisto.pdf [hereinafter Contribution].
[213] PWC, International Transfer Pricing Report, 2015/16, at 383, http://www.pwc.com/gx/en/services/tax/transfer-pricing/itp-download.html.
[214] *Id.*
[215] Contribution, *supra* note 212, at 7.
[216] Czech Republic, Finland, France, Greece, Hungary, Italy, Latvia, Luxembourg, Portugal, Slovak Republic, Slovenia, Spain, Sweden.
[217] Contribution, *supra* note 212, at 8.

Consequently, as long as the EU TPD provides options, each Member State has the right to implement different penalty provisions. Therefore, this situation leads to a lot of different approaches regarding penalty provisions.

III. National Practices

1. United States

a. In General

As discussed in §2 of this thesis, the U.S. was the first country to introduce both transfer pricing and transfer pricing documentation regulations. For this reason, the U.S. transfer pricing and transfer pricing documentation provisions stand as guidance for the OECD and various other countries.

Section 482[218] of the Internal Revenue Code ("IRC") titled "Allocation of Income and Deductions among Tax Payers" is the main provision of U.S. legislation for transfer pricing. In addition to Section 482 of the IRC, Section 6662 stipulates circumstances under which penalties will be applied for cases of non-compliance with Section 482 and also provides protection against imposition of penalties in case of certain documentation is provided[219]. The primary objective of Section 6662 is as follows:

> *"…to prompt taxpayer compliance with the arm's length standard by encouraging taxpayers to prepare contemporaneous documentation of their transfer pricing methodologies and to make the resulting documents available promptly to the IRS. The regulations set forth standards designed to ensure that the documentation evidences use of the transfer pricing*

[218] In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses. In the case of any transfer (or license) of intangible property (within the meaning of section 936 (h)(3)(B)), the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible, http://www.law.cornell.edu.

[219] Mark Madrian, *United States in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 6 (A. Michael Heimert & Michelle Johnson eds., 2010).

method that provides the most reliable measure of an arm's length result based upon the facts and circumstance involved[220]*."*

The Code of Federal Regulations ("Treasury Regulation") § 1.6662-6(d)(2)(iii)(B) defines ten principal documents that a tax payer should provide prior to filing time and other specific documentation requirements. If the tax payer complies with these contemporaneous documentation rules, they can avoid the penalty provisions provided that the analysis and documentation is reasonable and done in good faith[221]. Documentation requirements set under Treasury Regulation will be explained in detail in the following part.

b. Documentation Requirements

According to Section 1.6662-6(d)(2)(iii)(A) of the Treasury Regulation, the documentation requirements are met only if the tax payer provides sufficient documentation to prove that the transfer price is determined in line with the arm's length principle within the scope of the chosen transfer pricing method and its application[222]. In cases of non-compliance, the tax payer may be exempt from penalties only if he/she/it has shown effort to comply with the documentation requirements in good faith[223].

The following paragraphs[224] include specific documentation requirements to be fulfilled contemporaneously. Documents are categorized as principal documents which describe the basic transfer pricing analysis conducted by the tax payer and background documentation which includes any supportive documents to the principal documents[225]. Therefore, the principal documents that must be prepared by the tax payer are specified below:

1) *An overview of the taxpayer's business, including an analysis of the economic and legal factors that affect the pricing of its property or services;*
2) *A description of the taxpayer's organizational structure (including an organization chart) covering all related parties engaged in transactions potentially relevant*

---

[220] IRS, 2001, Effectiveness of IRC Section 6662(e), Department of the Treasury, LMSB, December 28, 2001, at 5. http://apps.americanbar.org/intlaw/committees/tax_estate_individuals/tax/final_report_v32.pdf.

[221] Mark Madrian, *United States in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 6 (A. Michael Heimert & Michelle Johnson eds., 2010).

[222] Transactions between persons described in section 482 and net section 482 transfer price adjustments, 26 C.F.R. § 1.6662-6(d)(2)(iii)(A) (1996), https://www.law.cornell.edu/cfr/text/26/1.6662-6.

[223] *Id.*

[224] Transactions between persons described in section 482 and net section 482 transfer price adjustments, 26 C.F.R. § 1.6662-6(d)(2)(iii)(B-C) (1996), https://www.law.cornell.edu/cfr/text/26/1.6662-6.

[225] Susan C. Borkowski, *Transfer Pricing Documentation and Penalties: How Much Is Enough?,* INT'L TAX J., Spring 2003, Vol.29, Issue 2, at 14.

undersection 482, including foreign affiliates whose transactions directly or indirectly affect the pricing of property or services in the United States;

3) *Any documentation explicitly required by the regulations undersection 482;*
4) *A description of the method selected and an explanation of why that method was selected, including an evaluation of whether the regulatory conditions and requirements for application of that method, if any, were met;*
5) *A description of the alternative methods that were considered and an explanation of why they were not selected;*
6) *A description of the controlled transactions (including the terms of sale) and any internal data used to analyze those transactions. For example, if a profit split method is applied, the documentation must include a schedule providing the total income, costs, and assets (with adjustments for different accounting practices and currencies) for each controlled taxpayer participating in the relevant business activity and detailing the allocations of such items to that activity. Similarly, if a cost-based method (such as the cost plus method, the services cost method for certain services, or a comparable profits method with a cost-based profit level indicator) is applied, the documentation must include a description of the manner in which relevant costs are determined and are allocated and apportioned to the relevant controlled transaction.*
7) *A description of the comparables that were used, how comparability was evaluated, and what (if any) adjustments were made;*
8) *An explanation of the economic analysis and projections relied upon in developing the method. For example, if a profit split method is applied, the taxpayer must provide an explanation of the analysis undertaken to determine how the profits would be split;*
9) *A description or summary of any relevant data that the taxpayer obtains after the end of the tax year and before filing a tax return, which would help determine if a taxpayer selected and applied a specified method in a reasonable manner; and*
10) *A general index of the principal and background documents and a description of the recordkeeping system used for cataloging and accessing those documents*[226].

The second category of background documents are designed to support the information provided in the principal documents, such as accounting records, legal agreements and financial projections[227]. After the tax administration has reviewed the principal documents,

[226] 26 C.F.R. § 1.6662-6(d)(2)(iii)(B) (1996).

[227] Mark Madrian, *United States in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 44 (A. Michael Heimert & Michelle Johnson eds., 2010).

the tax administration may also request the background documents to be submitted within 30 days.

c. Burden of Proof

In U.S. jurisdiction, the plaintiff usually bears the burden of proof in lawsuits as stated in the Wickwire v. Reinecke case[228]. Since tax payers are the plaintiff in tax cases, they bear the burden of proof in those cases. In fact, however, in both civil law and tax law cases the allocation of the burden of proof depends on different factors[229].

In tax cases, the presumption of correctness which assumes that the IRS Commissioner's assessments or determinations are preemptively correct is valid[230]. This presumption continues until the tax payer produces evidence to show otherwise. As a matter of fact, in the Supreme Court Decision in Welch v. Helvering[231] it is stated that the Commissioner of Internal Revenue made assessment against the tax payer on the grounds that the payments made by the tax payer were capital outlays rather than ordinary and necessary expenses in the operation of business. Therefore, by applying the presumption of correctness, the tax payer has the burden of proof[232].

On the other hand, some courts have decided on shifting of the burden of proof to the IRS even though the taxpayer had shown that the commissioner's original determination was invalid subject to the presumption of correctness[233]. However, this case maybe regarded as inconsistent with the existing rules that impose the burden of proof on the tax payer[234].

The discussions on allocation of burden of proof date back to 1924 with the United States Board of Tax Appeals (which is the predecessor of the U.S. tax courts). The Revenue Act of 1924 expressly left the discretion of adopting rules governing both practice and procedure to

---

[228] U.S. Supreme Court, Wickwire v. Reinecke, 275 U.S.101, at 105 (1927), *see in* Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases,* 39 Hastings L.J. 239, (1988).
[229] Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases,* 39 Hastings L.J. 239, (1988), at 6.
[230] *Id.*
[231] U.S. Supreme Court, Welch v. Helvering, 290 U.S.111 (1933), at 115 (1933), *see in* Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases,* 39 Hastings L.J. 239, (1988).
[232] Niles Bement Pond Co. v. United States, 281 U.S. 357, 361 (1929); Lesly Cohen v. Commissioner of Internal Revenue, 266 F 2d (1959); Dairy Home Co. v. United States, 180 F. Supp. 92, 95 (1960), *see in* Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases,* 39 Hastings L.J. 239, (1988).
[233] Sharwell v. Commissioner, 419 F.2d 1057, 1060 (6th Cir. 1969), Lesly Cohen v. Commissioner of Internal Revenue, 266 F 2d (1959), at 11 *see in* Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases,* 39 Hastings L.J. 239, (1988).
[234] Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases,* 39 Hastings L.J. 239, (1988), at 6.

the Board of Tax Appeals[235]. The United States Board of Tax Appeals stated in Rule 20, based on this discretion, as follows, "u*pon hearing of appeals the taxpayer shall open and close and the burden of proof shall be upon him"*[236].

Apart from these burden of proof rules, the allocation of burden of proof in transfer pricing cases is not different than the general rules applied in other tax matters. Accordingly, the tax payer initially bears the burden to prove that its transfer pricing calculations are in line with the arm's length principle.

On October 14, 1997 the Tax Executives Institute ("TEI") submitted their comments to Representative Bill Archer, Chairman of the House Committee concerning the Chairman's support for a proposal to shift the burden of proof from the tax payer to the Internal Revenue Service in tax disputes[237]. Proponents have argued that the current burden of proof rule was unfair because in U.S. jurisprudence, citizens are normally presumed innocent until proven guilty and that the same standard should apply to tax issues. However, this argument was refuted on the basis that the "innocent until proven guilty" rule was applicable only to criminal matters, including criminal tax matters. Conversely for civil tax matters, the burden of proof remains on the tax payer.

Under current law, a tax payer must document its transactions because the burden of proof is on the tax payer. According to the TEI, it seems logical because all the necessary documents are in the possession of the tax payer and the one who should prove that his/her transactions are in line with tax rules is also the tax payer. Otherwise a dishonest tax payer would have the incentive to allocate the burden of proof to the IRS. The President of the TEI also states in the commentary that:

> *"TEI is well aware of your support for efforts to "get the IRS out of the lives of the American people" and to protect taxpayers from intrusive requests. Ironically, your proposal would move the tax system in the opposite direction. This is because, if the burden of proof were shifted to the government in tax cases, the IRS's enforcement efforts would have to be intensified as the agency endeavored to sustain its heightened burden. If the taxpayer had no burden to come forward with the facts, the IRS would have to undertake to discover them itself. These intensified audits may well increase as*

[235] *Id.*
[236] Del Wright, *Improperly Burdened: The Uncertain and Sometimes Unfair Application of Tax Penalties,* 35 VA. TAX REV. 1, 31 n.82 (2015).
[237] TAX EXECUTIVES INSTITUTE, *Proposal to shift burden of proof,* 49 THE TAX EXECUTIVE 508 (1997).

the IRS struggles to reconcile reported income with expenditures. More summonses -- including those issued to third parties -- would undoubtedly be issued and more issues litigated, particularly in the Tax Court where there is no prepayment requirement.[238] ''

Therefore, the TEI believes that vesting the burden of proof to the IRS at first instance would be harmful for the U.S. tax system. In accordance with this view of the TEI, the current burden of proof rules in the U.S. initially vest with the tax payer. However, Section 7491[239] of the IRC (accepted in 1998 by the IRS) also states that the burden of proof may shift from the tax payer to the IRS in civil tax matters only by producing credible evidence supporting the tax payer's position.

d. Penalties

The U.S. penalty system generally aims to compel compliance with the relevant legislation. According to the U.S. penalty system, penalties must be proportional and fair considering the conduct of the tax payer in good faith[240]. In terms of transfer pricing, the IRS states that the main objective of the tax penalty regime is to encourage tax payers to show reasonable efforts to both determine and document that their inter-company transfer prices are in line with the

---

[238] *Id.*

[239] 26 I.R.C. § 7491 (1998), https://www.law.cornell.edu/uscode/text/26/7491 **(a) Burden shifts where taxpayer produces credible evidence**
(1) General rule
If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.
(2) Limitations
Paragraph (1) shall apply with respect to an issue only if—
(A) the taxpayer has complied with the requirements under this title to substantiate any item;
(B) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews; and
(C) in the case of a partnership, corporation, or trust, the taxpayer is described in section 7430 (c)(4)(A)(ii).
Subparagraph (C) shall not apply to any qualified revocable trust (as defined in section 645 (b)(1)) with respect to liability for tax for any taxable year ending after the date of the decedent's death and before the applicable date (as defined in section 645 (b)(2)).
(3) Coordination
Paragraph (1) shall not apply to any issue if any other provision of this title provides for a specific burden of proof with respect to such issue.
(b) Use of statistical information on unrelated taxpayers
In the case of an individual taxpayer, the Secretary shall have the burden of proof in any court proceeding with respect to any item of income which was reconstructed by the Secretary solely through the use of statistical information on unrelated taxpayers.
(c) Penalties
Notwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title.

[240] Sedat Kurdoğlu, *Transfer Fiyatlandırmasında Yaptırımlar: Hafif mi Yoksa Ağır mı? (ABD Uygulamasının Türkiye İle Karşılaştırılması),* 295 VSD 7 (2012).

arm's length principle[241]. Under the U.S. Treasury Regulation Section 1.6662-6, there are two types of penalties related to transfer pricing misstatements. The first one is defined as the transactional penalty and second one is defined as the net adjustment penalty.

aa. The Transactional Penalty

"The transactional penalty" is imposed in cases where the transfer prices are over- or under-stated by certain relative thresholds. The transactional penalty has a two-tiered system depending on the size of the transfer price misstatement. Accordingly, "*in the case of any transaction between related persons, there is a substantial valuation misstatement if the price for any property or services (or for the use of property) claimed on any return is 200 percent or more (or 50 percent or less) of the amount determined under section 482 to be the correct price.*[242]*"* In cases where the tax payer misstates the transfer pricing 200% or more; or 50% or less, 20% of the underpayment of tax will be applied as penalty.

On the other hand, "*in the case of any transaction between related persons, there is a gross valuation misstatement if the price for any property or services (or for the use of property) claimed on any return is 400 percent or more (or 25 percent or less) of the amount determined under section 482 to be the correct price.*[243]*"* Thus, in cases where the tax payer misstates the transfer pricing 400% or more; or 25% or less, 40% of the underpayment of tax will be applied as penalty.

bb. The Net Adjustment Penalty

Unlike the transactional penalty that is imposed according to the degree that the misstatement exceeds certain thresholds, *"the net adjustment penalty"* is imposed when a single or aggregation of misstatement reaches a certain size[244]. *"There is a substantial valuation misstatement if a net section 482 adjustment is greater than the lesser of 5 million dollars or ten percent of gross receipts."*[245] In such a case, if there is a substantial valuation misstatement, 20% of the underpayment penalty will be applicable.

---

[241] PWC, International Transfer Pricing 2013/14 Report, 2013, at 833.
[242] 26 C.F.R. § 1.6662-6(b)(1) (1996).
[243] 26 C.F.R. § 1.6662-6(b)(2) (1996).
[244] Mark Madrian, *United States in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 48 (A. Michael Heimert & Michelle Johnson eds., 2010).
[245] 26 C.F.R. § 1.6662-6(c)(2) (1996).

In addition, *"there is a gross valuation misstatement if a net section 482 adjustment is greater than the lesser of 20 million dollars or twenty percent of gross receipts*[246]. Thus, if there is a gross valuation misstatement, 40% of the underpayment penalty will be applicable.

Section 1.6662-6(b)(3)[247] of the IRS Treasury Regulation provides certain relief in cases where the tax payer proves that there is reasonable cause and they are acting in good faith. According to Section 1.6662-6(b)(3), if the tax payer acted in good faith and had reasonable cause to believe that its transfer pricing met the requirements, no penalties will be imposed against the tax payer. Additionally, Section 1.6662-6(d) of the IRS Treasury Regulation states that the tax payer should also meet certain contemporaneous documentation requirements to prove "reasonable cause" and "good faith". Therefore, it can be seen that the U.S. penalty provisions are designed more to promote compliance with the documentation requirements rather than to punish.

To sum up, the U.S. transfer pricing penalty system uses the principle of proportionality to determine the severity of penalty for any misstatements of the tax payer.

2. Germany

a. In General

German transfer pricing documentation requirements were only recently introduced in 2003 and it should be noted that the implementation process for such legislation was not simplistic for Germany. Before the enactment of formal transfer pricing documentation requirements, the general provisions of the Fiscal Code of Germany (*Abgabenordnung*) and German Commercial Code (*Handelsgesetzbuch*) were applicable to transfer pricing documentation cases. For example, the legal obligation for companies to keep accounting books is provided under Section 238 of German Commercial Code[248] which states that each tradesman has the

[246] 26 C.F.R. § 1.6662-6(c)(3) (1996).
[247] Pursuant to section 6664(c), the transactional penalty will not be imposed on any portion of an underpayment with respect to which the requirements of § 1.6664-4 are met. In applying the provisions of § 1.6664-4 in a case in which the taxpayer has relied on professional analysis in determining its transfer pricing, whether the professional is an employee of, or related to, the taxpayer is not determinative in evaluating whether the taxpayer reasonably relied in good faith on advice. A taxpayer that meets the requirements of paragraph (d) of this section with respect to an allocation under section 482 will be treated as having established that there was reasonable cause and good faith with respect to that item for purposes of §1.6664-4. If a substantial or gross valuation misstatement under the transactional penalty also constitutes (or is part of) a substantial or gross valuation misstatement under the net adjustment penalty, then the rules of paragraph (d) of this section (and not the rules of § 1.6664-4) will be applied to determine whether the adjustment is excluded from calculation of the net section 482 adjustment.
[248] HANDELSGESETZBUCH [HGB] art. 238,(F.R.G).

obligation to reflect its commercial transactions and financial status in its records according to the generally accepted accounting principles. In addition to this provision, Section 140 of the Fiscal Code[249] stipulates that *"Whoever is obliged under laws other than tax laws to keep accounts and records of relevance for taxation shall be obliged to fulfill the obligations imposed by such other laws in the interests of taxation as well[250]."* In accordance with these provisions tax payers must keep written records of all commercial transactions and the financial status of the company in line with the provision provided in the Commercial Code.

In addition to these provisions, Section 97(1) of the Fiscal Code[251] provides for submission and presentation of documents stating that tax payers must present documentation upon request during an inspection and audit. Furthermore, Section 200 of the Fiscal Code[252] requires tax payers to cooperate with the tax administration regarding such provision of documents. As it is seen, none of the above provisions apply specifically to transfer pricing documentation. In response to this lack of transfer pricing documentation legislation under German tax law, the German tax authority issued draft regulations on transfer pricing documentation and other procedural matters in August 2000[253]. The draft regulation provided information on audit procedures, cooperation obligations of tax payers and documentation requirements[254] and intended to replace Section 9 of the Administrative Principles which had regulated transfer pricing guidelines in Germany since 1983[255].

First of all, the draft regulation required tax payers to prepare comprehensive and appropriate documentation showing their transfer pricing structures[256]. Although the draft regulation did not give an exhaustive list of documents, it stated the general aim regarding transfer pricing documentation that "*the tax payer's duty to provide all relevant information will require appropriate documentation and the documentation must be extensive enough to allow the decision process for the transaction and the setting of the transfer price to be clearly understood[257]"*. In cases where the tax payers failed to provide comprehensive

[249] ABGABENORDNUNG [AO] art. 140 (F.R.G.).
[250] Translation provided by the Language Service of the Federal Ministry of Finance.
[251] ABGABENORDNUNG [AO] art. 97(1) (F.R.G.).
[252] ABGABENORDNUNG [AO] art. 200 (F.R.G.).
[253] Alexander Vögele, *Germany Protects Tax Base,* 12 INT'L TAX REV. 38, 38 (2001).
[254] Thomas Borstell and Ludger Wellens, *Germany Draft Threatens Heavy Burden,* 11 INT'L TAX REV. 11, 11 (2000).
[255] Alexander Vögele, *Germany Protects Tax Base,* 12 INT'L TAX REV. 38, 38 (2001).
[256] *Id.* at 39.
[257] Thomas Borstell and Ludger Wellens, *Germany Draft Threatens Heavy Burden,* 11 INT'L TAX REV. 11, 12 (2000).

documentation, there would breach of their compliance obligations and sanctions would be imposed[258].

The draft regulations also recognized the principle of continuing contemporaneous documentation and therefore tax payers had to provide all the transfer pricing related documentation contemporaneously as well as ensure their future availability[259]. According to the draft regulation, the tax payer must provide any relevant documents regarding its foreign related party transactions and if the foreign related party refused to provide documents or information, the tax payer would not be exempt from non-performance of his obligations[260]. Thus, the draft regulation required the provision of documents from foreign related parties under all circumstances.

Under German tax legislation, the tax authorities bear the burden of proof at the first instance. For this reason, tax authorities have to submit the facts of the case showing that the transfer prices are not in line with the arm's length principle[261]. However, according to the draft regulation, if the tax payer breach its obligation regarding to the determination process of transfer pricing, the burden of proof will shift to the tax payer[262].

aa. German Federal Tax Court Landmark Decision

Although the draft regulation was expected to be finalized, a German Federal Tax Court decision handed down on 17.10.2001[263] prevented its formal enactment. The case dispute related to the transfer price applied to the sale of goods between an Italian manufacturer company and its German marketing subsidiary[264]. With regarding to the transfer pricing documentation obligations, the Federal Tax Court held that the German tax legislation applicable at the material time did not require any specific requirements to provide transfer pricing related documentations and therefore the tax payer could not be obliged to provide specific documentation in order to show their transfer prices were at arm's length[265].

---

[258] Alexander Vögele, *Germany Protects Tax Base,* 12 INT'L TAX REV. 38, 39 (2001).
[259] *Id.*
[260] *Id.* at 40.
[261] *Id.* at 41.
[262] *Id.*
[263] Judgement of Oct. 17, 2001, BFH [Supreme Tax Court], IR 103/00 (F.R.G.), *see in* Alexander Vögele&William Bader, *New Deal For German Transfer Pricing,* 13 INT'L TAX REV. 22 (2002).
[264] Alexander Vögele&William Bader, *New Deal For German Transfer Pricing,* 13 INT'L TAX REV. 22, 22 (2002).
[265] Alexander Vögele&William Bader, *German Court Vetoes Document Regulations,* 12 INT'L TAX REV. 45, 46 (2001).

As discussed above, only general legislative provisions were applicable to book keeping requirements at the time of this decision in Germany. Therefore, the reasoning of the Federal Tax Court seems logical, since imposing transfer pricing requirements on the tax payer could not be considered as legal without any specific legislation in force.

Another determination made by the Federal Tax Court was in relation to the obligation of the tax payer to provide documents which were required by the tax administration. The Court held that although the tax payer had some obligations to provide documents under currently existing German legislation, they did not have to provide documents which were not specifically required[266]. Thus, the tax payers did not violate their compliance duties since they were not required to provide such documents at the first place[267].

The court also ruled that the tax payer only had the obligation to keep the documents that already existed[268]. However, the tax payer was not obliged to provide special transfer pricing documentation. In addition, the Federal Tax Court held that Section 90(2) of Fiscal Code only required a domestic subsidiary to produce documents regarding the transactions realized with third parties[269]. Therefore, the Federal Tax Court concluded that the tax payer should not be obliged to provide documents from their parent companies since they did not have such corporate law rights.

Finally, the Federal Tax Court stated that the burden of proof was on the German tax administration under the Fiscal Code provisions[270]. I am of the opinion that the consideration of the Court regarding the burden of proof is very important since the draft documentation regulation suggested that the burden of proof should shift to the non-compliant tax payers and consequently it reduced the fact finding duty of the tax administration.

bb. Impacts of Landmark Decision on German Legislation

As a result of the Federal Tax Court's decision discussed above, the draft regulations that proposed extensive documentation requirements could never be finalized because it included some provisions which did not comply with the general provisions of German Laws. For this reason, the German legislator introduced additional statutory rules through the Tax Benefit

[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *Id.* at 47.

Reduction Act[271]. By operation of this Act, Section 90(3) on transfer pricing documentation with respect to cross-border transactions was included in the Fiscal Code. In addition, Section 162[272] provided penalty provisions in case of non-compliance with the transfer pricing documentation requirements.

Following the enactment of Section 90(3), the German Ministry of Finance issued regulations[273] in November 2003 regarding the details of the documentation obligations stated under Section 90(3)[274]. In addition to these regulations, the German Tax Authority also published an administrative decree on 12 April 2005[275] which included general guidance on transfer pricing rules and documentation requirements[276].

It should be noted that Section 90(3) requires documentation rules only for the cross-border transactions, i.e. domestic transactions are excluded. In addition, Section 162 stipulates much higher monetary penalties for cross-border transactions than domestic transactions in case of non-compliance with documentation rules. This documentation and penalty system was criticized by some writers on the grounds that these rules did not comply with freedom of establishment rule defined under European Community Treaty ("EC Treaty").

cc. Violation of Fundamental Freedoms

In the Futura Participations SA and Singer v. Administration des Contributions[277] case, Futura Participations SA was incorporated in Paris and had a Luxembourg branch Singer. According

---

[271] STEUERVERGÜNSTIGUNGSABBAUGESETZES [StVergAbG] [Tax Benefit Reduction Act] (F.R.G.).

[272] ABGABENORDNUNG [AO] art. 162 (F.R.G.).

[273] Verordnung zu Art, Inhalt und Umfang von Aufzeichnungen im Sinne des § 90 Abs. 3 der Abgabenordung [Gewinnabgrenzungsaufzeichnungsverordnung – GaufsV] (F.R.G.).

[274] Angelika Thies, *Germany in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 9 (A. Michael Heimert & Michelle Johnson eds., 2010).

[275] Grundsaetze für die Prüfung der Einkunftsabgrenzung zwischen nahestehenden Personen mit grenzüberschreiten Geschaeftzbeziehungen in Bezug auf Ermittlungs-und Mitwirkungspflichten, Berichtigungen sowie auf Verstaendigungs- und EU-Schidsverfahren [Verwaltungsgrundsaetze-Verfahren] (F.R.G.).

[276] *Id.*

[277] Case C-250/95, Futura Participations SA v.Administrations des Contributions, 1997 E.C.J., par. 2, *http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=250/95&td=ALL*, *see also in* Wolfgang Joecks&Bert Kaminski, *Dokumentations-und Sanktionsvorschriften für Verrechnungspreise in Deutschland-Eine rechtliche Würdigung,* 2 ISTR 65 (2004); *See also* Case C-446/03, Marks&Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes), 2005 E.C.J., par. 36 http://curia.europa.eu/juris/liste.jsf?language=en&num=C-446/03, (ECJ decided on the question that although the Member States have the right to establish rules on direct taxes themselves, the established rules should be in line with the community law. Different treatment by declining to set off losses occurred in a subsidiary established in other countries; while accepting the losses occurred in a subsidiary established in United Kingdom discourage the establishment of subsidiary in other Member States and therefore constitutes a breach of freedom of establishment. Although under some circumstances the restriction on the freedom of establishment could be justified, under concrete case the justification could not be made.).

to relevant Luxembourg Law, non-resident tax payers can deduct net income previous losses carried forward from previous years if they are economically linked to income received in Luxembourg and the company accounts are kept within Luxembourg separately. However, non-resident tax payers are not obliged to keep separate accounts related to their activities operating in Luxembourg under Luxembourg laws.

In the case at issue, Singer did not have separate accounts in Luxembourg and the Luxembourg tax authorities had rejected the set-off claim of the previous year losses on the grounds that Singer did not keep separate accounts in Luxembourg and this decision of the tax administration was confirmed by the Directeur des Contributions. Consequently, Futura and Singer appealed to the Conseil d'Etat for the annulment of this decision by claiming the refusal to take into account the losses in question violated the freedom of establishment rule stated under Article 52 of the Treaty establishing the European Economic Community ("EEC Treaty")[278].

The Conseil d'Etat brought the case to the ECJ to determine whether rejecting the set-off constituted a breach of the freedom of establishment guaranteed under Article 52. Luxembourg law prescribed two conditions for deduction of the previous year's losses. The first condition is that there should be some type of economic link and the second condition is that the accounts of the branch should be kept separately. The ECJ examined the question whether these two conditions constituted breach of the freedom of establishment.[279]

According to the ECJ, the first condition prescribed in the Luxembourg Law was in line with Article 52 of the EEC Treaty. However the condition to keep separate accounts was considered as a restriction on the freedom of establishment principle and is prohibited on the basis that such a condition may affect the companies seated in another Member State.[280] The ECJ stated that even though such a condition is prohibited in principle, if the measure has a legitimate aim, it could be justified on the grounds of being in the public interest. However, even if it is justified, the measure should not go beyond what is necessary for that purpose.[281]

In the case at issue, the Luxembourg Government stated that the condition to keep separate accounts was aimed to guarantee that any losses to be carried forward arise from the Luxembourg activities and the amount of losses is corresponding. The ECJ agreed that the

[278] Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 52, 298 U.N.T.S. 11.
[279] Case C-250/95, Futura Participations SA v.Administrations des Contributions, 1997 E.C.J., par. 17.
[280] *Id.* par. 24.
[281] *Id.* par. 26.

aim of the Luxembourg Government was legitimate, but the condition was not essential for the stated purpose and went beyond what was necessary. In any event, the Luxembourg Government could, indeed, gain access to the accounts maintained by the non-resident taxpayer in its place of residence outside of Luxembourg.[282]

Therefore, based on these grounds the ECJ resolved the legal issue as follows; *"…the article does preclude the carrying forward of losses from being made subject to the condition that, in the year in which the losses were incurred, the tax payer must have kept and held in that State accounts relating to his activities carried on there which comply with the relevant national rules…*[283]*"* According to the ECJ, requiring certain documentation from non-resident tax payers may preclude the freedom of establishment stated under Article 52 of EEC.

Similar to this approach taken by the ECJ, certain writers also take the critical view that Article 90(3) breached the freedom of establishment rule. For example, it was argued that German law did not impose strict transfer pricing documentation rules or penalty provisions in case of domestic transactions, while it was imposed only on cross-border transactions[284]. Within this scope, the writers agree that the unequal treatment under Luxembourg laws constituted breach of the freedom of establishment guaranteed under EU[285].

On the contrary, some writers have argued that Article 90(3) does not breach the freedom of establishment[286]. Although they agree that the freedom of establishment principle was violated in the Futura Participations SA and Singer case, the imposition of certain documentation requirements could be justified with the aim of preventing tax fraud[287]. These writers were of the opinion that Article 90(3) was applied only for cross-border transactions

---

[282] *Id.* paras. 31-32.
[283] Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 52, 298 U.N.T.S. 11., par.43.
[284] Wolfgang Joecks&Bert Kaminski, *Dokumentations-und Sanktionsvorschriften für Verrechnungspreise in Deutschland-Eine rechtliche Würdigung,* 2 ISTR 65, 65 (2004); Steffen Christian Hörner, *National Report Germany in* TAX COMPLIANCE COSTS FOR COMPANIES IN AN ENLARGED EUROPEAN COMMUNITY, 207 n.74 (Michael Lang et al. eds.,2008).
[285] Wolfgang Joecks&Bert Kaminski, *Dokumentations-und Sanktionsvorschriften für Verechnungspreise in Deutschland-Eine rechtliche Würdigung,* 2 ISTR 65, 67 (2004); Steffen Christian Hörner, *National Report Germany in* TAX COMPLIANCE COSTS FOR COMPANIES IN AN ENLARGED EUROPEAN COMMUNITY, 208 (Michael Lang et al. eds.,2008).
[286] Hartmut Hahn&Ute Suhrbier-Hahn, *Mitwirkungspflichten bei Auslandssachverhalten europarechtswidrig? - Neukonzeption der §§* 90 *Abs.* 3 *und* 162 *Abs.* 3 *und* 4 *AO im SteVAG -,* 3 ISTR 94 (2003); Steffen Christian Hörner, *National Report Germany in* TAX COMPLIANCE COSTS FOR COMPANIES IN AN ENLARGED EUROPEAN COMMUNITY, 207 (Michael Lang et al. eds.,2008).
[287] *Id.*

because otherwise the tax administration was not able to provide documents relating to the cross-border transactions with the purpose of preventing the tax fraud[288].

After several debates on whether Article 90 (3) breached fundamental freedoms or not, a recent decision by the Federal Tax Court has clarified the issue for the time being. The Federal Tax Court[289] decided that the requirements to provide transfer pricing documentation in relation to cross-border transactions were in line with the fundamental freedoms in principle[290]. In this case, the tax payer refused to provide any transfer pricing documentation on the grounds that Section 90(3) of Fiscal Code constituted an infringement of the fundamental freedoms guaranteed by EU Law[291]. The Federal Tax Court decided that additional transfer pricing documentation requirements imposed only on tax payers who had realized cross-border transactions was discriminative, but such discrimination[292] was justified as necessary[293].

As a matter of fact, Article 18 of the Treaty on the Functioning of the European Union ("TFEU") states *"Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*[294]. This article prohibits any discriminatory treatment of tax payers, which is one of the crucial principles under the TFEU. Despite the fact that it is not specifically stated for taxation purposes in EU law, fundamental rights such as the free movement of persons, services and capital and the freedom of establishment stand as important principles to realize the aims of EU law regarding non-discrimination[295]. It should be noted that although discrimination of fundamental freedoms is forbidden, there is always an opportunity to justify such discrimination as stated in the Federal Tax Court decision discussed above.

The approach taken by writers regarding the imposition of certain documentation requirements can be justified with the aim of preventing the tax fraud and therefore is not

---

[288] Steffen Christian Hörner, *National Report Germany in* TAX COMPLIANCE COSTS FOR COMPANIES IN AN ENLARGED EUROPEAN COMMUNITY, 207-208 (Michael Lang et al. eds.,2008).
[289] Judgement of Apr. 10, 2013, BFH [Supreme Tax Court], IR 45/11 (F.R.G.) *see in* Baker&McKenzie, *German Transfer Pricing Documentation Obligation Conforms In Principle to European Law,* CLIENT ALERT (2013).
[290] Moritz Glahe&Juergen Luedicke, *Germany- Federal Fiscal Court Judgement on Transfer Pricing Documentation,* 5 PwC EU TAX NEWSL., July-Aug. 2013, at 6, 6 [hereinafter PwC EU TAX NEWSL].
[291] *Id.*
[292] *See* BİLLUR YALTI SOYDAN, AVRUPA BİRLİĞİNDE DOLAYSIZ VERGİLER, 73-74 (2002) (detailed information regarding to non-discrimination in EU Law with respect to taxation).
[293] *Id.*
[294] Consolidated Version of the Treaty on European Union art. 18, 2012 O.J. C 326/47.
[295] BİLLUR YALTI SOYDAN, AVRUPA BİRLİĞİNDE DOLAYSIZ VERGİLER, 73-74 (2002).

breach of the fundamental freedoms. It should be highlighted that the Federal Tax Court accepts that Section 90(3) does violate the freedom of services; however this violation is justified by the necessity of establishing the facts of the case[296]. The Federal Tax Court decision therefore sets the precedent that Section 90(3) currently operates against the fundamental freedoms until justified on a case by case basis under German tax law.

b. Documentation Requirements

Transfer pricing documentation requirements in German tax law are regulated under Section 90(3)[297] which was included in the Fiscal Code in 2003. Section 90(3) regulates the transfer pricing documentation requirements for cross-border transactions realized between associated enterprises. In other words, the requirements provided under this Section are only applied to transactions involving a foreign country. Therefore, if a tax payer realizes a cross-border transaction with an associated enterprise, they must keep the records regarding the nature and content of the business relations within the scope of Section 90(3). According to Section 90(3), the obligation to keep records includes both the determination of arm's length prices and also other business agreements concluded with the associated enterprises.

Although Section 90(3) states that the tax payer must keep records in relation to their cross-border transactions realized with associated enterprises, the Section does not provide any information regarding the type or content of the documents that should be prepared. Section 90(3) rather authorizes the Federal Ministry of Finance to stipulate through ordinance the type, content and extent of the documents to be kept.

Section 90(3) also authorizes the tax administration to request relevant documents only with the purpose of conducting an external audit. The tax payers must submit requested documents

[296] Baker&McKenzie, *German Transfer Pricing Documentation Obligation Conforms In Principle to European Law*, CLIENT ALERT (2013).

[297] Where circumstances relate to transactions involving another country, the taxpayer shall keep records on the nature and content of his business relations with associated persons within the meaning of section 1(2) of the Foreign Tax Act. The obligation to keep records shall also extend to the economic and legal aspects of any arm's-length agreement on prices and other terms of business concluded with associated persons. In the case of exceptional business transactions, records shall be prepared without delay. The obligation to keep records shall apply accordingly to taxpayers who, for the purposes of domestic taxation, are obliged to allocate profits between their domestic enterprise and its foreign permanent establishment or to determine the profit of the domestic permanent establishment of their foreign enterprise. In order to ensure the uniform application of the law, the Federal Ministry of Finance shall be authorised to stipulate, by way of ordinance issued with the consent of the Bundesrat, the type, content and extent of the records to be kept. In general, the revenue authority is to require the submission of records only for the purpose of conducting an external audit. Such submissions shall be governed by section 97. Submissions shall be made on request within a period of 60 days. Where records of exceptional business transactions are to be submitted, the period shall be 30 days. The period for submission may be extended in duly justified individual cases.

within 60 days upon request. However, if exceptional business transactions are involved, the submission period is reduced to 30 days upon request. The period for submission can only be extended if the individual case is justified.

As authorized by Section 90(3), the Federal Ministry of Finance issued an ordinance[298] regarding the details of the transfer pricing documentation requirements. The ordinance establishes two types of documents. The first type is defined as *ordinary* documentation, including general information on the shareholdings, business and structure of the organization, transactions realized with related parties such as description of the business relations to related persons, information about the functions performed and risks assumed by the tax payer, information on transfer pricing analyses such as description of the selected transfer pricing method and justification of the selected transfer pricing method[299].

The second type of documents regulated under the ordinance is defined as *special* documentation. The tax payer must prepare specific documentation in the event of an agreement on specific conditions to show that the transactions are at arm's length. In such a case, the tax payers must prepare documents containing information about business strategies such as market share strategies, related agreements in case of cost sharing agreement, and information on unilateral or bilateral Advance Pricing Agreements[300]. Even though the ordinance provides the list of documents that should be prepared, it does not have any intention to provide an exhaustive list of documents[301]. Rather it has the aim to provide a general understanding of the documents that should be prepared.

According to Section 3 of the ordinance, the tax payer must prepare documentation contemporaneously, i.e. within 6 months of the end of the fiscal year for extraordinary business transactions. As discussed above, the submission period for documents for exceptional business transactions is 30 days upon request.

The documentation that is submitted to the tax authority must be in German language and any translation must be made within 60 days. However if the relevant tax authority accepts

[298] Verordnung zu Art, Inhalt und Umfang von Aufzeichnungen im Sinne des § 90 Abs. 3 der Abgabenordnung [Gewinnabgrenzungsaufzeichnungsverordnung-GAufzV], 2003 (F.R.G.) [hereinafter GAufzV].
[299] Sven C. Bremer and Gerhard Engler, *Tightening of the German Transfer Pricing Documentation Requirements*, INT'L L. J., Vol.30 Issue 2, March 2004, at 17, 26.
[300] *Id.* at 6-27.
[301] *Id.* at 19-20.

documents in any other language than German, the tax payers can submit the documents in this other language[302].

Less strict documentation requirements are provided for the small and medium enterprises ("SME's") and entities in these circumstances:

> *"(1) The value of all transactions concerning goods and products with all related parties do not exceed the amount of EUR 5 million per year; and*
>
> *(2) The sum of all remunerations for all (other) services does not exceed an amount of EUR 500.000 per year."*

After the publication of the ordinance, the Federal Ministry of Finance also published the Administration Principles for Transfer Pricing and Documentation[303] ("Administrative Principles") to give further and detailed information. For example, the Administrative Principles provides information regulating the cooperation required by the parties concerned under Section 90(3) and also the legal consequences of any violation of these cooperation obligations, such as the burden of proof[304].

c. Burden of Proof

Historically before the enactment of the Tax Benefit Reduction Act in 2003, German tax legislation did not contain any transfer pricing documentation or specific burden of proof rules for transfer pricing documentation. However, Section 90(1) did require tax payers to cooperate with the tax administration and prepare all documents necessary for taxation. In addition, Section 90(2) stated that tax payers must provide all necessary evidence to German tax authorities pertaining to cross-border transactions and by doing so tax payers should exhaust all the available legal and practical resources. Based on these two provisions, the draft regulations for transfer pricing documentation, discussed in the above section, proposed a strict approach to vesting the burden of proof against tax payers[305].

---

[302] GAufzV, *supra* note 298, §2 Par.5.

[303]Grundsätze für die Prüfung der Einkunftsabgrenzung zwischen nahestehenden Personen mit grenzüberschreitenden Geschäftsbeziehungen in Bezug auf Ermittlungs- und Mitwirkungspflichten, Berichtigungen sowie auf Verständigungs- und EU-Schiedsverfahren [Verwaltungsgrundsätze-Verfahren],2005 (F.R.G.).

[304] Ulrich Ränsch&Alexandra John, *German Adminiatration Principles for Transfer Pricing and Documentation: Unofficial Translation of the Federal Ministry of Finance Letter Dated April 12, 2005,* 33 INT'L TAX REV. 368 (2005).

[305] Thomas Borstell and Ludger Wellens, *Germany Draft Threatens Heavy Burden,* 11 INT'L TAX REV. 11, 11 (2000).

The draft regulations determined that any refusal to provide necessary documents by an affiliated entity meant refusal to provide necessary documents by the tax payer itself[306]. However, this proposed rule was actually contrary to the operation of Section 88 of the Fiscal Code which required the tax authorities to investigate tax cases using their own resources[307]. According to the draft regulations, in cases where the tax payer breached its obligation to cooperate, the fact finding responsibility of the tax administration would not continue[308].

It should be noted that the Federal Tax Court stated in its landmark decision that the burden of proof should not be on the tax payer. Although the Court accepted that the burden should be on the tax administration, it also accepted the rebuttable presumption. As discussed above, the tax administration bears the burden of proof and must prove their presumption with virtual certainty[309]. If there is a presumption proved by the tax administration that the transfer prices are not at arm's length, the burden of proof shifts to the tax payer. Therefore, the tax payer has the opportunity to rebut the presumption and prove that their transfer prices are at arm's length.

Moreover, the Federal Tax Court cited in its landmark decision a part of the Federal Tax Court Judgement[310] of 17 February 1993 regarding the rebuttable presumption[311];

> *"[The court] understands the decision it reached with regard to allocation of evidentiary risks in [its judgment of February 17 1993 - Aquavit] as signifying that, when a [domestic] marketing company distributes the products of a [foreign] related-party manufacturing company and generates nothing but losses of considerable proportions for three years in a row, this triggers a rebuttable presumption that the agreed transfer prices are inappropriate and occasioned by the shareholder relationship. The ... rebuttable presumption means that the taxpayer must come forward with evidence (darlegen) and prove (nachweisen) why the transfer price actually agreed is nonetheless appropriate.... If the evidence [offered in rebuttal] is insufficient ... estimation is permitted within the limits of the presumption, that is, constructive dividends may be assessed by way of estimation in the amount of the difference between*

[306] *Id.*
[307] *Id.*
[308] Alexander Vögele, *Germany Protects Tax Base,* 12 INT'L TAX REV. 38, 41 (2001).
[309] Alexander Vögele&William Bader, *New Deal For German Transfer Pricing,* 13 INT'L TAX REV. 22, 24 (2002).
[310] Judgement of Feb. 17, 1993, BFH [Supreme Tax Court], IR 3/92 (F.R.G.) see *in* Alexander Vögele&William Bader, *New Deal For German Transfer Pricing,* 13 INT'L TAX REV. 22 (2002).
[311] Alexander Vögele&William Bader, *New Deal For German Transfer Pricing,* 13 INT'L TAX REV. 22, 24 (2002).

the reported loss and an appropriate overall profit and allocated to the years [in question]. The estimation may also relate to the purchase prices of the first three years without necessarily resulting in a profit for these years[312]"

In addition, the German Federal Tax Court held in its judgment dated 10 May 2001 that the tax authorities bear the burden of proof to show the transfer prices were not at arm's length[313]. Thus, German tax courts were consistent in holding that the tax administrations bear the burden of proof at the first instance in taxation cases[314]. However, this judicial position of the German Federal Tax Court regarding the burden of proof could be rebutted by the tax administration.

In compliance with precedent of the landmark decision of German Federal Tax Court, Section 90(3) was included in the Fiscal Code. Since 2003, Article 90(3) imposes an obligation on tax payers who realize cross-border transactions to provide necessary documents showing that their transfer prices are at arm's length. With the Tax Benefit Reduction Act, Section 162(3) was also included in the Fiscal Code. Article 162(3) provides rebuttable presumption in case of non-compliance with the obligations stated under Article 90(3). According to Article 162(3), the burden of proof will shift to tax payers if they do not prepare correct or sufficient documents[315].

Additionally, Paragraph 4.2 of the Administration Principle states that tax authorities bear the burden of proof in tax cases as a general rule and if a tax payer violates his/her cooperation obligations, the degree of burden of proof will be reduced in favor of the tax authorities[316].

d. Penalties

Article 162(3) of the Fiscal Code provides the tax authority with the right to income estimation. Accordingly, if the tax payer violates its obligation to cooperate as defined under Article 90(3), the tax authority is entitled to estimate its income. For instance, if the tax payer

---

[312] Judgement of Oct. 17, 2001, BFH [Supreme Tax Court], IR 103/00 (F.R.G.), *see in* Alexander Vögele&William Bader, *New Deal For German Transfer Pricing,* 13 INT'L TAX REV. 22 (2002).

[313] Alexander Vögele&William Bader, *German Court Vetoes Document Regulations,* 12 INT'L TAX REV. 45, 47 (2001).

[314] Alexander Vögele&William Bader, *New Deal For German Transfer Pricing,* 13 INT'L TAX REV. 22, 24 (2002).

[315] Roman Seer, *Germany in* THE BURDEN OF PROOF IN TAX LAW, 2011 EATLP CONGRESS, UPPSALA 2-3 JUNE 2011, at 139 (Gerard Meussen ed. 2013).

[316] Ulrich Ränsch & Alexandra John, *German Adminiatration Principles for Transfer Pricing and Documentation: Unofficial Translation of the Federal Ministry of Finance Letter Dated April 12, 2005,* 33 INT'L TAX REV. 368, 394 (2005).

does not submit necessary records or the submitted records are essentially of no use to the tax authority or it is determined that the tax payer does not submit contemporaneous records for the purposes of exceptional transactions, the tax administration will customarily assume that the income is higher than the income declared. Article 162(3) also states that if a foreign associated enterprises does not fulfill its obligations to cooperate, the income estimation will be applied to the tax payer. It should be noted that the tax administration can apply an unfavorable price calculation for the tax payer as stated under Article 162(3). However, this provision is considered against the Federal Tax Court decisions[317] in which the courts held that the income adjustments should be based on the most favorable calculation for the tax payer[318]. In any case, if the tax payer cannot prove that the transfer prices are at arm's length the tax administration will apply penalties within the scope of the Section 162(4).

According to Section 162(4), if a tax payer does not submit records defined under Section 90(3) or submits records that are essentially no use, a surcharge of at least 5% of the estimated income is applied provided that the penalty amount do not exceed 10% of that income. The surcharge must not be less than 5,000 Euros. For late submission of documents, the tax authority may apply a surcharge not exceeding 1,000,000 Euros and the surcharge should be at least 100 euros for each full day beyond the date of the deadline

As discussed above, if the relevant documentation is materially of no use, the tax authority will impose penalties. However German tax authorities do not clarify what "no use" actually means[319]. Apparently, the meaning of the concept "materially of no use" has been left to the broad interpretation of the tax administration and imposing penalties in such cases has also been left to the discretion of the tax authority. Due to the lack of a definition of the concept, different approaches are asserted in the literature. According to one of those opinions, the following definition is given for the concept:

> *"The overview of intercompany transactions needs to include about 50% of all cross-border transactions with related parties.*

[317] Judgement of June 4, 2003, BFH [Supreme Tax Court] (F.R.G.), Judgement of Feb. 27, 2003, BFH [Supreme Tax Court] (F.R.G.) *see in* Sven C. Bremer and Gerhard Engler, *Tightening of the German Transfer Pricing Documentation Requirements,* INT'L L. J., Vol.30 Issue 2, March 2004, at 17.

[318] Sven C. Bremer and Gerhard Engler, *Tightening of the German Transfer Pricing Documentation Requirements,* INT'L L. J., Vol.30 Issue 2, March 2004, at 17, 23.

[319] Angelika Thies, *Germany in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 28 (A. Michael Heimert & Michelle Johnson eds., 2010).

With respect to each cross-border transactions or each kind of such transaction, a function and risk analyses has to be provided for the German tax payer.

An explanation on how transfer prices were determined, including an explanation on the choice of transfer pricing methods, has to be available.

Documentation should show serious efforts for determining appropriate transfer prices[320]*."*

If transfer pricing documentation requirements are fulfilled within the meaning of this definition, they must be qualified as sufficient and penalties can not be applied[321].

Section 162(4) also provides for fault provision, which states that if non-fulfillment of Section 90(3) obligations is excusable or the default of the tax payer is minor, penalties must not be applied. Section 4.6.4 of the Administrative Principles gives example regarding this issue and states that if the records or the basis for the records were destroyed without the fault of the tax payer, penalties will not be applied[322].

3. Sweden

a. General

Sweden tax legislation did not include specific transfer pricing documentation requirements until 1 January 2007. Until that date, Section 19 of Chapter 14 of Swedish Income Tax Law[323] ("IL") included only the arm's length principle and the correction rule. According to Section 19, *"if an enterprise has reduced taxable income due to conditions that differ from what two independent enterprises would have agreed to, then the Swedish Tax Agency may adjust the enterprise's income if;*

- *the enterprise, which due to the conditions made between the enterprises receives an increased income will not be liable to tax in Sweden according to IL or according to a tax treaty;*
- *it can be reasonably established that the enterprises are associated; and*

[320] *Id.*
[321] *Id.*
[322] Ulrich Ränsch & Alexandra John, *German Administration Principles for Transfer Pricing and Documentation: Unofficial Translation of the Federal Ministry of Finance Letter Dated April 12, 2005,* 33 INT'L TAX REV. 368, 397 (2005).
[323] INKOMSTSKATTELAG 1999:1229 [IL] Section 19 Chapter 14 (Swed.).

- *it is not evident from the circumstances that the conditions were made for other reasons than for the reason of the enterprises being associated.*[324]

Accordingly, associated enterprises were obliged to define their transfer prices in accordance with the arm's length principle. However, no transfer pricing documentation obligation existed.

Although Swedish tax legislation did not require any specific documentation obligations for tax payers, studies on establishing transfer pricing documentation requirements began in 2003 with the report[325] on Information and Documentation requirements regarding international enterprises' transfer pricing on controlled transactions ("2003 Report") prepared by the Swedish Tax Agency ("STA")[326]. The 2003 Report introduced a Government Bill on compulsory tax return disclosure and documentation requirements for transfer pricing[327]. According to the 2003 Report, the transfer pricing documentation requirements were designed to apply to tax liable companies in Sweden that own or control 50% of shares of foreign legal entities, companies owned or controlled by foreign legal entities or by the same shareholders and for transactions realized between headquarters and their permanent establishments[328].

Based on the 2003 Report, the Swedish Ministry of Finance published the Government Bill on 21 March 2006 regulating the transfer pricing documentation obligations of MNE's that realize cross-border transactions with their associated enterprises[329]. The Government Bill stated that in lieu of any prescribed documentation format, the OECD guidelines should be followed for documentation requirements[330]. It should be noted that following the Bill, the Swedish Supreme Administrative Court referred to the OECD guidelines for the first time in its Shell decision[331] and stated that the guidelines should be followed in the application of the arm's length principle and correction rule[332].

---

[324] Elise Krumholz, BEPS Action 13: Standardized Transfer Pricing Documentation Does One Size Fit All? 17 (2015) (unpublished master thesis, Lund University), http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8511365&fileOId=8521736.
[325] RSV Rapport 2003:5 (Swed.).
[326] PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 44 (2009).
[327] Nils von Koch, *New Transfer Pricing Documentation Requirements*, 16 INT'L TAX REV., 46, 46 (2005).
[328] *Id.*
[329] Nils von Koch, *Bill on Transfer Pricing Documentation Requirements Released*, 17 INT'L TAX REV., 7, 7 (2006).
[330] Nils von Koch, *New Transfer Pricing Documentation Requirements*, 16 INT'L TAX REV., 46, 46 (2005).
[331] RA 1991 ref.107 (Swed.).
[332] Elise Krumholz, BEPS Action 13: Standardized Transfer Pricing Documentation Does One Size Fit All? 12, 13 (2015) (unpublished master thesis, Lund University).

Sections 2a and 2b of the Government Bill were included in Chapter 19 of the Income Tax Law on transfer pricing documentation requirements[333]. Thus, Sweden accepted its very first transfer pricing documentation legislation in 2007. Sections 2a and 2b construct a framework of documentation requirements, but do not provide any details. The details are regulated under regulations[334] and a notice provision[335] of the STA. The former operates as a binding rule, while the latter is a non-binding guideline[336].

It should be noted that the transfer pricing documentation requirements will be applicable only to cross-border transactions; i.e. domestic transactions are excluded. The same issue raised in Germany that imposing documentation requirements only for the cross-border transactions may not comply with freedom of establishment rule defined under the EC Treaty could also be considered for the Swedish context.

b. Documentation Requirements

The transfer pricing documentation requirements regulated by Sections 2a and 2b of Chapter 19 do not go far beyond the general framework provisions and refer to information pertaining to controlled transactions, a description of the company, organization and the business of the company, realized transactions, functional analysis, description of the chosen transfer pricing method, and details of the comparability analysis[337]. In addition, Chapter 19 also states that the STA has the authority to produce more detailed guidelines on what kind of documentation should be prepared[338]. However, it should be noted that questions have been raised about the legislative power delegated to the STA and whether the STA has the authority to impose totally new requirements not already stated under laws[339]. The consensus is that the STA exceeds its authority by preparing regulations and notice provisions that impose documentation requirements beyond the law[340].

---

[333] PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 45 (2009).
[334] SKVFS 2007:1 (Swed.).
[335] SKV M 2007:25 (Swed.).
[336] PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 45 (2009).
[337] PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 45 (2009).
[338] *Id.*
[339] Elise Krumholz, BEPS Action 13: Standardized Transfer Pricing Documentation Does One Size Fit All? 20 (2015) (unpublished master thesis, Lund University).
[340] *Id.*; *See* slightly detailed discussions on Elise Krumholz, BEPS Action 13: Standardized Transfer Pricing Documentation Does One Size Fit All? 20 (2015) (unpublished master thesis, Lund University).

The regulations and notice provision of the STA provide more detailed information pertaining to transfer pricing documentation requirements. Firstly, a specific transfer pricing method is not required; rather the OECD TP Guidelines are recommended. The regulations also make reference to the comparability factors under Chapter I of the OECD TP Guidelines. In addition, the regulations refrain from providing an exhaustive list for transfer pricing documentation in line with the approach taken by the OECD TP Guidelines. Section 2 of the regulations states that the documentation should include only the information which is necessary to provide reasonable assessments[341]. The approach of the STA in this respect is referred to as "the principle of proportionality[342]". Although this approach seems fair for tax payers to provide no documents more than necessary, the determination on the necessary documents is open to discretion, as well as subjective interpretation by tax payers and the STA[343]. The notice provision[344] prepared by the STA is also a guideline designed to give examples on what necessary information means. For example, it states that the necessary financial information should include turnover, gross profit, and operational profits[345].

Furthermore, the binding STA regulations provide details on what information should be included in the documentation, such as description of the enterprise, organization and business, information on the type and scope of the transactions, functional analysis, and description of the chosen transfer pricing method.

Unlike most other jurisdictions and international approaches, the regulations do not include any special documentation provisions for SME's. However, it does include special requirements for "transactions of minor value"[346]. It can be considered that transactions realized by SME's will be of a minor value nature[347] and SME transactions could therefore possibly fall within the scope of the minor value transactions. According to the provisions, the simplified report can be prepared for minor value transactions. The transactions are considered as minor if the transactions with goods do not exceed 630 base amounts and other

[341] SKVFS 2007:1 §2 (Swed.); PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 45 (2009).
[342] Elise Krumholz, BEPS Action 13: Standardized Transfer Pricing Documentation Does One Size Fit All? 40 (2015) (unpublished master thesis, Lund University).
[343] *Id.*
[344] SKV M 2007:25 (Swed.); PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 44 (2009).
[345] *Id.*
[346] SKVFS 2007:1 §10 (Swed.).
[347] PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 48 (2009).

transactions do not exceed 125 base amounts per enterprise within the enterprise group. The simplified report must include the following information;

> *"1- the legal structure of the enterprise group as well as the business structure and the business of the enterprise and the enterprise group,*
> *2- the counterparty in the intra-group transaction and information about its business,*
> *3- the transactions in question, stating the type, scope and value,*
> *4- the method used to establish that the transfer pricing of the intra-group transactions is on an arm's length basis, and*
> *5- any comparable transactions that may have been used."*[348]

The binding STA regulations do not require contemporaneous documentation as required by the OECD TP Guidelines. Instead, the tax payer must provide related transfer pricing information for each financial year upon the request of the STA within a "reasonable period of time"[349]. The binding regulations, however, do not clarify what a reasonable period of time means. According to the non-binding notice provision of the STA, tax payers must submit the transfer pricing documents within 30 days upon request[350]. The language of the documents can be written in Swedish, Danish, Norwegian or English[351]. In addition to the submission requirements, the retention period is stated as 10 days under the binding STA regulations[352].

It should be noted that if the tax payer prepares their documentations in line with the EU TPD, it is accepted that all the terms and conditions of the binding STA regulations have been complied with satisfactorily[353]. This view seems logical as long as the EU TPD requires more detailed transfer pricing documentation.

c. Burden of Proof

As a general rule, the burden of proof in tax cases is divided between the tax payer and the tax administration. More specifically, the tax administration bears the burden of proving the income of the tax payer and the tax payer must prove their costs[354].The aim of the division of burden of proof under Sweden tax law focuses on which party obtains the related documents

[348] SKVFS 2007:1 Annex (Swed.).
[349] SKVFS 2007:1 §12 (Swed.).
[350] SKV M 2007:25 (Swed.).
[351] SKVFS 2007:1 §13 (Swed.).
[352] SKVFS 2007:1 §14 (Swed.).
[353] SKVFS 2007:1 §15 (Swed.).
[354] Stefan Olsson, *Sweden in* THE BURDEN OF PROOF IN TAX LAW, 2011 EATLP CONGRESS, UPPSALA 2-3 JUNE 2011, at 249 (Gerard Meussen ed. 2013).

in the easiest way[355]. For example, the tax administration can obtain facts and documents pertaining to income, while the tax payers can more easily prove their costs.

Notwithstanding the above mentioned division of burden of proof, it is accepted that the tax administration bears the burden of proof for both income and costs under certain circumstances. For example, if the tax administration intends to issue an additional assessment after the tax year ends, the tax administration must bear the burden of proof alone[356]. Therefore, the tax administration has the responsibility to prove that the estimation on the tax assessment of the tax payer is actually wrong.

On the other hand, the burden of proof on the tax administration can also shift to the tax payer under other circumstances . For example, if the tax administration proves its estimation, the burden of proof shifts to the tax payer[357]. Consequently, the tax payer has to prove that the estimation made by the tax administration is actually wrong. Otherwise, the estimation of the tax administration will be deemed as probable. This approach taken in Sweden regarding a shift in the burden of proof can be considered as quite similar with the German approach in so far as they both accept the rebuttable presumption of the tax administration.

More specifically, in transfer pricing cases, the Ministry of Finance in Sweden agrees that the tax administration has the primary responsibility to prove that the transfer prices are not at arm's length[358]. Under Swedish taxation legislation, the tax administration must prove the following items to show the legitimacy of additional tax assessment:

> *"- the party to whom the income is transferred is not liable to taxation in Sweden on that income,*
> *- they have reasons for believing that a community of economic interests exists between the contracting parties,*
> *- it is clear from the circumstances that the contractual conditions have not been agreed upon for reasons other than economic community of interest,*
> *- the adjustment does not depend upon consideration of the facts applying to one year in isolation, and*

[355] *Id.*
[356] *Id.* at 251.
[357] *Id.*
[358] Prop. 2005/06:169, p.102 (Swed.); Stefan Olsson, *Sweden in* THE BURDEN OF PROOF IN TAX LAW, 2011 EATLP CONGRESS, UPPSALA 2-3 JUNE 2011, at 260 (Gerard Meussen ed. 2013).

- there has been a significant deviation from the arm's length price, sufficient to justify an adjustment.[359]"

As a matter of fact, even this legal approach to transfer pricing documentation requirements was formalized for the Ministry of Finance, the Supreme Administrative Court in the Shell case[360] determined that the STA must bear the burden of proof in transfer pricing cases[361]. In addition, in the recent judgement of the Supreme Administrative Court in the Tetra Pak case, the transfer pricing documentation of Tetra Pak indicated that the new packaging technology increased the profitability of the company[362]. However, the transfer pricing documentation did not indicate where and how this research on profitability was made. Tetra Pak submitted the information to the Supreme Administrative Court that the research had been conducted in Italy since 1993. The Court regarded it strange that this information was not submitted before, but in any case there was not any requirement to question the reliability of the information. Therefore, the Tetra Pak case shows that the STA has the burden to provide enough evidence showing that the transfer prices are not at arm's length[363].

d. Penalties

Under Swedish transfer pricing legislation there is no specific transfer pricing documentation related penalties in case of non-compliance[364]. Under the Government Bill, however, it is stated that in case of submission of erroneous factual or misleading information, tax penalties must be applied. However, these penalties will not be applicable if the tax payer submits the erroneous factual or misleading information by mistake[365]. In the event an adjustment is made by the STA, a penalty of 40% over the additional tax assessed will be applicable[366].

---

[359] PWC, International Transfer Pricing 2015/16 Report, 2015, at 957, http://www.pwc.com/gx/en/international-transfer-pricing/assets/itp-2015-2016-final.pdf.
[360] RA 1991 ref.107 (Swed.) *in* PWC, International Transfer Pricing 2015/16 Report, 2015, at 954.
[361] PWC, International Transfer Pricing 2015/16 Report, 2015, at 954.
[362] Annika Lindström & Selma Omanovic, *The Swedish Tax Agency's Difficulty in Meeting its Burden of Proof,* INT'L TAX REV. (TP Week), May 27,2015.
[363] *Id.*
[364] PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS, 50 (2009).
[365] *Id.*
[366] Nils von Koch, *Bill on Transfer Pricing Documentation Requirements Released,* 17 INT'L TAX REV., 7, 7 (2006).

§4. CURRENT TURKISH TRANSFER PRICING DOCUMENTATION PRACTICE

I. Legal Nature of Transfer Pricing Documentation: Proof and Evidence

The term "proof" is defined under the Oxford Dictionary as "*evidence or argument establishing a fact or the truth of a statement*[367]". In the legal context, proof could be regarded as the outcome of the process of evaluation of the evidence and reaching a conclusion[368]. On the other hand, "evidence" is defined within the legal context as the *"Information drawn from personal testimony, a document, or a material object, used to establish facts in a legal investigation or admissible as testimony in a law court*[369]".

Additionally, as mentioned in the Introduction chapter of this thesis, "documentation" is defined in the dictionary as material that provides official information or evidence or serves a record. In other words, documentation is a means of proof. In addition to the definition of documentation, transfer pricing documentation, as mentioned several times throughout this thesis, is the set of documents that prove that the transfer prices determined between associated enterprises are at arm's length. Therefore, there is no doubt that transfer pricing documentation operates as both evidence and proof to that show that the transfer prices are at arm's length.

This section evaluates transfer pricing documentation within the legal meaning of proof and evidence under Turkish legislation.

1. Law of Proof

a. Law of Proof under General Provisions

It is inevitable to make connection with other branches of law when evaluating the law of proof in taxation law, such as provisions of the Code of Civil Procedure, the Civil Code and also the Turkish Commercial Code.

[367] "proof", Oxford Dictionary, 2016, http://www.oxforddictionaries.com/ 22 Apr.. 2016.
[368] IAN DENNIS, THE LAW OF EVIDENCE, 4, 2nd ed. (2002).
[369] "evidence", Oxford Dictionary, 2016, http://www.oxforddictionaries.com/ 22 Apr.. 2016.

aa. Proof

As a matter of fact, the law of proof is not directly addressed under tax law, but is defined in the Code of Civil Procedure No. 6100 ("CCP")[370]. Article 187 of the CCP states that proof is essential in determining controversial cases disputed by parties. In a procedural sense, there should be a controversial matter and determination of a material fact in relation to this controversial matter. It should be noted that proof can not be regarded as a type of burden with respect to the parties[371]. On the contrary, proof represents a right for the parties by taking its source from the Constitution[372]. Article 36 of the Turkish Constitution titled Freedom to Claim Rights states that *"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures*[373]*"*. The freedom to claim rights regulated under the Turkish Constitution should be interpreted broadly so that it covers both the right to claim and defense[374]. The parties can only use the right to claim and defense if the right to proof is made available to the parties[375]. In addition to the Turkish Constitution, Article 189 of the CCP explicitly provides the right of proof to parties within the framework of time limits and procedures defined under the CCP.

An important issue to determine is when the parties are deemed to have proven their claims by using their aforementioned rights of proof. This is referred to as "the standard of proof,"[376] but there is no measurement of proof provided by the CCP or any other laws in Turkey. Therefore, the degree of certainty needed to be deemed as proven is not clear[377]. However, in the literature, a general definition of proof is accepted[378] to mean a certainty which is acceptable in ordinary life in the absence of all the possible doubts[379].

---

[370] NİHAL SABAN, VERGİ HUKUKU, 550, (8th ed. 2016).
[371] BAKİ KURU, RAMAZAN ARSLAN & EJDER YILMAZ, MEDENİ USUL HUKUKU, 369 (22nd ed. 2011).
[372] NİHAL SABAN, VERGİ HUKUKU, 546-47, (8th ed. 2016); Yıldırım Taylar, *Vergi Yargılaması Hukukunda İspata İlişkin Genel Esaslar Ve Bu Bağlamda Bir Danıştay Kararının Değerlendirilmesi, in* PROF. DR. MUALLA ÖNCEL'E ARMAĞAN CİLT II 1189, 1192 (2009) (Turk.).
[373] CONSTITUTION OF THE REPUBLIC OF TURKEY, art. 36 (Turk.).
[374] BAKİ KURU, RAMAZAN ARSLAN & EJDER YILMAZ, MEDENİ USUL HUKUKU, 369 (22nd ed. 2011).
[375] *Id.*
[376] M. KAMİL YILDIRIM, MEDENİ USUL HUKUKUNDA DELİLLERİN DEĞERLENDİRİLMESİ, 40 (1990).
[377] *Id.*
[378] *Id.*
[379] *Id.*

bb. Burden of Proof

Although proof is regarded as a right for the parties, under some circumstances it also represents a burden. In fact, it is a matter of discussion which facts should be proved by whom and the burden of proof shifts under specific circumstances. Within this scope, the burden of proof could be considered as a matter of determining which party bears the burden of proof and establishing which facts should be proved[380]. Even though determination of the party who bears the burden of proof is mainly a subject of procedural law, it also relates to substantive law[381].

As a matter of fact, the former Civil Procedure Code did not provide any provisions regarding the burden of proof. Instead, the provisions of the Turkish Civil Code No. 4721 ("TCC") were applied to civil procedural cases. As a general rule, Article 6 of the TCC states that *"unless otherwise provided in the law, each party shall bear the burden of proof to prove the existence of the facts which form the basis of their rights."* Unlike the former Civil Procedure Code, the current CCP includes provisions regarding the burden of proof in line with the TCC. Paragraph 1 of Article 190 states that *"the burden of proof is on the party who takes a favorable right from the legal result bound to the claimed fact, unless special provisions are provided in the law".*

As stated above, the general rule on the burden of proof is defined both under the TCC and CCP. However, it should be noted that not all cases can be resolved with one general rule. For this reason, exceptions to the general rule can apply depending on the features of each concrete case.

aaa. Exceptions defined under Law

Article 6 of the TCC and Article 190 of the CCP provide a general rule for determination of the party who must bear the burden of proof, unless otherwise provided under the law. Therefore, the legislator has the opportunity to provide specific burden of proof rules. In cases where specific burden of proof rules are provided by other laws, it is not necessary to determine which party bears the burden of proof[382].

---

[380] M. KEMAL OĞUZMAN & NAMİ BARLAS, MEDENİ HUKUK 327 (21th ed. 2015).
[381] *Id.*
[382] BAKİ KURU, MEDENİ USUL HUKUKU DERS KİTABI, 233 (2016).

bbb. Ordinary Flow of Life

Facts that represent the ordinary flow of life and experience should not have to be proved. On contrary, the burden of proof vests with the person who claims the existence of a fact that is contrary to the ordinary flow of life[383]. For example, in a purchase agreement, if the parties agreed that the goods will be delivered by the seller to the buyer after payment of the price and if the seller claims that he/she delivered the goods before payment of the price, he/she has to prove this claim. That is because the expectation in the ordinary flow of life is to make payment before delivery[384].

ccc. Presumptions

Presumption is a conclusion drawn for an unknown case from a specifically known case[385]. There are two types of presumption; the first one is defined as the legal presumption and the second one is defined as the factual presumption.

Legal presumptions are defined under the laws. If the presumption is favorable to one party, that party does not have the burden of proof[386]. The legal presumption also has two types; non-rebuttable legal presumption and rebuttable legal presumption. For non-rebuttable legal presumptions, the determination is certain and therefore, not rebuttable. A rebuttable legal presumption applies to determinations that can be rebutted and proven to be opposite.[387]

Contrary to legal presumptions, factual presumptions are not defined by any laws. They are also referred to as "life experience rules"[388] and they can be rebutted.

b. Law of Proof under Tax Law

aa. Proof

As indicated above, the subject of proof is the process of finding the material fact in a controversial case. Therefore, determination of the characteristics of the underlying material fact constitutes the subject of proof[389]. The material fact within the scope of tax law is the real

[383] *Id.* at 233-34.
[384] M. Kemal Oğuzman & Nami Barlas, Medeni Hukuk 334 (21th ed. 2015).
[385] BAKİ KURU, MEDENİ USUL HUKUKU DERS KİTABI, 234-35 (2016).
[386] *Id.* at 375.
[387] BAKİ KURU, MEDENİ USUL HUKUKU DERS KİTABI, 235 (2016).
[388] *Id.*
[389] MUALLA ÖNCEL, AHMET KUMRULU & NAMİ ÇAĞAN, VERGİ HUKUKU, 201 (25th ed. 2016) [*hereinafter* ÖNCEL, KUMRULU, ÇAĞAN].

nature of the taxable event. The taxable event is defined under Article 19 of the Tax Procedural Code No. 213 ("TPC") as *"the occurrence of the event to which the tax laws link the tax or the maturation of the legal status*[390]. Accordingly, the material facts which are the subject of proof could be a legal status or a legal case.

Proof under tax law is regulated by Article 3 of the TPC titled as "Implementation of tax laws and proof", which states the following:

> *"A) Implementation of tax laws: The phrase of "Tax Law" that is used in this law refers to this law and to the laws of taxes, duties and levies that are subject to the provisions of this law.*
>
> *Tax laws apply with their wording and sprit. In cases where the wording is not clear, the provisions of tax laws are implemented by taking into account the purpose for inclusion, the place of the provisions in the structure of the law, and its connection with other articles*
>
> *B) Proof: The real nature of the taxable event and the transactions relating to this event is essential in the taxation.*
>
> *The real nature of the taxable event and the transactions relating to this event may be proved with any type of evidence excluding oath. However, witness statements that are not naturally and clearly related to the taxable event are not used as a means of proof.*
>
> *In case a situation that is not in accordance with the economic, commercial, and technical requirements, or abnormal and unusual depending on the nature of the event, is alleged, the burden of proof vests on the party that alleges it*[391].

Article 3/B[392] of the TPC essentially states that identification of the taxable event is not sufficient, and the real nature of the identified taxable event must be proved with evidence.

---

[390] VERGİ USUL KANUNU [VUK] art. 19 (Turk.).

[391] *For the translation see* Nihal Saban, *What is the being of Article 3, B, 1 of the Tax Procedural Law?, in* Vergiden Kaçinmanin Önlenmesi 169, 171 (Billur Yaltı ed., Argüs Tercüme Ajansı trans. 2014).

[392] Milli Güvenlik Konseyi, *04.01.1961 gün ve 213 sayılı Vergi Usul Kanununda Değişiklik yapılmasına ilişkin Kanun tasarısı ve Bütçe-Plan Komisyonu raporu,* (Dec. 25, 1980), https://www.tbmm.gov.tr/tutanaklar/TUTANAK/MGK_/d01/c002/mgk_01002028ss0084.pdf.

For instance, some tax payers intend to pay less tax by hiding the real nature of the taxable events. The aim of taxation is to ensure the collection of taxes by revealing the real nature of the taxable events. In this way, Article 3/B operates to clarify that identification and substantiation of the taxable base and taxable event is realized with evidence and not oath or testimony, although witness statements can be used limitedly. Article 3/B also provides guidance on which party must bear the burden of proof.

Therefore, by evaluating both Article 3/B of the TPC and its reasoning, there is no doubt that Paragraph 2 of Article 3/B regulates issues of evidence, and Paragraph 3 regulates the burden of proof in tax cases. However the provision in the first Paragraph of Article 3/B of the TPC is not clear so that there are many discussions in the literature[393] on what is provided under the first paragraph. It is certain, however that the first paragraph does not provide any regulations of the concept of proof.

bb. Standard of Proof

The standard of proof is not regulated explicitly under tax laws. The standard of proof is related to the degree of certainty that is needed for a case to be regarded as proven[394]. Paragraph 1 of Article 3 states that *"the real nature of the taxable event and the transactions relating to this event is essential in taxation."* Therefore, under tax law, the standard of proof is defined as "reality", which is the material facts of the taxable event under Article 19 of TPC[395]. However, this wording raises questions about the nature of reality for taxable events[396] and Article 138 of the Turkish Constitution is relied on for guidance. It states that *"Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming with the law,"* which indicates that judges can determine reality by their personal conviction[397]

Therefore the judges should determine on the standard of proof, when they reach the reality. based on their personal understanding of relevant laws.

---

[393] *E.g.*, ÖNCEL, KUMRULU, ÇAĞAN, 200-201 (25th ed. 2016); Selim Kaneti, Vergi Hukuku, 48 (2nd ed. 1989); Salih Şanver, *Vergi Hukukunda Yorum ve Kanıtlama, in* İSTANBUL İKTİSADİ VE TİCARİ İLİMLER AKADEMİSİ SİYASAL BİLİMLER FAKÜLTESİ REŞAT KAYNAR'A ARMAĞAN 183, 185 (1981), NİHAL SABAN, VERGİ HUKUKU, 49, (8th ed. 2016); MUSTAFA AKKAYA, VERGİ HUKUKUNDA EKONOMİK YAKLAŞIM, 76 (2016); Billur Yaltı, *VUK 3B'nin Sınırlarına İlişkin Bir Uygulama: Vergi Hukukunda Sermaye Tamamlama Akçesi,* 262 VERGİ SORUNLARI DERGİSİ [VSD] 8 (2010) (Turk.).

[394] Billur Yaltı, *Transfer Fiyatlandırmasında "Gizli Emsal",* 251 VSD 8 (2009) (Turk.).

[395] NİHAL SABAN, VERGİ HUKUKU, 551, (8th ed. 2016).

[396] *Id.*

[397] *Id.* At 78-79.

However, Turkish courts have determined a more objective approach and the Supreme Administrative Court has stated the following:

> *"According to Turkish tax system, taxation based on general opinion and assumption is not possible. It is mandatory to reveal the taxable event in line with the reality or the closest reality to apply the type of assessments defined in Tax Procedural Code and all the material evidence shall be revealed in respect to this.*[398]*"*

Similarly, the court has stated in another decision that *"…the facts regarding to the tax base shall be proven with the material information and documents rather than the opinion or assumption. In Turkish tax system, taxing the real income is essential and taxation based on the assumption or opinion is not allowed.*[399]*"*

This case law therefore asserts that the standard of proof under tax law in Turkey is based on definitive proof and not personal opinion or assumption[400].

cc. Burden of Proof

Paragraph 3 of Article 3/B of the TPC regulates the burden of proof in tax cases and states that *"In case a situation that is not in accordance with the economic, commercial, and technical requirements, or abnormal an unusual depending on the nature of the event, is alleged, the burden of proof vests on the party that alleges it*[401]." As stated in the reasoning[402]

---

[398] The Supreme Administrative Court 4D, 03.06.1998, E. 1998/128, K. 1998/2379, (Turk.), www.lebibyalkın.com.tr.

[399] The Supreme Administrative Court 4D, 22.02.2005, E. 2004/1389, K. 2005/248, (Turk.), www.lebibyalkın.com.tr.

[400] NİHAL SABAN, VERGİ HUKUKU, 550-51, (8th ed. 2016).

[401] *For the translation see,* Nihal Saban, *What is the being of Article 3, B, 1 of the Tax Procedural Law?, in* Vergiden Kaçinmanin Önlenmesi 169, 172 (Billur Yaltı ed., Argüs Tercüme Ajansı trans. 2014).

[402] "… The provision in the last paragraph describes which party would have the burden of proof in tax assessment and the defense before administrative and judicial authorities against the tax assessment made. As is known, the determination of party that would have the burden of proof appears to be an important issue, as is the case in all other branches of law. Therefore, it has become necessary when laying out the system of evidence to determine who would have the burden of proof, in other words, the administration or the tax payer. Though each party has to prove its own allegation according to the basic rule in the general law, this rule does not provide a practical solution to the matter and, therefore, the rule of "the party that alleges a matter that is not normal according to the substance of the case is obliged to prove that allegation" is applied. The provision of the last paragraph for the burden of proof has been laid out by taking this rule of the general law regarding the burden of proof as the basis and by adapting this principle to the requirements of the tax practice. According to the provision in the paragraph, the party that alleges a situation that does not conform to economic, technical and commercial requirements and is abnormal or unusual according to the characteristics of the event is obliged to prove this allegation. For instance, in case a taxpayer brings a lawsuit on the basis of convincing and credible evidence accepted by the general law against an assessment that has been made in accordance with economic, technical, and commercial requirements by alleging the opposite of this normal and unusual situation, it is required that the burden of proof be on the tax payer, in other words, the taxpayer must prove his allegation."

of Article 3 of the TPC, a special provision in tax law is provided and therefore the burden of proof is vested to the party who claims that an unusual case has occurred. However, it is also stated in the reasoning of Article 3 of the TPC that this provision is drafted within the scope of the general rules regarding the burden of proof.

It should be noted that this provision is not a general rule under tax law regarding the burden of proof, but rather it provides a presumption[403]. Each concrete case may not directly fall under this provision. Therefore, Article 6 of the TCC also applies to tax law as a general rule regarding the burden of proof[404]. Although Article 6 of the TPC is applicable to tax law, there are some special presumptions arising from the specific nature of tax law.

aaa. Prima Facie Presumption

Tax payers have the responsibility to document the facts regarding taxation and maintain formal records as prescribed by law[405]. If the tax payer maintains such records for tax returns and other financial requirements, the information in these documents is be deemed as true within the scope of the prima facie presumption, until being proven otherwise. Therefore, tax payers do not have the burden to prove the information provided in the documents. However, if those documents are not provided or not properly maintained by the tax payer as prescribed by law, then he/she cannot benefit from the prima facie presumption[406].

The Supreme Administration Court has made the following statement regarding the prima facie presumption:

> *"... It is concluded that the claimant had indeed bought the goods which are written on the invoice issued by the mentioned persons and paid the value added tax. The contrary of this occasion should have been proven by the administration; however, the administration that bears the burden of proof did not provide any evidence in this direction. Therefore there is no conformity with the law in the decision held on the contrary, while the assessment should have been cancelled by the court.*[407]"

For the translation see Nihal Saban, *What is the being of Article 3, B, 1 of the Tax Procedural Law?, in* Vergiden Kaçinmanin Önlenmesi 169, 174 (Billur Yaltı ed., Argüs Tercüme Ajansı trans. 2014).

[403] NİHAL SABAN, VERGİ HUKUKU, 552, (8th ed. 2016).

[404] SELIM KANETI, VERGI HUKUKU, 55 (2nd ed. 1989).

[405] *Id.* at 55.

[406] *Id.* at 55.

[407] The Supreme Administrative Court 4D, 30.06.2009, E. 2008/2274, K. 2009/3773, (Turk.), www.lebibyalkın.com.tr.

It is clear from this statement that the tax administration bears the burden of proof if financial documents are maintained in accordance with the law.

bbb. Situations that are not in line with economic, commercial, and technical requirements or are abnormal and unusual

Similar to the procedural law, tax law also accepts that taxable events develop in line with the economic, commercial and technical requirements common to the ordinary flow of life[408]. Paragraph 3 of Article 3/B of the TPC provides that this prima facie presumption can be rebutted by the tax administration if the tax administration shows that the documents and facts are not in accordance with the economic, commercial and technical requirements in line with the ordinary flow of life. In such a case, the burden of proof shifts to the tax payer.

Regarding to this shift, the General Assembly of Tax Courts[409] states that the burden of proof shifts to the tax payer from the tax administration, because the claimant company did not reflect the sale of the factory building and the land in its records and therefore hid the company profit and was not able to prove otherwise.

2. Law of Evidence

The subject of evidence are the material facts and evidence should be produced in order to prove the existence of these material facts[410]. The question on how these material facts are proven relates to the production of evidence, which is determined in line with procedural law[411].

For this reason, the law of evidence should primarily be evaluated within the scope of the CCP. In addition, it could be beneficial to examine the provisions regulating evidence under the Commercial Code to understand it's conceptual and operational meaning before analyzing the law of evidence under tax law[412].

---

[408] Selim Kaneti, Vergi Hukuku, 56 (2nd ed. 1989).
[409] The General Assembly of Tax Courts, 30.03.2007, E. 2006/348, K. 2007/119, (Turk.) www.lebibyalkın.com.tr.
[410] BAKİ KURU, MEDENİ USUL HUKUKU DERS KİTABI, 230 (2016).
[411] SAIM ÜSTÜNDAĞ, MEDENI YARGILAMA HUKUKU, 507(4th ed. 1989).
[412] NİHAL SABAN, VERGİ HUKUKU, 82, (5th ed. 2009).

a. Law of Evidence under General Provisions

There are two types of evidence: material and arbitrary evidence. Material evidence is defined under the CCP as confession, final judgement, deed and oath. Material evidence is binding on judges in legal proceedings and cases are deemed to be proven when proven with material evidence[413]. On the other hand, arbitrary evidence is defined as witness or expert testimony, research or opinion and other types of evidence provided by law. Judges have the right to evaluate these types of evidence freely,[414] but are not bound by arbitrary evidence.

As a type pf material evidence, deeds are examined in this section for the relevance they have with the research focus of this thesis. The provisions regulating deeds under the CCP are included under the main heading "document and deed". Document is defined in Article 199 of CCP as *"The written or printed text, deed, drawing, plan, sketch, photo, film, image or data such as recording and data in electronic environment and such like information bearers which are suitable to prove the matter of dispute are documents according to this law."*[415] It should be noted that the definition of document does not provide an exhaustive list but rather gives examples of different types of documents.

Deed has no definition under the CCP, but can be defined as a written document which is created by someone to constitute evidence against another[416]. Therefore, deeds are a type of written document, but not all documents are deeds. The differentiation between deeds and documents is important for the use of evidence. As a matter of fact, the use of documents as evidence depends on whether it is a deed or not. As noted above, deeds are a type of material evidence that are binding on judges, while other ordinary documents are not.

b. Law of Evidence under Tax Law

The rules regulating the use of evidence are provided in Paragraph 2 of Article 3/B of the TPC which states the following: *"The real nature of the taxable event and the transactions relating to this event may be proved with any type of evidence excluding oath. However, witness statements that are not naturally and clearly related to the taxable event are not used as a means of proof."* The principle of circumstantial evidence is valid under tax law, because the determination and proof of the taxable events can only be possible by using each of the

[413] BAKİ KURU, MEDENİ USUL HUKUKU DERS KİTABI, 242 (2016).
[414] *Id.* at 380.
[415] HUKUK MUHAKEMELERİ KANUNU [HMK] art. 199 (Turk.).
[416] BAKİ KURU, MEDENİ USUL HUKUKU DERS KİTABI, 252 (2016).

evidences freely, as stated in the reasoning of the Article. It is reasonable to accept all kinds of evidence under tax law, because the real nature of taxable events rather than their appearances should be considered[417].

However, there are some limitations on the type of admissible evidence. Unlike the CCP which accepts oath as material evidence, the TPC does not accept the evidence of oath. The second limitation is on witness statements as evidence, which are only admissible if they are naturally and clearly related to the taxable event. It should be noted that witness statements are accepted as arbitrary evidence under the CCP without any limitation.

As discussed above, there are two types of evidence under the CCP; material evidence that binds judges and arbitrary evidence that does not. However, tax law does not include such differentiation regarding the weight of evidence and evaluating procedural law and commercial code can function as a guide to determine the weight of evidence under tax law[418].

Article 82 of the abrogated Turkish Commercial Code No. 6762 ("abrogated TCC") stated that financial records and commercial book-keeping carried the weight of material evidence. However, the new Turkish Commercial Code No. 6102 now excludes such records as material evidence on the grounds that *"the process of proof by the commercial books, which is no longer included in the laws of lots of countries and conflicts with the general principles of law of proof, has been terminated. The commercial books, indeed, still protect their nature of evidence as the arbitrary evidence[419]."* In conjunction with Article 222 of the CCP, the TCC treats commercial book-keeping as a type of arbitrary evidence and not material. Similarly, Article 227 of the TPC states that the records prepared in accordance with the TPC are merely substantiating documents.

3. Evidence Nature of Transfer Pricing Documentation as a Means of Proof

Tax payers sometimes intend to pay less or even no tax through different commercial practices. One of them is referred to as "tax-veiling" which means using a nontaxable private law transaction outside of its ordinary and natural use in order to reach a financial solution that can normally be reached by another taxable private law transaction[420]. These transactions

[417] Salih Şanver, *Vergi Hukukunda İspat,* 21 VERGİ DÜNYASI DERGİSİ 521 (1983) (Turk.).
[418] NİHAL SABAN, VERGİ HUKUKU, 82, (5th ed. 2009).
[419] MUTLU DİNÇ, TÜRK TİCARET KANUNU, GENEL GEREKÇE 88, (8th ed. 2013).
[420] SELİM KANETI, VERGİ HUKUKU, 49 (2nd ed. 1989).

are formalized in tax-veiling contracts[421]. Tax laws include special provisions to prevent possible tax-veiling contracts in different areas of taxation which are open to manipulation. One of these provisions is Article 13 of the Corporate Tax Code No. 5520 ("CTC") which states that when associated enterprises realize transactions such as sale of goods or services inconsistent with the arm's length principle, any profit shall be deemed as wholly or partially distributed disguisedly through transfer pricing. It should be noted that Article 13 constitutes a rebuttable legal presumption with regards to the real nature of the transaction[422].

Where tax laws prescribe a rebuttable legal presumption, tax administrations must prove the existence of the presumption to benefit from the presumption[423]. In accordance with the presumption prescribed under Article 13 of CTC, the tax administration has to prove that the price for the sale of goods or services is not determined in accordance with the arm's length principle. If the tax administration proves its claim, the burden of proof[424] will shift to the tax payer to prove that their transfer prices are in line with the arm's length principle. Obviously, the transfer pricing documentation will be the primary evidence for the tax payer to prove the arm's length nature of the transfer prices.

Based on the analysis above, there is no doubt that the transfer pricing documentation[425] functions as a type of evidence for the legal purposes of proof.

II. Transfer Pricing Documentation Rules

1. In General

Transfer pricing requirements are a relatively new topic in Turkish tax legislation. As a matter of fact, transfer pricing requirements were introduced for the first time in 2006 by the CTC and entered in to force on 13 June 2006. However, the effective date of the transfer pricing documentation provisions is recorded as 1 January 2007. Previously, the concept of "transfer

[421] ÖNCEL, KUMRULU, ÇAĞAN, *supra* note 389, at 28.

[422] ÖNCEL, KUMRULU, ÇAĞAN, *supra* note 389, at 203; Billur Yaltı, *Transfer Fiyatlandırmasında "Gizli Emsal",* 251 VSD 8 (2009) (Turk.); *But see* Mustafa Akkaya, İbrahim Bayar & Oytun Canyaş, *Vergi Hukukunda "Emsallere Uygunluk" ve "Gerçeklik" İlkesi* (Feb. 09,2016), http://www.vmhk.org.tr/vergi-hukukunda-emsallere-uygunluk-ve-gerceklik-ilkesi/. (The writer is of the opinion that Article 13 of the CTC constitutes the irrebuttable legal presumption).

[423] *Id.*

[424] Detailed explanations regarding to the burden of proof in transfer pricing will be given in the next part of this Thesis.

[425] It should be noted that a similar kind of reporting is defined under Article 199 of the new TCC. It is called as affiliation report and prepared by the board of directors of the affiliated company to show the relationships between the dominant company and the affiliated company. This affiliation report regulated in the TCC is also in nature of evidence to show that the board of directors manage the company appropriately.

pricing" was not regulated in the abrogated Corporate Tax Code No. 5422 ("abrogated CTC"). Rather the abrogated CTC regulated disguised profit distribution and thin capitalization as the nearest concepts. However, these Articles were not sufficient to address international transfer pricing problems[426].

The provisions of Article 13 of the CTC were drafted by taking into consideration both international and OECD regulations[427]. With the title Disguised Profit Distribution through Transfer Pricing, Article 13[428] of the CTC stipulates that if related parties realize transactions not at arm's length price, any profits will be deemed as wholly or partially distributed in a disguised manner.

Article 13 includes definitions regarding the related parties, the arm's length principle and transfer pricing methods that are offered as appropriate methods. In addition to these definitions, Paragraph 3 of Article 13 states that it is obligatory that records, tables and documents concerning the calculations of prices determined in line with the arm's length principle be kept by the tax payer as substantiating documents. This paragraph is the most relevant paragraph regarding the transfer pricing documentation requirements under the CTC. However, it is important to note that there is no such explicit requirements for preparation and submission of transfer pricing documentation.

Paragraph 6 of Article 13 of the CTC states that in the case of disguised profit distribution, the amounts so distributed are considered as dividends distributed as of the last day of the fiscal year or as the amount transferred to the headquarters for the non-resident related parties. It should be noted that in order for Paragraph 6 of Article 13 to operate, there must be a treasury loss due to transactions realized contrary to the arm's length principle.

Finally, authority is given to the Council of Ministers to determine procedures regarding transfer pricing and recent amendments have broadened this authority further.[429] However, the provisions for this delegation of power do not provide any detail on which subjects the Council of Ministers has authorization. The legitimacy of this provision will be discussed in the following chapters of this thesis.

---

[426] TUNCAY KAPUSUZOĞLU, VERGISEL YÖNDEN TRANSFER FIYATLANDIRMASI, 244, (2003).
[427] Türkiye Büyük Millet Meclisi, *Kurumlar Vergisi Kanunu Tasarısı ve Bursa Milletvekili Mehmet Küçükaşık ve 47 Milletvekilinin; Kurumlar Vergisi Kanununda Değişiklik Yapılmasına İlişkin Kanun Teklifi ile Plan ve Bütçe Komisyonu Raporu (1/1170, 2/719),* (Feb. 8, 2006), https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d22/c123/tbmm22123114ss1192.pdf.
[428] KURUMLAR VERGİSİ KANUNU [KVK] art. 13 (Turk.).
[429] *See infra* Part §4.IV.

Based on its authority, the Council of Ministers published the Decree on Disguised Profit Distribution through Transfer Pricing[430] ("Decree") on 6 December 2007. Just before the publication of the Decree, the Finance Ministry published the General Communique on Disguised Profit Distribution through Transfer Pricing[431] (Serial No:1) ("Communique No.1"). These two administrative regulatory acts present different kinds of documentation requirements which will be explained in §4.II.2.

It should be noted that the Turkish Ministry of Finance drafted the General Communiqué on Disguised Profit Distribution through Transfer Pricing Serial No:3[432] to implement transfer pricing documentation requirements within the scope of the BEPS Action Plan 13[433].

2. Documentation Requirements

As discussed above, there are two different regulations for transfer pricing documentation in Turkish tax legislation. First one is the Decree and the second one is the Communique No.1. This Section will analyze the different regulations separately.

a. The Decree of the Council of Ministers

Transfer pricing documentation regulations are provided under Section V of the Decree titled "Documentation in Transfer Pricing". Article 18 of the Decree defines the purpose of transfer pricing documentation as to understand the process of transfer pricing and provide details about how to calculate transfer prices as in line with the arm's length principle[434]. In accordance with this purpose, tax payers are obliged to prepare documentation that proves the transfer prices are at arm's length. Tax payers are also obliged to keep this documentation in order to submit it to the tax administrations upon request.

Article 19 of the Decree provides details on the type of companies obliged to provide the documentation and the information that should be included in the documentation. For instance, tax payers who are registered to the Large Tax Payers' Office are obliged to prepare an "Annual Transfer Pricing Report" for domestic or foreign transactions realized with their

[430] Bakanlar Kurulu, Transfer Fiyatlandırması Yoluyla Örtülü Kazanç Dağıtımı Hakkında Karar No. 2007/12888, (Dec. 6, 2007) (Turk.).
[431] Maliye Bakanlığı, Transfer Fiyatlandırması Yoluyla Örtülü Kazanç Dağıtımı Hakkında Tebliğ (Seri No:1) Tebliğ [General Communiqué on Disguised Profit Distribution through Transfer Pricing Serial No:1](2007), (Turk.).
[432] Transfer Fiyatlandırması Yoluyla Örtülü Kazanç Dağıtımı Hakkında Genel Tebliğ (Seri No:3) [General Communiqué on Disguised Profit Distribution through Transfer Pricing Serial No:3] (2016) (Turk.).
[433] *See infra* Part §5.III.3.
[434] Bakanlar Kurulu, Transfer Fiyatlandırması Yoluyla Örtülü Kazanç Dağıtımı Hakkında Karar No. 2007/12888, Art. 18 (Dec. 6, 2007) (Turk.).

associated enterprises. Other tax payers are obliged to prepare an Annual Transfer Pricing Report only for foreign transactions realized with their associated enterprises. In addition, the Decree also requires documentation from companies operating in free zones and for all tax payers who realize transactions with companies operating in free zones.

The Annual Transfer Pricing Report must be prepared within the same time limit as submission of the annual tax return and submitted after the tax return deadline upon the request by the tax authority or the authorities who are authorized to conduct tax inspections[435]. It should be noted that contemporaneous documentation is also prescribed under this Article 19.

The Annual Transfer Pricing Report must include information defining the operations of the tax payer and the structure of its organization, its shareholders, shareholding structure, the relevant sector, brief information about the economic and legal background, definition of the related parties, information about the functions performed, risk assumed and assets used, list of products, production costs regarding the year of operation, etc. and other documents which are necessary for the determination of transfer prices in accordance with the arm's length principle[436].

Any documentation prepared in a foreign language must also be translated and submitted in Turkish language.

It should be noted that the Decree does not provide any further requirements or penalties in relation to failing to fulfill the documentation requirements.

b. Communique No. 1

Transfer pricing documentation requirements are also stated under Section 7.1. of the Communique No.1 titled "Annual Reporting", which states that tax payers are obliged to prepare the Form on Transfer Pricing, Controlled Foreign Corporation and Disguised Capital ("Transfer Pricing Form") in relation to transactions realized with their associated enterprises and submit it to the tax authority as an attachment to their corporate tax return.

In addition to the Transfer Pricing Form, the Communique No.1 also requires submission of the same Annual Transfer Pricing Report as required by the Decree.

[435] *Id.* at Art. 19(1).
[436] *Id.* at Art. 19(2).

However, unlike the Decree, the Communique No.1 also includes the penalty provisions which will be examined in detail in the next chapters.

3. Burden of Proof

Regulation of the burden of proof under Turkish tax legislation was explained in detailed in the previous part of this Thesis[437]. Therefore, this section will only provide a summary on this topic.

Tax payers have the responsibility to document facts relating to taxation and therefore if the tax payer abides by these documentation obligations, information contained in these documents will be deemed as true in accordance with the prima facie presumption. However, the prima facie presumption is rebuttable in practice. Where the tax administration is able to show that the documents and facts are not in line with the ordinary flow of life, the tax payer will no longer benefit from the prima facie presumption. Consequently, the tax payer then bears the burden of proving the legitimacy of this information and documents.

However, this prima facie presumption is not applicable when other specific laws provide for another presumption. For instance, Article 13 of CTC states that if the tax administration is able to prove that associated enterprises realize transactions (such as the sale of goods or services) contrary to the arm's length principle, any profit from these transactions will be deemed as wholly or partially distributed disguised through transfer pricing. This provision constitutes a specific, but rebuttable legal presumption[438].

If the tax administration proves its claim and benefits from the rebuttable presumption, the burden of proof will shift to the tax payer, which must prove that the transfer prices are in line with the arm's length principle[439].

4. Penalties

Turkish tax legislation does not provide any specific penalty regulations for non-compliance with transfer pricing documentation. Furthermore, Turkish tax legislation does not prescribe any specific obligations to provide and submit transfer pricing documentation. Instead, the

[437] *See supra* Part §4.I.1.b.cc.

[438] ÖNCEL, KUMRULU, ÇAĞAN, *supra* note 389, at 203; Billur Yaltı, *Transfer Fiyatlandırmasında "Gizli Emsal",* 251 VSD 8 (2009) (Turk.); EDA ÖZDILER KÜÇÜK, VERGI HUKUKUNDA KARINELER, 147, (2011).

[439] *But see* Mustafa Akkaya, İbrahim Bayar & Oytun Canyaş, *Vergi Hukukunda "Emsallere Uygunluk" ve "Gerçeklik" İlkesi* (Feb. 09,2016), http://www.vmhk.org.tr/vergi-hukukunda-emsallere-uygunluk-ve-gerceklik-ilkesi/.

Communique No.1 states that where enterprises and corporations distribute their profit in a disguised manner through transfer pricing, the penalties defined under the TPC will apply[440]. In addition, if the tax payers fail to submit documents required under the Communique No.1 within the specified time limits, the penalties defined under the TPC will also apply[441].

According to the recently amended Article 13 of the CTC, any penalties imposed for taxes which have not been accrued on time or have deficiently been accrued due to profit distributed in a disguised manner will be reduced by 50% provided that the tax payer complies with the transfer pricing documentation requirements in a proper and timely manner.[442] Therefore, like the OECD TP Guideline and the U.S. penalty provisions, the concept of "good faith" is now recognized under the Turkish tax penalty system. As a matter of fact, both the OECD and the U.S. take the approach that the good faith of the tax payer should be taken into account if the tax payer shows reasonable effort to determine transfer prices in accordance with the arm's length principle, but somehow fails to prepare the correct documentation.

Although there is no clarity in the legislation, in practice, the Turkish tax authorities impose a special irregularity fine pursuant to Article 355/1, based on the obligations stated under Article 256 and repeating Article 257 of the TPC[443]. Article 256 of the TPC titled as "Obligation to Submit Books and Documents and Other Records" states:

> *"the real and legal persons specified in the aforementioned articles, as well as those subject to the obligations introduced under the repeated article 257 must submit all kinds of books, documents and reports they are obliged to keep, as well as the records pertaining to the information they are obliged to provide in micro vouchers, micro films, magnetic tapes, disks and similar media and all kinds of information and passwords required to access to or read these records, for examination and review upon the demand of authorized officials and officers within the retention period.*[444]"

[440] Transfer Fiyatlandırması Yoluyla Örtülü Kazanç Dağıtımı Hakkında Genel Tebliğ, Sec. 8 (Dec. 18, 2007) (Turk.).
[441] The illegality of imposing penalties through a regulatory administrative act will be discussed in the following chapters of this Thesis.
[442] *See infra* Part §4.IV.
[443] Serdar Sumay, *Transfer Fiyatlandırması Dokümantasyon Yükümlülüğü,* 6 VERGİDE GÜNDEM 4 (2009) (Turk.), http://www.vergidegundem.com/documents/10156/14657/makale1.pdf.
[444] For the translation of the provision, *see* Burak Küpeli, *Statute of limitations in assessments, corrections and tax inspections,* VERGİDE GÜNDEM 2, (Jan. 2015)(Turk.).

Therefore, tax payers who are liable for the obligations defined under the repeating Article 257/1[445], have to submit upon request all types of books, documents, etc. that must be kept. There is no doubt that the tax administration considers the transfer pricing documentation within the scope of the documents that must be prepared in accordance with Article 256.

It should be noted that the legislator recently prepared a draft proposal for amendment of the TPC ("Draft Proposal")[446]. Article 278 of the Draft Proposal states that the special irregularity fine amounting TRY 50.000 for each form and report is imposed on those tax payers who do not timely prepare, deficiently or misleadingly prepare the transfer pricing reports or forms required by the Ministry of Finance.[447]

[445] The Ministry of Finance has the authority to determine the procedures and principles of accounting for tax payers and the occupational groups, to determine, to change the nature, form and required information of book and documents kept in accordance with this Law and additionally, other books and documents that are considered as appropriate; to issue and disseminate in return of its value or ask to issue from third persons and disseminate or to require to be disseminated, to require to keep their records, to require or abolish the obligation for confirmation, keeping and submission of these books and documents, to abolish the obligation to keep and provide the books that shall be kept and documents that shall be provided in accordance with this Law.
[446] Vergi Usul Kanunun Taslak Tasarısı (Turk.), http://www.istanbulymmo.org.tr/dosyalar/vuk_Tasarisi_Gib.pdf.
[447] *Id.* Art. 278.

III. Unconstitutionality of Transfer Pricing Documentation Rules

1. The Principle of Legality of Tax

a. The Fundamental Rights and Freedoms Perspective as provided under the Constitution and European Convention on Human Rights

Fundamental human rights and freedoms can also be classified as "constitutional rights". The fundamental rights and freedoms in Turkey are prescribed under the Constitution of the Turkish Republic ("the Constitution") and those rights and freedoms are guaranteed with the principle of the rule of law[448]. The principle of the rule of law is defined by legal certainty and compliance with the law.

It is inevitable in community life that some of the fundamental rights and freedoms are restricted. However, in a democratic society, any restrictions must not be unlimited, arbitrary or total[449]. Article 13[450] of the Constitution states that restriction of fundamental rights and freedoms can only be made under specific conditions.

Article 13 of the Constitution sets out several conditions for the restriction of fundamental rights and freedoms. These restrictions must be proportional in achieving the desired aim and must correspond to both the wording and spirit of the Constitution and the requirements of the democratic order of society in the secular republic.

Subject to Article 13, Article 35 provides the State with the right to restrict an individual's fundamental rights and freedoms to property by using its taxation power[451]. Article 73 of the Constitution then prescribes "the duty to pay taxes" on everyone in order to meet public expenditures. Taxes, fees, duties, and other financial obligations can only be imposed, amended, or revoked by law. Article 73 of the Constitution includes one of the important principles in taxation called "**the principle of legality of taxes**".

---

[448] ÖNCEL, KUMRULU, ÇAĞAN, *supra* note 389, at 43.
[449] *Id.* at 153.
[450] *See official translation;* Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality. https://global.tbmm.gov.tr/docs/constitution_en.pdf.
[451] ÖNCEL, KUMRULU, ÇAĞAN, *supra* note 389, at 43-44.

Although the Constitution does not explicitly state that taxation constitutes a restriction on the right to property, it is understood from the systematic interpretation[452] of the Constitution and the Constitutional Court's case-law. For instance, one of the Constitutional Court's decision on an individual application states the following; *"While Article 13 of the Constitution establishes the general principle on the restriction of the fundamental rights and freedoms, Article 73 on the duty to pay taxes includes special provisions on the constitutional boundaries of the interference to right to property through taxation*[453]*"*

It should be noted that the taxation is accepted as a restriction to right to property not only at the constitutional level, but also at the international level. Article 1 of Protocol 1 to the European Convention on Human Rights ("ECHR"), to which Turkey is a party, provides for the peaceful enjoyment of possessions. However, taxation is prescribed as an exception to this right to property and States are not deprived of their taxation power[454]. Article 1 further provides that States have the legal authority to enforce such laws to control the use of property in accordance with the public interest or secure the payment of taxes. Therefore, according to Article 1 of Protocol 1 to ECHR, the right to property can be restricted through taxation, but any restriction can only be regarded as legitimate if provided by law[455].

Case law decisions of the European Court of Human Rights ("ECtHR") explicitly accept that taxation is a lawful restriction to the right to property[456] and has established a set of criteria to determine whether taxation is lawful.

A landmark decision of the ECtHR regarding the legality of taxation is *Spacek, s.r.o. v. The Czech Republic*[457]. The facts of the case were as follows; the company Spacek used a single-

---

[452] BERTİL EMRAH ODER, ANAYASA YARGISINDA YORUM YÖNTEMLERİ, 55 (2010) ("Systematic interpretation implies not only focusing solely on the text of the rule but also the meaning derived from the context which is formed together with the other rules").

[453] Turkish Constitutional Court Decision, Application No. 2013/3245, 11.12.2014, ¶ 35, http://www.anayasa.gov.tr/icsayfalar/kararlar/kbb.html.

[454] Billur Yaltı, *Mülkiyet Hakkı Versus Vergilendirme Yetkisi: İnsan Hakları Avrupa Mahkemesine Göre Mülkiyet Hakkına Müdahalenin Sınırı",* 227 VSD 1 (2000) (Turk.); Billur Yalti, Vergi Yükümlüsünün Haklari, 43, (2006).

[455] Billur Yaltı, *Mülkiyet Hakkına Vergisel Müdahale Kanunilik: İnsan Hakları Avrupa Mahkemesinin Yeni Kararlarında "Çelişik Mevzuat" ve "Çelişik İçtihat",* 276 VSD 1 (2011) (Turk.).

[456] Billur Yaltı, *Mülkiyet Hakkı Versus Vergilendirme Yetkisi: İnsan Hakları Avrupa Mahkemesine Göre Mülkiyet Hakkına Müdahalenin Sınırı",* 227 VSD 2 (2000) (Turk.); *See, e.g.,* Spacek, s.r.o. v. The Czech Republic, App. No. 26449/95, ECtHR. ¶ 41, http://hudoc.echr.coe.int/ ("The Court recalls that taxation, as an interference with the rights guaranteed in Article 1 of Protocol No. 1, is justified under the second paragraph of Article 1.); Serkov v. Ukraine, App. No. 39766/05, ECtHR. ¶ 32, http://hudoc.echr.coe.int/ ("It is common ground that charging VAT to the applicant constituted an interference with his property rights within the meaning of Article 1 of Protocol No.1").

entry book-keeping system in accordance with Section 25 of the Private Business Activities Act ("Act") and then changed over to a double-entry book keeping system. In response to this change of accounting systems, the Prague Finance Office imposed an additional income tax including penalty on Spacek on the grounds that the company did not fulfill its obligations stated in the Rules and Regulations. The Rules and Regulations included the obligation for companies to clarify the application of Section 25 of the Act.

Spacek applied to the ECtHR claiming that the Rules and Regulations requiring income tax to be increased when the business was making the transition from single to double-entry book keeping systems[458] were not published in the Official Gazette, but published in the Financial Bulletin. Therefore, the company claimed that the Rules and Regulations were not generally binding legislative or regulatory instruments, because they were not published in the Official Gazette. For these reasons, Spacek *"complained that the additional assessment of income tax and the penalty imposed on it by the national authorities violated its right under Article 1 of Protocol No.1 to the Convention*[459]*"*

The ECtHR based its determination on whether the requirements defined under the Rules and Regulations were announced publicly. First of all, the ECtHR gave the definition of the concept of "law" under Article 1 of Protocol No.1 as *"the same concept to be found elsewhere in the Convention, a concept which comprises statutory law as well as case-law. It implies qualitative requirements, notably those of* ***accessibility*** *and* ***foreseeability***[460]***".***

ECtHR emphasized that even if the Rules and Regulations were not published in the Official Gazette as binding legislative or regulatory rules, the applicant applied the accounting standards set out under the Rules which were published in the Financial Bulletin. Therefore, the ECtHR decided that the Regulations were ***adequately accessible*** *and* ***foreseeable*** and the interference to the right to property guaranteed under Article 1 of Protocol No. 1 was legitimized under Czech law.

The criteria set by ECtHR in *Spacek, s.r.o. v. The Czech Republic* for lawful determination is whether the law is adequately accessible and foreseeable. If the law comprises these criteria, any interference to the right to property can be legitimized according to precedent of the

---

[457] Spacek, s.r.o. v. The Czech Republic, App. No. 26449/95, ECtHR. *see in* Billur Yaltı, *Mülkiyet Hakkına Vergisel Müdahale Kanunilik: İnsan Hakları Avrupa Mahkemesinin Yeni Kararlarında "Çelişik Mevzuat" ve "Çelişik İçtihat",* 276 VSD 1 (2011) (Turk.).
[458] Spacek, s.r.o. v. The Czech Republic, App. No. 26449/95, ECtHR. ¶ 42.
[459] *Id.* ¶ 38.
[460] *Id.* ¶ 54.

ECtHR. It is interesting to note that in *Spacek, s.r.o. v. The Czech Republic* decision the ECtHR did not address the issue whether a tax could be imposed with an administrative regulatory action, because ECtHR does not have the authority to evaluate the compatibility of a measure with national laws[461].

In *Serkov v. Ukraine*[462] the ECtHR addressed the issue whether divergent domestic case-law regarding value added tax ("VAT") exemption constituted unlawful intervention to the right to property. The specific issue in this case was whether VAT exemption was applicable for the importation activities of Serkov. Serkov was a single tax payer within the meaning of Section 11 of the Law on State Support for Small Business which provided a simplified system of taxation by replacing taxes and duties with a single tax[463]. The customs authority imposed a VAT tax on Serkov for the imported goods and he claimed that there was contradictory tax legislation on the same issue and different interpretations by the courts regarding the same issue[464]. For these reasons, Serkov claimed that the customs authority had unlawfully imposed the VAT in violation of Article 1 of Protocol No.1[465].

The ECtHR held that tax legislation regulating VAT exemption caused the divergent interpretations by the domestic courts. Therefore, the divergent interpretations by the domestic courts prevented the ***foreseeability*** of the legal provisions. The ECtHR in its decision stated that *"the lack of the required* ***foreseeability*** *and* ***clarity*** *of the domestic law on such an important fiscal issue, producing opposing judicial interpretations, upset the requirement of '****quality of law'*** *under the Convention*[466]. Consequently, the ECtHR found a breach of Article 1 of Protocol No.1.

In another case *Shchokin v. Ukraine*[467], the tax payer submitted his tax declaration for income earned in 2001 by calculating the tax amount in line with the Income Tax Decree. The Income Tax Decree stipulated the fixed rate of 20% for income earned outside the principle place of business. The applicant used the same fixed rate of 20% when submitting his tax declaration for income earned in 2002 and 2003. However, the Tax Inspectorate increased the amount of

[461]Billur Yaltı, *Mülkiyet Hakkı Versus Vergilendirme Yetkisi: İnsan Hakları Avrupa Mahkemesine Göre Mülkiyet Hakkına Müdahalenin Sınırı",* 227 VERGİ SORUNLARI DERGİSİ [VSD] 8 (2000).
[462] Serkov v. Ukraine, App. No. 39766/05, ECtHR.
[463] Serkov v. Ukraine, App. No. 39766/05, ECtHR., ¶ 8.
[464] Billur Yaltı, *Mülkiyet Hakkına Vergisel Müdahale Kanunilik: İnsan Hakları Avrupa Mahkemesinin Yeni Kararlarında "Çelişik Mevzuat" ve "Çelişik İçtihat",* 276 VERGİ SORUNLARI DERGİSİ [VSD] 5 (2011) (Turk.).
[465] Serkov v. Ukraine, App. No. 39766/05, ECtHR., ¶ 27.
[466] *Id.* ¶ 42.
[467] Shchokin v. Ukraine, App. Nos. 23759/03 and 37943/06, ECtHR, http://hudoc.echr.coe.int/.

tax for these years by applying a progressive tax rate relying on Instruction no.12 on the Citizens' Income Tax. The applicant initiated litigation against the Tax Inspectorate, but as a result of the proceedings, the claim was rejected.

After all of the applicants proceedings were rejected, Shchokin applied to ECtHR claiming that his property rights were violated by recalculation and increasing the taxable amount and this violated Article 1 of Protocol No.1[468].

The ECtHR accepted the application and found a violation of Article 1 of Protocol No.1. ECtHR in its decision stated the following:

> *"…the relevant legal acts had been manifestly* ***inconsistent*** *with each other. As a result, the domestic authorities applied, on their own discretion, the opposite approaches as to the correlation of those legal acts. In the Court's opinion* ***the lack of the required clarity and precision of the domestic law, offering divergent interpretations on such an important fiscal issue****, upset the requirement of the* ***"quality of law"*** *under the Convention and did not provide adequate protection against arbitrary interference by the public authorities with the applicant's property rights*[469]*."*

The ECtHR found that the inconsistent domestic legislation resulted in different interpretations by the local courts and this failed the degree of lawfulness required by the Convention. With this precedent, the ECtHR not only expects the law to be accessible and foreseeable by itself but also requires it to be consistent with other legislation and case-law in order to be regarded as a legitimate restriction through taxation.

b. Detailed analysis of Article 73 of the Constitution

As discussed above, Article 73 of the Constitution includes the principle of legality of taxes. An excerpt of Article 73 is inserted below for further examination:

> *"Everyone is under obligation to pay taxes according to his financial resources, in order to meet public expenditure.*
> *An equitable and balanced distribution of the tax burden is the social objective of fiscal policy.*

[468] *Id.* ¶42.
[469] *Id.* ¶56.

Taxes, fees, duties, and other such financial obligations shall be imposed, amended, or revoked by law.

The Council of Ministers may be empowered to amend the percentages of exemption, exceptions and reductions in taxes, fees, duties and other such financial obligations, within the minimum and maximum limits prescribed by law[470]*."*

The first paragraph of Article 73 prescribes the obligation for everyone to pay taxes as kind of primary duty. To fulfill this primary duty, tax payers also have procedural duties to maintain book keeping, submit tax return and documentation[471]. The second paragraph Article 73 includes the social objective of the fiscal policy of equitable taxation. The third paragraph embodies the principle of legality of taxes and provides the right of the State to impose, amend and revoke taxes by law. The legality of this right is based on the close connection of taxation with fundamental rights and freedoms[472]. In this way, the Constitution aims to prevent any arbitrary application of taxes[473] and consequently any arbitrary restriction on the right to property as a fundamental freedom through taxation.

However, imposing, amending and revoking taxes formally by law is insufficient on its own. Any taxation policy must be based on lawful principles in order to be regarded as law[474]. In accordance with the principle of legality of tax, determining only the subject of the tax will be viewed as arbitrary. Therefore, the tax base, rate, assessment and accrual, the procedure of collection, sanctions, statute of limitations and maximum and minimum level of tax must also be determined to be lawful[475]. A tax rule which does not include these constituent elements is not qualified as a tax law, even if it is designed to be a tax law in a formal sense[476].

It should be noted that the principle of legality of taxes covers not only imposing, amending and revoking the material elements of taxes such as the tax base, rate, assessment, etc. by law; but also covers the procedural and formal rules related to taxation such as book keeping and documentation For this reason, requirements regulating book keeping or documentation should also be imposed, amended and revoked by law.

---

[470] Türkiye Cumhuriyeti Anayasası, Art. 73 (Turk.).
[471] ÖNCEL, KUMRULU, ÇAĞAN, *supra* note 389, at 71.
[472] NAMİ ÇAĞAN, VERGİLENDİRME YETKİSİ, 100 (1982).
[473] SELİM KANETİ, VERGİ HUKUKU, 36 (2nd ed. 1989).
[474] NAMİ ÇAĞAN, VERGİLENDİRME YETKİSİ, 100-101 (1982); SELİM KANETİ, VERGİ HUKUKU, 37 (2nd ed. 1989).
[475] Turkish Constitutional Court Decision E.1986/20, K.1987/9, 31.03.1987, (Turk.), http://www.kararlaryeni.anayasa.gov.tr/.
[476] NİHAL SABAN, VERGİ HUKUKU, 63, (8th ed. 2016).

Under Paragraph 3 of Article 73, the authority to impose, amend and revoke taxes is given to the legislator and the will of the legislator cannot be derogated from through any alternative interpretation[477]. For this reason, determining the constituent elements of taxes through laws provides the preciseness and prediction necessary for tax payers[478].

Paragraph 4 of Article 73 of the Constitution provides an exception to this rule to impose, amend and revoke taxes by law. The Council of Ministers are empowered to amend the percentages of exemption, exceptions and reductions in taxes, fees, duties and other financial obligations, within the minimum and maximum limits prescribed by law. Therefore, if the general framework of taxes is formulated and established by law, regulating some other issues may be delegated to the Council of Ministers. Nevertheless, legislation remains the sole source for the main elements of taxes. Consequently, empowering the Council of Ministers (executive body) to determine these main elements is not legitimate[479].

2. Analysis of the principle of Legality of Tax with respect to Transfer Pricing Documentation Regulations

a. A lack of Statutory Law

Transfer pricing documentation requirements under Turkish legislation is discussed in the previous chapters[480]. Article 13 of the CTC states that it is obligatory to keep book keeping records, tables and documents as substantiating documents concerning the calculations of the prices determined in accordance with arm's length principle. If the tax administration does not agree that the transactions have been determined at arm's length, any profits will be deemed as distributed in a disguised manner. As a consequence, the amount deemed to be distributed in a disguised manner will be classified as *dividend distribution* and taxed accordingly.

The Council of Ministers is empowered to determine the procedures regulating transfer pricing. However, Article 13 does not clarify the operational scope of the authority in the transfer pricing area. Based on the authority prescribed under Article 13 of the CTC, the Decree and Communique No.1 regulates transfer pricing documentation procedures.

This analysis supports the view that tax laws have the authority to empower the Executive in Turkey to prepare administrative regulatory procedures regarding the practical, technical and

[477] *Id.* at 102.
[478] Turkish Constitutional Court Application No. 2014/6192, 12.11.2014, (Turk.), http://www.kararlaryeni.anayasa.gov.tr/.
[479] NAMİ ÇAĞAN, VERGİLENDİRME YETKİSİ, 127 (1982).
[480] *See supra* Part §4.II.2.

special issues after determining the basic elements of taxation[481]. However, if the boundaries of the administrative regulatory procedures are not determined, the Executive cannot regulate such procedures[482].

According to Article 7 of the Constitution, the legislative power is vested in the Grand National Assembly and this power cannot be delegated. Additionally, Article 8 of the Constitution states that the Executive can only exercise its power in conformity with the Constitution and laws. In a procedural sense, the Legislature first determines the principles and boundaries of the framework for legislation[483] and the Executive can then formulate the details for legislation in conformity with this framework[484]. Otherwise, the Executive does not have any authority to regulate matters beyond the boundaries of this framework[485] as confirmed by the Constitutional Court states in one of its decisions on this issue:

> *"A statutory law which empowers the executive shall provide the essential principles, draw the framework and shall not leave unlimited, unclear, broad area to be regulated by the executive for conformity with Article 7 of the Constitution. The legislator may leave the issues which needs a specialty and technical knowledge of the administration when necessary provided that the boundaries are determined[486]."*

As discussed in the above sections[487] the tax administration requires transfer pricing documentation within the scope of the repeating Article 257 of TPC. Article 257 also provides broad authority to the Ministry of Finance to require additional documents to those specified by law, change or abolish existing requirements and abolish the obligation to maintain and provide such documents prescribed by law. This paper argues, this broad authority given to the Ministry of Finance can be considered as unlawful by going beyond the boundaries of the legislative framework established by Article 257 of the TPC. This extended authority empowers the Ministry of Finance to provide procedures regarding to the additional documentation not provided by existing law. In addition, the Ministry of Finance is also empowered to abolish existing legal requirement for transfer pricing documentation.

---

[481] NAMİ ÇAĞAN, VERGİLENDİRME YETKİSİ, 130 (1982).
[482] *Id. ıat* 133.
[483] BÜLENT TANÖR & NECMİ YÜZBAŞIOĞLU, 1982 ANAYASASINA GÖRE TÜRK ANAYASA HUKUKU, 375, (2015).
[484] SIDDIK SAMİ ONAR, İDARE HUKUKUN UMUMİ ESASLARI, 372 (1966).
[485] *Id.* at 360.
[486] Turkish Constitutional Court E.2007/2, K.2011/13, 13.01.2011, (Turk.), http://www.kararlaryeni.anayasa.gov.tr/.
[487] *See supra* Part §4.II.4.

Despite this analytical view, the Constitutional Court states in its decisions[488] on the authority of the Ministry of Finance under the repeating Article 257 of TPC that the authority to impose additional documentation requirements is designed to prevent tax evasion. Therefore, the Constitutional Court believes that the authority given to the Ministry of Finance to require additional documentation from the tax payer is not in contravention of the delegation of legislative power, because the purpose of such extended authority is to regulate the daily, technical and detailed issues of the existing law.

It should be noted that the Constitutional Court did not examine the operational meaning of the entire Article 257, because the Article also empowers the Ministry of Finance to abolish existing requirement to maintain and provide transfer pricing documentation. These additional legislative powers given to the Ministry of Finance effectively breach the fundamental doctrine of separation of powers between the Executive and Legislative under secular democracies.

This thesis now focuses analysis on the legality of determining material requirements for transfer pricing documentation by an administrative regulatory body[489]. Based on previous analysis above, it is evident that neither Article 13 of the CTC or repeating Article 257 of the TPC provide any specific obligation to prepare transfer pricing documentation. Article 13 of the CTC does contain specific requirements for tax payers to keep book keeping records, tables and documents concerning the calculations of prices determined in accordance with the arm's length principle. However, it does not impose any obligation to prepare or submit transfer pricing documentation and reports specifically. A similar consideration can be made for the repeating Article 257 of TPC.

As explained throughout this thesis, transfer pricing documentation is a technical type of documentation that must include various information pertaining to transactions realized with affiliated enterprises; such as the definition of operations, structure of the organization, legal and economic background of the company, the reasons for the determination of the transfer pricing methods etc. This types of detailed and technical information is not described adequately under the broad wording of Article 13 of the CTC as "records, tables and

[488]Turkish Constitutional Court E.1990/29, K.1991/37, 15.10.1991, (Turk.), http://www.kararlaryeni.anayasa.gov.tr/; Turkish Constitutional Court E.2009/5, K.2011/33, 03.02.2011, (Turk.), http://www.kararlaryeni.anayasa.gov.tr/.

[489] LEYLA ATEŞ, TRANSFER FIYATLANDIRMASI VE VERGILENDIRME, 73 (2011) (Turk.).

documents concerning the calculations of the prices" or generalized within the scope of the repeating Article 257 of the TPC.

Therefore, two executive bodies in both the Council of Ministers and the Ministry of Finance[490] prescribe regulations for transfer pricing documentation without the authority given by statutory law. As stated above, the operational scope of laws must first be determined by general principles within a legislative framework and the regulatory details can then be determined by executive bodies. However, analysis shows that there is no such statutory legal framework for transfer pricing documentation requirements in Turkey and the legislative powers given to the Council of Ministers and the Ministry of Finance are therefore unconstitutional[491]. This thesis argues that Article 13 of CTC or the repeating Article 257 of the TPC regarding the preparation of the transfer pricing documentation obligations must be amended in order to define a legislative framework within which the executive bodies can define specific regulations.

b. Problematic Delegation of Power

In the former part of this Thesis, the unconstitutionality of the transfer pricing documentation requirements was examined. Even if it is assumed that the transfer pricing documentation requirements are sufficiently regulated under statutory law, there are still some serious problems in relation to the delegation of power. It has already been noted[492] that Article 13 of the CTC empowers the Council of Ministers to regulate transfer pricing procedure. Although there is no such authority given by law to the Ministry of Finance, it issued a communique in relation to transfer pricing documentation based on Article 13 of the CTC. When an executive body uses its authority like this without any delegated constitutional authority, there will be "unauthorized function" and therefore the regulatory act will be regarded as null and void[493]. Therefore, I assert that the communique published by the Ministry of Finance should be regarded as null and void and any requirements established by the Communique No.1 do not bind any tax payers.

In accordance with this analysis, only the Decree prepared by the Council of Ministers should be regarded as a valid administrative regulatory act. Article 115[494] of the Constitution

[490] The delegation of power problem will be discussed in the following chapter.
[491] Under Sweden tax legislation, there are similar discussions regarding to imposing new requirements through executive act, *See supra* Part §3.III.3.b.
[492] *See supra* Part §4.II.1.
[493] NAMİ ÇAĞAN, VERGİLENDIRME YETKİSİ, 111 (1982).
[494] Türkiye Cumhuriyeti Anayasası, Art. 115 (Turk.).

empowers the Council of Ministers to prepare regulations as follows; *"The Council of Ministers may issue regulations indicating the implementation of laws or designating matters ordered by law, as long as they do not conflict with laws, and are examined by the Council of State."* The Council of Ministers may issue regulations regarding the implementation of laws or designating matters ordered by the law. Such regulations must then be examined by the Council of State.

The Council of Ministers may also issue, except those stated in the Constitution, different types of administrative regulatory acts such as decree, communique, directive etc.[495] The Council of Ministers issued a decree regulating transfer pricing documentation requirements. However, the contents of the Decree is a type of regulation since it operates to explain the procedural implementation of Article 13 of the CTC in relation to transfer pricing.

Although the content of the Decree falls within the scope of a regulation, the fact that the Council of Ministers issued the Decree with the intent to eliminate the Council of State examination can be considered as a circumvention of the law[496]. Therefore, even if the transfer pricing documentation requirements are regarded as lawful, there is still a legitimacy issue with the delegation of power and procedural concerns about the Council of Ministers' Decree.

3. The principle of Legality of Crime and Punishment

The principle of the legality of crime and punishment takes its source from the Constitution. Article 38 of the Constitution titled "Principles relating to offences and penalties" states the followings:

> *"No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed.*
>
> *[…]*

[495] ERDOĞAN TEZİÇ, ANAYASA HUKUKU, 75, (20th ed. 2016).
[496] BÜLENT TANÖR & NECMİ YÜZBAŞIOĞLU, 1982 ANAYASASINA GÖRE TÜRK ANAYASA HUKUKU, 406-407, (2015).

Penalties, and security measures in lieu of penalties, shall be prescribed only by law[497]*."*

In accordance with Article 38, penalties can only be imposed if prescribed by law. In addition to the Constitution, Article 2 of the Turkish Criminal Code No. 5237 ("Criminal Code") also prescribes the principle of legality of crime and punishment. Paragraph 1 of Article 2 states that a person must not be punished and security measures must not be imposed for an act not explicitly stated under law. According to the following paragraph of Article 2, a crime and punishment must not be prescribed with an administrative regulatory act.

The purpose of these provisions in the Constitution and the Criminal Code is to ensure that a person is not punished arbitrarily[498]. For further protection of persons, the Criminal Code also strictly prohibits the prescription of crime and punishment with administrative regulatory acts. These provisions ensure that all persons have the opportunity to learn in advance which acts constitute crime and their concomitant punishment as a deterrent to act accordingly[499].

The last paragraph of Article 2 of the Criminal Code states the prohibition on the concept of *analogy* in criminal law. Analogy means imposing a penalty through comparison to an act which is not explicitly stated under the law as a crime[500]. Article 2 states that analogy is prohibited for all provisions regulating crime and punishment and those provisions cannot be interpreted so broadly that it leads to analogy.

This analysis clearly demonstrates that all crimes and punishments must only be prescribed by law. Otherwise, it leads to the arbitrary application of crimes and punishment which is not accepted both by the Constitution and the Criminal Code.

4. Analysis of the principle of Legality of Crime and Punishment in relation to the Transfer Pricing Documentation Regulations

The system of crime and punishment under tax law is formed in accordance with the general principles of criminal law[501]. Thus, the principle of legality of crime and punishment applies strictly to the framework of tax crime and punishment[502]. Therefore, analysis of the principle

[497] Türkiye Cumhuriyeti Anayasası, Art. 38 (Turk.).
[498] NUR CENTEL, HAMİDE ZAFER & ÖZLEM ÇAKMUT, TÜRK CEZA HUKUKUNA GİRİŞ 45-46 (9th ed. 2016).
[499] *Id.*
[500] *Id.* at 53.
[501] NİHAL SABAN, VERGİ HUKUKU, 467, (8th ed. 2016).
[502] ÖNCEL, KUMRULU, ÇAĞAN, *supra* note 389, at 209.

of legality of crimes and punishments in relation to transfer pricing documentation regulations is examined in the context of criminal law.

As discussed above,[503] Turkish tax legislation does not provide any specific regulation for non-compliance with transfer pricing documentation requirements. Instead, the Communique No.1 states that if a tax payer fails to submit the documents required by the Communique No.1 within the time limits, the penalties defined under TPC will apply. In practice, the tax authorities impose the special irregularity fine regulated by the repeating Article 355/1of the TPC in accordance with the obligations stated under Article 256 and repeating Article 257 of the TPC.

The first consideration that should be taken into account is whether creating a crime and its punishment regarding the transfer pricing documentation by an administrative regulatory act is against the principle of legality of crimes and punishments[504]. As already stated above, there are no explicit statutory law for crime and punishment for non-compliance of the transfer pricing documentation requirements. Instead, the Communique No.1 makes a general (and so arbitrary) reference to penalties stipulated under the TPC.

It should be noted that according to the Constitution and the Criminal Code, the crimes and punishment legally determined for a particular act or event must be prescribed by laws. Turkish tax legislation does not prescribe any specific obligation for the preparation and submission of transfer pricing documentation, nor does it provide a definition for the crime and punishment for non-compliance with those obligations under statutory laws. Instead, the special irregularity fine is applied by the tax administration pursuant to the regulatory administrative act.

In practice, the tax administration considers it appropriate to impose a penalty for the non-submission of transfer pricing documentation in accordance with the repeating Article 355/1 of the TPC, which is also regulated by Articles 256 and repeating Article 257 of the TPC. The tax administration considers that the obligations stated under Article 256 and repeating Article 257 also apply to the transfer pricing documentation obligations and consequently create a definition for crime for non-compliance with transfer pricing documentation requirements. Thus, the crime and punishment for non-compliance of transfer pricing documentation are

[503] *See supra* §4.II.4.
[504] LEYLA ATEŞ, TRANSFER FIYATLANDIRMASI VE VERGILENDIRME, 187 (2011).

created through making analogy with other Articles which is prohibited by Article 2 of the Criminal Code.

This analysis demonstrates that the current system for crime and punishment for transfer pricing documentation totally violates the principle of legality of crime and punishment guaranteed under the Constitution and the Criminal Code.

Nevertheless, in a case before the Constitutional Court[505] questioning the constitutionality of the repeating Article 355 of the TPC, it was argued that there was no legal justification for the penalty rule under the repeating Article 355 to impose special irregularity fine for the non-submission of electronic tax return. The Constitutional Court dismissed the claim on the following grounds:

> *"The special irregularity fine which will be imposed in case of the non-compliance with the obligation stated under the repeating Article 257 of this Law is included in the contested subsection one of the repeating Article 355 of the Law numbered 213.*
>
> *The authority is given to the Ministry of Finance by law. The general communiques which are based on this authority are published in the Official Gazette, and the imposed obligations are announced and the assurance is provided for the tax payers.*
>
> *After stating the act constituting a crime and its punishment in the law, authorization of the executive body with the aim of taking precaution with regards to the subjects that needs specialty and management technique does not mean that the crime is executed by the administrative acts."*

This reasoning of the Constitutional Court cannot be applied to the prescribed crime and punishment for transfer pricing documentation. The reasoning states that the issuance of administrative acts regulating crime and punishment after they have been prescribed laws is permissible. On this reasoning we can argue that if there is no statutory law prescribing crime and its punishment for a particular act, the executive body cannot create the crime and punishment with an administrative act. However, as it has been already explained above, Turkish tax laws do not include any definition for crime for the non-compliance with the transfer pricing documentation requirements, nor does it prescribe any punishment.

[505]Turkish Constitutional Court E.2009/21, K.2011/16, 13.01.2011, (Turk.), http://www.kararlaryeni.anayasa.gov.tr/.

Based on this analysis, I argue that the current characterization of crime and imposition of punishment for transfer pricing documentation through analogy is against the principle of legality of crime and punishment in tax law.

The second argument is that even if the prescription of crime and punishment for non-compliance with the transfer pricing documentation requirements with a regulatory administrative act is regarded as constitutional, due to the problematic delegation of power under the Communique No.1, the penalty provision is invalid. This based on the fact that the authority to regulate the procedural issues of transfer pricing is only given to the Council of Minister, but not to the Ministry of Finance.

The Decree prepared by the Council of Ministers does not include any penalty provisions and the Communique No.1 is invalid law due to the delegation of power problematic. Therefore, under Turkish tax legislation, there is no prescribed sanction for non-compliance with the transfer pricing documentation requirements. Consequently, the special irregularity fine imposed on tax payers in practice is unconstitutional and against the principle of legality of the crime and punishment under tax law.

It is important to note that the Legislature recently identified the unlawful practice of imposing the special irregularity fine for non-compliance with transfer pricing documentation and has prepared a Draft Proposal.[506] Article 278 of the Draft Proposal states that the special irregularity fine amounting to TRY 50.000 for the each form and report must be imposed on those tax payers who do not prepare documentation in time, or prepare deficient or misleading transfer pricing reports or forms required by the Ministry of Finance.[507]

At first instance, the draft article seems to resolve the unconstitutionality issue and principle of legality of crime and punishment regarding the current penalty practice for transfer pricing documentation. However, closer examination identifies other problems that need to be resolved. First of all, as already discussed above in this thesis[508], there are no statutory laws requiring the preparation and submission of transfer pricing documentation. Therefore, without prescribing such an obligation with statutory law, imposing any sanction for non-compliance with transfer pricing documentation requirements will have no legal basis or

[506] Vergi Usul Kanunun Taslak Tasarısı (Turk.), http://www.istanbulymmo.org.tr/dosyalar/vuk_Tasarisi_Gib.pdf.
[507] *Id.* Art. 278.
[508] *See supra* Part §4.III.2.a.

framework. For this reason, the Legislature must first draft a statutory law regulating the preparation and submission of transfer pricing documentation before drafting any sanction.

The second problem is that Article 278 imposes a requirement to prepare transfer pricing reports or forms required by the Ministry of Finance. However, the Communique No.1 published by the Ministry of Finance is considered as invalid due to the problematic delegation of power. The transfer pricing reports and forms required by the Ministry of Finance do not have any legal basis. Consequently, the draft Article 278 imposing penalty for non-compliance with transfer pricing documentation requirements does not have any legal basis either.

IV. Amendment of Article 13 of CTC

The Draft Law on the Amendments to Certain Laws with the Purpose of Improving Investment Environment[509] ("Draft Law"), which includes amendments to Article 13 of the CTC, was introduced to parliament on 23 June 2016 and enacted on 15 July 2016 without any changes to the Draft Law.[510] The Law on the Amendments to Certain Laws with the Purpose of Improving Investment Environment ("Law on Amendments to Certain Laws") was prepared within the scope of the development plan od Turkish economy. Relevant to the analytical purposes of this thesis, Article 59 of the Law on Amendments to Certain Laws amended Article 13 of the CTC to regulate disguised profit distribution through transfer pricing.

A paragraph was added to Article 13 of the CTC to provide a reduction for tax loss penalty on the condition of compliance with transfer pricing documentation requirements. More specifically, it states that any tax loss penalty for taxes that have not been accrued on time or for deficient profit distributed in a disguised manner must be imposed at a discount of 50% if that the tax payer has complied with transfer pricing documentation requirements in a proper and timely manner[511].

Although Article 13 now refers to compliance with the transfer pricing documentation requirements, there is no such requirement prescribed by law.[512]. Therefore, prescribing an

[509] Yatırım Ortamının İyileştirilmesi Amacıyla Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Tasarısı, http://www2.tbmm.gov.tr/d26/1/1-0728.pdf (Turk.).
[510] Yatırım Ortamının İyileştirilmesi Amacıyla Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun, http://www.resmigazete.gov.tr/eskiler/2016/08/20160809-22.htm (Turk.).
[511] *Id.* Art. 59.
[512] *See supra* Part §4.III.2.a.

incentive for tax payers to prepare transfer pricing documentation properly before introducing such a transfer pricing documentation requirement with statutory law does not seem a logical proposition for Turkish tax legislation.

Apart from this significant shortcoming, Article 13 seems an effective legal initiative to encourage tax payers to prepare their transfer pricing documentation in a proper and timely manner. However, the reasoning of this provision cannot be understood, because the reasoning[513] of the Law on the Amendments on Certain Laws does not provide anything more than repetition of the text of the Article itself.

The only conclusions to be drawn is that this provision seems similar to the U.S. transfer pricing documentation penalty system which encourages tax payers to comply with transfer pricing documentation requirements by providing certain pecuniary relief in the adjustment of penalties[514]. However, the Turkish Legislature should be explicit about the reasoning for this provision, including the aim of the incentive and which jurisdiction it is based on etc. As a matter of fact, in the meeting of the Planning and Budget Commission held on 28 June 2016, it was stated that the reasoning of the Draft Law is insufficient and should be revised[515].

The Article does also include any provisions addressing the authority given to the Council of Ministers to issue regulations on transfer pricing. According to the Article, the Council of Ministers is authorized to determine the procedures regulating documentation requirements and to require information about the operations of affiliated enterprises located abroad in accordance with international treaties, as well as to determine the procedure for sharing this information with other states within the scope of the international treaties[516].

The Article gives the authority to the Council of Ministers to determine documentation requirements. However, the authority given to the Council of Ministers is vague in terms of which kinds of documentation procedures can be determined by the Council. Paragraph 3 of Article 13 of the CTC only states that it is obligatory to keep records, tables and documents as substantiating documents concerning the calculation of prices determined in accordance with

[513] Yatırım Ortamının İyileştirilmesi Amacıyla Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Tasarısı, Madde Gerekçeleri, Art.59 (Turk.).
[514] *See supra,* Part §3.III.1.d.
[515]The minutes of the Budget Commission on 28.06.2016, (TBMM Tutanak Hizmetleri Başkanlığı İncelenmemiş Tutanaktır) (Turk.).
[516] Yatırım Ortamının İyileştirilmesi Amacıyla Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Tasarısı, Art. 59, at 25 (Turk.).

the arm's length principle without making any explicit reference to the authority of the Council of Ministers.

In my opinion, this abstract authorization cannot be regarded as lawful since such requirements regarding taxation must be prescribed by law, be precise and avoid doubt in interpretation. The amended Article 13 authorizing the Council of Ministers to determine procedures regulating such documentation does not contain these qualities.

The former Article 13 of the CTC authorized the Council of Ministers to issue procedural regulations for transfer pricing documentation. The amended Article 13, however, authorizes the Council of Ministers to issue not only the procedural regulations, but also regulations "on merit". Therefore, the amended Article 13 intends to give the Council of Ministers broader authority. However, similar to the former Article, the amended Article does not clarify the scope or extent of authority given to the Council of Ministers.

I am therefore of the opinion that the Council of Ministers does not have the authority to issue the administrative regulatory act in relation to the transfer pricing documentation, due to the lack of statutory law[517].

To sum up my analysis of the Law on Amendments to Certain Laws, the amendments lack any legal basis and do not resolve the unconstitutionality concerns regarding the transfer pricing documentation requirements and concomitant penalty provisions. Therefore, I assert that the Legislature must be made aware of this significant problem regarding transfer pricing documentation requirements.

V. Suggestions For The Transfer Pricing Documentation Requirements

The growing importance of transfer pricing both in Turkey and abroad when we consider the increasing numbers of the international transactions in the globalized economy. Furthermore, as stated in the Introduction of this thesis, the transfer pricing is an area open to tax manipulation, which makes it more compelling for countries intend to implement strict measures to prevent taxation base erosion within their jurisdictions.

One way of preventing transfer pricing manipulation is requiring the preparation of transfer pricing documentation to show that the determined transfer prices are in line with the arm's length principle. For this reason, proper legal requirements and penalty provisions for the

[517] *See supra* Part §4.III.2.

deterrence of non-compliance with transfer pricing documentation is extremely important for all jurisdictions.

Although preventing the base erosion in each jurisdiction has great importance, this importance does not justify any unconstitutional or unlawful tax legislation. Thus, great importance should also be given to lawful tax legislation.

Analysis in this thesis shows that current transfer pricing documentation requirements under Turkish tax legislation are unconstitutional and unlawful since there are no statutory law requiring the preparation and submission of transfer pricing documentation. Similarly, none of the tax laws prescribe any penalty provisions for non-compliance with the transfer pricing documentation requirements.

Therefore, I argue that the Legislature must first prescribe transfer pricing documentation requirements either under Article 13 of CTC or under relevant articles of the TPC. After imposing these requirements by statutory law, authority can then be given to the Council of Ministers or Ministry of Finance to regulate procedural aspects, such as the information that must be included in the documentation and the submission periods, etc. At the same time, the Communique No.1 which was prepared by an unauthorized executive body should be abrogated.

Secondly, the Legislature must ensure that crime and punishment provisions for non-compliance with transfer pricing documentation requirements are explicitly stated in statutory law, such as under the TPC. Even though the Legislature recently made amendments to the TPC with the aim to provide such penalty provision, the amended Article still falls short of fundamental legal principles such as principle of legality of taxes and also principle of legality of crime and punishment.

I argue that it would be effective for the Turkish Legislature to harmonize transfer pricing documentation legislation with the current German and U.S. transfer pricing documentation systems.

§5. FUTURE PRACTICES FOR TRANSFER PRICING DOCUMENTATION: THE BEPS ACTION PLAN

I. Development Process

1. Historical Background

In the last 10 years the number of countries which have established transfer pricing documentation requirements has been increasing rapidly[518]. These legal reforms originated from the increasing number of complex intra-group trades around the world. The tax administrations around the world are now committed to tightening their transfer pricing requirements in order to prevent base erosion in their jurisdictions. As a consequence, transfer pricing documentation has become one of the main tax compliance issues for both tax administrations and companies which realize intra group transactions across different jurisdictions[519].

There is now consensus that current transfer pricing documentation requirements do not fulfill the needs of international business transactions. It is agreed that simpler, straightforward, focused and useful transfer pricing documentation is needed for tax administrations to effectively consider transfer pricing risk assessment[520]. For this purpose, in November 2011, the Working Party No.6 of the Committee on Fiscal Affairs approved a program which focuses on simplifying transfer pricing requirements, including transfer pricing documentation[521].

However, it should be noted that shortcomings in the current international taxation rules are not limited to transfer pricing documentation issues. As a consequence of globalization, it is agreed that clear and predictable rules need to be achieved to give certainty to both tax administrations and businesses regarding all international taxation matters[522]. Under the current international tax law system, MNE's have the opportunity to use aggressive tax planning opportunities which result in base erosion and profit shifting. Therefore, to prevent these shortcomings, the G20 finance ministers called on the OECD to develop action plans to

[518] *OECD Transfer Pricing Documentation White Paper, supra* note 92, at 1.
[519] *Id.*
[520] *Id.*
[521] *Id.*
[522] *OECD BEPS Action Plan, supra* note 92, at 7.

address Base Erosion and Profit Shifting ("BEPS") issues in a coordinated and comprehensive way[523].

As a matter of fact, the current international tax regime is based on competition rather than coordination and therefore the residence-based countries and source-based countries for MNE's try to collect more taxes in a competitive way[524]. However, the solution for problems in the international taxation area should be based on coordination as envisioned in the BEPS Action Plans in order for each country to increase tax revenue[525]. For this reason, the OECD published BEPS Action Plan on 19 July 2013 to identify actions needed to address BEPS, to set deadlines to implement these actions and to identify the resources and methodology needed to implement these actions[526].

The BEPS Action Plan includes 15 different action plans and each of them is structured to prevent BEPS. Action 13 re-examines the critical transfer pricing documentation issue and recommends to *"develop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNE's provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template*[527].

Following the publication of the BEPS Action Plan, the Working Party No. 6 published a White Paper on Transfer Pricing Documentation on 30 July 2013 to report on current transfer pricing documentation requirements, consider their purposes and objectives, provide suggestions regarding transfer pricing documentation requirements to be modified in order to make transfer pricing compliance easier and more direct, as well as provide useful information for tax administrations[528]. The White Paper on Transfer Pricing Documentation was published as open to public consultation in order to enable global conversation on how transfer pricing documentation rules can be improved, standardized and simplified[529].

---

[523] *Id.* at 11.
[524] Yariv Brauner, *What the BEPS,* 16 FLA. TAX REV. 55, 58 (2014) [*hereinafter What the BEPS*].
[525] *Id.*, at 59.
[526] *Id.* at 11.
[527] *Id.*, at 23
[528] *OECD Transfer Pricing Documentation White Paper, supra* note 92, at 1-4.
[529] *Id.*

Based on these detailed studies, the OECD published a Discussion Draft on 30 January 2014. In the Discussion Draft it is proposed to replace the current Chapter V of the OECD TP Guideline with the drafted transfer pricing documentation requirements.

2. Discussion Draft

a. In General

The Discussion Draft was published as open to public consultation and called for comments to be submitted within a month. The consensus was for the current Chapter V of the OECD TP Guideline to be replaced with the draft chapter. For this purpose, the draft chapter provides guidance both for tax administrations to make necessary transfer pricing queries and risk assessments and also for tax payers to prove that their transfer prices are at arm's length[530].

The Discussion Draft considers the current Chapter V of the TP Guideline to be insufficient in not providing any list of documents that should be prepared in order to prove that transfer prices are at arm's length, nor providing clear guidance on how to prepare transfer pricing documentation. In addition, Chapter V does not provide a link between the documentation and the penalty provisions as well as the burden of proof[531]. As a consequence of this lack of guidance and information, countries have tended to require excessive transfer pricing documentation requirements in order to prevent tax base erosion. However, this approach has resulted in unfavorable outcomes for both tax payers and tax administrations. The compliance costs of businesses has increase for tax payers and tax administrations have received excessive amounts of unnecessary, uninformative and/or inadequate documentation[532].

In order to prevent these unfavorable outcomes for both tax payers and tax administrations, the Discussion Draft aims to provide adequate documentation for tax administrations and at the same time, reduce the compliance costs for tax payers[533]. More specifically, the Discussion Draft has the following three objectives:

> *"1. to provide tax administrations with the information necessary to conduct an informed transfer pricing risk assessment;*
> *2. to ensure that tax payers give appropriate consideration to transfer pricing requirements in establishing prices and other conditions for transactions between*

[530] *Discussion Draft*, *supra* note 96, at 1.
[531] *Id.* at 2.
[532] *Id.*
[533] *Id.*

associated enterprises and in reporting the income derived from such transactions in their tax returns; and

3. to provide tax administrations with the information that they require in order to conduct an appropriately thorough audit of the transfer pricing practices of entities subject to tax in their jurisdictions[534]*."*

The OECD states that are two possible approaches to achieve these three objectives for transfer pricing documentation. The first approach involves contemporaneous documentation, whereby tax payers must document their transactions at the time of the transaction or at the latest, at the time of completion and submission of the tax return. The second approach is to establish transfer pricing penalty regimes to support the timely and accurate submission of transfer pricing documentation.

b. Documentation Requirements

Under the Discussion Draft, the most recognizable change is the two-tiered approach to transfer pricing documentation involving the master file and local file. The "blueprint" master file includes standardized information about all MNE group members, such as its organizational structure, description of its business, its intercompany financial activities and financial and tax positions[535]. Country-by-country reporting is also required within the master file. The country-by-country reporting must include information on the global allocation of profits, taxes paid and certain indicators of the location of economic activity among countries in which the MNE group realizes transactions[536]. Some questions have been raised whether country-by-country reporting should be included with the master file or treated as completely separate document. The language of the master file must be in English[537].

The local file requires information necessary to analyze transfer prices on transactions realized between the local country affiliate and associated enterprises in other countries. The local file must include financial information regarding specific transactions, comparability analysis and the selection and application of the most appropriate transfer pricing method[538]. The language of the local file can be submitted in local languages[539]. It should also be noted

[534] *Id.*
[535] *Id.* at 5.
[536] *Id.*
[537] *Id.* at 8.
[538] *Id.* at 6.
[539] *Id.* at 8.

that the Discussion Draft provides a list of documents that should be included in the master file, local file and also for country-by-country reporting.

By requiring these types of detailed documents, the Discussion Draft also considers the confidentiality of information submitted to tax administrations. The Discussion Draft states that tax administrations cannot disclose the trade secrets or any other confidential information to the public[540].

The Discussion Draft recommends the filing of contemporaneous documentation. This means that tax payers must submit their documents no later than the date of filing the tax return. In addition, the Discussion Draft considers the material aspect of the transactions. In other words, not all the transactions have the same size and nature. Therefore the transfer pricing documentation requirements only apply to documents defined for certain thresholds[541]. In addition, the Discussion Draft also recommends that not all documentation requirements apply to SMEs.

c. Burden of Proof

The Discussion Draft does not give specific details on the burden of proof. Rather it emphasizes that the burden of proof is a tool to encourage tax payers to comply with the transfer pricing documentation requirements. For example, it suggests that if the tax payer fulfills the documentation requirements, the burden of proof should then shift to the tax administration[542]. On the other hand, if the tax administration customarily bears the burden of proof in a specific jurisdiction, the burden of proof should shift to the tax payer as a way to discourage or deter non-compliance. Therefore, the Discussion Draft only provides recommendations and gives the right for each jurisdiction to determine the specific rules for the burden of proof.

d. Penalties

The Discussion Draft states that many countries have implemented documentation-related penalties which make non-compliance more costly than compliance[543]. However, the Discussion Draft recommends that if the tax payer acts in good faith, the documentation-related penalties should not be applied. It is also recommended that if the tax payer fails to

[540] *Id* at 9.
[541] *Id* at 7.
[542] *Id.* at 9.
[543] *Id.*

submit some relevant documents because they are not in the possession of the tax payer, the documentation-related penalties should not be applied. Finally it should be noted that adjustments to the tax base of the tax payer can always be made as a way to compensate for lost tax revenue if documentation-related penalties are not applied[544].

3. Comments on Discussion Draft

a. Submitted Public Comments on Discussion Draft

Even though a great number of comments on many topics were submitted to the Discussion Draft, only some of them will be examined in this section of the thesis.

aa. Comments on Confidentiality

One of the main public concerns about the Discussion Draft relates to confidentiality. For instance, the TEI stated that the Discussion Draft did not provide sufficient guidance for confidentiality and made a number of recommendations for shared information to be limited only to authorized personnel of the companies and a reliable means for the information exchange must be developed in order to guarantee the necessary standards of confidentiality. One main recommendation was for sensitive information to be reviewed only at the tax payer's premises rather than requiring it to be submitted to the tax administration[545]. The TEI also recommended that information exchanges should be realized under formal agreements, either bilateral or multilateral agreements to guarantee confidentiality[546]. The TEI argued that tax payers would not be willing to share information under the provisions of the Discussion Draft[547] and penalties must also be imposed if tax administrations disclosed any submitted information.

In relation to the confidentiality issue, KPMG argued that the Discussion Draft must not only guarantee non-disclosure of information to the public, but also guarantee non-disclosure to people within the MNE that are not authorized to obtain such information[548]. For this consideration, KPMG recommended implementing further protection mechanisms for confidentiality. Firstly, KPMG stated that the master file and country-by-country reports must

---

[544] *Id.*
[545] TAX EXECUTIVE INSTITUTE, *TEI Comments on OECD Transfer Pricing Documentation and CbC Reporting Draft,* 66 THE TAX EXECUTIVE, Jan.-Feb. 2014, 45, 57.
[546] *Id.*
[547] *Id.*
[548] OECD, *Public Comments Received Vol. III – Letters K to R Discussion Draft on Transfer Pricing Documentation and CbC Reporting,* (Feb. 23, 2014), https://www.oecd.org/ctp/transfer-pricing/volume3.pdf.

only be shared through tax treaties or information exchange procedures[549]. Secondly, tax authorities should not hold the original documents, but should only be entitled to have copies of necessary documents[550].

It should be noted that other commentators also made similar types of recommendations regarding the confidentiality of submitted transfer pricing documentation.

bb. Comments on Compliance Costs

The TEI also pointed out that the compliance costs associated with complex transfer pricing documentation requirements under the Discussion Draft would increase further the already high costs of documentation obligations for tax payers[551]. The TEI also argued that the increased compliance costs would only result in small amounts of additional revenue for governments[552]. Therefore, the OECD should consider limiting the documentation requirements with only necessary information for risk assessments. In other words, the OECD should revise the documentation requirements proposed in the Discussion Draft by adopting the substance over form approach[553].

PwC Global also believed the proposals for documentation requirements went far beyond what was materially necessary[554]. In relation to feedback received from tax payers, PwC Global argued that the requirements in the Discussion Draft would not only increase the compliance burden of tax payers, but would also require considerable investment by businesses to comply with such requirements[555].

cc. Comments on Penalties

The Banking and Finance Company Working Group on BEPS highlighted the point that if the penalties proposed in the Discussion Draft were imposed in accordance with each jurisdiction's local laws, MNE's would be subject to a different set of penalty provisions in different jurisdictions[556], thus causing significant uncertainty for MNE's. Therefore, the

---

[549] *Id.*
[550] *Id.*
[551] Tax Executive Institute, *TEI Comments on OECD Transfer Pricing Documentation and CbC Reporting Draft*, 66 THE TAX EXECUTIVE, Jan.-Feb. 2014, at 45, 46.
[552] *Id.*
[553] *Id.*
[554] OECD, *Public Comments Received Vol. III – Letters K to R Discussion Draft on Transfer Pricing Documentation and CbC Reporting*, (Feb. 23, 2014).
[555] *Id.*
[556] OECD, *Public Comments Received Vol. I – Letters A to C Discussion Draft on Transfer Pricing Documentation and CbC Reporting* (Feb. 23, 2014), https://www.oecd.org/ctp/transfer-pricing/volume1.pdf.

Banking and Finance Company Working Group on BEPS recommended that the OECD provide clear guidance in relation to non-compliance or compliance[557]. It should also be noted that there was some criticism that the penalty provisions were too vague and more guidance was needed for both for administrations and tax payers under the Discussion Draft [558].

Some of the commentators, including Ernst&Young, recommended that there should not be any duplicate penalties imposed for non-compliance with the master file requirements. Instead, penalties should only be imposed on the headquarters of MNE's and not the subsidiaries[559].

dd. Comments on the Burden of Proof

Several commentators stated that the burden of proof should be on tax administrations if tax payers adequately submitted their transfer pricing documentation. In addition, the TEI agreed with provisions in the Discussion Draft stating that if the burden of proof was delegated to tax payers under some jurisdictions; the burden of proof should shift to the tax administration if the tax payer provided adequate and timely submitted documentation[560]. It should be noted that the TEI recommended that there should also be more detailed provisions regulating the burden of proof under the Discussion Draft[561].

b. Other Comments

In addition to these main comments submitted regarding the Discussion Draft, there were also comments and concerns raised about the requirements introduced by the OECD. As discussed above, the main concern about the current Chapter V of OECD TP Guideline is that it does not provide details for a standardized set of documents. It is considered that the standardization of documentation improves transparency, which is consistent with the principles of BEPS[562]. In addition, standardizing transfer pricing documentation requirements is regarded as effective in reducing compliance costs for the businesses[563].

---

[557] *Id.*
[558] *Id.* at 13.
[559] OECD, *Public Comments Received Vol. II – Letters D to J Discussion Draft on Transfer Pricing Documentation and CbC Reporting* (Feb. 23, 2014), https://www.oecd.org/ctp/transfer-pricing/volume2.pdf.
[560] Tax Executive Institute, *TEI Comments on OECD Transfer Pricing Documentation and CbC Reporting Draft,* 66 THE TAX EXECUTIVE, Jan.-Feb. 2014, at 45, 64.
[561] *Id.*
[562] *What the BEPS, supra* note 524, at 72.
[563] Pascal Saint-Amans & Raffaele Russo, *The men behind BEPS,* 25 INT'L TAX REV. 10, 12 (2014).

However, even though the advantages of standardizing documentation are indisputable, it is not a one size fits to all model[564] and it is difficult to create a standardized requirements that suits every jurisdiction[565]. In addition, there were concerns at the international level that the detailed documentation requirements in the master file, local file and the country-by-country reporting may increase the compliance costs of businesses[566]. It should also be noted that the confidentiality issue was another major concern on the basis that some jurisdictions do not have confidentiality regulations for tax administrations[567].

To sum up, if the comments submitted for the Discussion Draft and other comments discussed in this section are considered together, we can see common concerns about the newly proposed transfer pricing documentation requirements. Nevertheless, despite these concerns and comments, the proposed transfer pricing documentation requirements do seem encouraging for international taxation.

II. The Final Report

1. In General

The OECD published the Final Report[568] on 5 October 2015. In this section of the thesis, not all the requirements presented in the Final Report will be discussed; only the differences between the Discussion Draft and Final Report will be evaluated.

2. Documentation Requirements

Unlike the Discussion Draft, the Final Report establishes a three-tiered transfer pricing documentation approach. As discussed above, the country-by-country reporting was included in the master file under the Discussion Draft. However, as a result of the submitted comments, country-by-country reporting is now required as a separate document by the OECD Final Report.

---

[564] *Id.*

[565] Sophie Harding, *BEPS scepticism still rife despite OECD's attempts at reassurance,* 25 INT'L TAX REV., July-Aug. 2014, at 20, 20.

[566] THE DAVIS TAX COMMITTEE, ADDRESSING BASE EROSION AND PROFIT SHIFTING IN SOUTH AFRICA DAVIS TAX COMMITTEE INTERIM REPORT, ACTION 13: RE-EXAMINE TRANSFER PRICING DOCUMENTATION (2015). http://www.taxcom.org.za/docs/New_Folder/7%20DTC%20BEPS%20Interim%20Report%20on%20Action%20Plan%2013%20-%20Transfer%20Pricing%20Documentation,%202014%20deliverable.pdf.

[567] *Id.*

[568] OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report,* OECD/G20 Base Erosion and Profit Shifting Project (2015), http://dx.doi.org/10.1787/9789264241480-en.

As a response to the comments on confidentiality, the Final Report extends the scope of confidentiality protection to information submitted with the master file, local file and the country-by-country reporting. It is stated that tax administrations must take all necessary actions to guarantee the non-disclosure of confidential information, such as trade secrets, scientific secrets and any other commercial sensitive information[569]. In addition to this extended protection, the Final Report also emphasizes that the OECD Guide (2012) "Keeping It Safe[570]" regulating the protection of confidential information exchanged for tax purposes must be followed to ensure the confidentiality of submitted documents is protected.

In the Final Report, the OECD has followed the same approach on contemporaneous documentation , which is now considered the preferred way to achieve transfer pricing documentation objectives. In addition, the Final Report also recommends that transfer pricing documentation requirements apply under certain material thresholds. In departing from the Discussion Draft, the Final Report provides further details about the standards for material thresholds, stating they should be objective and commonly understood and accepted in commercial practices[571].

While the Discussion Draft required the master file to be prepared in English and local file in the local language, the Final Report empowers each jurisdiction to determine the language for documents to be submitted to tax administrations[572]. The only caveat is that tax administrations should require commonly used languages.

3. Burden of Proof

The Final Report does not include detailed provisions regulating the burden of proof. However, it does stipulate that the burden of proof shifts to the tax administration in jurisdictions where the tax payer previously bore the burden of proof[573]. Therefore, if the tax payer complies with all documentation requirements and submits the documents in a timely manner, the burden of proof shifts to the tax administration, which must then prove that the transfer prices of the tax payer are not determined at arm's length.

[569] *Id.* at 19.
[570] OECD, *Joint OECD/Global Forum Guide On The Protection Of Confidentiality Of Information Exchanged For Tax Purposes* (2012), http://www.oecd.org/tax/transparency/final%20Keeping%20it%20Safe%20with%20cover.pdf.
[571] *Id.* at 17.
[572] *Id.* at 18.
[573] *Id.* at 19.

4. Penalties

The Final Report does not include any considerable changes from the Discussion Draft regarding the imposition of penalties. It does emphasize that different penalty provisions under different jurisdictions may result in changes in the level of compliance level of tax payers. For example, if one jurisdiction does not provide penalty provisions for non-compliance, the tax payer does not have to provide sufficient documentation in this jurisdiction.

However, the Final Report does make significant changes regarding the concepts of reasonable effort and good faith by not providing any relief for transfer pricing documentation related penalties when the tax payers acts in a good faith and show reasonable effort[574].

III. Country Implementations

With the purpose of ensuring effective and consistent implementation of transfer pricing documentation requirements, the Final Report provides detailed guidance on how to prepare the master file, the local file and country-by-country reporting[575].

The Final Report states that provisions for the master file and the local file must be implemented through domestic legislation or administrative procedures, which must include a specific list of documents annexed to the files for consistency. In addition to the master and local file, the Final Report provides more detailed guidance for implementation of country-by-country reporting. It provides a package of specific documents that functions as a legislative model for countries to implement the same requirements under local laws.

While some countries have already implemented the same requirements for master file, local file and country-by-country reporting into the local laws, other counties have just initiated the legislative process. However, there are still some countries that have not even started to begin draft these documentation requirements in accordance with the Action 13 of BEPS guidelines.

1. Australia

On 11 December 2015, Australia enacted Schedule 4 to the Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015 in order to include Subdivision 815-E in the Income Tax Assessment Act 1997 ("ITAA"). The new law implements the documentation

[574] *Id.*
[575] *Id.* at 20.

requirements developed by the OECD in accordance with the BEPS Action Plan 13. Schedule 4 states that entities which have annual global revenue of $1 billion or more should present to the Commissioner one or more country-by-country report, master file and local file[576].

In accordance with these legal reforms, the Australian Tax Office ("ATO") developed the Law Companion Guideline ("LCG") to explain the specific procedures for the documentation requirements[577] for the country-by-country reporting, the master file and the local file. In addition, the LCG also explains the material standards, penalties and exemption provisions as prescribed by the Final Report. It should be noted that if tax payers rely on the LCG in good faith, they are not obliged to pay underpaid taxes and no penalties or interest payment will be imposed. However, these concessions do not apply if the LCG provides an incorrect statement on how a provision applies to the tax payer.

2. The Netherlands

The Netherlands is another country that has implemented the documentation requirements prescribed by the Final Report. On 22 December 2015, the Netherlands enacted a new law on transfer pricing documentation requirements for master file, local file, country-by-country reporting[578]. It should be noted that according to the new law, country-by-country reporting is applicable for MNE's with a Dutch resident parent and a consolidated turnover of at least EUR 750 million. However, the law also provides for exceptional cases that require country-by-country reporting.

The Netherlands also regulates consequences for non-compliance with documentation requirements, including both administrative fines and criminal sanctions. In addition, in case of failure to submit the master file or the local file, shift in the burden of proof could be considered.

3. Turkey

Unlike Australia and the Netherlands, Turkey prepared draft legislation on 16 March 2016, but not yet finalized new transfer pricing documentation requirements in line with the Final Report. The Turkish Ministry of Finance intends to implement new transfer documentation

---

[576] Exposure Draft Country-by-Country Reporting and New Transfer Pricing Documentation Standards (2015)(Austl.), http://www.treasury.gov.au/.

[577] Law Companion Guideline 2015/3 (Subdivision 815-E of the *Income Tax Assessment Act 1997:* Country-by-Country reporting (2015) (Austl.), http://www.treasury.gov.au/.

[578] PWC, *The Netherlands implements transfer pricing documentation and country-by-country reporting requirements,* TAX INSIGHTS FROM TRANSFER PRICING, Jan. 6, 2016.

requirements through an administrative communique, rather than a legislative statute by publishing the draft General Communiqué on Disguised Profit Distribution through Transfer Pricing Serial No: 3 ("Communiqué No: 3")[579].

In accordance with the BEPS Action Plan 13, the Draft Communique No: 3 includes the same three-tiered documentation requirements for the master file, local file and country-by-country reporting, including the type of information that must be included in each document. The Draft Communique No: 3 also includes materials thresholds, which means that that not every MNE must prepare all three types of document reporting. For example, MNE's with the parent company resident in Turkey only have to prepare and submit the country-by-country reporting only if it has a minimum consolidated turnover of EUR 750,000,000. In addition, companies in the MNE group with balance sheet assets and net sales in excess of TRY 250,000,000 for the previous fiscal year must only prepare the master file with respect to transfer pricing documentation. Furthermore, companies that realize transactions with associated enterprises in excess of TRY 30,000 and have balance sheet assets and net sales in excess of TRY 30,000 for the previous fiscal year must prepare the local file as well. It is important to note that the draft Communique No: 3 does not provide any explanatory guidance for penalties or the burden of proof.

It must be stated that these efforts by Turkey to implement transfer pricing regulations in accordance with the Final Report is commendable. It is especially constructive to see the Draft Communique No: 3 propose to implement the three-tiered approach to Turkish legislation and set the material thresholds for required documentation. Nevertheless, the concerns stated in this thesis[580] about the unconstitutionality of transfer pricing documentation rules still apply to these recent initiatives.

The fundamental problem is that Turkish tax legislation does not include any statutory laws regulating the preparation and submission of transfer pricing documentation. Under these circumstances, the current Draft Communique No:3 does not have any legal basis. The first imperative for the Turkish Legislature is to enact the legal framework for transfer pricing documentation requirements under Article 13 of CTC or other articles of the TPC, before enacting specific provisions in accordance with the OECD Final Report,.

[579] Transfer Fiyatlandırması Yoluyla Örtülü Kazanç Dağıtımı Hakkında Genel Tebliğ [General Communiqué on Disguised Profit Distribution through Transfer Pricing Serial No:3] (2016) (Turk.).
[580] *See supra* Part §4.III.

Otherwise, the Draft Communique No: 3 prepared by an unauthorized executive body will be rendered null and void due to the current delegation of power problematic under legislation[581].

[581] *See supra* Part §4.III.2.b.

§6. CONCLUSION

Transfer pricing is defined as the price determined for the sale of goods or services realized between associated enterprises. The primary purpose of transfer pricing rules is to prevent economic double taxation. For example, if there is an international transaction is realized between associated enterprises, the tax administration in one of the jurisdictions may adjust the transfer price. However, if the other tax administration in another jurisdiction does not agree to make such adjustment, the MNE group may be taxed twice for the same income amount.

Although the primary objective of transfer pricing within an international context is to prevent double taxation by determining the price realized between associated enterprises of MNE for the sale of goods and services, in practice, transfer pricing is used for manipulative purposes. To state it simply, MNE's are able to shift their income to countries with lower tax rates and consequently, minimize their overall tax burden.

To prevent this manipulative purpose of MNE's, countries are committed to introduce, revise and govern transfer pricing requirements, especially in relation to documentation requirements and penalty provisions for non-compliance, to prevent base erosion in their jurisdictions.

Due to the increasing importance of transfer pricing documentation in many jurisdictions, this thesis is designed to analyze legal aspects in this area. More specifically, the research objective was to examine current transfer pricing requirements, the regulation of the burden of proof and penalty provisions for international, supranational and different national practices. In doing so, this thesis make a significant contribution to the transfer pricing documentation requirements with a particular focus on the unconstitutionality of current Turkish law.

In Chapter 2 I first conducted research on the historical development of transfer pricing documentation from its inception at the turn of the 20th Century in the U.S. until the first transfer pricing documentation legislation was enacted in 1996. Through this development process, the Toyota case in U.S. represents a landmark case that triggered the need for the enactment of formal and specific transfer pricing documentation regulations. Germany was the second country to enact transfer pricing documentation rules after the Federal Tax Court decision in 2001 and together with U.S. legislation and the OECD guidelines, transfer pricing documentation was internationalized.

In Chapter 3 I examined current transfer pricing documentation practices at the international, supranational and national levels. At the international level, the OECD does not provide detailed guidance for transfer pricing documentation requirements, burden of proof and penalty provisions. Instead, it has designed a legal framework to guide countries to implement domestic laws. In comparison, the PATA does provide a detailed list regarding the requirements for transfer pricing documentation and advises Member States not to impose documentation-related penalties. However, the PATA Documentation Package has been extensively criticized for not providing a standardized approach transfer pricing documentation. For this reason, MNE's have been unwilling to adopt the PATA Documentation Package and this thesis argues that there needs to be a standardized regulatory approach at the international level in order to have successful transfer pricing documentation requirements.

At the supranational level, I specifically examined the EU in Chapter 3. According to the EU, the OECD has failed to provide effective solutions for increasing international commerce and the integration of internal markets. For this reason, the EU developed the EU TPD that regulates a two-tiered approach to transfer price documentation requirements. However, it should be noted that the EU TPD regulatory model is optional for EU Member States. Furthermore, the EU TPD does not include any provisions regulating the burden of proof, which means that all Member States are free to apply their own national provisions. To clarify the issue, I conducted a research on ECJ case law, which supports the view that the burden of proof is not explicitly delegated to either tax administrations or tax payers. Instead, a general rule applies that delegates the burden of proof to tax administrations in the first instance, but at the same time, tax payers are expected to provide supporting documentation to prove that they acted in line with the arm's length principle when determining transfer prices. With regard to penalty provisions, the EU TPD provides an option for EU Member States to implement different penalty provisions, which also fails the need for a standardized approach to regulate non-compliance with transfer pricing documentation requirements.

At the national level, I examined the U.S., Germany and Sweden in Chapter 3 due to the comparative maturity of their legislation in the area of transfer pricing documentation. In addition to analysis of the relevant provisions of legislation, I also examined relevant case-laws and legal literature each country. As the first country to enact transfer pricing documentation laws, the U.S. was examined first. The U.S. has robust transfer pricing documentation requirements in operation. For instance, Section 482 of IRC provides detailed

transfer pricing documentation requirements and Section 6662 stipulates the circumstances under which penalties will be applied for non-compliance with the provision under Section 482. Unlike many other countries, the U.S. enforces very specific penalty provisions for non-compliance, which are effective in compelling MNE's to determine transfer prices correctly in American jurisdiction. Although there is some debate as to who bears the burden of proving transfer pricing cases in the U.S., my analysis of relevant legislation, case-law and literature supports the view that the burden of proof is placed on the tax payer. Nevertheless, analysis also shows that the burden of proof can shift to the tax administration, if the tax payer produces credible evidence supporting the tax payer's position. The overall conclusion is that U.S. has well-established and effective legislation regulating transfer pricing documentation.

In comparison to the U.S.. transfer pricing documentation laws in Germany are relatively new being enacted in 2003. Before the enactment, draft transfer pricing documentation requirements were published in 2000. Although the draft regulations were expected to be finalized, the German Federal Tax Court decision concluded that current German tax legislation did not require any specific amendment in rejecting the draft regulations. Nevertheless, despite this landmark decision, the German legislature introduced additional statutory rules under Article 90(3) to regulate cross-border transactions. However, in response to widespread criticism that these new rules breached the *freedom of establishment* principle defined under EC Treaty, the ECJ also took the view that requiring certain documentation from only non-resident tax payers did preclude the freedom of establishment in the *Futura* case. The Federal Tax Court also determined that Article 90(3) violates the freedom of establishment, but held that such violation was justified in establishing the necessary facts of transfer pricing case In relation to the burden of proof, the landmark decision determined that the tax administration in Germany bears the burden of proving illegal transfer pricing activities. The German legislator also introduced specific penalty provisions for non-compliance with documentation requirements and is one of the few countries, with the U.S., to do so effectively.

I then examined relevant Sweden legislation and literature and found some similarities with Turkey in relation to transfer pricing documentation. Before Sweden enacted specific transfer pricing documentation legislation in 2007, Section 19 of Chapter 14 of the Swedish Income Tax Law provided only the arm's length principle and the correction rule in line with the general framework established by the OECD Guidelines. Any details, such as the type of required documents, were governed by other regulations (binding) and notice provisions (non-

binding). This regulatory approach was heavily criticized in Sweden literature, stating that legislative power was delegated to the tax administration which does not have the authority to impose new requirements. A similar concern is raised by this thesis in relation to Turkish laws in Chapter 4. Further research of Swedish legislation and case-law indicates that the burden of proof for transfer pricing cases is placed on the tax administration and Swedish law does not provide any specific penalty provisions for non-compliance.

In Chapter 4 I focused analysis on Turkish legislation and current literature with respect to transfer pricing documentation. Under Turkish legislation, the authority to determine procedures regulating transfer pricing is given to the Council of Ministers. However, that authority does not explicitly refer to transfer pricing documentation. Using its general authority prescribed by law, the Council of Ministers published the the Decree on Disguised Profit Distribution through Transfer Pricing ("Decree"). In addition, the Ministry of Finance published the Communique No.1. These two executive acts provide different types of documentation requirements.

Regarding the burden of proof, Turkish legislation provides a rebuttable legal presumption that if the tax administration proves its claim, the burden of proof shifts to the tax payer who has to prove its transfer price is in line with the arm's length principle. Unlike Germany and the U.S., Turkish tax legislation does not provide any specific transfer pricing documentation penalties for non-compliance. Rather, the special irregularity fine is applied in practice based on the general provisions of the TPC.

Most significantly, this research study identifies a number of constitutionality problems. First and foremost, there is no statutory law giving the Ministry of Finance the authority to issue transfer pricing documentation regulations. Current regulations without such legal authority contravene the principle of legality of taxes guaranteed under Article 1 of Protocol No.1 of ECHR and Article 73 of the Turkish Constitution. Furthermore, Article 13 of CTC only empowers the Council of Ministers to regulate transfer pricing procedures. However, the Ministry of Finance issued a communique regulating transfer pricing documentation based on the authority given by Article 13 of CTC. Under these circumstances, I assert that the communique must be treated as null and void. Additionally, the current penalties prescribed for non-compliance with transfer pricing documentation requirements are also unconstitutional on the basis that crime and punishment can only be prescribed by law.

Subject to these legal constraints, the special irregularity fine imposed on tax payers by the Communique No.1. must be treated as null and void.

Recently, the Draft Law on amendment to Article 13 of the CTC regulating disguised profit distribution through transfer pricing was finalized and published. The Draft Law includes specific amendments regulating transfer pricing documentation requirements. However, these proposed amendments also lack the legal basis to resolve the unconstitutionality concerns regarding the transfer pricing documentation requirements and the penalty provisions. Regrettably during the research process for this thesis, the Draft Law was enacted on 15 July 2016 without any further changes to transfer pricing regulations.

Based on this analysis, the primary argument of this thesis is that the Turkish Legislature must consider prescribing transfer pricing documentation requirements under Article 13 of the CTC and relevant articles of the TPC. Additionally, provisions for crime and punishment for non-compliance with such requirements must also be promulgated in accordance with statutory law in order to be constitutional and lawful under Turkish jurisdiction.

As a possible regulatory model for Turkey, the OECD BEPS Action Plan was examined in Chapter 5. The G20 finance ministers called on the OECD to develop action plans to prevent the shortcomings of the current international taxation system and also address the BEPS issues. Therefore, the OECD developed 15 different action plans, one of which relates to transfer pricing documentation. The OECD published the Discussion Draft on transfer pricing documentation requirements to receive public comments, which mainly focused on confidentiality, compliance costs, penalties and burden of proof concerns. In response to this feedback, the OECD finalized the Final Report on 5 October 2015. The most significant amendment in the Final Report was to adopt a three-tiered documentation system instead of the two-tiered system initially recommended by the Discussion Draft. However, other recommendations for specific burden of proof provisions were not included in the Final Report. Since the Final Report was published, some counties have already enacted laws regulating transfer pricing documentation in line with the terms of the Final Report, such as Australia and the Netherlands. Other countries like Turkey have started the implementation process.

However, the same constitutional concerns raised by this thesis also apply to the current laws being developed for transfer pricing documentation in Turkey. For these reasons, I aim to

raise awareness about these legal issues in the hope to establish legal reforms in this increasingly important area of taxation.

Bibliography

Books

A. Michael Heimert & Michelle Johnson (eds.), GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, (2010)

BAKİ KURU, MEDENİ USUL HUKUKU DERS KİTABI (2016)

BAKİ KURU, RAMAZAN ARSLAN & EJDER YILMAZ, MEDENİ USUL HUKUKU (22nd ed. 2011)

BERTİL EMRAH ODER, ANAYASA YARGISINDA YORUM YÖNTEMLERİ (2010)

BİLLUR YALTI SOYDAN, AVRUPA BİRLİĞİNDE DOLAYSIZ VERGİLER (2002)

BİLLUR YALTI, VERGİ YÜKÜMLÜSÜNÜN HAKLARI (2006)

BİLLUR YALTI (ed.), VERGİDEN KAÇINMANIN ÖNLENMESİ (2014)

BÜLENT TANÖR & NECMİ YÜZBAŞIOĞLU, 1982 ANAYASASINA GÖRE TÜRK ANAYASA HUKUKU (2015)

Dejan Jelic, Allocation of burden of proof that the arm's length principle was (not) breached under the TFEU Fundamental Freedoms (2013) (unpublished master thesis, Lund University), http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=3800768&fileOId=3814897

EDA ÖZDILER KÜÇÜK, VERGI HUKUKUNDA KARINELER (2011)

Eduardo Baistrocchi & Ian Roxan (eds.), RESOLVING TRANSFER PRICING DISPUTES A GLOBAL ANALYSIS (2015)

Elise Krumholz, BEPS Action 13: Standardized Transfer Pricing Documentation Does One Size Fit All? (2015) (unpublished master thesis, Lund University), http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8511365&fileOId=8521736

ERDOĞAN TEZİÇ, ANAYASA HUKUKU (20th ed. 2016)

Gerard Meussen (ed.), THE BURDEN OF PROOF IN TAX LAW, 2011 EATLP CONGRESS, UPPSALA 2-3 JUNE 2011, (2013)

H.H. Alpert & K. Van Raad (eds.), ESSAYS ON INTERNATIONAL TAXATION *(*1993)

IAN DENNIS, THE LAW OF EVIDENCE, (2nd ed. 2002)

LEYLA ATEŞ, TRANSFER FIYATLANDIRMASI VE VERGILENDIRME (2011)

LORRAINE EDEN, TAXING MULTINATIONALS: TRANSFER PRICING AND CORPORATE INCOME TAXATION IN NORTH AMERICA (1998)

M. KAMİL YILDIRIM, MEDENİ USUL HUKUKUNDA DELİLLERİN DEĞERLENDİRİLMESİ (1990)

M. KEMAL OĞUZMAN & NAMİ BARLAS, MEDENİ HUKUK (21th ed. 2015)

Michael Lang et al. (eds.), TAX COMPLIANCE COSTS FOR COMPANIES IN AN ENLARGED EUROPEAN COMMUNITY (2008)

MUALLA ÖNCEL, AHMET KUMRULU & NAMİ ÇAĞAN, VERGİ HUKUKU (25th ed. 2016)

MUSTAFA AKKAYA, VERGİ HUKUKUNDA EKONOMİK YAKLAŞIM (2016)

NAMİ ÇAĞAN, VERGİLENDİRME YETKİSİ (1982)

NİHAL SABAN, VERGİ HUKUKU (7th ed. 2015)

NİHAL SABAN, VERGİ HUKUKU (5th ed. 2009)

NUR CENTEL, HAMİDE ZAFER & ÖZLEM ÇAKMUT, TÜRK CEZA HUKUKUNA GİRİŞ (9th ed. 2016)

PI PETRA SANDSLATT, TRANSFER PRICING, THE GLOBAL DIVERGENCES REGARDING THE DOCUMENTATION REQUIREMENTS (2009)

Richard Doernberg et al. (eds.), TRANSFER PRICING AND THE ARM'S LENGTH PRINCIPLE IN INTERNATIONAL TAX LAW (2010)

SAİM ÜSTÜNDAĞ, MEDENİ YARGILAMA HUKUKU (4th ed. 1989)

SELİM KANETİ, VERGİ HUKUKU (2nd ed. 1989)

SERKAN AĞAR, TRANSFER FIYATLANDIRMASI ÖRTÜLÜ KAZANÇ DAĞITIMI (2011)

SIDDIK SAMİ ONAR, İDARE HUKUKUN UMUMİ ESASLARI (1966)

TUNCAY KAPUSUZOĞLU, VERGISEL YÖNDEN TRANSFER FIYATLANDIRMASI (2003)

UFUK OLCAY TOKAY ACAR, TRANSFER FİYATLANDIRMASI (2013)

YASEMİN TAŞKIN, TRANSFER FİYATLANDIRMASINDA EMSALLERE UYGUNLUK İLKESİ (2012)

Articles

Akihiro Hironaka and Masaki Iwasaki, *Assessing Burden of Proof in Transfer Pricing Disputes,* INT'L L. OFF. (2012)

Alexander Vögele, *Germany Protects Tax Base,* 12 INT'L TAX REV. 38 (2001)

Alexander Vögele&William Bader, *German Court Vetoes Document Regulations,* 12 INT'L TAX REV. 45 (2001)

Alexander Vögele&William Bader, *New Deal For German Transfer Pricing,* 13 INT'L TAX REV. 22 (2002)

Andreas Oestreicher, *Transfer Pricing in Germany in* RESOLVING TRANSFER PRICING DISPUTES A GLOBAL ANALYSIS, (Eduardo Baistrocchi & Ian Roxan eds., 2015)

Andrew Blair-Stanek, *Intellectual Property Law Solutions to Tax Avoidance,* 62 UCLA L. REV. 2 (2015)

Angelika Thies, *Germany in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 9 (A. Michael Heimert & Michelle Johnson eds., 2010)

Annika Lindström & Selma Omanovic, *The Swedish Tax Agency's Difficulty in Meeting its Burden of Proof,* INT'L TAX REV. (TP Week), May 27, 2015

Baker&McKenzie, *German Transfer Pricing Documentation Obligation Conforms In Principle to European Law,* CLIENT ALERT (2013)

Billur Yaltı, *Mülkiyet Hakkı Versus Vergilendirme Yetkisi: İnsan Hakları Avrupa Mahkemesine Göre Mülkiyet Hakkına Müdahalenin Sınırı",* 227 VSD (2000) (Turk.)

Billur Yaltı, *Transfer Fiyatlandırmasında "Gizli Emsal",* 251 VSD (2009) (Turk.)

Billur Yaltı, *VUK 3B'nin Sınırlarına İlişkin Bir Uygulama: Vergi Hukukunda Sermaye Tamamlama Akçesi,* 262 VSD 8 (2010) (Turk.)

Billur Yaltı, *Transfer Fiyatlandırmasında Bağımsız ve Açık Emsal,* 275 VSD 2011 (Turk.)

Billur Yaltı, *Mülkiyet Hakkına Vergisel Müdahale Kanunilik: İnsan Hakları Avrupa Mahkemesinin Yeni Kararlarında "Çelişik Mevzuat" ve "Çelişik İçtihat",* 276 VSD (2011) (Turk.)

Sophie Harding, *BEPS scepticism still rife despite OECD's attempts at reassurance,* 25 INT'L TAX REV., July-Aug. 2014

Burak Küpeli, *Statute of limitations in assessments, corrections and tax inspections,* VERGİDE GÜNDEM (Jan. 2015) (Turk.)

Christian Keuschnigg and Michael P. Devereux, *The arm's length principle to multinational firm organization,* 89 J. INT'L ECON. 432 (2013)

Del Wright, *Improperly Burdened: The Uncertain and Sometimes Unfair Application of Tax Penalties,* 35 VA. TAX REV. 1, 31 n.82 (2015)

Erik Sherman, *How Google Hides its Profits from the Tax Man*, BNET, (Oct. 21, 2010), http://www.bnet.com/blog/technology-business/how-google-hides-its-profits-from-the-tax-man/62966

Ernst&Young, *Transfer Pricing 2003 Global Survey: Practices, Perceptions, and Trends in 22 Countries Plus Tax Authority Approaches in 44 Countries*, 30 INT'L TAX J. 17 (2004)

Giovanna Chiesa & Giammarco Cottani, *Supreme Court Decision on Transfer Pricing: Burden of Proof, Anti-Avoidance Interpretation and Abuse of Law Principle*, INT'L TRANSFER PRICING J. May-June 2007

Giuseppe Marino, *The burden of proof in cross-border situations (international tax law) in* THE BURDEN OF PROOF IN TAX LAW, 2011 EATLP CONGRESS, UPPSALA 2-3 JUNE 2011 (Gerard Meussen ed. 2013)

Hartmut Hahn&Ute Suhrbier-Hahn, *Mitwirkungspflichten bei Auslandssachverhalten europarechtswidrig?- Neukonzeption der §§* 90 *Abs.* 3 *und* 162 *Abs.* 3 *und* 4 *AO im SteVAG -*, 3 IStR 94 (2003)

Hendrik Swaneveld and Martin Przysuski, *PATA and Transfer Pricing*, 10 CANADIAN TAX HIGHLIGHTS, Oct. 29, 2002

J.H. Guttentag & T. Miyatake, *in* ESSAYS ON INTERNATIONAL TAXATION, (H.H. Alpert & K. Van Raad eds., 1993)

J. Philip van Hilten, *Transfer Pricing Policy in the International Tax System-Past And Present and a Quick Look in the Fiscal Crystal Ball*, 10 GEO. MASON L. REV. 709 (2002)

JENS WITTENDORFF, TRANSFER PRICING AND THE ARM'S LENGTH PRINCIPLE IN INTERNATIONAL TAX LAW, (Richard Doernberg et al. eds., 2010) Vol.35

Jesse Drucker, *Google 2.4% Rate Shows how $60 Billion Lost to Tax Loopholes*, BLOOMBERG, (Oct. 21, 2010), http://www.bloomberg.com/news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html.

Jesse Drucker, *Google Has Made $11.1 Billion Overseas Since 2007. It Paid Just 2.4% in Taxes. And That's Legal,* 4201 BLOOMBERG BUS. WK. 43 (2010).

John Neighbour, Jeffrey Owens, *Tax Council Policy Institute Symposium: The Future of International Transfer Pricing: Practical and Policy Opportunities:Article: Transfer Pricing In the New Millennium: Will The Arm's LengthPrinciple Survive,* 10 GEO. MASON L. REV. 951 (2002)

John Sokatch, *Transfer-Pricing with Software Allows for Effective Circumvention of Subpart F Income: Google's "Sandwich" Costs Taxpayers Million,* INT'L L., Summer 2011, Vol.45, No.2

Jonathan Lubick, *OECD Guidelines in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, (A. Michael Heimert & Michelle Johnson eds., 2010)

Karen Wheelwright, *Tax Payers' Rights in Australia,* 7 REVENUE L. J. 226 (1997)

Kimberly A. Clausing, *The Revenue Effects of Multinational Firm Income Shifting,* TAX NOTES, (March 28, 2011)

Kiyokazu Iida, *Japan,* TRANSFER PRICING INT'L J. 2 (2012)

Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 Hastings L.J. 239, (1988)

Maria Italia, *Taxpayers' in Australia Bear the Burden of Persuasion and Burden of Production,* 7 INT'L REV. OF BUS. RES. PAPERS 231 (2011)

Mark Bronson, Michelle Johnson & Kate Sullivan, *Overview*/Best Practices in GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, 6 (A. Michael Heimert & Michelle Johnson eds., 2010)

Mark Madrian, *United States in* GUIDE TO INTERNATIONAL TRANSFER PRICING LAW, TAX PLANNING AND COMPLIANCE STRATEGIES, (A. Michael Heimert & Michelle Johnson eds., 2010)

Moritz Glahe&Juergen Luedicke, *Germany- Federal Fiscal Court Judgement on Transfer Pricing Documentation,* 5 PwC EU TAX NEWSL., July-Aug. 2013

Mustafa Akkaya, İbrahim Bayar & Oytun Canyaş, *Vergi Hukukunda "Emsallere Uygunluk" ve "Gerçeklik" İlkesi* (Feb. 09,2016), http://www.vmhk.org.tr/vergi-hukukunda-emsallere-uygunluk-ve-gerceklik-ilkesi/

Nihal Saban, *What is the being of Article 3, B, 1 of the Tax Procedural Law?, in* Vergiden Kaçinmanin Önlenmesi 169 (Billur Yaltı ed., Argüs Tercüme Ajansı trans. 2014)

Nils von Koch, *New Transfer Pricing Documentation Requirements,* 16 INT'L TAX REV., 46 (2005)

Nils von Koch, *Bill on Transfer Pricing Documentation Requirements Released,* 17 INT'L TAX REV., 7 (2006)

Pascal Saint-Amans & Raffaele Russo, *The men behind BEPS*, 25 INT'L TAX REV. 10 (2014)

Philip Anderson, *PATA Transfer Pricing Documentation Package*, ASIA PACIFIC TAX BULL. (2003)

REUVEN S. AVI-YONAH, *The Rise And Fall Of Arms's Length: A Study In The Evolution Of U.S. International Taxation*, (Law&Economics Working Papers Archive: 2003-2009), available http://repository.law.umich.edu/law econ archive/art73

Robert Feinschreiber & Margaret Kent, *Pacific Tax Administrators Coordinate Transfer Pricing Documentation*, 9 CORP. BUS. TAX'N MONTHLY 23 (2007)

Roman Seer, *Germany in* THE BURDEN OF PROOF IN TAX LAW, 2011 EATLP CONGRESS, UPPSALA 2-3 JUNE 2011, at 139 (Gerard Meussen ed. 2013)

Salih Şanver, *Vergi Hukukunda Yorum ve Kanıtlama, in* İSTANBUL İKTİSADİ VE TİCARİ İLİMLER AKADEMİSİ SİYASAL BİLİMLER FAKÜLTESİ REŞAT KAYNAR'A ARMAĞAN 183 (1981) (Turk.)

Sedat Kurdoğlu, *Transfer Fiyatlandırmasında Yaptırımlar: Hafif mi Yoksa Ağır mı? (ABD Uygulamasının Türkiye İle Karşılaştırılması)* 295 VSD (2012) (Turk.)

Serdar Sumay, *Transfer Fiyatlandırması Dokümantasyon Yükümlülüğü,* 6 VERGİDE GÜNDEM (2009) (Turk.), http://www.vergidegundem.com/documents/10156/14657/makale1.pdf

Sophie Harding, *BEPS scepticism still rife despite OECD's attempts at reassurance,* 25 INT'L TAX REV., July-Aug. 2014

Soren Bo Nielsen, *Transfer Pricing: Roles and Regimes*, 37 REVISTA DE ECONOMIA MUNDIAL 103 (2014)

Stefan Olsson, *Sweden in* THE BURDEN OF PROOF IN TAX LAW, 2011 EATLP CONGRESS, UPPSALA 2-3 JUNE 2011, at 249 (Gerard Meussen ed. 2013)

Steffen Christian Hörner, *National Report Germany in* TAX COMPLIANCE COSTS FOR COMPANIES IN AN ENLARGED EUROPEAN COMMUNITY, 207 n.74 (Michael Lang et al. eds.,2008)

Susan C. Borkowski, *Transfer Pricing Documentation and Penalties: How Much Is Enough?*, INT'L TAX J., Spring 2003, Vol.29, Issue 2

Susan C. Borkowski, *The history of PATA and its effect on advance pricing arrangements and mutual agreement procedures*, J. INT'L ACCT., AUDITING & TAX'N 17 (2008)

Sven C. Bremer and Gerhard Engler, *Tightening of the German Transfer Pricing Documentation Requirements*, INT'L L. J., Vol.30 Issue 2, March 2004

TAX EXECUTIVES INSTITUTE, *Proposal to shift burden of proof*, 49 THE TAX EXECUTIVE (1997)

TAX EXECUTIVES INSTITUTE, *Pacific Association of Tax Administrators' Transfer Pricing Documentation Package*, 54 THE TAX EXECUTIVE, Sept.-Oct. 2002

TAX EXECUTIVE INSTITUTE, *TEI Comments on OECD Transfer Pricing Documentation and CbC Reporting Draft*, 66 THE TAX EXECUTIVE, Jan.-Feb. 2014

Thomas Borstell and Ludger Wellens, *Germany Draft Threatens Heavy Burden*, 11 INT'L TAX REV. 11 (2000)

Thomas C. Pearson, *Proposed International Legal Reforms For Reducing Transfer Pricing Manipulation of Intellectual Property*, 40 N.Y.U. J. INT'L L. & POL. 541 (2008)

Ulrich Ränsch & Alexandra John, *German Adminiatration Principles for Transfer Pricing and Documentation: Unofficial Translation of the Federal Ministry of Finance Letter Dated April 12, 2005*, 33 INT'L TAX REV. 368 (2005)

William Innes and Hemamalini Moorthy, *Onus of Proof and Ministerial Assumptions: The Role and Evolution of Burden of Proof in Income Tax Appeals*, 46 CANADIAN TAX J. 1187 (1998)

Wolfgang Joecks&Bert Kaminski, *Dokumentations-und Sanktionsvorschriften für Verechnungspreise in Deutschland-Eine rechtliche Würdigung,* 2 IStR 65 (2004)

Yıldırım Taylar, *Vergi Yargılaması Hukukunda İspata İlişkin Genel Esaslar Ve Bu Bağlamda Bir Danıştay Kararının Değerlendirilmesi, in* PROF. DR. MUALLA ÖNCEL'E ARMAĞAN CİLT II 1189 (2009) (Turk.)

OECD Publishing

OECD, *Measuring Globalisation: OECD Handbook on Economic Globalisation Indicators*, Doc. ISBN 92-64-10808-4 (2005)

OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (2010), http://www.oecd.org/publications/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm

OECD, *OECD Guidelines for Multinational Enterprises* (2011), http://dx.doi.org/10.1787/9789264115415-en

OECD, Lanz, R. and S. Miroudot, "Intra-Firm Trade:Patterns, Determinants and Policy Implications", Trade Policy Papers, No. 114 (2011), http://dx.doi.org/10.1787/5kg9p39lrwnn-en

OECD, *Joint OECD/Global Forum Guide On The Protection Of Confidentiality Of Information Exchanged For Tax Purposes* (2012), http://www.oecd.org/tax/transparency/final%20Keeping%20it%20Safe%20with%20cover.pdf

OECD, *Dealing Effectively with the Challenges of Transfer Pricing* (2012) http://dx.doi.org/10.1787/9789264169463-en

OECD, *The OECD Declaration and Decisions on International Investment and Multinational Enterprises* (2012), http://www.oecd.org/daf/inv/investment-policy/ConsolidatedDeclarationTexts.pdf

OECD, *Public Consultation White Paper On Transfer Pricing Documentation* (2013), http://www.oecd.org/ctp/transfer-pricing/white-paper-transfer-pricing-documentation.pdf

OECD, *Action Plan on Base Erosion and Profit Shifting* (2013) https://www.oecd.org/ctp/BEPSActionPlan.pdf

OECD, *Discussion Draft On Transfer Pricing Documentation and Cbc Reporting* (2014), https://www.oecd.org/tax/transfer-pricing/discussion-draft-transfer-pricing-documentation.pdf

OECD, *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*, OECD/G20 Base Erosion and Profit Shifting Project (2014), https://www.oecd.org/ctp/beps-action-13-guidance-implementation-tp-documentation-cbc-reporting.pdf

OECD, *Public Comments Received Vol. I – Letters A to C Discussion Draft on Transfer Pricing Documentation and CbC Reporting* (Feb. 23, 2014), https://www.oecd.org/ctp/transfer-pricing/volume1.pdf

OECD, *Public Comments Received Vol. II – Letters D to J Discussion Draft on Transfer Pricing Documentation and CbC Reporting* (Feb. 23, 2014), https://www.oecd.org/ctp/transfer-pricing/volume2.pdf

OECD, *Public Comments Received Vol. III – Letters K to R Discussion Draft on Transfer Pricing Documentation and CbC Reporting*, (Feb. 23, 2014), https://www.oecd.org/ctp/transfer-pricing/volume3.pdf

OECD, *Model Tax Convention on Income and on Capital 2014 (Full Version)*, (2015) http://dx.doi.org/10.1787/9789264239081-en

OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (2015), http://dx.doi.org/10.1787/9789264241480-en

EU Documents

Commission Press Release, IP/02/1105, (July 19, 2002), http://europa.eu/rapid/press-release_IP-02-1105_en.htm?locale=en

Company Taxation in the Internal Market: Commission Staff Working Paper, SEC(01) 1681, https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/company_tax_study_en.pdf

Communication From the Commission to the Council, the European Parliament and the Economic and Social Committee, The application of anti-abuse measures in the area of direct taxation-within the EU and in relation to third countries, COM(2007) 785 Final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0785:FIN:en:PDF

EU Joint Transfer Pricing Forum-Business Representatives, Transfer Pricing Documentation Discussion Paper, Doc.JTPF/014/BACK/2003/EN, http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/forum5/documentation_requirements_business_view.pdf

EU Joint Transfer Pricing Forum Contribution by Prof. Maisto on Penalties, DOC.JTPF/011/BACK/2005/EN, http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/13th-maisto.pdf

On the work of the EU Joint Transfer Pricing Forum on transfer pricing documentation for associated enterprises in the EU: Communication From the Commission to the Council, the European Parliament and the Economic and Social Committee, Proposal for a Code of Conduct on transfer pricing documentation for associated enterprises, COM(2005) 543 Final, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005PC0543&from=EN

Report on the Activities of the EU Joint Transfer Pricing Forum in the Field of Documentation Requirements Report prepared by the EU Joint Transfer Pricing Forum

(COM(2005)543 final), SEC(2005) 1677, http://ec.europa.eu/transparency/regdoc/rep/2/2005/EN/2-2005-1477-EN-1-0.Pdf

Decree of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD), 2006 O.J. (C 176/01), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42006X0728(01)&from=EN

Towards an Internal Market without tax obstacles A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities: Communication From the Commission to the Council, the European Parliament and the Economic and Social Committee, COM(2001) 582 Final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0582:FIN:EN:PDF

Other Sources

AUSTRALIAN TAX OFFICE, TAX RULING, TR 98/11, par. 2.2., https://www.ato.gov.au/law/view/document?DocID=TXR/TR9811/NAT/ATO/00001

Canada Revenue Agency, Referrals to the Transfer Pricing Review Committee, TPM-07 (2005), http://www.transferpricing.com/pdf/CRA%20TPM-07.pdf

Canada Revenue Agency, Verifying Income Tax Returns Of Individuals And Trusts (2005), http://www.oag-bvg.gc.ca/internet/English/parl_oag_200511_03_e_14941.html

Canada Revenue Agency, Reasonable efforts under section 247 of the Income Tax Act,, TPM-09 (2006), http://www.transferpricing.com/pdf/CRA%20TPM-09.pdf

Consolidated Version of the Treaty on European Union art. 18, 2012 O.J. C 326/47

Exposure Draft Country-by-Country Reporting and New Transfer Pricing Documentation Standards (2015)(Austl.), http://www.treasury.gov.au/

International Monetary Fund [IMF], Spillovers in International Corporate Taxation, IMF Policy Paper, (May 9, 2014), http://www.imf.org/external/np/pp/eng/2014/050914.pdf

Internal Revenue Service, 2001, Effectiveness of IRC Section 6662(e), Department of the Treasury, LMSB, December 28, 2001, at 5. http://apps.americanbar.org/intlaw/committees/tax_estate_individuals/tax/final_report_v32.pdf

Law Companion Guideline 2015/3 (Subdivision 815-E of the *Income Tax Assessment Act 1997:* Country-by-Country reporting (2015) (Austl.), http://www.treasury.gov.au/

PWC, International Transfer Pricing 2013/14 Report, http://www.pwc.com/gx/en/international-transfer-pricing/assets/itp-2013-final.pdf

PWC, International Transfer Pricing Report, 2015/16, http://www.pwc.com/gx/en/services/tax/transfer-pricing/itp-download.html

PWC, *The Netherlands implements transfer pricing documentation and country-by-country reporting requirements*, TAX INSIGHTS FROM TRANSFER PRICING, Jan. 6, 2016

T.C. EKONOMİ BAKANLIĞI, ULUSLARARASI DOĞRUDAN YATIRIMLAR 2014 YILI RAPORU(2014), http://www.ekonomi.gov.tr/portal/content/conn/UCM/uuid/dDocName:EK-212362 (last visited Jan. 16, 2017).

THE DAVIS TAX COMMITTEE, ADDRESSING BASE EROSION AND PROFIT SHIFTING IN SOUTH AFRICA DAVIS TAX COMMITTEE INTERIM REPORT, ACTION 13: RE-EXAMINE TRANSFER PRICING DOCUMENTATION (2015), http://www.taxcom.org.za/docs/New_Folder/7%20DTC%20BEPS%20Interim%20Report%20on%20Action%20Plan%2013%20-%20Transfer%20Pricing%20Documentation,%202014%20deliverable.pdf.

Transfer Pricing Documentation Package, PAC. ASS'N TAX ADMIN. (Mar. 12, 2003), https://www.nta.go.jp/kohyo/katsudou/shingi-kenkyu/kokusai020617/pdf/01.pdf

Transfer Pricing Documentation: A case for international cooperation, ICC Doc. 180-46/1rev.9 FINAL (Oct. 30, 2003), http://www.uscib.org/docs/icc_transfer_pricing.pdf

Transfer Pricing History, State of Art, Perspectives, Sept. 10-14, 2001, Ad Hoc Group of Experts on International Cooperation in Tax Matters Tenth Meeting, U.N. Doc. ST/SG/AC.8/2001/CRP.6 (June 6,2001), http://unpan1.un.org/intradoc/groups/public/documents/un/unpan004399.pdf.

Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 52, 298 U.N.T.S. 11.

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2012, TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, 2012, at 168, U.N. Sales No. E.12.II.D.3 (2012)

U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS, U.N. PRACTICAL MANUEL ON TRANSFER PRICING, U.N. Doc. ST/ESA/347 (2013)

Cases

Vale Press Pty Ltd. v. Commissioner of Taxation, 53 F.C.R. 92 (1994) (Austl.)

Anderson Logging Company v. Canada, S.C.R. (1925) (Can.)

Hickman Motors Limited v. Canada, 2 S.C.R. (1997) (Can.)

Donna McMillan v. Canada, 2012 F.C.A. 126 (2012) (Can.)

Judgement of October 13, 2006, Cass. [Italian Supreme Court], (It.)

Judgement of Feb. 17, 1993, BFH [Supreme Tax Court], IR 3/92 (F.R.G.)

Judgement of Oct. 17, 2001, BFH [Supreme Tax Court], IR 103/00 (F.R.G.)

Judgement of Feb. 27, 2003, BFH [Supreme Tax Court] (F.R.G.)

Judgement of June 4, 2003, BFH [Supreme Tax Court] (F.R.G.)

Judgement of Apr. 10, 2013, BFH [Supreme Tax Court], IR 45/11 (F.R.G.)

Supreme Court, 28 June 2002, No:36 446 (Neth.)

Turkish Constitutional Court Decision E.1986/20, K.1987/9, 31.03.1987, (Turk.)

Turkish Constitutional Court E.1990/29, K.1991/37, 15.10.1991, (Turk.)

Turkish Constitutional Court E.2009/5, K.2011/33, 03.02.2011, (Turk.)

Turkish Constitutional Court E.2007/2, K.2011/13, 13.01.2011, (Turk.)

Turkish Constitutional Court E.2009/21, K.2011/16, 13.01.2011, (Turk.)

Turkish Constitutional Court Application No. 2014/6192, 12.11.2014, (Turk.)

The General Assembly of Tax Courts, 30.03.2007, E. 2006/348, K. 2007/119, (Turk.)

The Supreme Administrative Court 4D, 03.06.1998, E. 1998/128, K. 1998/2379, (Turk.)

The Supreme Administrative Court 4D, 22.02.2005, E. 2004/1389, K. 2005/248, (Turk.)

The Supreme Administrative Court 4D, 30.06.2009, E. 2008/2274, K. 2009/3773, (Turk.)

U.S. Supreme Court, Wickwire v. Reinecke, 275 U.S.101 (1927)

U.S. Supreme Court, Niles Bement Pond Co. v. United States, 281 U.S. 357, 361 (1929)

U.S. Supreme Court, Welch v. Helvering, 290 U.S.111 (1933)

Lesly Cohen v. Commissioner of Internal Revenue, 266 F 2d (1959)

Dairy Home Co. v. United States, 180 F. Supp. 92, 95 (1960)

Sharwell v. Commissioner, 419 F.2d 1057, 1060 (6th Cir. 1969)

United States v. Toyota Motor Corporation, et al., No. CV 83-0687-CHH, 1983 U.S. Dist. LEXIS 17859 (Apr. 8, 1983)

Judgement of October 30, 2008 (Adobe Systems Inc v. Japan), Kösai [High Court] (Japan)

Case C-250/95, Futura Participations SA v.Administrations des Contributions, 1997 E.C.J.

Case C-446/03, Marks&Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes), 2005 E.C.J.

Case C-524/04, Test Claimants in the Thin Cap Group Litigation v. Comm'rs of Inland Revenue, 2007 E.C.J.

Case C-311/08, Société de Gestion Industrielle (SGI) v. Belgian State, 2010 E.C.J.

Serkov v. Ukraine, App. No. 39766/05, ECtHR

Shchokin v. Ukraine, App. Nos. 23759/03 and 37943/06, ECtHR

Spacek, s.r.o. v. The Czech Republic, App. No. 26449/95, ECtHR

News Releases

IRS News Releases, IR-92-71, http://www.unclefed.com/Tax-News/1992/Nr92-71.html

I.R.S. News Release IR-2003-32 (Mar. 12, 2003), https://www.irs.gov/uac/pacific-association-of-tax-administrators-finalizes-transfer-pricing-documentation

Web Sites

http://www.anayasa.gov.tr

http://www.echr.coe.int/

http://eur-lex.europa.eu/

https:// tbmm.gov.tr/

https://www.law.cornell.edu

http://www.lebibyalkın.com.tr

http://www.oxforddictionaries.com/