



Transfer Pricing



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The tax environment in Malta has experienced significant changes the past years, in view of the international consensus to combat harmful tax practices. Countries around the world are collaborating to improve the coherence of international tax rules and ensure a fair tax environment, through the OECD recommendations.

DEVELOPMENTS IN MALTA



One of the most important initiatives of the OECD is the introduction of Transfer Pricing (“TP”) Guidelines, which was proposed through Action 8-10 of the BEPS project. The importance of the TP rules is based on the need to counteract the base erosion and profit shifting, which can result in a distortion of governmental tax revenues. In general, TP refers to methods in determining the arm’s length price of intragroup transactions, by considering the pricing, terms and conditions underpinning such transactions.

While Malta has not yet formally adopted this recommendation, the current international practice and the recent developments, in particular the enabling provision in the Budget Implementation Measures Act 2021 indicates that TP rules are likely to be introduced in Maltese tax laws in the very near future.

While details will be revealed when the rules are published, the enabling provision clearly states that the rules will provide for the determination of the arm’s length pricing of a transaction or a series of transactions, any adjustments in relation thereto and advance pricing agreements, known as APAs.

Even without formal TP requirements, it can be contended that adhering to the Arm’s Length Principle (“ALP”) would make sense, especially in the light of recent developments in Maltese law.

In recent years, Maltese law made specific reference to TP rules in its local and in particular, in its Special Tax Regime – The Patent Box. Malta provided for the application of TP rules in its 2019 revised Patent Box Regime, following recommendations based on the BEPS initiative and the EU Rules. The revised regime not only incorporated the substantial activity criterion, but also went a step further and provided for the determination of the income/gains from the intellectual property in accordance to the OECD TP Guidelines.

Additionally, Malta has indirectly introduced TP rules by adhering to international conventions and relevant EU directives and in particular in the following:

1. Associated Enterprises – Article 9 of the OECD Model Tax Convention:

Malta’s double tax treaties use the OECD Model Tax Convention. Therefore, Article 9 Associated Enterprises of the OECD Model Tax Convention is included in Malta’s double tax treaties. This Article provides that any transactions between associated enterprises that are not at arm’s length shall be adjusted for tax purposes in accordance to the ALP. In a situation where a cross boarder transaction is not in accordance to the ALP, the determination of the ALP will refer to various sources of international law implying the use of the TP. In such a scenario, Malta will apply TP, due to the international obligation raised from the conclusion of the relevant Article in its treaties.

2. The EU Directive on Dispute Resolution Mechanism

Malta transposed the EU Directive on Dispute Resolution Mechanism in its domestic legislation. The Directive provides that in a case of a dispute, the contracting Member States concerned shall endeavour to resolve the dispute by mutual agreement, subject to conditions.

A common dispute between the contracting Member States concerns the ALP. The internationally accepted principle of determining the ALP is the TP rules based on the OECD TP Guideline. Therefore, this may again be considered as an indirect application of TP rules in Malta.

THE BOTTOM LINE

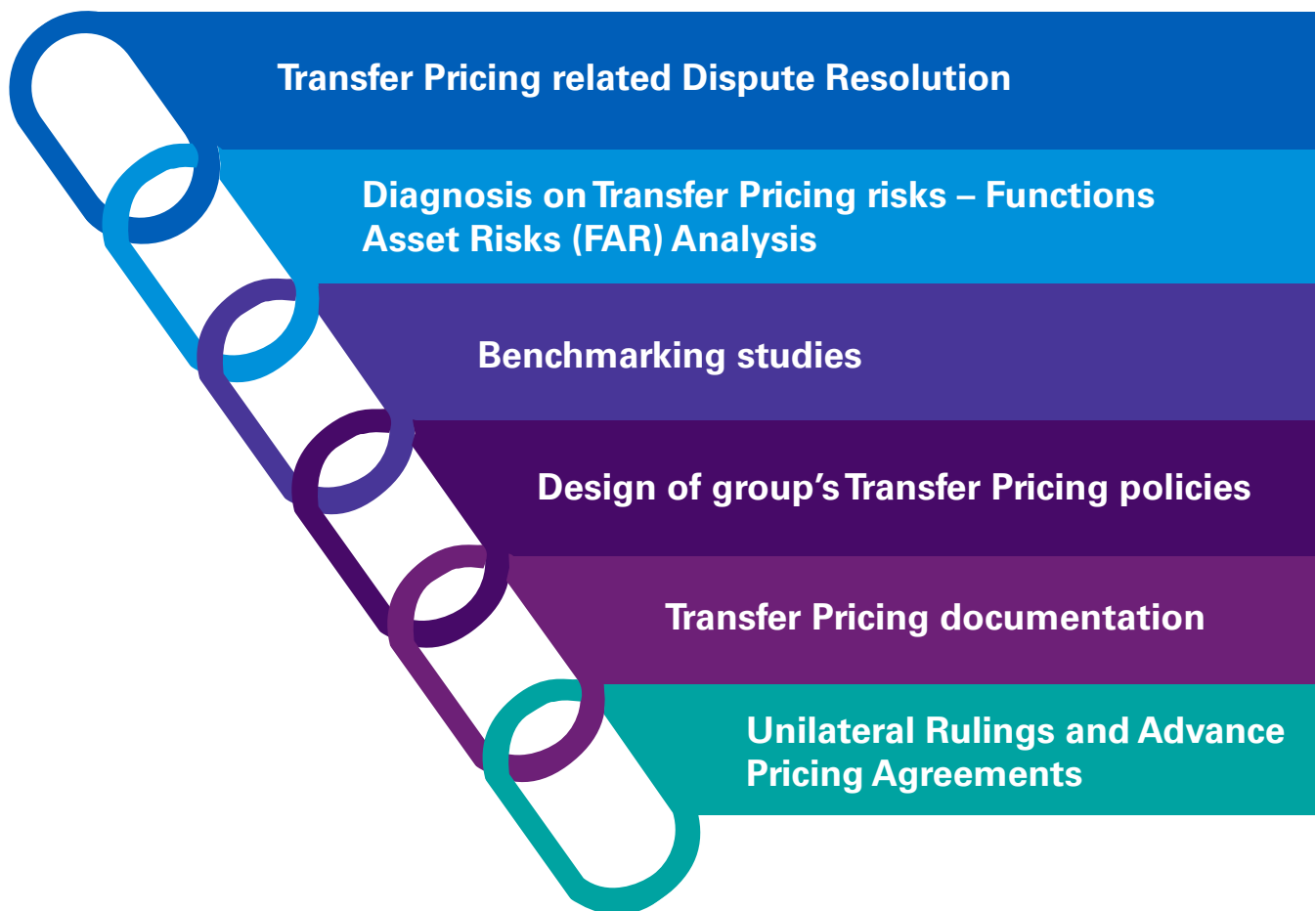


The application of the TP rules in Malta is only a matter of time. In this respect, businesses should start evaluating the effect of the formal introduction of TP rules on their intra group transactions and manage any associated risks well in advance by performing a company's functional analysis, covering functions performed, risks assumed and assets used by associated companies in a transaction.

OUR EXPERTISE



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We at KPMG Malta strive to be at the forefront of current events, and our experienced TP team is here to assist you on any TP-related matters.

So let's start a conversation! Get in touch directly with our team to know more about the steps you can take to be well-prepared for the oncoming TP requirements.

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