

# Analytical report with recommendations for the improvement of TP legal framework in Romania

Strengthening the consistency of transfer pricing audits approaches and improvement of tax legislation in Romania

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## Introduction

The Romanian National Agency for Fiscal Administration (NAFA) has requested, and the European Commission has agreed to provide technical support in the area of tax administration. Specifically, it was considered that NAFA may lack practical experience in identifying and correctly addressing potential abuses in the area of transfer pricing (TP). Moreover, the primary and secondary Romanian legislations in this area may have certain limitations.

The general project objective is to contribute to institutional, administrative and growth-sustaining structural reforms in Romania. The specific project objective is to assist the national tax authorities in improving their capacity to design, develop and implement reforms. Subject to other contributing factors, the project outcomes should, over the longer-term, contribute to improved tax compliance of large taxpayers and reduction of the average tax audit duration.

The activities and tasks to be performed during the project are organized around five deliverables:

1. Inception report;
2. Analytical report with recommendations for the improvement of TP legal framework in Romania;
3. Practical transfer pricing guidelines and a practical handbook;
4. Specialised trainings in the area of transfer pricing;
5. Final report.

The European Commission has contracted NERA (we or us) to complete these deliverables. This document constitutes the second deliverable (analytical report with recommendations for the improvement of TP legal framework in Romania). For this deliverable, NERA is expected to provide a set of recommendations to improve the Romanian TP legal framework based on an analysis of the framework in light of European developments.

Our analysis is based on a review and comparative analysis of the relevant Romanian legislation and administrative procedures provided by and discussed with NAFA. Appendix 1 provides a list of the Romanian legislative and procedural texts shared by NAFA and reviewed by us. On 21 January 2022, after an initial review of these documents, a work session has taken place between NAFA and NERA.

During the work session, we have presented the review framework topics listed below and discussed initial observations and questions on each of the topics included in the analytical framework. NAFA has commented these topics and indicated areas with particular implementation challenges and perceived needs for reform:

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# **1. Technical Items**

## **1.1. Arm's Length Principle**

Transactions between related parties must respect the arm's length principle. The rule applies to both domestic and non-domestic transactions. In applying the arm's length principle, Romanian legislation makes direct reference to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD TPG). The ownership threshold for the definition of related parties is 25%.

Based on our review of the Romanian legislative and procedural resources as well as discussion with NAFA, we see no necessity for reform of the TP legal framework with respect to the arm's length principle. The current framework is in line with recent European developments and international best practices.

## **1.2. Transfer Pricing Methods**

The Romanian Tax Act contains specific regulations regarding transfer pricing methods. These methods are in line with the method guidance included in the OECD TPG, including the most appropriate method rule that no longer sets any method hierarchy.

Based on our review of the Romanian legislative and procedural resources as well as discussion with NAFA, we see no necessity for reform of the TP legal framework with respect to transfer pricing method. The current framework is in line with recent European developments and international best practices.

In preparing deliverables 3 and 4, we will cover written guidance and capacity building trainings on applying transfer pricing methods in practice.

## **1.3. Comparability Analysis**

The Romanian Tax Act follows the guidance on comparability analysis outlined in Chapter III of the OECD TPG. Regarding the use of comparables, the preference order is national, European Union (EU), pan-European, international. NAFA can use secret comparables for transfer price risk assessments but not for transfer price assessment purposes. The Romanian legislative framework requires the use of comparability adjustments where necessary and provides guidance on the use statistical measures (i.e., interquartile range and median) for determining arm's length remuneration.

Based on our review of the Romanian legislative and procedural resources as well as discussion with NAFA, we see no necessity for reform of the TP legal framework with respect to comparability analysis. The current framework is in line with recent European developments and international best practices.

In preparing deliverables 3 and 4, we will cover written guidance and capacity building trainings on performing comparability analysis, comparability adjustments and dealing with a lack of comparables in practice.

## **1.4. Intangible Property**

The Romanian legislation on the pricing of controlled transactions involving intangibles is a condensed description of the OECD TPG. However, the Romanian legislation does not directly contain any provisions on the application of financial / economic valuation methods for determining the value of

intangibles (and other assets) nor on the DEMPE framework for determining the functional / economic ownership of intangibles.

While the Romanian legislation may be updated to make explicit reference to these provisions in the OECD TPG, we do not identify a necessity for including corresponding provisions directly in the Romanian legislation itself.

- **Valuation methods:** Romania generally follows the OECD TPG, which in Chapter VI on “Intangibles” state that “*valuation techniques can be useful tools*” (para. 6.145) and provide commentary and guidance on various technical areas related to the application of methods based on the discounted value of projected cash flows (paras. 6.158 - 6.178). Therefore, we do not see an urgent need for including such explicit provisions in Romanian legislation itself.
- **DEMPE<sup>1</sup> framework:** Romania generally follows the OECD TPG, which in Chapter VI on “Intangibles” state that “*the ultimate allocation of the returns derived by the MNE group from the exploitation of intangibles, and the ultimate allocation of costs and other burdens related to intangibles among members of the MNE group, is accomplished by compensating members of the MNE group for functions performed, assets used, and risks assumed in the development, enhancement, maintenance, protection and exploitation of intangibles*” (para. 6.23) and provide commentary on performing DEMPE analysis (paras. 6.50 – 6.68). Therefore, we do not see an urgent need for including such explicit provisions in Romanian legislation itself.

## 1.5. Intragroup Services

The Romanian legislation on intra-group service transactions is a condensed description of the OECD TPG. However, the Romanian legislation does not directly contain any provisions on the simplified approach for low value-adding intra-group services.

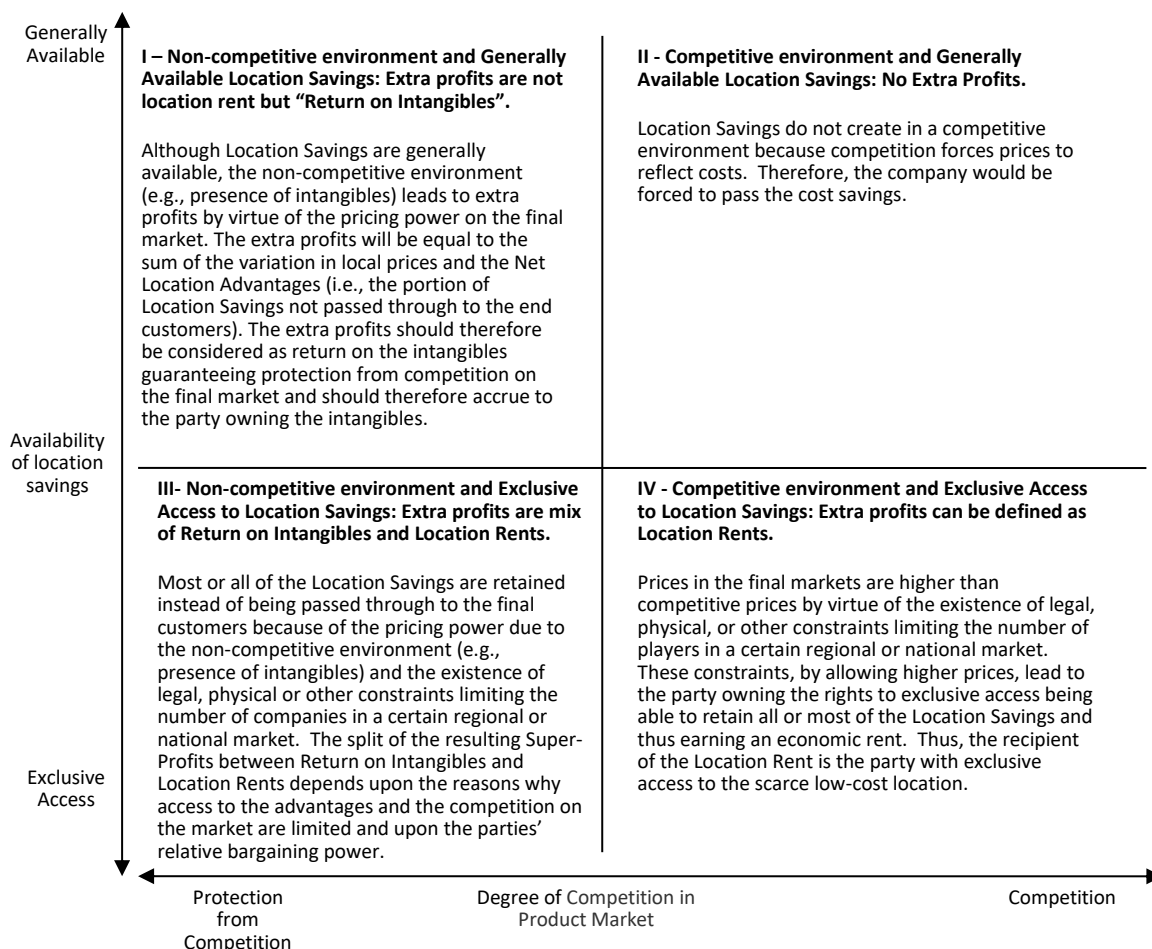
Based on discussions with NAFA, we do not identify a necessity for including corresponding provisions directly in the Romanian legislation itself.

Moreover, we understand that a number of Romanian companies host intragroup service activities that benefit from location saving and benefits obtained in Romania. One of the questions that arises is ultimately who should capture the benefits from such advantages. The chart below illustrates NERA’s analytical framework to assess whether location savings (if any) result in location rents. In preparing deliverables 3 and 4, we can cover written guidance and capacity building trainings on applying this framework in practice.

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<sup>1</sup> Development, Enhancement, Maintenance, Protection, Exploitation.

**Figure 1: Framework for Location Specific Advantages**



## 1.6. Financial Transactions

The Romanian legislation on financial transactions is a condensed description of the OECD TPG. Moreover, specific rules for interest deduction are applicable as per European Directive 2016/1.164/UE which lays down rules against tax avoidance practices that directly affect the functioning of the internal market, as a consequence of BEPS Action 4.

Based on our review of the Romanian legislative and procedural resources as well as discussion with NAFA, we see no necessity for reform of the TP legal framework with respect to financial transactions. The current framework is in line with recent European developments and international best practices.

In preparing deliverables 3 and 4, we will cover written guidance and capacity building trainings on performing shadow credit rating assessments and pricing intercompany loans and guarantees, including the importance of implicit support.

## 1.7. Attribution of Profits to Permanent Establishments

The Romanian tax legislation includes specific provisions according to which the profits attributable to a permanent establishment (PE) are the profits that the PE might be expected to earn if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions,

taking into account the functions performed, assets used, and risks assumed by the PE and through other parts of the multinational enterprise (MNE). These provisions are consistent with the Authorized OECD Approach for the attribution of profits to PEs. The AOA is followed in all of Romania’s tax treaties.

Based on our review of the Romanian legislative and procedural resources as well as discussion with NAFA, we see no necessity for reform of the TP legal framework with respect to the attribution of profits to PEs. The current framework is in line with recent European developments and international best practices.

## **2. Procedural Matters**

### **2.1. Transfer Pricing Documentation: Requirements**

#### **2.1.1. Current Framework**

In terms of primary legislation, the Code of Fiscal Procedure, Law 207/2015, art. 108, para. 2, requires taxpayers to document their transfer prices. In terms of secondary legislation, the same requirement is included in art. 1 of Order No 442/2016:

*“In order to document compliance with the principle of market value of transfer prices applied in transactions with related persons, taxpayers/payers are required to draw up the transfer pricing file...”*

In 2016, the Romanian transfer pricing documentation requirements have been aligned with the documentation contents recommended under the new OECD TPG, updated further to BEPS Action 13. Art. 3 of Order No 442/2016 refers to an Annex that sets out the content of the current TP legal framework in Romania. Depending on the size/type of the taxpayer, these documentation requirements include a master file (consistent with Annex I to Chapter V of the OECD TPG), local file (consistent with Annex II to Chapter V of the OECD TPG), and country-by-country report (consistent with Annex III to Chapter V of the OECD TPG). This is in line with recent European developments and international best practices.

Beyond these files, the Romanian documentation requirements do not include any specific transfer pricing form or document to be filed on an annual basis. In particular, the current Romanian framework does not include a simplified (quantitative) transfer pricing reporting form (informative statement) that could be used by NAFA for transfer pricing risk assessment and audit target selection purposes. We understand from the NAFA/NERA work session on 21 January 2022, that it may be helpful for NAFA to introduce such a transfer pricing reporting form in the Romanian transfer pricing documentation requirements. This may help NAFA to focus on quantitative metrics (the “numbers”), without having to spend resources on qualitative descriptions (the “story”) in its initial risk assessment and audit target selection procedures.

#### **2.1.2. Comparative Analysis**

We have performed a comparative analysis of simplified transfer price reporting forms required in three different OECD peer countries that require transfer pricing forms to be filed on an annual basis (France, Turkey, and Australia). Based on this analysis, we propose quantitative transfer pricing reporting form for Romania.



## France

France put in place in a simplified transfer price reporting form called Form 2257-SD, which is due six months after the filing deadline for the corporate income tax return.

The first part of the French form (Cerfa – N.2257-SD) starts with general information about the group. The taxpayer has to describe the main activities performed by the group, and list the intangibles owned (patents, brands, trade names, know-how, other) as well as the country of incorporation of each owner. The taxpayer also has to briefly describe the main transfer pricing policy in relation with the taxpayer.

In the second part of the form, the taxpayer has to list the transactions with related parties and specify the applicable transfer pricing method (CUP, Resale Minus, Cost plus, TNMM, Profit Split, Other). The taxpayer also has to notify if the transaction was subject to a change during the period and elaborate on the change. The taxpayer also has to elaborate if the chosen method is not one of the traditional 5 methods.

Transactions are aggregated by nature (see below table) across all countries. Only transactions by single nature (see below table) across all countries over €100 000 have to be declared. Only one transfer price method can be specified by transaction.

Revenues	Costs
Sales	Purchases
Service provision	Service provision
Commissions	Commissions
Patent royalties	Patent royalties
Brand royalties	Brand royalties
Know-How royalties	Know-How royalties
Other IP Royalties	Other IP Royalties
Financing revenues	Financing costs
Flows related to financing instruments	Flows related to financing instruments
Other revenues	Other costs

In addition, the taxpayer has to declare Balance Sheet related transactions (sales of assets or IP) and specify the transfer price method relied upon.

Asset Purchase	Asset Sales
Patents	Patents
Brands	Brands
Going concern	Going concern
Intangible assets	Intangible assets
Tangible Assets (other than PP&E)	Tangible Assets (other than PP&E)
PP&E	PP&E

An English translation of the French form is provided in Appendix 2.

## Turkey

Turkey put in place a simplified reporting form (Appendix 2 of Transfer Pricing Communiqué No. 1) about Transfer Pricing, Controlled Foreign Corporation (CFC) and Thin Capitalization. The form is required to be completed and submitted with the annual corporate tax return.

The taxpayer is required to fill a table to identify the foreign related parties with whom each Turkish legal entity has transactions with.

The taxpayer then has to fill another table with the amounts of intercompany transactions by nature (see below table): purchases on the one hand, and sales on the other hand.

Assets
Raw materials – work in progress – inventories
Finished goods – commercial goods
Intangible assets (acquired or used)
Leases
Other (to be specified)
Services
Construction – repair – technical
R&D
Commission
Other (to be specified)
Financial Transactions
Loan – Interest
Derivative Instruments and transactions
Insurance
Other (to be specified)
Other
Bonus – Salary and Wages
Intragroup Services
Cost Contribution Arrangements
Other (to be specified)

The taxpayer then has to fill another table with the amounts of intercompany transactions by transfer price method (CUP, Cost Plus, Resale Minus, Profit Split, TNMMM, Other): purchases on the one hand, and sales on the other hand.

The taxpayer then has to fill a table listing its foreign participations, specifying the country, the % of shares, voting rights or % dividends, and the gross revenues of each foreign participation.

The taxpayer also has to provide information about thin capitalization, specifying its total assets and liabilities, shareholder equity, total interest expenses and total foreign exchange (FX) losses.

Finally, the taxpayer has to fill table about loans obtained from related parties, specifying the name of the lender and its tax registration number date of the loan and amount as well as repayment date.

An English translation of the Turkey form is provided in Appendix 3.

## Australia

Australia has a very detailed reporting system which requires taxpayer to provide numerous information on a single transaction basis level, including reference to intercompany agreements. The form is due at year end (31 December) with the annual tax submission and is structured into three parts: Short form (i), Part A (ii) and Part B (iii).

The short form (i) requires high level disclosures about the following aspects of the Australian entities and operations:

- Organisational reporting structure including overseas reporting lines for local functions
- Business and strategy
- Business restructures including significant changes in ownership structure, related party funding arrangements, assets or operations
- Transfer of intangibles including associated related party licensing or service arrangements
- Key competitors

The taxpayer is required to provide sufficient level of information and details to ensure the following aspects are covered:

- formal and effective overseas reporting lines for local functions and staff, including any dual or multiple reporting lines
- significant changes in ownership or related party funding structure, including any resulting cross border tax hybrid arrangements
- significant disposals or acquisitions, or commencement or cessation of operations
- transactions or dealings connected with relevant changes or transfers.

Part A (ii) requires the taxpayer to list all transactions (no minimum threshold) with each foreign related party. Transactions include tangible property, service arrangements, rights, share-based employment remuneration, derivative transactions, debt interests, debt factoring or debt securitisation, disposal or acquisition of tangible property, disposal or acquisition of intangible property or rights etc. Taxpayers are also required to declare any FX gain or loss resulting from each transaction.

For each transaction, taxpayers are expected to disclose a number of information such as the amount, the related party, the TP method, the level of documentation, the amounts of revenues or expenditure costs with the transaction, for loan transaction the opening and closing balance, capitalized interest, deduction etc. are required.

Part B (iii) requires the taxpayer to provide the associated intercompany agreement(s) and amendment(s) for each transaction.

An overview of the content of the Australia form is provided in Appendix 4.

In addition, Australia issued a specific guideline to assess the transfer pricing risk of inbound distribution arrangements. The guideline concerns local entities distributing goods purchased from

related foreign entities for resale, and local entities distributing digital products or services where the intellectual property in those products or services is owned by related foreign entities.

The purpose of this guideline is to assess the taxpayer TP risk in relation to distribution arrangements. If the inbound distribution arrangement is rated as having a low transfer pricing risk, the Australian Tax Office (ATO) will allocate compliance resources to review the taxpayer's transfer pricing outcomes. However, if the rating falls outside the low transfer pricing risk category, the ATO will monitor, test and/or verify the taxpayer's transfer pricing outcomes. The higher the risk rating, the more likely ATO will review the arrangements as a matter of priority.

For example, for General distributor, ATO consider that the taxpayer's distribution arrangement constitutes a low risk if the local distributor earns more than 5.3% EBIT Margin. The risk is considered as medium between 2.1% and 5.3% EBIT margin, is considered high if the EBIT margin is lower than 2.1%. The target EBIT margins differ by industry (life science, ICT, Motor Vehicles).

The Australia risk assessment form is provided in Appendix 4.

### **2.1.3. Conclusion / Recommendation**

Below is a proposition of a reporting form that could be used in Romania.

Fiscal Year	
Tax registration number	
Group to which the entity belongs to	
Headquarter (country)	
Activity of the group	
Activity of the taxpayer	
Main Transfer Pricing Policy(ies) involving the taxpayer	

Intangibles Asset	Type	Legal Owner (Country)

Taxpayer data in EUR		n-1	n
Revenues			
Operating Profit			
Assets			
Shareholder equity			

Third party rev.		
Intercompany rev.		
Total costs		
Intercompany costs		

Details of related party transactions (including services, tangible goods, intangibles, asset deals, etc.; excluding financial transaction)							
	Foreign related party name	Foreign related party tax registration number	Foreign related party country	Type of transaction	Specify if revenue/sale or cost/purchase for Romania	Amount in EUR	Transfer Pricing Method
1.							
2.							

Financing (loans / borrowings / cash pooling)											
	Foreign related party name	Foreign related party tax registration number	Foreign related party country	Type of transaction	Specify if revenue or cost for Romania	Amount in EUR (Stock)	Interest rate or guarantee fee (%)	Issuance Date	Maturity	Reimbursed (Y/N)	Transfer Pricing Method
1.											
2.											

## 2.2. Transfer Pricing Documentation: Penalties

### 2.2.1. Current Framework

Art. 336 of the Romanian Fiscal Procedure Code<sup>2</sup> defines penalties in relation transfer pricing documentation obligations.

- According to paragraphs (1) e) to h), NAFA can impose transfer pricing documentation related penalties when certain compliance criteria are not met:

*“(1) The following acts shall constitute contraventions, if they have not been committed under such conditions as to be considered, in accordance with the law, as criminal offences:*

*e) non-compliance by the taxpayer/payer with the obligations to draw up the transfer pricing file [...] as well as the failure by the taxpayer/payer to submit the transfer pricing file at the request of the central tax body [...]*

*f) non-compliance by the taxpayer/payer with the obligation to keep, as well as the obligation to submit to the tax authority, the electronically archived data and the computer applications with which he generated them [...]*

*g) failure to comply with the measures ordered within the terms and conditions laid down by the tax inspection body [...]*

*h) failure by the taxpayer/payer to provide the periodic information requested by the fiscal body [...]*”

- According to paragraph (2) c), NAFA can impose transfer pricing penalties between RON 2,000 and RON 14,000 depending on the size/type of taxpayer:

*“(2) The offences referred to in paragraph (1) shall be punished as follows:*

*c) with a fine of between RON 12 000 and RON 14 000 for legal persons classified as medium and large taxpayers and with a fine from RON 2,000 to RON 3,500, for other legal persons, as well as for natural persons, in case of committing the act referred to in paragraph (1)(e) to (h);”*

With a EUR/RON exchange rate of 0.2019<sup>3</sup>, NAFA can impose documentation related penalties between EUR 404 and EUR 2,827. We understand from the NAFA/NERA work session on 21 January 2022, that the current penalties that can be imposed for non-compliance with Romanian transfer price obligations are perceived as low.

### 2.2.2. Comparative Analysis

The main incentive for taxpayers to comply with transfer pricing documentation requirements is not the penalty itself. Generally, the main incentive is that in the absence of an accepted transfer pricing documentation submitted by the taxpayer, the tax authority will make its own transfer price estimations.

<sup>2</sup> Law No 207/2015 of 20 July 2015 on the Code of Fiscal Procedure

<sup>3</sup> Oanda.com. 2022. Historical Currency Converter | OANDA. [online] Available at: <<https://www.oanda.com/fx-for-business/historical-rates>> [Accessed 31 January 2022].

The main risk to the taxpayer is that these estimations lead to a higher tax burden than the transfer prices it would document itself.<sup>4</sup>

Nevertheless, we agree with the perception, that the current transfer pricing documentation penalties as established in art. 336 of the Romanian Fiscal Procedure Code are comparably low. It may therefore be recommendable to increase the penalties.

We substantiate this recommendation with a comparative analysis of (i) transfer pricing documentation costs and (ii) penalties imposed by other tax authorities.

## Documentation Costs

In our experience, the minimum cost for preparing an OECD compliant local file is a few thousand EUR. We recommend that the penalty imposed on non-compliance with documentation requirements should not be below this cost:

- **If penalty is less than minimum documentation cost**, taxpayers that do not expect a high tax adjustment by NAFA are incentivized to save costs by not complying with documentation requirements. In a sense, those taxpayers are incentivized to “outsource” (parts of) the economic analysis and transfer pricing documentation work to NAFA. Typically, taxpayers can make informed estimates on the justifiability and associated risk of high tax reassessments. Therefore, in the absence of penalties that exceed the documentation costs, taxpayers with low estimated reassessment risk are disincentivized from complying with documentation requirements. Overall, this may force NAFA to spend limited resources on cases with comparably low reassessment potential.
- **If penalty is greater than minimum documentation cost**, taxpayers should be incentivized to submit a transfer pricing documentation and respond to NAFA’s information requests, regardless of the (perceived) reassessment risk. This increases general compliance with the local documentation requirements. Moreover, it may help NAFA to avoid spending administrative resources on cases where this may not yield a high increase in taxable income. Instead, NAFA can spend these resources on cases with a higher potential for re-assessment.

## Country Peers

We have performed a comparative analysis of transfer pricing documentation related penalties in a peer group of 29 countries (EU27 + United Kingdom and Switzerland). In Cyprus, the Czech Republic, Malta, and Switzerland no transfer pricing documentation related penalties are imposed (or we have not been able to extract the relevant data from the legislation). The remaining 25 peer countries, including Romania, impose some form of absolute penalty, relative penalty, or a combination of the two penalty types for non-compliance with transfer pricing documentation requirements. To achieve comparability across countries, we have made different standardization assumptions as detailed below.

### Absolute Penalties

Most tax authorities impose some sort of absolute penalty, i.e., a penalty that is not set relative to the underlying transaction amount or associated profit or tax reassessment. Sweden, Poland, and Italy are exemptions. In most countries, absolute penalties can range between minimum and maximum values, depending on criteria like the specific non-compliance event (e.g., delay vs. complete failure to submit

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<sup>4</sup> In addition, many countries, including Romania, apply a late-payment interest/penalty per day. This is not considered here.

a documentation), size/type of the taxpayer (e.g., small/medium sized taxpayer vs. large taxpayer) or behaviour of the taxpayer (e.g., one-off offense vs. repeated non-compliance).

For standardization, we consider only the lower and upper ends, as well as the midpoints of the absolute penalty ranges. Table 1 presents descriptive statistics on the absolute penalties imposed by tax authorities in the selected peer countries compared to NAFA/Romania. Appendix 5 presents the full country list with details.

**Table 1: Absolute Penalty Benchmarking**

	Abs. penalty min. (EUR)	Abs. penalty max. (EUR)	Abs. penalty midpoint (EUR)
Peer countries	Minimum	0	0
	First Quartile	0	5,100
	Median	1,250	11,200
	Third Quartile	3,600	25,000
	Maximum	32,500	100,000
	Average	3,480	19,495
Romania / NAFA	404	2,827	1,615

Source: NERA research based on OECD Transfer Pricing Country Profiles and respective country legislation. Local currency converted to EUR with exchange rate as of 22 January 2022. The per group covers 21 countries (25 countries with either absolute or relative transfer pricing documentation related penalties, less Sweden, Poland, Italy, and Romania)

The absolute transfer pricing documentation related penalties imposed by NAFA are towards the lower end of penalty amounts imposed in the analysed peer countries. However, several countries combine absolute penalties with some form of relative penalty or impose only relative penalties. To get the full picture, it is necessary to include relative penalty practices in the comparative analysis.

## Relative Penalties

Relative penalties are set as a percentage of the transaction amount, profit adjustment or tax adjustment resulting from the tax authorities' own estimation in reaction to the taxpayer's non-compliance. Within the group of selected European peer countries, the following tax authorities impose relative penalties:

- **Denmark:** The relative penalty *increases the maximum* total penalty amount (added to the absolute penalty of DKK 250,000 / EUR 32,500). The basis for the relative penalty calculation is the *tax adjustment* resulting from the tax authorities' estimation. A relative penalty of 10% is applied to this calculation basis.
- **France:** The relative penalty *caps the maximum* total penalty amount (beyond minimum absolute penalty of EUR 10,000). The basis for the relative penalty calculation is either the *profit adjustment* or the *transaction amount*; a relative penalty of 5% is applied to the profit adjustment, and a 0.5% penalty is applied to the transaction amount. The final relative penalty amounts to the *higher of the two* calculations.
- **Germany:** The relative penalty *caps the maximum* total penalty amount (beyond minimum absolute penalty of EUR 5,000). The basis for the relative penalty calculation is the *profit adjustment* resulting from the tax authorities' estimation. A relative penalty of 5% to 10% is applied to this calculation basis (value within this percentage range chosen at tax authorities' discretion).



- **Italy:** The relative penalty *sets the minimum and maximum* total penalty amount (no separate absolute penalty). The basis for the relative penalty calculation is the *tax adjustment* resulting from the tax authorities' estimation. A relative penalty of between *90% (minimum) to 180% (maximum)* is applied to this calculation basis.
- **Latvia:** The relative penalty *sets the minimum* total penalty amount (up to a maximum absolute penalty of EUR 100,000). The basis for the relative penalty calculation is the *transaction amount*. A relative penalty of *1%* is applied to this calculation basis.
- **Poland:** The relative penalty *sets the minimum and maximum* total penalty amount (no separate absolute penalty). The basis for the relative penalty calculation is the *profit adjustment* resulting from the tax authorities' estimation. A relative penalty of between *10% (minimum) to 30% (maximum)* is applied to this calculation basis.
- **Spain:** The relative penalty *caps the maximum* total penalty amount (beyond minimum absolute penalty of EUR 1000). The basis for the relative penalty calculation is either the *taxable income* or the *net revenue*; a relative penalty of *10%* is applied to the taxable income, and a *1%* penalty is applied to the net revenue. The final relative penalty amounts to the *lower of the two* calculations.
- **Sweden:** The relative penalty *caps the maximum* total penalty amount (beyond minimum absolute penalty of EUR 0). The basis for the relative penalty calculation is the *tax adjustment* resulting from the tax authorities' estimation. A relative penalty of *40%* is applied to this calculation basis.

Table 2 presents descriptive statistics on the relative penalties imposed by tax authorities in the selected peer countries.

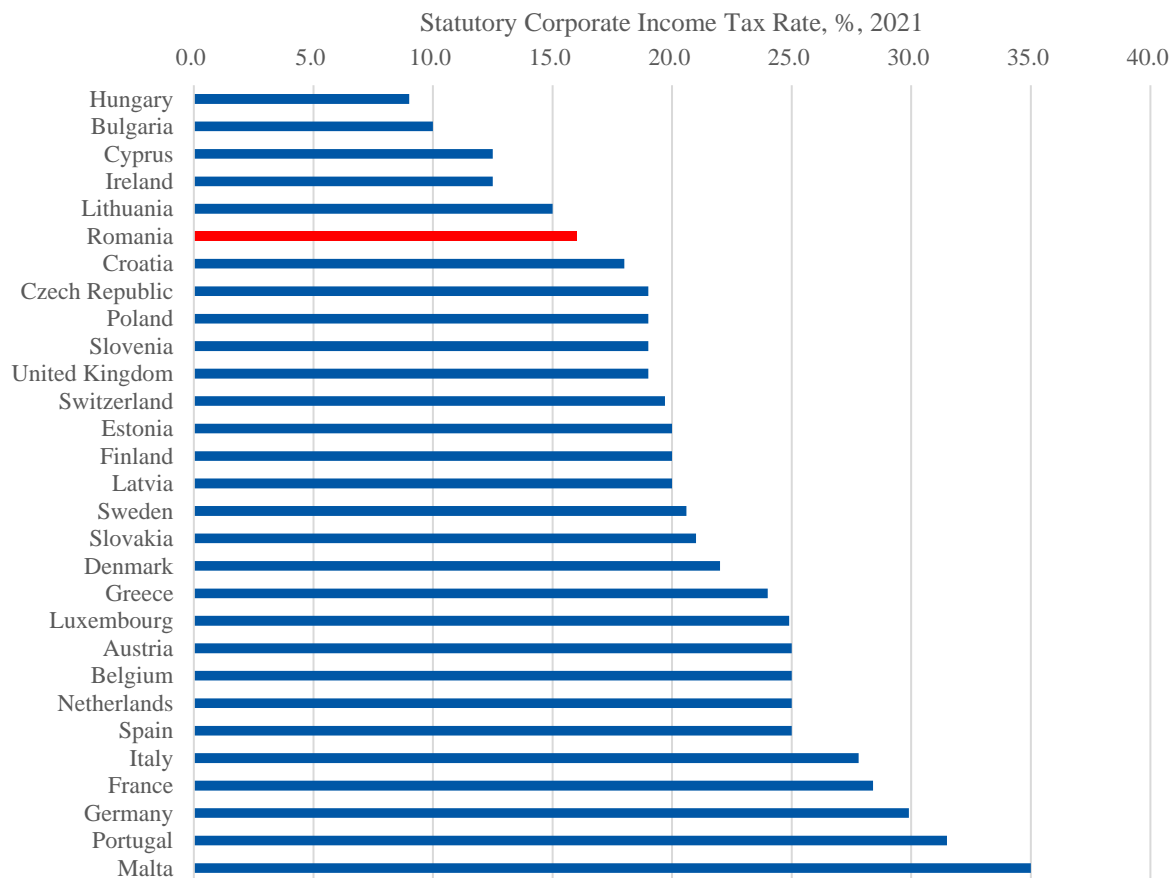
**Table 2: Relative Penalty Benchmarking**

	Use of rel. penalty	Percentage	Percentage base
<b>Denmark</b>	Added to min.	10.0%	Profit adjustment
<b>France</b>	Caps max.	5.0% / 0.5%	Profit adjustment / transaction amount
<b>Germany</b>	Caps max.	10.0%	Profit adjustment
<b>Italy</b>	Sets min. / max.	90.0% - 180.0%	Tax adjustment
<b>Latvia</b>	Sets min.	1.0%	Transaction amount
<b>Poland</b>	Sets min. / max.	10.0% - 30.0%	Profit adjustment
<b>Spain</b>	Caps max.	10.0% / 1.0%	Taxable income / net revenue
<b>Sweden</b>	Caps max.	40.0%	Tax adjustment

*Source: NERA research based on OECD Transfer Pricing Country Profiles and respective country legislation.*

## Total Penalties

For standardization of the relative penalties an illustrative calculation of total penalties, we assume a profit adjustment of EUR 100,000 with an underlying transaction amount of EUR 2,500,000. The implied tax adjustment depends on the country's statutory corporate income tax rates, which are shown in Figure 2 below.

**Figure 2: Corporate Income Tax Rate**

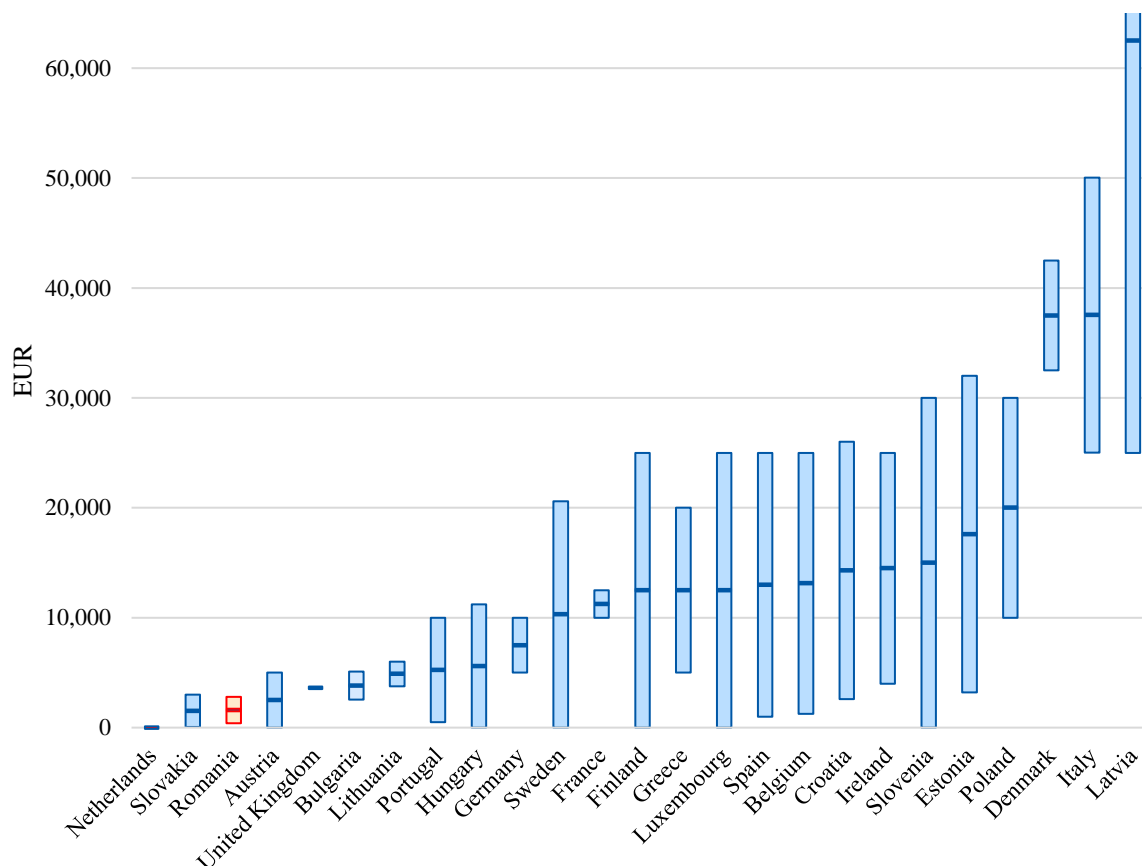
Source OECD Corporate Tax Statistics

Figure 3 presents the full range of possible penalties and midpoints obtained by combining the absolute and relative penalty practices described above. Table 3 presents descriptive statistics on the total penalties imposed by tax authorities in the selected peer countries compared to NAFA/Romania. Appendix 6 provides a table with the full calculation details per country.

**Table 3: Total Penalty Benchmarking**

	Abs. penalty min. (EUR)	Abs. penalty max. (EUR)	Abs. penalty midpoint (EUR)
Peer countries	Minimum	0	0
	First Quartile	0	9,000
	Median	2,185	22,800
	Third Quartile	5,000	27,000
	Maximum	32,500	100,000
	Average	5,546	22,606
Romania / NAFA	404	2,827	1,615

Source: NERA calculations based on OECD Transfer Pricing Country Profiles and respective country legislation. The peer group covers 24 countries (25 countries with either absolute or relative transfer pricing documentation related penalties, less Romania).

**Figure 3: Total Penalty Benchmarking**

Source: NERA calculations based on OECD Transfer Pricing Country Profiles and respective country legislation.

With the described standardization assumptions, the total transfer pricing documentation related penalties imposed by NAFA are at the lower end of total penalty amounts imposed in the analysed peer countries. Out of the 25 tax authorities that impose transfer pricing documentation related penalties, only the Netherlands and Slovakia impose lower penalties when considering the midpoint of possible penalty amounts.

The penalty range itself (RON 2,000 to RON 14,000 / EUR 404 to EUR 2,827) is also small compared to the peer countries. Only the United Kingdom has a penalty structure that scales less in relation to the specific non-compliance event, type/size and behaviour of taxpayer, and/or underlying transaction amounts and related profit or tax adjustments. More specifically, the UK tax authorities impose a fixed absolute penalty of GBP 3,000 (EUR 3,600) regardless of the characteristics of the specific case.

The risk associated with a low penalty notably arises when combined with limited tax authorities audit resources. In this context, taxpayers have limited incentive to provide high quality transfer pricing documentation or documentation at all, since the probability of an audit is low. Instead, in such situations, there are incentives for taxpayers to provide a minimalist approach to transfer pricing documentation, just aiming at obtaining penalty protection, less likely to address the needs of tax authorities.

### 2.2.3. Conclusion / Recommendation

In summary, we agree with the perception that NAFA's current penalty structure is comparably low. When considering a penalty increase, NAFA may consider the following recommendation:

As a minimum, we recommend setting absolute penalties that cover at least the cost of preparing an OECD compliant local file for a Romanian company, including the economic analyses required for the arm's length test and include a relative penalty (for example as a percent of the amount reassessed). This should induce increased compliance with Romanian transfer pricing documentation requirements and will lead taxpayers to focus their transfer pricing documentation efforts on the most significant transactions.

## 2.3. Transfer Pricing Documentation: Thresholds

### 2.3.1. Current Framework

Art. 2 of Order No 442/2016 defines transfer pricing documentation thresholds and exemptions. According to paragraph (4), financing and service transactions below EUR 50,000 and tangible and intangible good transactions below EUR 100,000 are exempt from proactive transfer pricing documentation requirements:

*“Taxpayers/payers belonging to the category of large taxpayers [...] as well as taxpayers/payers of the categories of small and medium-sized taxpayers, who carry out transactions with related persons with a total annual value, calculated by summing the value of the transactions carried out with all related persons, excluding VAT, higher or equal to any of the materiality thresholds provided for in this paragraph, shall be required to draw up and submit the transfer pricing file only at the request of the tax body, in the framework of a tax inspection action. [...]*

*The value level of the materiality threshold for taxpayers/payers in the category of large taxpayers, who do not fall within the criteria established in accordance with paragraph (1), as well as for taxpayers/payers in the categories of small and medium-sized taxpayers, depending on the type of transaction carried out, shall be:*

- *EUR 50,000, in the case of interest received/paid for financial services, calculated at the exchange rate communicated by the National Bank of Romania valid for the last day of the fiscal year;*
- *EUR 50,000, in the case of transactions concerning services received/provided, calculated at the exchange rate communicated by the National Bank of Romania valid for the last day of the fiscal year;*
- *EUR 100,000, in the case of transactions concerning acquisitions/sales of tangible or intangible goods, calculated at the exchange rate communicated by the National Bank of Romania valid for the last day of the fiscal year.”*

We understand from the NAFA/NERA work session on 21 January 2022, that the current documentation thresholds are perceived as low.

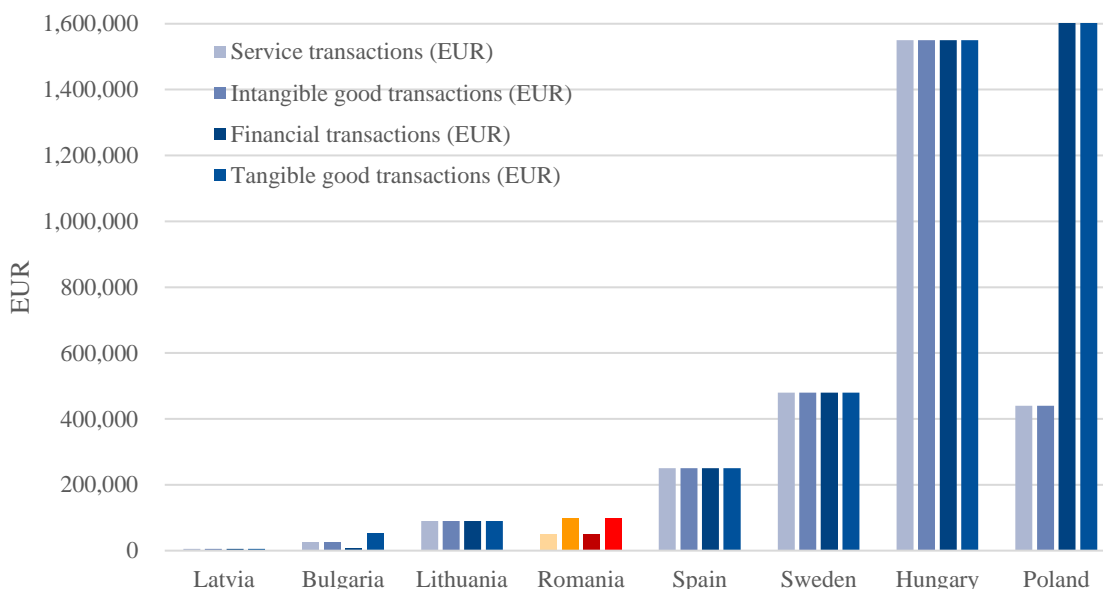
### 2.3.2. Comparative Analysis

We have performed a comparative country analysis using peer countries that define transaction-related documentation thresholds. This is a separate issue from general company size related thresholds that establish which, if any, documentation requirements apply to the company as a whole. Bulgaria and Poland, like Romania, differentiate transaction related documentation thresholds according to the transaction type (e.g., higher thresholds for tangible good transactions and lower thresholds for service transactions). The other countries, namely Latvia, Lithuania, Spain, Sweden, and Hungary, define uniform documentation thresholds across transaction types. Table 4 and Figure 4 present details on the thresholds.

**Table 4: Documentation Threshold Benchmarking**

	Service transactions (EUR)	Intangible good transactions (EUR)	Financial transactions (EUR)	Tangible good transactions (EUR)
Peer countries				
Latvia	5,000	5,000	5,000	5,000
Lithuania	90,000	90,000	90,000	90,000
Bulgaria	102,000	102,000	25,500	204,000
Spain	250,000	250,000	250,000	250,000
Poland	440,000	440,000	2,200,000	2,200,000
Sweden	480,000	480,000	480,000	480,000
Hungary	1,550,000	1,550,000	1,550,000	1,550,000
Median	250,000	250,000	250,000	250,000
Average	416,714	416,714	657,214	682,714
Romania	50,000	100,000	50,000	100,000

*Source: NERA research based on OECD Transfer Pricing Country Profiles and respective country legislation. Local currency converted to EUR with exchange rate as of 22 January 2022 (thresholds in Latvia, Romania, Lithuania, and Spain are directly denominated in EUR in the respective legislation).*

**Figure 4: Documentation Threshold Benchmarking**

Source: NERA research based on OECD Transfer Pricing Country Profiles and respective country legislation. Local currency converted to EUR with exchange rate as of 22 January 2022.

The Romanian transaction related documentation thresholds are below the average and median thresholds defined by other peer countries that use such thresholds (in addition to general company size related documentation thresholds).

### 2.3.3. Conclusion / Recommendation

It makes sense to impose documentation thresholds to avoid forcing the taxpayer and NAFA to spend resources on testing and documenting transaction types that have an immaterial effect on taxable profits in Romania. If this applies to every transaction type of a given taxpayer, then that taxpayer should not be required to prepare a transfer pricing documentation at all, considering overall company size related documentation thresholds alone. Therefore, the appropriateness of transaction threshold amounts depends on two factors: (i) the overall company size related documentation thresholds and (ii) the overall size of taxable profits in the country. For this reason, it is difficult to infer a detailed recommendation from comparing only the absolute levels of transaction thresholds across countries. A more detailed analysis would require data on the overall company size thresholds, corporate income tax base, and the frequency of taxpayers triggering the defined transaction thresholds. This data is currently not available and out of scope of this deliverable.

However, considering that Romania lies well below the median and average compared to its peers, we would recommend increasing the threshold amounts. A practical approach could be to consider doubling or tripling the amounts in order to at least get closer to the median of the current range observed.

## 2.4. Transfer Pricing Documentation: Deadlines

### 2.4.1. Current Framework

Art. 4 of Order No 442/2016 defines transfer pricing documentation deadlines. According to paragraph (1), large taxpayers have 10 days to submit master file and local file documentation when requested by NAFA. According to paragraph (2), medium and small taxpayers (as well as large taxpayers below

certain thresholds) have 30-60 days to submit the documentation, with the possibility of a 30-day extension of the deadline:

*“(1) The time limit for making available the transfer pricing file drawn up in accordance with the provisions of Article 2 (1), requested in accordance with the provisions of Article 2(2) and (3), shall be no more than 10 calendar days from the date of the request, but not earlier than 10 days after the expiry of the period laid down for drawing up.*

*(2) For taxpayers/payers who are required to draw up the transfer pricing file in accordance with the provisions of Article 2 (4), the tax inspection body shall establish the deadline for submitting it by taxpayers/payers by means of the application form. The deadline for submitting the transfer pricing file, requested in accordance with Article 2 (4), shall be between 30 and 60 calendar days, with the possibility of extending once, at the written request of taxpayers/payers, for a maximum period of 30 calendar days. In these circumstances, if necessary, the tax inspection may be suspended until the expiry of the deadline for making available the transfer pricing file [...].”*

Additionally, large taxpayers should prepare their transfer pricing documentation file on an annual basis, no later than the legal deadline for submitting the annual corporate tax return, for each fiscal year (25 June, or, for companies with a fiscal year that is different from the calendar year, the 25<sup>th</sup> day of the sixth month in the fiscal year). We understand from the NAFA/NERA work session on 21 January 2022, that this can create problems when taxpayers have not closed the relevant financial data by then and/or do not have sufficient data regarding comparables' closed accounts for the relevant period.

Moreover, we understand, that NAFA has a deadline of 6 months for issuing their notice of reassessment / audit report.

## **2.4.2. Conclusion / Recommendation**

In terms of the transfer pricing documentation filing requirements for large taxpayers, we recommend prolonging the legal deadline by (for example) three months. This should circumvent the potential issue of taxpayers not having closed their books for the previous period by the time the filing is due.

Regarding the audit report deadline for NAFA, if it does not consider the delay of up to 60 days for obtaining the documentation from medium and small taxpayers (or large taxpayers below certain thresholds), the effective audit time remaining to NAFA is significantly reduced. Thus, we recommend prolonging the deadline to 360 days.

## **2.5. Other Administrative Procedures: Burden of Proof**

The Romanian tax legislation specifies that the burden of proof is on the taxpayer. When NAFA does not agree with the arm's length test and makes a reassessment, the burden of proof shifts to NAFA. NAFA needs to explain and file its own assessment in an audit report communicated to the taxpayer. If the taxpayer does not agree with NAFA's assessment, it can initiate administrative procedures, including administrative appeals, and finally court proceedings in which the burden of proof is on both, NAFA and the taxpayer.

Based on our review of the Romanian legislative and procedural resources as well as discussion with NAFA, we see no necessity for reform of the TP legal framework with respect to the burden of proof. The current framework is in line with recent European developments and international best practices.

## 2.6. Other Administrative Procedures: Negative Adjustments

### 2.6.1. Current Framework

The Romanian tax legislation that stipulates how to treat cross-border related-party transactions that are not in line with the arm's length (or market value) principle are not contingent on whether the deviation from the arm's length principle leads to a reduced taxable income in Romania or not (see Fiscal Code, art. 11, para 4 below):<sup>5</sup>

*“(4) Transactions between affiliated persons shall be carried out according to the market value principle. In a transaction, a group of transactions between related persons, **tax bodies may adjust, where the market value principle is not respected**, or estimate, where the taxpayer does not provide the competent tax body with the data necessary to determine whether the transfer prices charged in the situation under consideration comply with the market value principle, the amount of income or expense of the tax income to any of the related parties on the basis of the level of the central market trend. The adjustment/estimation procedure and the method of determining the level of the central market trend, as well as the situations in which the tax authority may consider that a taxpayer has not provided the data necessary to establish compliance with the principle for the transactions analysed, shall be determined in accordance with the Code of Fiscal Procedure. In determining the market value of transactions between related persons, the most appropriate of the following shall be used:*

- a) the method of price comparison;*
- b) cost plus method;*
- c) the resale price method;*
- d) the net margin method;*
- e) profit sharing method;*
- f) any other method recognised in the Transfer Pricing Guidelines issued by the Organisation for Economic Cooperation and Development for Multinational Enterprises and Tax Administrations, as amended. For the purposes of this paragraph, the provisions of the Transfer Pricing Guidelines issued by the Organisation for Economic Cooperation and Development for Multinational Enterprises and Tax Administrations, as amended, shall be used.”*

Similarly, art. 113, para 2 of the Fiscal Procedure Code, on the subject matter of tax inspection, specifies that tax reassessments can be made upwards or downwards:

*(2) “For the purpose of carrying out the tax **inspection, the tax inspection body shall:***

- i) correct determination of the basis of assessment, **differences due in excess or less**, as the case may be, against the principal tax obligation declared by the taxpayer/payer and/or established, as the case may be, by the tax body;”*

Effectively, this means that (as long as the aim is to comply with the arm's length standard) transfer pricing adjustments can be made either upward or downward for tax purposes, regardless of whether this leads to an increased or reduced income of the respective taxpayer in Romania.

<sup>5</sup> Art 11 alin 4 cod fiscal / Fiscal Code; bold emphasis added to highlight relevant wording.



## 2.6.2. Comparative Analysis

Comparing this legislation to the relevant provisions from four large OECD countries (Australia, France, Germany, UK), it can be observed that all these jurisdictions only allow their respective primary transfer pricing adjustment rules to operate in one direction, so that it is not possible for the respective tax authorities to make primary adjustments that would reduce taxable income or increase losses in their respective territories. Table 5 below provides a summary of these countries' relevant legislation.

**Table 5: Legislation for Transfer Pricing Adjustments in Major OECD Countries**

Jurisdiction	Relevant provision	Relevant wording
Australia	Division 815-115, Chapter 4, Part 4-5 Income Tax Assessment Act 1997 "Substitution of arm's length conditions"	815-115(1) For the purposes covered by subsection (2), if an entity gets a <b>*transfer pricing benefit</b> from conditions that operate between the entity and another entity in connection with their commercial or financial relations: (a) those conditions are taken not to operate; and (b) <b>instead, the *arm ' s length conditions are taken to operate.</b>
France	Article 57 Code général des Impôts (General tax code)	For the purposes of determining the income tax due by companies that are dependent on or control companies <b>located outside France, profits indirectly transferred to the latter</b> , either by way of an increase or decrease in purchase or sale prices, or by any other means, are incorporated into the results shown in the accounts. The same procedure is followed with respect to companies that are dependent on an enterprise or group that also controls companies located outside France.
Germany	Article 1, Paragraph 1 Außensteuergesetz (Foreign tax law)	If a taxpayer's <b>income</b> from international business relations with a related party is <b>reduced</b> as a result of the taxpayer's basing the income assessment on terms, particularly prices (transfer prices), that diverge from those which independent third parties would have agreed under the same or similar circumstances (arm's length principle), the taxpayer's income must, without prejudice to other provisions, be assessed to be as it would be under terms agreed between unrelated third parties.
United Kingdom	Section 4, Chapter 1, Subsection 147, Taxation (International and Other Provisions) Act 2010 (TIOPA 2010) "Tax calculations to be based on arm's length, not actual, provision"	(1) For the purposes of this section "the basic pre-condition" is that—(a) provision ("the actual provision") has been made or imposed as between any two persons ("the affected persons") by means of a transaction or series of transactions, (b) the participation condition is met (see section 148), (c) the actual provision is not within subsection (7) (oil transactions), and (d) the actual provision differs from the provision ("the arm's length provision") which would have been made as between independent enterprises. (2) Subsection (3) applies if— (a) the basic pre-condition is met, and (b) the actual provision confers a <b>potential advantage in relation to United Kingdom taxation on one of the affected persons.</b>

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(3) **The profits and losses of the potentially advantaged person are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision.**

(4) Subsection (5) applies if—

(a) the basic pre-condition is met, and (b) the actual provision confers a **potential advantage in relation to United Kingdom taxation (whether or not the same advantage) on each of the affected persons.**

(5) **The profits and losses of each of the affected persons are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision.**

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In Australia the legislation requires a “*transfer pricing benefit*” for the taxpayer.<sup>6</sup> In France an adjustment is clearly contingent on profits being indirectly transferred to an affiliate outside of France (i.e., if taxable income is reduced in France), while in Germany the legislation explicitly makes reference to the taxpayer’s income being reduced as an effect of non-arm’s length transfer pricing. In the United Kingdom the legislation more vaguely defines “*a potential advantage in relation to United Kingdom taxation*” as a prerequisite for a transfer pricing adjustment.

### 2.6.3. Conclusion / Recommendation

Romania could follow the example of the above jurisdictions for the following reasons:

- The Romanian tax authorities (as in any other country) only have limited resources. These resources should be aimed at facilitating and ensuring that taxpayers comply with local tax rules and at defending the Romanian tax base.
- Every taxpayer in Romania has the responsibility of ensuring that their transfer pricing policies are compliant with the arm’s length principle.
- If they fail to do so, and this leads to a tax disadvantage for themselves (because for example a lower portion of their profits are taxed in another country with a lower tax rate) it should not be the responsibility of NAFA to take on a higher administrative burden for assessing the relevant facts and circumstances, for formally administering an adjustment, and for making sure that a corresponding adjustment is made in the respective other tax jurisdiction (which otherwise would lead to a double non-taxation of the relevant portion of the taxpayers profits).
- If the taxpayer would like to apply for an adjustment in order to prevent double taxation (because an adjustment has been made in the respective other country), they still have the means to do so by applying for a MAP or any other available instruments and procedures, at least in principle.

Based on legislation from other countries reviewed, we have added some exemplary language (see wording added in bold) to Romania’s existing legislation (Fiscal Code, art. 11, para. 4) that might be

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<sup>6</sup> The relevant Australian tax ruling for the application of section 815-130 of the Income Tax Assessment Act 1997 (TR 2014/6) defines a transfer pricing benefit to be if either of the following would apply: the amount of the entity's taxable income for an income year would be greater, the amount of the entity's loss of a particular sort for an income year would be less, the amount of the entity's tax offsets for an income year would be less, an amount of withholding tax payable in respect of interest or royalties would be greater.

considered to achieve the objective of only allowing primary transfer pricing adjustments by NAFA to operate towards increasing the taxable income in Romania:

*“(4) Transactions between affiliated persons shall be carried out according to the market value principle. In a transaction, a group of transactions between related persons, tax bodies may adjust, where the market value principle is not respected, or estimate, where the taxpayer does not provide the competent tax body with the data necessary to determine whether the transfer prices charged in the situation under consideration comply with the market value principle, the amount of income or expense of the tax income to any of the related parties on the basis of the level of the central market trend, **if this adjustment increases the taxpayers income or reduces their losses in Romania.** The adjustment/estimation procedure and the method [...]”*

However, please note that NERA Economic Consulting cannot provide tax nor legal advice and that any amendments to legislation would of course need to be made by appropriate tax and legal expertise to ensure coherence and consistency with the wider tax legislation.

## 2.7. Other Administrative Procedures: International Assistance

Tax authorities in the EU have agreed to cooperate more closely to be able to apply their taxes correctly to their taxpayers and combat tax fraud and tax evasion. Administrative cooperation in direct taxation between the competent authorities of the EU Member States is based on Council Directive 2011/16/EU. This directive establishes the necessary procedures and provides the structure for a secure platform for the cooperation. Romania participates in this exchange and has included the corresponding provisions on the exchange of information on VAT and other direct taxes in its current legislative and procedural framework. In addition, NAFA makes reference to existing conventions on the avoidance of double taxation concluded between Romania and other countries.<sup>7</sup>

We see no necessity for reform of the TP legal framework with respect to international assistance. The current framework is in line with recent European developments and international best practices.

However, we understand from the NAFA/NERA work session on 21 January 2022, that there can be challenges with leveraging these provisions and conventions more efficiently in practice. These challenges relate primarily to delays in receiving timely answers to requests for information / assistance from tax authorities in certain countries, including other EU Member States. The specific delay can depend on the topics of assistance and the corresponding resources of the other competent authority, it is also influenced by the way that the requests / questions are framed. Our experience suggests focused questions tend to have a better rate of answers than open questions which require interpretation.

## 2.8. Other Administrative Procedures: Statute of Limitations

No specific statute of limitations exists for transfer pricing assessments. The general Romanian procedural framework defines a 5-year statute of limitations (or 10 years in the case of fiscal evasion or fraud). Currently there are certain extensions in response to delays caused by the COVID pandemic. Moreover, the Romanian framework includes an exception if a taxpayer is correcting a tax return. In

<sup>7</sup> NAFA publishes a full list of these conventions on its website:  
[https://static.anaf.ro/static/10/Anaf/AsistentaContribuabili\\_r/Conventii/Conventii.htm](https://static.anaf.ro/static/10/Anaf/AsistentaContribuabili_r/Conventii/Conventii.htm)

that case, the statute of limitations starts from the moment of that correction and not from the year for which the tax return was corrected.

Based on our review of the Romanian legislative and procedural resources as well as discussion with NAFA, we see no necessity for reform of the TP legal framework with respect to the statute of limitations. The current framework is in line with recent European developments and international best practices.

## **2.9. Administrative Approaches to Avoiding and Resolving Disputes**

Romanian taxpayers have access to Advance Pricing Agreements (APA) and Mutual Agreement Procedures (MAP) to prevent and resolve transfer pricing related disputes. In addition, joint audits are starting to gain ground.

APAs can be unilateral, bilateral, and multilateral. They are binding for NAFA as long as taxpayers adhere to their terms and conditions. Unilateral APAs should be issued within 12 months, while bilateral and multilateral APAs should be issued within 18 months. Fees for issuance range from EUR 10,000 to EUR 20,000, fee for amendments range from EUR 6,000 to EUR 15,000, depending on the size/type of the taxpayer. Generally, APAs are issued for a period of up to five years, but this term may be extended in certain cases. The current Romanian procedural framework does not allow for a roll-back of APAs over preceding periods. NAFA's APA unit is functionally and operationally separated from audit teams.

MAPs must be requested before the deadline established under the relevant double taxation treaty, from the date of the NAFA notification that leads (or may lead) to double taxation. Taxpayers have three years to present a case to NAFA under the EU Arbitration Convention. NAFA's MAP unit exchanges more continuously with the audit teams.

Based on our review of the Romanian legislative and procedural resources as well as discussion with NAFA, we see no necessity for reform of the TP legal framework with respect to dispute avoidance and resolution. The current framework is in line with recent European developments and international best practices. We simply note that the deadline of 12 months for issuing a unilateral APA and 18 months for a bilateral or multilateral APA are short and below the time we observe for APA negotiations in countries where we have experience with APA processes.

## **2.10. Tax Risk & Audit Target Selection Methodologies**

Based on the TP documentation form proposed in Section 2.1 (see page 10) a tax risk assessment relating to the transfer pricing arrangements of the respective taxpayer can be performed. This assessment can be used to make a decision on whether a detailed audit of the taxpayer is likely to lead to findings by NAFA and thus to an adjustment of the taxable income of the respective taxpayer in Romania. Aspects that might be worth considering within such an assessment of the form include the following:

- Significant changes from the previous period (n-1) to the current period (n) in the financial data provided
- A high share of intercompany revenue / costs compared to the overall revenue / costs
- Losses in either the previous (n-1) or the current (n) period
- Intercompany transactions with related parties that are based in low-tax jurisdictions

- Application of “other” transfer pricing methods, i.e. methods other than CUP, TNMM, cost plus, resale minus or profit split
- Financing transactions with very long maturities (e.g. beyond 25 years)
- Financing transactions with interest rates that significantly deviate from the general interest level of the relevant time period

## Appendix 1. List of Documents Received / Reviewed

File name	Language	Description (file type)	Description (file content)
211104 REFORM MVC2021003 - 1. Inception Report Questionnaire DRAFT_SPT.docx	EN	Answers to NERA questionnaire	Audit target selection, processes, examples, learning needs
LEGE Nr227_Fiscal_Code_EN.docx	EN	Law No 227/2015 of 8 September 2015 on the Fiscal Code	Legal tax framework
LEGE Nr207_Fiscal_procedural_co de_EN.docx	EN	Law No 207/2015 of 20 July 2015	Procedural guidelines for the administration of tax claims
ORDIN Nr442_EN.docx	EN	Order No 442/2016 of 22 January 2016	TP documentation guidelines & adjustment rights
Annex 1 Checklist for the content of the transfer pricing documentation file.doc	EN	Tax audit procedures	Checklist on the contents of the transfer pricing file
Annex 2 Transfer pricing tax risk assessment form.doc	EN	Tax audit procedures	Transfer pricing tax risk analysis form
OPANAF NR 2506 - 10.10.2018- SISTEM PROCEDURI INSPECTIE FISCALA_EN.docx	EN	Tax audit procedures	Legal tax audit procedures
Analiza de risc DGAMC TP_prealabila_EN.docx	EN	Transfer pricing risk analysis procedures	Transfer pricing risk analysis procedures
Anexa nr.1 FITA_EN.docx	EN	Transfer pricing risk analysis procedures	Scrutiny sheet for transactions of affiliates
CIRCULARA 2_852511_18.03.2014_EN.d ocx	EN	Transfer pricing risk analysis procedures	Tax risk analysis checklist
III.16 FISA IDENTIFICARE TRANZACTII.dot	RO	Transfer pricing risk analysis procedures	Transaction identification sheet
Metodologie 2015.06.16_865981 actualizata_EN.docx	EN	Transfer pricing risk analysis procedures	Transfer pricing control methodology
Instructiuni Orbis _21052015_EN.docx	EN	Transfer pricing tax audit legislation and procedures	Orbis database screening methodology
OPANAF 3737_2015_EN.docx	EN	Transfer pricing tax audit legislation and procedures	TP adjustment template
OPANAF nr. 222_2008_EN.docx	EN	Transfer pricing tax audit legislation and procedures	TP documentation requirements
OPANAF_442_2016_EN.doc x	EN	Transfer pricing tax audit legislation and procedures	TP documentation requirements
Preturi de transfer - CPF 2016_RO_EN.doc	EN	Transfer pricing tax audit legislation and procedures	Summary of key legislation

## **Appendix 2. Translation of French TP Form**

DIRECTORATE-GENERAL  
FOR PUBLIC FINANCES



NO 15221\*02

Compulsory form

(Article 223d B of the General Tax Code)



NO 2257-SD

2017

## STATEMENT OF TRANSFER PRICING POLICY

Exercise opened on \_\_\_\_\_ and closed on \_\_\_\_\_

### A – IDENTIFICATION OF THE UNDERTAKING

Name of the company:	Address of registered office:
SIRET	
Address of principal place of business	Former address in case of change

### B – ACTIVITY

Activities exercised	If you have changed your activity, tick the box
----------------------	---

Name and address of the expert's professional accounting officer:	Name and address of the consultant:
<i>Tel:</i>	<i>Tel:</i>
Business Tax Department:	Identity of declarant:
	Date: _____ Place: _____
	Capacity and name of the signatory:
	Signature: _____





**Unproved Draft  
Internal Review Only**

**1 General information on the group of associated enterprises**

(1) Main activities of the group to which the undertaking belongs	Intangible assets held by the group used by the declarant (patents, trademarks, trade names, know-how and others)	
	(2) Nature of the intangible asset	(3) State of incorporation of the owner enterprise

(4) General description of the group's transfer pricing policy in relation to the declarant:

**Unproofed Draft  
Internal Review Only**

**2 Description of the activity with a summary statement, by nature and amount, of transactions above EUR 100 000 with other associated enterprises and presentation of transfer pricing methods**

Nature of transactions with associated enterprises	(5) Aggregate amount more than EUR 100,000	(6) Countries concerned by the transaction (ISO standard)	Indicate the methods used (tick box)						(13) Box to be ticked if change occurred during the course for the financial year
			(7) Comparable Uncontrolled Price Method	(8) Resale Price Method	(9) Cost Plus Method	(10) Transactional Net Margin Method	(11) Profit Split Method	(12) Other Methods	
<b>INCOME</b>									
Sales									
Provision of services									
Commissions									
Patent royalties									
Brand royalties									
Know-how royalties									
Other intellectual property related royalties									
Financial income									
Income related to forward derivatives									
Other income									
<b>EXPENSES</b>									
Purchases									
Provision of services									
Commissions									
Patent royalties									
Brand royalties									
Know-how royalties									
Other intellectual property related royalties									
Financial expenses									
Expenses related to forward derivatives									
Other expenses									

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Nature of transactions with associated enterprises	(5) Aggregate amount more than EUR 100,000	(6) Countries concerned by the flow (ISO standard)	Indicate the methods used (tick box)						(13) Box to be ticked if change occurred during the course for the financial year
			(7) Comparable Uncontrolled Price Method	(8) Resale Price Method	(9) Cost Plus Method	(10) Transactional Net Margin Method	(11) Profit Split Method	(12) Other Methods	
<b>ACQUISITIONS OF ASSETS</b>									
Patents									
Brands									
Goodwill									
Movable intangible property									
Movable tangible property									
Immovable assets									
<b>DISPOSALS OF ASSETS</b>									
Patents									
Brands									
Goodwill									
Movable intangible property									
Movable tangible property									
Immovable assets									

Activity of the reporting company (14):

- description of changes during year if column 13 of the table is ticked
- description of the method applied if column 12 of the table is ticked
- and/or additional comments

## Appendix 3. Translation of Turkish TP Form

### FORM REGARDING TRANSFER PRICING, CONTROLLED FOREIGN COMPANY AND THIN CAPITALIZATION

(to be completed and submitted by corporation taxpayers)

(Unofficial English Translation)

GENERAL INFORMATION ABOUT THE ENTITY	
Tax Registration Number	
Trade Registry Number	
Trade Name	
Activity Code	
Telephone and Fax Numbers	
Taxable (Fiscal) Period	

INFORMATION REGARDING RELATED PARTIES WITHIN THE SCOPE OF TRANSFER PRICING APPLICATIONS

	Name/Trade Name of the Related Parties Resident in Turkey	Tax Registration Number	Name/Trade Name of the Related Parties Who are non-residents	The country where non-resident related party is located
1				
2				
3				
4				
5				

<b>TRANSACTIONS REALIZED WITH RELATED PARTIES WITHIN THE SCOPE OF TRANSFER PRICING</b>			
		<b>Purchases (YTL)</b>	<b>Sales (YTL)</b>
	<b>Assets</b>		
1	Raw Material - work-in-process inventory		
2	Finished Goods - commercial goods		
3	Intangibles assets (acquired or used)		
4	Leases		
5	Other (please specify)		
	<b>Services</b>		
6	Construction-Repair-Technical		
7	Research and Development		
8	Commission		
9	Other (please specify)		
	<b>Financial Transactions</b>		
10	Loan - interest		
11	Derivative Instruments and Transactions		
12	Insurance		
13	Other (please specify)		
	<b>Other Transactions</b>		
14	Bonus - Salaries & Wages		
15	Intra-group services		
16	Cost Contribution Arrangements		
17	Other (please specify)		
	<b>Total Value of Transactions with Related Parties</b>		

<b>TRANSFER PRICING METHODS USED</b>		
	<b>Purchases (YTL)</b>	<b>Sales (YTL)</b>
Comparable Uncontrolled Price (CUP)		
Cost-plus		
Resale Price		
Profit-split		
Transactional Net Margin Method (TNMM)		
Specific Method Determined/Applied By Taxpayer		

<b>Total Value of Transactions (by TP method used)</b>		
--	--	--

INFORMATION ABOUT FOREIGN PARTICIPATIONS				
	Name of foreign participation	The country where legal or business center is located	Percentage of shares, voting rights or percentage of dividends	Gross revenues of foreign participation
1				
2				
3				
4				
5				

INFORMATION ABOUT THIN CAPITALIZATION	
Total Assets	
Total Liabilities	
Total Shareholders' Equity	
Total Interest Expense	
Total Foreign Exchange Losses	

INFORMATION ABOUT LOANS OBTAINED FROM RELATED PARTIES (INCLUDING THOSE OBTAINED FROM PARTICIPATIONS)					
	Name of the Lender	Tax Registration Number	Date on which loan was obtained	Amount of Loan	Date on which loan was paid back
1					
2					
3					
4					
5					
<b>Total</b>					

**EXPLANATIONS:**

This form is to be completed and submitted by corporate taxpayers. The form includes sections regarding transfer pricing, controlled foreign company (CFC) transactions and thin capitalization. Only those sections which are relevant to the corporate taxpayer concerned shall be completed. In case there are no related party, CFC transactions or thin capitalization, then it will not be necessary to complete and submit this form to the tax office.

(\*) The terms "*purchases*" and "*sales*" are used in the form in a broad sense to mean purchases and sales of not only goods and services but also such transactions as leasing, borrowing, lending, receiving or paying wages, salaries, bonus and the similar, as well. Considering this broad meaning, all the purchases will be indicated in the column of "Purchases" and similarly all the sales in the column of "Sales".

The term *intangible rights* is used to cover and include the present value of the company, concession rights (franchising), patents, formulas, designs, samples, technical knowledge (know-how), format, copyrights, licenses, the right/permission to use a right, the rights granted by the public authorities (e.g. operation rights) and the similar.

*Intra-group services* indicated in line no. 15 of the Section regarding related party transactions include those services provided by one group company for the other companies in the same group. Examples can be legal, accounting, internal audit, financing consultancy and intra-group training services.

The term *Cost Contribution Arrangements* indicated in line no. 16 of the Section regarding related party transactions is used to mean the agreements concluded among the related parties so as to share costs and risks associated with the development, production or acquisition of a tangible asset, service or an intangible right/asset and at the same time to determine the type and degree of interest of each party contributing to such activities. In other words, such agreements are made to attribute the benefit derived from the activities realized to the contributing parties fairly in accordance with the costs contributed and/or incurred by each party.

(\*\*) This Section is required to be completed considering the following explanations:

**Total Assets / Total Liabilities** : The relevant figures on the balance sheet prepared at the beginning of the accounting period shall be taken into consideration.

**Shareholders' Equity** : To be determined and indicated considering total assets and total liabilities and also in accordance with the explanations made in Section 12.1.5. of the Corporation Tax Law General Communiqué No. 1.

**Total Interest Expenses and Foreign Exchange Losses** : Those interest expenses and foreign exchange losses which are recorded to cost of goods sold or directly expensed shall be indicated.

(\*\*\*) Those related parties that have granted loans qualifying as thin capitalization shall be considered in completing this Section.

—

## Appendix 4. Translation of Australian TP Form

### Part A

Transaction information										
Transaction Number	Australian counterparty name	Non-resident counterparty name	Non-resident counterparty tax jurisdiction	Transaction Type	Australian counterparty ABN	Australian counterparty TFN	What transfer pricing / capital asset pricing methodology has been applied to this transaction?		What level of transfer pricing documentation has been prepared for this transaction?	Related Transaction Identifier
	LCMSF207	LCMSF37		Transaction List	LCMSF83	LCMSF84	TP Methodology	CAP Methodology	Documentation Coverage	

RAS			
Is this transaction part of a Relevant Agreement Series (RAS)?	How many transactions are part of the RAS?	Was the transaction/RAS entered into by the non-resident counterparty in the course of its business operations carried on through a permanent establishment in a different country to its country of tax residence?	Country of permanent establishment of non-resident counterparty
LCMSF33	LCMSF35	LCMSF208	

Revenue			
Amount of expenditure (not of a capital nature for income tax purposes) for the transaction	Amount of revenue (not of a capital nature for income tax purposes) for the transaction	Was non-monetary consideration provided (not of a capital nature for income tax purposes) for the transaction	Was non-monetary consideration obtained (not of a capital nature for income tax purposes) for the transaction
		LCMSF44	LCMSF45

Capital			
Amount of consideration paid (of a capital nature for income tax purposes) for the transaction.	Amount of consideration received (of a capital nature for income tax purposes) for the transaction.	Was non-monetary consideration provided (of a capital nature for income tax purposes) for the transaction?	Was non-monetary consideration obtained (of a capital nature for income tax purposes) for the transaction?
		LCMSF85	LCMSF86



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Loan																				
Amounts Borrowed						Capitalised interest deducted	Amounts Loaned						Capitalised interest deducted	Capitalised interest returned	Book values of factored receivables	Has the special short term tenor rule for ordinary borrowings and ordinary loans been applied to this transaction?	Has the special short term tenor rule for short term derivatives been applied to this transaction?	Has the special short term tenor rule for FX derivatives been applied to this transaction?	Is this transaction an Overseas Banking (OB) Activity?	
Opening balance	Q1 closing balance	Q2 closing balance	Q3 closing balance	Final closing balance	Average balance	LCMSF211	Opening balance	Q1 closing balance	Q2 closing balance	Q3 closing balance	Final closing balance	Average balance	LCMSF211	LCMSF213	LCMSF214	LCMSF88	LCMSF128	LCMSF129	LCMSF63	

Foreign Exchange								
Was the transaction entered into in your functional currency?	Did the transaction give rise to a payable or receivable balance?	Is the payable/receivable balance settled within 12 months?	What deferred foreign currency payment arrangement for IRPD's category applies to this transaction?	Foreign Currency Code	Amount of foreign exchange losses deducted for the transaction  <i>(for trade payable/receivable balances settled outside 12 months)</i>	Amount of foreign exchange losses deducted for the transaction  <i>(for other types of transactions, eg loans and capital transactions)</i>	Amount of foreign exchange gains returned for the transaction  <i>(for trade payable/receivable balances settled outside 12 months)</i>	Amount of foreign exchange gains returned for the transaction  <i>(for other types of transactions, eb loans and capital transactions)</i>
	LCMSF215					LCMSF87		LCMSF43

Exclusions List					
Predicted Exclusions List response	Is the transaction provided or received in connection with use or enjoyment of any trademark, patent, design, copyright, other intellectual property, secret formula or process or similar property rights?	Does this transaction involve a reimbursement under an Employee Secondment Agreements?	Predicted Exclusions List response	Is this transaction covered by an exclusion list category?	What exclusion list category applies to this transaction?
				LCMSF48	

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**Part B**

Transaction information - Part B										
Is the Reporting Entity unable to obtain the transfer pricing methodology the IRP relied upon for this transaction (from the IRP)?	What transfer pricing / capital asset pricing methodology has been applied to this transaction from the perspective of the counterparty? This should refer to the method used to SET the price of the transaction as documented in the relevant agreement/s.		Is there a written agreement or other relevant documentation evidencing the terms of the agreement covering this transaction (as reported in Part A)?	Is the Reporting Entity unable to obtain from any of the related counterparties the written agreement or other relevant documentation evidencing the terms of the agreement covering the transaction (as reported at Part A)?	Has this written agreement been previously provided to the ATO?	Please confirm that you have attached the agreement(s) for this transaction	Attachment 1	Attachment 2	Attachment 3	Attachment 4
LCMSF130	TP Methodology	CAP Methodology	LCMSF52	LCMSF64	LCMSF53	LCMSF89				

Previously provided and amendments												
Previous year - Attachemnt (Year 1)	Previous year - Attachment 1	Previous year - Attachment 2	Previous year - Attachment 3	Previous year - Attachment 4	Title of the agreements previously provided to the ATO	Year agreement was previously provided to the ATO?	Since providing the written agreement to the ATO has the agreement been amended?	Have the amended agreements or agreements incorporating the amendments been provided to the ATO?	What is the title of the amendment agreements or agreement incorporating the amendments previously provided to the ATO?	What is the year in which the amendment agreements or agreements incorporating the amendments was previously provided to the ATO?	Please confirm that you have attached the amendments for previously provided agreement(s) for this transaction	Filename(s) of the amended agreement(s)
					LCMSF54	LCMSF90	LCMSF91	LCMSF92	LCMSF132	LCMSF133	LCMSF131	LCMSF226

APA				
Are there APAs / rulings provided by other jurisdictions for this transaction?	Has the Reporting Entity previously provided these APAs / rulings to the ATO?	What is the year in which the Reporting Entity previously provided these APAs / rulings?	Please confirm that you have attached the relevant APAs / rulings for this transaction	Filename(s) of the APAs / Rulings
LCMSF106	LCMSF134	LCMSF136	LCMSF135	LCMSF229

## Appendix 5. Absolute Penalty Benchmarking Details

Country	Abs. penalty (min) - original currency	Abs. penalty (max) - original currency	FX rate	Abs. penalty (min) - EUR	Abs. penalty (max) - EUR	Abs. penalty midpoint EUR
Austria	n.a.	n.a.	n.a.	0	5,000	2,500
Belgium	n.a.	n.a.	n.a.	1,250	25,000	13,125
Bulgaria	5,000	10,000	0.5100	2,550	5,100	3,825
Croatia	20,000	200,000	0.1300	2,600	26,000	14,300
Cyprus	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Czech Republic	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Denmark	250,000	n.a.	0.1300	32,500	32,500	32,500
Estonia	n.a.	n.a.	n.a.	3,200	32,000	17,600
Finland	n.a.	n.a.	n.a.	0	25,000	12,500
France	n.a.	n.a.	n.a.	10,000	10,000	10,000
Germany	n.a.	n.a.	n.a.	5,000	5,000	5,000
Greece	n.a.	n.a.	n.a.	5,000	20,000	12,500
Hungary	0	4,000,000	0.0028	0	11,200	5,600
Ireland	n.a.	n.a.	n.a.	4,000	25,000	14,500
Italy	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Latvia	n.a.	n.a.	n.a.	0	100,000	50,000
Lithuania	n.a.	n.a.	n.a.	1,820	6,000	3,910
Luxembourg	n.a.	n.a.	n.a.	0	25,000	12,500
Malta	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Netherlands	n.a.	n.a.	n.a.	0	0	0
Poland	n.a.	n.a.	0.2200	n.a.	n.a.	n.a.
Portugal	n.a.	n.a.	n.a.	500	10,000	5,250
Romania	2,000	14,000	0.2019	404	2,827	1,615
Slovakia	n.a.	n.a.	n.a.	60	3,000	1,530
Slovenia	n.a.	n.a.	n.a.	0	30,000	15,000
Spain	n.a.	n.a.	n.a.	1,000	10,000	5,500
Sweden	0	0	n.a.	n.a.	n.a.	n.a.
Switzerland	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
United Kingdom	3,000	3,000	1.2000	3,600	3,600	3,600

Source: NERA research based on OECD Transfer Pricing Country Profiles and respective country legislation. Local currency converted to EUR with exchange rate as of 22 January 2022.

## Appendix 6. Total Penalty Benchmarking Details

Country	Tot. penalty (min) - EUR	Tot. penalty (max) - EUR	Tot. penalty midpoint EUR
Austria	0	5,000	2,500
Belgium	1,250	25,000	13,125
Bulgaria	2,550	5,100	3,825
Croatia	2,600	26,000	14,300
Cyprus	n.a.	n.a.	n.a.
Czech Republic	n.a.	n.a.	n.a.
Denmark	32,500	42,500	37,500
Estonia	3,200	32,000	17,600
Finland	0	25,000	12,500
France	10,000	12,500	11,250
Germany	5,000	10,000	7,500
Greece	5,000	20,000	12,500
Hungary	0	11,200	5,600
Ireland	4,000	25,000	14,500
Italy	25,020	50,040	37,530
Latvia	25,000	100,000	62,500
Lithuania	1,820	6,000	3,910
Luxembourg	0	25,000	12,500
Malta	n.a.	n.a.	n.a.
Netherlands	0	0	0
Poland	10,000	30,000	20,000
Portugal	500	10,000	5,250
Romania	404	2,827	1,615
Slovakia	60	3,000	1,530
Slovenia	0	30,000	15,000
Spain	1,000	25,000	13,000
Sweden	0	20,600	10,300
Switzerland	n.a.	n.a.	n.a.
United Kingdom	3,600	3,600	3,600

Source: NERA research based on OECD Transfer Pricing Country Profiles and respective country legislation. Local currency converted to EUR with exchange rate as of 22 January 2022.

## Appendix 7. Ease of Doing Business & Paying Taxes Ranking

The Doing Business project<sup>8</sup> provides objective measures of business regulations and their enforcement across 190 economies and selected cities at the subnational and regional level. By gathering and analysing comprehensive quantitative data to compare business regulation environments across economies and over time, Doing Business encourages economies to compete towards more efficient regulation and offers measurable benchmarks for reform.

Doing Business covers 12 areas of business regulation. Ten of these areas—starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts, and resolving insolvency—are included in the ease of doing business score and ease of doing business ranking.

The table below ranks the 29 selected European peer companies according to their latest overall ease of doing business scores as well as their paying taxes scores. Rank 1 has the highest score (best ranking) and rank 29 has the lowest score (worst ranking) compared to the other countries. The paying taxes score considers “*payments, time, and total tax and contribution rate for a firm to comply with all tax regulations as well as postfiling processes*”. Romania ranks 24<sup>th</sup> out of 29 in terms of overall doing business score and 13<sup>th</sup> out of 29 in terms of paying taxes score.

Country	Paying taxes rank within peer group	Overall rank within peer group
Ireland	1	9
Denmark	2	1
Finland	3	7
Estonia	4	5
Latvia	5	6
Lithuania	6	4
Switzerland	7	13
Netherlands	8	18
Luxembourg	9	27
United Kingdom	10	2
Cyprus	11	23
Sweden	12	3
Romania	13	24
Spain	14	11
Portugal	15	15
Austria	16	10
Slovenia	17	14
Germany	18	8
Croatia	19	21

<sup>8</sup> The World Bank & Doing Business project, 2022. [online] Available at: <<https://www.doingbusiness.org/en/rankings>> [Accessed 2 February 2022].

<b>Country</b>	<b>Paying taxes rank within peer group</b>	<b>Overall rank within peer group</b>
<b>Czech Republic</b>	20	17
<b>Slovakia</b>	21	19
<b>Hungary</b>	22	22
<b>France</b>	23	12
<b>Belgium</b>	24	20
<b>Greece</b>	25	28
<b>Poland</b>	26	16
<b>Malta</b>	27	29
<b>Bulgaria</b>	28	26
<b>Italy</b>	29	25

*Source: NERA analysis based on World Bank Doing Business Project 2020 data (latest data available).*

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