From arm’s length interest rates and guarantee fees, to cash pools and thin capitalisation rules, this global survey helps tax professionals navigate these complex regulations in over 40 countries.
Transfer pricing at your fingertips.

For up-to-date information from PwC’s leading transfer pricing publications, download TP to Go from your app store now. TP to Go is free to download on iOS, Android, and Blackberry. Once installed, it checks automatically for new content every time it starts.

www.pwc.com/tptogo
# Contents

Preface ........................................... 3  
Contributors .................................... 4  
Introduction .................................... 6  

**Transfer pricing issues**  
Loans ............................................ 10  
Cash pooling .................................... 14  
Guarantees ...................................... 19  

**Americas**  
Argentina ........................................ 26  
Brazil ............................................. 32  
Canada .......................................... 35  
Colombia ........................................ 46  
Mexico ............................................ 51  
Peru ............................................... 61  
United States .................................. 69  
Uruguay ......................................... 75  
Venezuela ....................................... 81  

**Europe**  
Austria .......................................... 152  
Belgium .......................................... 157  
Denmark ......................................... 165  
Finland .......................................... 170  
France .......................................... 177  
Germany ........................................ 186  
Greece .......................................... 197  
Hungary ......................................... 203  
Iceland .......................................... 206  
Ireland .......................................... 208  
Italy .............................................. 215  
Luxembourg .................................... 220  
Netherlands, The .............................. 223  
Poland ........................................... 230  
Portugal .......................................... 235  
Romania ......................................... 242  
Spain .............................................. 249  
Sweden .......................................... 256  
Switzerland ..................................... 261  
Turkey ........................................... 268  
United Kingdom ............................... 274  

**Asia Pacific**  
Australia ........................................ 88  
China, People’s Republic of .................. 95  
Hong Kong ...................................... 102  
India ............................................. 108  
Indonesia ........................................ 112  
Japan ............................................. 117  
Korea, Republic of ............................. 122  
Malaysia ......................................... 127  
Middle East ..................................... 132  
New Zealand .................................... 134  
Singapore ....................................... 140  
Taiwan ........................................... 146  

**Glossary**  
Glossary ......................................... 282  

**Contacts**  
Contacts list .................................... 286
Preface

The transfer pricing of intercompany financial transactions has received considerably more attention in recent years from tax authorities, taxpayers and multilaterals. This is evidenced by the many changes to interest tax deduction legislation globally in recent years. Furthermore, the OECD has addressed financial transactions as one of the key transactions used for base erosion and profit shifting (reference is made to the OECD report “Addressing Base Erosion and Profit Shifting” published earlier this year). Given this fast changing environment, we sought to bring together the country practices to these issues in over 40 countries. This book offers pragmatic guidance to the reader on a range of intercompany financial transactions related transfer pricing issues such as loans, guarantees and cash pooling. This input was provided by PwC offices globally and this book is correct as of 1 January 2013.

Besides specific financial transactions related transfer pricing issues, our readers may also require information on wider transfer pricing matters. Readers can obtain an electronic copy of PwC’s International Transfer Pricing 2013/14 book or order a hardcopy version of this book on www.pwc.com/internationaltp. International Transfer Pricing 2013/14, now in its fourteenth edition, is an easy-to-use reference guide covering a range of transfer pricing issues in nearly 80 countries worldwide.

In addition to this reference book, many of our readers also require real-time access to current information. Readers wishing to receive e-news alerts on current transfer pricing, dispute and controversy developments by email can register for this service at no charge by visiting www.pwc.com/tpinsights. Don’t forget our TP to Go app. It is available to download on most devices. Search for it in your app store today.

Aamer Rafiq
PwC UK
Global Financial Services Transfer Pricing Leader

Michel van der Breggen
PwC Netherlands

Jeff Rogers
PwC Canada

Wout Moelands
PwC UK

Krishnan Chandrasekhar
PwC US

The book has been updated with information correct as of 1 January 2014 for the following countries: Brazil, Colombia, Mexico, Peru, Uruguay and Venezuela.
Contributors

Many members of PwC’s international network of transfer pricing specialists have contributed to this book. In particular, thanks are due to the following individuals who have edited their country materials. To contact any of these individuals please refer to the Contact list at the back of the book.

**Americas**
**Argentina**
Jose Maria Segura, Leandro Romano, Nicolas Creixent, Javier Hernan Marano

**Brazil**
Cristina Medeiros, Alvaro Taiar, Ivo Rocha

**Canada**
Jeff Rogers

**Colombia**
Carlos Mario Lafaurie Escorce, Jorge Ricardo Suarez Rozo, Francisco Javier Gonzales Ceballos

**Asia Pacific**
**Australia**
Nick Houseman, Julian Hine, Andrew Korlos, Tanja Koch

**China, People’s Republic of**
Phillip Mak, David McDonald, Jeffrey Wong

**Hong Kong**
Phillip Mak, David McDonald, Jeffrey Wong

**India**
Dhaivat Anjaria, Bhavik Timbadia, Abir Mukherjee

**Indonesia**
Ay Tjhung Phan, Margie Margaret, Ravi Gupta, Ivan Budiarnawan

**Mexico**
Fred Barrett, Ivan Diaz-Barreiro, Edgar Ahrens, Augusto Cesar Montoya

**Peru**
Rudolf Roder, Bryan Cottle

**United States**
Adam M. Katz, Krishnan Chandrasekhar, Mac Calva, Robert Ritter, Joshua Cline, Zachary J Noteman, Nicola Lostumbo

**Uruguay**
Daniel Garcia, Javier Cots

**Venezuela**
Elys Aray, Alberto Mendez

**Japan**
Ryann Thomas, Naoki Hayakawa, Ashlyn Kayoboke, Noriaki Ishigami, Akiko Hakoda, Naokazu Suga

**Korea, Republic of**
Han-Jun Chon, Jae-Young Kang, Min-Ha Gang, Myung Jin

**Malaysia**
Anushia Joan Soosaipillai, Mika Yoon

**Middle East**
Dan Axelsen, Aparna Lakshminarasimhan

**New Zealand**
Ed Freeman, Erin Venter, Briar Paterson

**Singapore**
Gavin Helmer, Paul Lau, Carrie Lim

**Taiwan**
Richard Watanabe, May YH Li
Europe

Austria
Herbert Greinecker, Doris Bramo-Hackel, Marianna Dosza, Sophia Reismann

Belgium
David Leduc, Alexis de Meyere, Jelle Loos, Elisabeth Hermans

Denmark
Jørgen Juul Andersen, Anne Mette Nyborg, Rasmus Steiness

Finland
Sari Takalo, Johanna Isakov,

France
Pierre Escaut, Christophe Hillion, Gilles Vincent du Laurier, Deniz Arikan

Germany
Jobst Wilmanns, Stephanie Wahlig, Yu Tao, Abraham Ackerman

Greece
Antonis Desipris, Antigoni Gkarla, Alexandros Roukalis

Hungary
Zaid Sethi, Agnus Varga

Iceland
Elin Árnadóttir, Jón Ingi Ingibergsson

Ireland
Barbara Dooley, Aoife Murray, Dáire Corcoran

Italy
Alessandro Caridi

Luxembourg
Begga Sigurdardottir, Marc Rasch, Ruja Todorova, Caroline Goemaere

Netherlands, The
Michel van der Breggen, Daniel Lierens, Dewi Wayuni

Poland
Piotr Wiewiorka, Wojciech Cipielewski

Portugal
Jaime Esteves, Leendert Verschoor, Clara Madalena Dithmer, Alexandre Belo Gonçalves, Samuel Noronha Sanches

Romania
Ionut Simion, Mihaela Popescu, Olivia Chitic

Spain
Michael Walter, Javier Gonzalez Carcedo, Alexis Insauti, Adam Aroian, Estanislao Domecq

Sweden
Pär Magnus Wiséen

Switzerland
Karl-Heinz Winder

Turkey
Baris Yalcin, Pinar Karamahmutogl

United Kingdom
Aamer Rafiq, Matthew Hardy, Wout Moelands, David Horowitz, David O’Brien
Introduction

Financial transactions – setting the scene
The transfer pricing of intercompany financial transactions has received considerably more attention in recent years from both tax authorities and taxpayers. In particular, the impact of the global financial crisis on credit markets, the GE Capital Canada decisions, and the Euro crisis have dramatically increased the profile of the transfer pricing issues associated with such transactions.

Given the current environment of government deficits and the resultant changes in tax rates and treaties, multinational enterprises have devoted significant resources to developing treasury business models that promote a higher degree of self-funding and tax optimisation through the use of intercompany loans, guarantees and tools such as cash pooling.

Considering these developments and the uncertainty in this environment, PwC* undertook this survey to gather key information on the current legislative transfer pricing environment on intercompany loans globally as well as our own experience with tax authorities’ attitudes towards transfer pricing of financial transactions (i.e. intercompany loans, guarantees and cash pooling). In particular, we asked our transfer pricing specialists to answer the following questions:

• Does your country have specific transfer pricing rules regarding the treatment of intercompany loans and/or guarantees?
• Does your country have specific corporate income tax rules on thin capitalisation?
• Does your country have specific procedures in place to obtain certainty on the transfer pricing treatment of intercompany financial transactions (e.g. APAs, ATCAs, etc.)?
• How does your country deal with the transfer pricing aspects of intercompany loans and guarantees: is an intercompany transaction recognised and is a fee (interest rate, guarantee fee) justified?
• Which transfer pricing methodologies are preferred/generally accepted by the tax authorities in your country with respect to pricing intercompany loans and guarantees?
• How does your country deal with implicit support/passive association with respect to pricing intercompany loans and guarantees?

*PwC refers to the PwC network and/or one or more of its member firms, each of which is a separate legal entity. Please see www.pwc.com/structure for further details.
Survey conclusions

Based on the responses, it is clear that transfer pricing legislation and general practice with respect to these issues is inconsistent across territories and, in many cases, still evolving. Nevertheless, some key themes have emerged:

- Transfer pricing and thin capitalisation rules are embedded in the tax law of most responding countries.
- If transfer pricing rules explicitly address financial transactions, they primarily address intercompany loans (i.e. in terms of volume and interest rate) with only limited rules addressing intercompany guarantees and cash pooling.
- To the extent that a country lacks specific guidelines for evaluating transfer pricing applied to intercompany financial transactions, the broader transfer pricing guidance provided in the OECD Guidelines is applied by analogy.
- Generally accepted methodologies to evaluate the arm’s length interest rate on intercompany loans require an internal or external CUP analysis taking into account the specific terms and conditions of the loan and the creditworthiness of the related party debtor based on a credit rating analysis as a distinct and separate enterprise.
- The CUP method is the preferred method to evaluate arm’s length guarantee fees for intercompany guarantees. If no CUPs are available, the ‘benefit approach’ is the preferred alternative.
- There is no common approach for taking into account the concept of passive association/implicit support in substantiating the arm’s length nature of interest rates/guarantee fees.

Given the inconsistency in global transfer pricing rules, planning and management of intercompany financial transactions from a transfer pricing perspective is challenging. However, some common practices can be identified to help ease some of the compliance burden; these practices can also be used as a basis for a master file/policy paper addressing an organisation's main financial transactions, which can be modified to specific local needs where necessary.

In the following chapters, we provide more background on the current transfer pricing issues underlying intercompany financial transactions, as well as the results for the survey from the jurisdictions that participated.
Transfer pricing issues
Transfer pricing issues

Loans
Multinational enterprises in all industries commonly finance their operations through intercompany loans when possible, as these are perceived as tax efficient and cost-effective tools. The transfer pricing considerations of these transactions must be carefully evaluated (i.e. establishing arm’s length interest rates), and are discussed below.

Guidance and OECD commentary
The arm’s length principle requires that intercompany financial transactions be undertaken on terms similar to those that would have been entered into by independent enterprises.

The OECD Guidelines only touch on the application of transfer pricing methods in determining an arm’s length result for intercompany financing activities, such as establishing interest rates on intercompany loans. As a result, determining arm’s length interest rates on these loans requires reference to local transfer pricing rules (if any); as these rules vary by country, there is an increased risk of disputes regarding appropriate rates.

Overview
A number of factors must be considered when determining arm’s length prices for an intercompany loan. In particular, if the underlying terms of a transaction are not consistent with those that would have been entered into by independent third parties, it will not be possible to determine an arm’s length price for that transaction (i.e. because by definition it is not arm’s length). Indeed, the OECD Guidelines refer to financial transactions as a special case where it may be appropriate for a tax authority to disregard a taxpayer’s characterisation of a transaction and re-characterise it in accordance with its substance.

The example cited in the OECD Guidelines is that of “an investment in an associated enterprise in the form of interest-bearing debt when, at arm’s length, having regard to the economic circumstances of the borrowing company, the investment would not be expected to be structured in this way. In this case it might be appropriate for a tax administration to characterise the investment in accordance with its economic substance with the result that the loan may be treated as a subscription of capital.”

With this in mind, careful consideration should be given to the characterisation of the financial transaction to be priced before beginning any analysis to determine the arm’s length interest rate. Characterising a transaction typically requires consideration of the following:

- Does the transaction meet the definition of debt under the relevant local tax rules/case law?
- Will the interest deduction be restricted due to local thin capitalisation or earnings stripping rules in the country of the borrower?

1 OECD Guidelines, para. 1.65.
2 These questions may require a significant amount of scrutiny. A large body of case law may be available to provide guidance as to how to approach the characterisation of the transaction exercise (e.g. key financial ratios to be considered for thin capitalisation analysis precedents that have been set, etc.).
• Are the terms of the transaction consistent with those that would have been agreed between two independent third parties?

Once these questions have been answered, one should consider an appropriate arm’s length interest rate based on the terms and conditions of the intercompany debt.

**Basic principles and methods**

The following three factors determine interest rates charged in third party scenarios:

1. How creditworthy is the borrower and how able is it to meet its liabilities;
2. The seniority and/or security of the loan; and
3. The current market conditions for a loan with the same terms and conditions.

**Setting interest rates**

While in most countries interest rates between related parties must be set according to the arm’s length standard, there is little guidance provided by the OECD or local country regulations on how to determine an arm’s length rate of interest. This lack of specified methods has resulted in tax controversies, and taxpayers have responded by trying to replicate the approaches used by unrelated parties when determining arm’s length rates of interest.

Most available information regarding loans and technical analysis of interest rates involves transactions entered into by banks. When a bank determines the interest rate to charge a borrower, it typically accounts for: (i) the terms and conditions of the loan (e.g. loan tenure, seniority and collateral); (ii) the credit or default risk of the borrower (measured through a credit rating process); and (iii) the interest rates offered by other lenders in comparable circumstances, as described further below.

(i) **Loan terms**

When lending to an unrelated party, the lender first evaluates the creditworthiness of the borrower. The next step is negotiating the terms and conditions (e.g., principal amount, payment frequency, interest rate and any special features). In doing so, the two-sided perspective needs to be applied. Interest rates negotiated by third parties on comparable terms and conditions should serve as a basis for a loan benchmarking analysis. Under normal credit market conditions (all else being equal), longer term loans carry higher interest rates that increase with their degree of subordination. Other features that affect arm’s length interest rates (and must therefore be considered in the benchmarking analysis) include embedded options (e.g. convertible to equity, prepayment), seniority of the loan, collaterals and guarantees.

A potentially important factor in this analysis is the borrower’s ability to obtain a similar amount from an outside lender. While this may be addressed with a ‘bankability letter’, this document does not constitute a comparable transaction for transfer pricing purposes because it is not a consummated transaction. Furthermore, as a result of banks reducing their lending, it may prove difficult to obtain such a letter. As such, other sources to support this point become even more important including referring to third-party loans with similar characteristics at the time of the intercompany transaction.

3 It does not cover the quantum of debt that is acceptable, as this varies significantly by country.
(ii) Credit rating process

A crucial step in the benchmarking analysis is estimating the credit rating of the borrowing entity. This section highlights the key transfer pricing concepts to consider while assigning this rating.

The arm's length principle: competing definitions

The credit rating of the borrowing entity can be determined either as a distinct and separate enterprise (i.e. on a ‘standalone’ basis), or in the context of its membership in a larger group. The purpose of estimating the credit rating is to demonstrate that the interest rate charged to the borrower is the same as the rate that would be charged to an arm’s length party with the same credit rating (i.e. the price of the intercompany transaction meets the arm’s length principle). The basics of credit ratings and their wider use are described below.

What is a credit rating?

A credit rating is a function of quantitative and qualitative factors within an ordinal ranking system that summarises the ability of a borrower to repay debt. In financial markets, a credit rating reflects the likelihood that a potential borrower will default on its financial obligation. Because determining the likelihood of default of any company is a complex exercise, an entire industry devoted to evaluating the credit ratings of publicly listed companies, banks and countries has evolved over the last few decades.

The borrower’s credit rating and the features of the loan (such as currency of issue and term/duration) are typically the main factors used to determine both the interest rate and the principal amount of the loan.

Credit ratings within the transfer pricing context

A credit rating plays an essential role in determining whether a transaction between related parties is structured at arm’s length. Under normal market conditions, a company with an excellent credit rating usually pays a lower interest rate, while a company with a poor credit rating usually pays a higher interest rate to compensate the lender for the higher risk it is assuming. Therefore, in a transfer pricing context, the credit rating of a borrower within a multinational group is of great interest to tax authorities because it is a reliable indicator of whether the intercompany debt transaction is priced at arm’s length.

OECD guidance

While the OECD Guidelines do not provide explicit recommendations in determining credit ratings per se, the arm’s length principle implies that a credit rating ascribed to a related party should be consistent with one that would have been determined between parties acting at arm’s length.

Standalone versus group rating

At one extreme, using the ‘standalone approach’, a borrower within a multinational group is treated as a distinct and separate enterprise and its creditworthiness is evaluated on the basis of its own financial standing. This approach imposes the arm’s length principle and ignores the influence of the parent company and other members of

4 The biggest credit rating agencies are Standard & Poor’s (S&P), Moody’s Investor Service (Moody’s) and Fitch Ratings (Fitch). There are also smaller agencies like Dominion and AM Best. In general, most credit rating agencies use the rating methodology that best suits the borrower’s industry and offers the best possible relative ranking of the creditworthiness of a borrower vis-à-vis similar companies in the same industry. Given that credit ratings are relative, they are generally expressed using a letter designation such as A (excellent), B (moderate), C (poor) and D (already in default).
the multinational group. The standalone approach is generally applied in the broader transfer pricing context.

At the other extreme, in the ‘member-of-the-group’ approach, the creditworthiness of the subsidiary is evaluated, recognising that the subsidiary is a part of a multinational group. This approach assumes that the parent company/group will intervene if the subsidiary encounters financial difficulty. This is the concept of implicit support. Under this approach, the subsidiary’s financial standing matches that of the group, which is generally unlikely.

One high profile decision that includes extensive discussions about these competing extremes is the GE Capital Canada case, in which the issue was the validity of the payment of a guarantee fee by a Canadian subsidiary to a US parent. In this case, the Tax Court of Canada (TCC) in effect applied both the standalone approach and the concept of implicit support by the parent company to arrive at an appropriate credit rating for the Canadian subsidiary of GE Capital. The TCC recognised that implicit support has limited value and was therefore not equivalent to the explicit support that would be required for the subsidiary to be assigned the parent company rating, which was the original position of the Canada Revenue Agency (CRA).

This decision has muddied the waters even further as there is still no clear tax authority guidance on which approach should be used to determine a credit rating. With its view on the limited value of implicit support, one could argue that the TCC sided more with the standalone approach. However, since the decision was fact-specific, it is unclear whether it can be used to support the appropriateness of this approach. (See section on Guarantees, below, for more details of the GE Capital Canada case.)

(iii) Benchmarking interest rates agreed between unrelated parties

Once the terms and conditions of an intercompany loan and the credit rating of the borrower have been established, the next step is determining an arm’s length range of interest rates, which requires consideration of the following factors:

- **Type of financing transaction**: examples include term loans, revolving loans, stand-by letters of credit, etc.
- **Industry of the borrower**: riskier or more volatile industries would expect higher interest rates (e.g. retail or dot-coms versus utilities companies).
- **Credit rating of the borrower**: the credit rating indicates the probability or risk that the borrower will default on repaying the principal or interest of the loan. Entities with a lower credit rating should expect higher interest rates.
- **Tenure**: the time to maturity of the loan affects the expected return on investment by the borrower. This relationship between tenure and time premium is illustrated in market yield curves. Under normal market conditions, this premium increases with the tenure of the loan.
- **Fixed versus floating rate**: floating rates, established as a base rate plus a spread, typically represent less risk to lenders because they will automatically reflect changes in market conditions.
- **Currency**: the currency of the loan carries certain risk resulting from foreign exchange markets. Currencies more prone to devaluations will typically draw higher rates of interest.

5 General Electric Capital Canada Inc. v. The Queen, 2009 Tax Court of Canada 563.
• **Embedded options:** certain loans include different types of options, e.g. allowing the borrower to repay before maturity or the lender to collect before maturity, or making the loan convertible to equity, etc.

• **Senior/Subordinated debt:** this refers to the priority in which claims are paid by a company. A loan that is subordinated is paid after senior debt has been paid.

• **Collaterals and guarantees:** additional collaterals or guarantees included in the financing transaction typically reflect a reduction in the risk of default.

**Summary**

To summarise, the terms and conditions of the transaction need to be at arm’s length, including the principal amount, and this should be analysed from both the lender’s and the borrower’s perspective. In terms of credit ratings, these are opinions on the likelihood of default of a company or individual debt issues based on a set of quantitative and qualitative factors affecting the borrower.

In a transfer pricing context, where the focus is primarily on intercompany debt transactions, estimating the credit rating of a potential borrower is one of the best signals to tax authorities that a taxpayer has followed standard industry practice and made reasonable efforts to act as independent parties would have, i.e. at arm’s length. That said, competing approaches to credit-rating borrowers and recent case law commentary, which is ambiguous, does little to alleviate the uncertainty about which approach a tax authority is most likely to accept as providing an arm’s length result.

**Cash pooling**

Debt is an integral part of how most organisations manage their daily operations. As such, debt management is a key aspect of most treasury groups. To optimise their intra-group working capital management and obtain certain benefits, almost all companies operating on a cross-border basis make use of cash pools.

The purpose of a cash pool is to ensure that members of the group access internal cash and assets before seeking external financing. The cash pool essentially pools all cash and other liquid assets available within the various subsidiaries of a company for use within the group before any one member obtains external financing (if required), generally from the bank facilitating the cash pool. As such, a cash pool reduces a multinational’s external financing costs.

The 2008 financial crisis and ensuing recession increased both the use and relevance of cash pools. Companies had more difficulty obtaining external financing, and market credit spreads made this type of financing more expensive and scarcer. At the same time, companies needed more liquidity as a result of lower than expected operational profits.

Although a cash pool is generally established for operational rather than tax purposes, there are important tax aspects to consider when establishing a cash pool, as discussed in more detail below.
Cash pool: background and characteristics

Why cash pooling?
Companies use cash pools: (i) to reduce the transaction costs for the participants in the cash pool relative to the costs of maintaining separate local bank accounts; (ii) to obtain more favourable borrowing conditions from banks as a result of increased bargaining power; (iii) to centralise the management of financing decisions; and (iv) to take advantage of the so-called ‘cash pool benefit’, which is based on the principle that the interest a debtor pays to the bank (debit interest) is higher than the interest a creditor receives from the bank (credit interest). This benefit, which is obtained at group level, results from the settling of the debit and credit positions of all participants (between each other) before surplus cash is deposited or borrowed from the bank, and therefore consists of interest savings on debit positions to the extent there are equally high credit positions within the group.

Different types of cash pooling
There are two main types of cash pools: the target-balancing cash pool (also known as zero-balancing) and the notional cash pool.

Target-balancing (zero-balancing) cash pool
In a target-balancing cash pool the bank accounts of the participants are levelled regularly (often daily) to a certain predetermined amount. When the balance of a participant’s bank account exceeds this amount, the excess is transferred to a central bank account (i.e. the account of the cash pool leader or CPL). If the balance of a participant’s bank account is lower than this amount, funds are transferred from the CPL’s bank account to level the account to the targeted amount. A zero-balancing cash pool is the most common type of target-balancing cash pool (i.e. the targeted balance on the bank accounts of the participants is zero).

If the target-balancing cash pool is linked to a credit facility (between the bank and the CPL), the CPL can off-set a total debit position of the cash pool with funds withdrawn from that credit facility. In this case, the CPL pays interest to the bank. On the other hand, if the cash pool is in a total credit position, the bank pays interest to the CPL. Alternatively, excess cash in the pool can be invested in, typically, short-term limited risk securities. Whether the participants in the target-balancing cash pool must provide a guarantee to the bank depends in part on the financial position of the CPL and the participants; usually a guarantee is required.

In summary, a target-balancing cash pool is a cash management tool that concentrates cash at the level of the CPL. The CPL is responsible for managing the company’s overall working capital as efficiently as possible.

Notional cash pool
A notional cash pool does not involve the transfer of cash from one bank account to another. Instead, the bank calculates the credit and debit interest on each participant’s individual bank account and subsequently calculates (i.e. notionally) the total balance of all individual bank accounts combined. The cash pool benefit is calculated on the basis of this notional balance. Depending on the underlying agreements, the cash pool benefit may be paid by the bank to the CPL or the participants by means of adjusting the debit and credit interest accordingly. This type of cash pool is therefore also called an ‘interest compensation’ cash pool.
Like the target-balancing cash pool, in principle the combined total balance of the notional cash pool cannot be less than zero. Furthermore, the cash pool participants may have to provide cross-guarantees to the bank to prevent it from incurring debtor’s risk on the notional cash pool. Participants that want the option to be in a debit position with the bank must enter into a credit facility with the bank, which may need to be cross-guaranteed by the participants and/or the parent company.

In a notional cash pool the CPL’s role consists mainly of contacting the bank on matters such as interest payments and cash pool benefit payments. A notional cash pool thus serves fewer purposes than a target-balancing cash pool; its main purpose is to obtain an interest benefit for the group.

**What type of cash pool to implement: notional versus target-balancing**

An important difference between target-balancing and notional cash pools (also for tax purposes) is that intercompany payables and receivables are created in the former, but not in the latter, at least in principle. Since the participants in a notional pool maintain their bank accounts with the bank individually, debit and credit positions are maintained with the bank and not intra-group, i.e. there are no transactions between the participants and the CPL. As a notional cash pool limits the number of transactions to be performed by the bank (and therefore the transaction fees) as well as the number of intercompany payables and receivables, many companies prefer notional over target-balancing cash pools. Banks also often prefer notional cash pools: as no credit positions are created with the participants (unless a credit facility is agreed to) the bank does not have to include the cash pool (i.e. additional capital) on its balance sheet.

Another important consideration when selecting a cash pool is whether the company’s management structure is centralised or decentralised. Target-balancing cash pooling centralises cash in one entity, often the company’s headquarters, resulting in more centralised control and management of cash, while local subsidiaries unwilling to give up their autonomy in financial decision making might prefer a notional cash pool.

Furthermore, a target-balancing cash pool requires more management and administration than a notional cash pool and is therefore more costly to maintain. Legal and financial monitoring as well as operational considerations (such as IT infrastructure) influences this decision. Finally, companies should consider the extent to which the CPL also provides other treasury services to participants, such as a ‘payment factory’ (i.e. central payment of third-party invoices) or ‘netting’ (i.e. allows intercompany credit and debit positions to set-off and partially or entirely cancel each other out).

**Cash pooling in practice**

Regardless of the type of cash pool, all participants should maintain a current account with one bank (or local offices of that bank). One entity is appointed CPL to manage the cash pool, centralise all cash positions of the participants and the bank (for target-balancing cash pools) and manage interest payments. The bank generally offers the IT platform on which the cash pool operates (e.g. all periodical payments, transfers, etc.).
A cash pool is typically covered by a number of legal agreements between all participating parties and always relates to short-term financing of working capital; that is, it is not intended to fund long-term financing. However, in practice it is not uncommon for some participants to have long-term debit (or credit) positions with the CPL; this may have consequences for the long-term legal relationships between the participants as well as their transfer pricing positions.

**Transfer pricing aspects of cash pooling**

Most jurisdictions follow the arm’s length principle as defined in the OECD Guidelines and Article 9 of the OECD Model Tax Convention in determining appropriate remuneration for financial activities. The arm’s length principle states that where “conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.”

As such, arm’s length remuneration for financial activities must be determined based on the functions performed, risks assumed and assets used by the relevant parties. For cash pools, this requires that credit and debit interest rates and the remuneration received by the CPL for its activities be at arm’s length. Further issues to be considered include the impact of any guarantees on overall pricing (either cross-guarantees, parental or by the CPL) as well as the capital structure of the CPL and how its activities are characterised (i.e. as an entrepreneur or service provider).

**How to determine arm’s length credit and debit interest rates**

Tangible benefits for cash pool participants include savings on transaction-related bank costs and more favourable credit and debit interest rates. However, in most cases participants in the cash pool also incur higher debtor’s risk relative to having direct deposits with a bank.

To determine the arm’s length credit and debit interest rate in a cash pool, an important consideration is that the ultimate debtor is typically neither the bank nor the CPL, but the participants with a cash deficit; the creditworthiness of these participants is often much lower than that of a bank. Therefore, applicable arm’s length interest rates within a cash pool should be based on the creditworthiness of the participants.

In the case of a target-balancing cash pool where no cross-guarantees are provided by the participants, the creditworthiness of the CPL may also need to be considered because it is the ‘principal’ to the transactions with the participants. However, as the participants and CPL rarely have their own credit ratings, it is necessary to estimate a standalone credit rating for each.

CUP analyses should be performed based on these credit ratings and the terms and conditions of the cash pool. These CUP analyses result in (interquartile) ranges of credit spreads that, together with the underlying base interest rate (i.e. the interest rate for risk free funding), can be used as the arm’s length credit and debit interest rates within the cash pool. These interest rates should be verified regularly and adjusted when appropriate based on actual market interest rates.
Depending on the underlying guarantee structure, it may be necessary to pay a guarantee fee to any subsidiary that provides a guarantee for the benefit of, but does not itself belong to the cash pool. Whether a guarantee fee is appropriate depends on the type of cash pool, the creditworthiness of the participants and the guarantors, and whether credit facilities are attached to the cash pool. To determine the level of guarantee fees, reference can be made to the associated interest benefit realised by the participants with a cash deficit.

**Remunerating the CPL**
The remuneration received by the CPL will differ depending on the type of cash pool, because it performs different functions and assumes different risks in each type of pool.

In a target-balancing cash pool, transactions between the participants and the CPL require an arm’s length interest rate. The CPL may effectively operate as an internal bank. If its role is not to act as a service provider (i.e. assumes no principal risk on transactions but only administers the scheme) but more as an entrepreneur (as the effective bank being the counterparty to the transactions), its remuneration is the difference between the debit and credit interest rates (and potential guarantee fees). In this respect, note that the higher the CPL’s equity (capital), the larger the interest rate spread: a high level of equity will improve the creditworthiness of the CPL, resulting in a lower credit interest rate. The CPL will not receive separate remuneration for its functions performed, but will recover its expenses and earn a profit from the interest rate spread it realises.

Alternatively, in a notional cash pool, there are no transactions between the participants and the CPL (although interest payments may be routed via a master-account in the name of the CPL). Its function and risk profile depends mainly on how the notional cash pool is set up. In the simplest of forms, the CPL advises the bank of the credit and debit interest rates applicable to the various participants. Because the CPL does not provide any guarantees it does not incur any debtor’s risk. In this situation, the CPL operates as a service provider. The cost plus method or a (limited) basis point spread may therefore be used to determine the appropriate remuneration, which can be settled by means of a separate fee or by credit and debit interest rate adjustments.

**Allocation of the cash pool benefit**
The cash pool benefit is generally conferred on whichever participants (and potentially the CPL) economically incur the debtor’s risk with respect to the cash pool.

One complicating factor stemming from more favourable interest rate conditions is a result of economies of scale. This should benefit all participants, not only those that incur the debtor’s risk with respect to the cash pool, because these conditions are a result of the total volume and number of transactions of the cash pool, to which all participants contribute.

**Practical considerations**
Cash pools are regularly considered a planning tool to obtain fiscal benefits, i.e. by establishing the CPL in a country with a favourable tax regime and allocating the entire cash pool benefit to the CPL. Putting aside the benefit generated from economies of scale, the entire cash pool benefit can be allocated to the CPL only if it both legally and economically incurs the debtor’s risk with respect to the cash pool (i.e. the CPL should have sufficient equity at risk with respect to the cash pool).
Furthermore, while in practice a participant may have a long-term credit position in the cash pool, credit and debit interest rates are determined on a short-term basis (i.e. because the purpose of a cash pool is to facilitate short-term financing of working capital). This issue has prompted many discussions with local tax authorities, because it is easy for them to establish (with the benefit of hindsight) if and when cash was deposited in the cash pool for a long period. In particular, these discussions relate to the interest rate received by the participant when making its deposit, with the tax authorities arguing that the interest rate is too low given its short-term nature.

Preparing a cash pool policy paper
In the United States and most countries in Europe and Asia, the arm’s length nature of the terms and conditions of a cash pool, remuneration for the CPL and the applied credit and debit interest rates must be substantiated and documented.

However, with often dozens of participants and constantly fluctuating capital markets, it is almost impossible to apply real time credit ratings and market interest rates for setting arm’s length credit and debit interest rates. The OECD Guidelines seem to recognise this, i.e. that there may be a difference between theory and practice in applying transfer pricing, and that it is possible to take a somewhat practical approach even if it may not be fully correct in theory.

Conclusion
Each type of cash pool should be analysed based on its own merits. The aforementioned factors that influence the transfer pricing for cash pools must be considered when setting up transfer pricing guidelines for cash pools.

Guarantees
This section addresses key transfer pricing considerations with respect to guarantees provided by one group company in relation to a financial transaction entered into by another group company, typically with a third party (internal guarantees). Despite the theoretical complexities, it is possible to develop best practices to comply with local transfer pricing requirements.

First, we set out the background of internal guarantees and their increased use by multinationals. We then describe the relevance of the arm’s length principle and the types of guarantees observed in practice. We conclude with an overview of the elements that should be addressed when dealing with the transfer pricing aspects of internal guarantees.

Setting the scene
As noted, the credit crunch that began in 2008 and subsequent recession put pressure on all funding sources. Banks and other financial institutions became more risk-averse, which resulted in increased costs of borrowing or restricted credit lines. To lower their reliance on external debt, multinationals have sought means to optimise their internal use of cash through cash pools, intercompany loans (to relocate idle cash) and centralising the collection of trade receivables (factoring). Multinationals reliant on external debt often face increased demand for (additional) security or strict covenants.
Thus, multinationals often use credit guarantees, both with internal cash optimisation and external debt funding.

The increased use of internal guarantees has also caught the attention of tax authorities globally, as these guarantees often benefit one group company at the expense of another. To ensure they receive their fair share of a multinational's profit, local tax authorities will ascertain whether the internal guarantees are established and priced in accordance with the arm’s length principle. Transfer pricing may also offer tax authorities a means to counter the potential tax consequences of internal guarantees.

The following sections further detail the arm’s length principle and the risks multinationals are exposed to if internal guarantees are not established and priced on an arm’s length basis.

**The arm’s length principle and guarantees**

Internal guarantees used by multinationals are often governed by domestic transfer pricing rules and bilateral tax treaties which typically refer to the arm’s length principle in accordance with Article 9 of the OECD Model Tax Convention. If a transaction between group companies is not at arm’s length, a tax authority may disregard the transaction as structured by those companies, impose arm’s length conditions and tax accordingly.

The potential impact of transfer pricing on internal guarantees is demonstrated by the GE Capital Canada case, in which the CRA issued reassessments for several taxation years, totalling CAD$136 million, thereby denying deductions for guarantee fees claimed by GECC (the Canadian subsidiary) in those years with respect to a guarantee provided by its US-based parent company, General Electric Capital Corporation. The TCC allowed GECC’s appeals and ordered that the Minister’s reassessments be vacated, finding that the 1% guarantee fee paid was equal to or below an arm’s length price. The Crown’s appeal of this decision was dismissed.

In view of the above, it is imperative that internal guarantees used by multinationals are established and priced at arm’s length. Additional reasons to closely consider internal guarantees include performance measurement and financial reporting; for example, multinationals reporting under International Financial Reporting Standards need to account for uncertain income tax positions on the basis of IAS 12 (Income Taxes), whereas under US generally accepted accounting principles, this may be particularly relevant under FIN 48 (Accounting for Uncertainty in Income Taxes).

**Types of guarantees**

Internal guarantees are used to obtain better conditions, either lower interest rates or a higher credit limit, (notably interest rates) on external financial transactions, hence creating a benefit on a group basis. The following is an overview of various types of internal credit guarantees typically observed in practice and that may need to be accounted for from an arm’s length perspective:

- **Comfort letters/letters of intent**: a promise (rather than a legally binding commitment) whereby a (parent) company declares it will refrain from taking actions that would jeopardise its subsidiary’s financial stability.
- **Keep-well agreement**: a declaration by the parent company that it will provide its subsidiary with additional capital to prevent it from defaulting.
• **Explicit credit guarantee**: a legally binding commitment of a party (the guarantor) to pay an amount to another party (the creditor) in case a group company (the debtor) defaults under its obligations to the creditor.

As comfort letters/letters of intent, keep-well agreements and other more ‘soft’ commitments generally lack legal enforceability, most countries do not recognise these forms of internal guarantees as an intercompany transaction for transfer pricing purposes. As such, in this chapter only explicit credit guarantees are further considered; this type of internal guarantee is often observed in practice and creates a legally enforceable commitment for the guarantor. From a transfer pricing perspective, the question whether this type of internal guarantee indeed constitutes a ‘service being rendered’ is more apparent in most countries.

The type of explicit guarantee used may vary depending on how it is used in a financing structure:

• **Upstream guarantee**: issued by a group company to creditors for the benefit of its (ultimate) parent company for the purpose of the latter entering into an external agreement, normally to obtain external debt funding – this typically occurs when external debt financing is obtained at group or top holding level (and where the central treasury function is performed by the parent company).

• **Downstream guarantee**: issued by a parent company to creditors for the benefit of a subsidiary for the purpose of the latter entering into an external agreement, normally to obtain external debt funding – this typically occurs where business models are decentralised or where the (offshore) location of the subsidiary is more attractive to obtain external funding.

• **Cross-guarantees**: issued by multiple group companies in respect of a creditor, whereby all group companies can effectively be regarded as one legal obligor to the creditor – this typically occurs when multinationals set up cash pooling structures with independent banks.

**The OECD Guidelines on credit guarantees**

Further detail on the application of the arm’s length principle to internal guarantees is provided by the OECD Guidelines, which provide that a multinational should establish whether an internal guarantee qualifies as a service being rendered between group companies and, if so, what the appropriate level of the arm’s length guarantee fee should be. The OECD Guidelines also provide guidance on the application of Article 9 of the OECD Model Tax Convention.

**Internal guarantees: Service provided or shareholder transaction?**

According to the OECD Guidelines: “the question whether an intra-group service has been rendered … should depend on whether the [guarantee] provides a group [company] with economic or commercial value … This can be determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the [guarantee]…”

This basically means that for each internal guarantee (i) the underlying reason for the guarantee should be established and (ii) it should be determined whether the guarantee creates a benefit for which the guaranteed group company should pay a fee. As further explained in the OECD Guidelines, the guarantee fee should be established by taking into account the perspective of both the guaranteed group company and the guarantor (i.e. the group company issuing the guarantee). That is, the underlying reason for the guarantee should take both these perspectives into account.
In the event that a third party (the creditor) would not under any circumstances have been willing to enter into the transaction with the guaranteed company (the debtor) had the guarantee not been issued, it can be concluded that the guaranteed company would not have been able to enter into the transaction on a standalone basis. In other words, the guaranteed group company is not considered by the third party to be financially strong enough to enter into this transaction on a standalone basis. In this case, the provision of the guarantee may have been provided in by the guarantor in its capacity as a shareholder, as no third party would appear willing to accept the risk associated with the transaction. Hence, the internal guarantee may not qualify as a service being rendered and a guarantee fee is not appropriate. As a further consequence, in many countries a loss resulting from such a guarantee being invoked may not be deductible.

**Internal guarantees: establishing the guarantee fee**

If a guaranteed company is able to obtain better conditions for external funding through an internal guarantee, a commercial rationale exists for a guarantee fee as long as the benefit conferred by the guarantee exceeds the guarantee fee charged.

An arm’s length guarantee fee is in practice typically established in the range between the guarantee fee the guarantor would want to receive to cover the costs it incurs with respect to a guarantee, and the guarantee fee that the guaranteed group company would, at most, be willing to pay based on the benefit conferred by the guarantee.

A controversial issue relating to the calculation of guarantee fees under the benefit conferred or yield approach is the role played by the previously discussed ‘implicit parent guarantee.’ Following the GE Capital Canada case, various positions can be argued in determining this saving:

1. No guarantee fee is payable as the borrower did not receive any economic benefit as it would have been able to borrow at the same rate thanks to its affiliation with the group.
2. A guarantee fee can be calculated based on the interest rate differential that corresponds to each of the credit ratings of the guarantor and the guarantee, with no adjustments made to reflect any implicit support.
3. A guarantee fee can be calculated based on the credit spread resulting in the difference between the credit rating of the guarantor and the guarantee. However, in determining the credit rating of the guarantee, implicit support, if applicable, must be appropriately considered.

This seems to be the best practice from a transfer pricing perspective, albeit determining the impact of the implicit parent guarantee (if any) is, unfortunately, highly subjective.

After determining the interest saved following one of the approaches above, a final question is if (and to what extent) it can be argued that the full benefit should be charged as a guarantee fee or whether the benefit should be split between the guarantor and the guarantee.
**Best practice approach**
Charging a guarantee fee may be contentious in some countries, yet it may be expected elsewhere (particularly with outbound guarantees). Multinationals should therefore carefully review their internal guarantee structure and prepare appropriate documentation or policies to substantiate their arm’s length nature. Typically, the transfer pricing of internal guarantees is still country-specific; there is no international consensus on how to determine the arm’s length nature of internal guarantees and the level of the arm’s length guarantee fee:

Most countries do not recognise comfort letters, letters of intent or keep-well agreements as a service being rendered, whereas some do.

Guarantee fee payments may be characterised differently, e.g. as a service payment or interest payment, potentially triggering withholding tax (WHT) or thin capitalisation issues.

Different approaches are taken to establish the arm’s length guarantee fee whereby some countries may account for passive association while others would not.

Because of these differences and the complexities surrounding internal guarantees, multinationals should develop a consistent and robust approach toward the transfer pricing aspects of these guarantees. This approach can consist of a group policy, which can be tailored to specific local country requirements.

**Conclusion**
Since the 2008 financial crisis and ensuing recession, we have observed a resurgence of intercompany loans as well as guarantee arrangements and cash pooling structuring. Due to the potential adverse tax consequences of such intra-group arrangements, the pricing of these transactions must follow the arm’s length principle.

It is reasonable to expect the enhanced scrutiny of tax authorities with respect to these types of transactions in the foreseeable future and, as such, great care should be taken by taxpayers to ensure they develop thorough pricing strategies.
Americas
Argentina

Transfer pricing rules and regulations

Rules by means of legislation

- **Section 15 of the Income Tax Law (ITL):** The methods to evaluate and adjust the pricing of intercompany transactions and documentation requirements.
- **Section added after Section 15 of the ITL:** Definition of economic relationship.
- **Section 128 of the ITL:** Foreign source income earned by foreign permanent establishments (PEs) of local taxpayers and gives a broad definition of PE.
- **Section 130 of the ITL:** Refers to Section 15 to test the arm's length nature of transactions carried out by a foreign PE of a local taxpayer and define economic relationship for such PE.
- **Section 2 of the Law of Fiscal Procedures (Law 11.683):** The economic reality principle (substance over form) for the application of tax laws.

Rules by means of regulations (decrees, manuals, position papers, etc.)

- **Regulatory Decree of the ITL:** Regulates criteria for transfer pricing analyses (i.e. definition of the TP methods, comparability factors and comparability adjustments, the mandatory use of the inter-quartile range), provides a list of tax havens and provides specific regulations on the transfer pricing method applicable to export of commodities through an international intermediary.
- **General Resolution 1122/01 by Federal Administration of Public Revenues (Administración Federal de Ingresos Públicos –AFIP):** Regulates the most appropriate method rule; content requirements for transfer pricing documentation, which must be submitted yearly to the tax authorities and attested by a CPA, and other formal obligations; assumptions on the existence of economic relationships; the obligation to submit tax returns relating to intercompany transactions and to export and import transactions with unrelated parties.
- **Internal Instruction 747/2005 by AFIP:** Provides guidance to the tax auditors on how they should evaluate financial transactions.

Rules by means of case law (most relevant ones)

- **Laboratorios Bagó:** Implications regarding the transfer pricing audit process, including the acceptance of secret comparables, comparability issues and the quality of comparables’ financial data.
- **Ericsson case:** Implications regarding contractual formalities within related parties, the evaluation of arm's length leverage and the use of internal comparables for the analysis of financial transactions.
- **Volkswagen case:** The Tax Court used the OECD Guidelines for interpretative guidance.

Specific rules PE context

- **Sections 14 of the IT:** The attribution of profit to PEs of foreign enterprises and the arm’s length principle.
- **Section 129 of the ITL:** The attribution of profit to foreign PEs of a local taxpayer.

Accounting records of PEs should be kept separately from those of the home office and other PEs abroad of the same home office. If separate accounting records do not properly reflect the Argentinean-source income of a PE, the AFIP may determine it on the basis of the accounting records of the home office or on other appropriate indexes.
In order to document the arm’s length nature of the transactions carried out by the PE with its home office, other PEs of the same entity and/or related entities abroad, the transfer pricing methods set out in Section 15 of the ITL are applicable. Nevertheless, since neither the legislation nor the regulations contain directions on how to carry out separate accounting, it is not clear whether or not the AFIP will use the OECD PE Report as interpretative guidance to determine the income of PEs.

**Thin capitalisation**

**Rules by means of legislation and regulations**

- **Article 81 of the ITL:** The payment of interest on loans received from foreign entities different than regulated banking institutions are subject to a 35% WHT rate (100% is deemed to be Argentine source income for the foreign entity). As such, thin capitalisation rules apply only to loans granted to an Argentine taxpayer by a related bank abroad (which interests are subject to a lower withholding rate).

  When thin capitalisation rules apply, interest is deductible up to the proportion, at the year-end closing date, of the total amount of the liability generating the interest (excluding any liability corresponding to interest whose deductibility is not conditioned) being twice the amount of the net worth at that date.

**What is the effect of the rules on the deduction of interest?**

Any excess interest, as defined by the thin capitalisation rules, is not tax deductible and will be treated as dividend. Equalisation tax may apply on the excess interest.

**Are there additional rules on the tax deductibility of interest/guarantee fees (e.g. safe harbours)?**

In order to be tax deductible, interest must be paid prior to the income tax return filing (i.e. no tax deduction on accrued interest).

**Intercompany loans**

**How is the arm’s length nature of an intercompany loan evaluated?**

In order to determine the arm’s length nature of intercompany loans, the transfer pricing methods of Section 15 of the ITL should, in principle, be applicable; however, there are not specific provisions for intercompany loans. Furthermore, according to Section 21.2 of the ITL’s Regulatory Decree, to assess the comparability in the case of financial transactions, factors such as the amount, term, collateral, debtor’s creditworthiness and capacity of repayment, the interest rate, commissions and any other administrative fee must be taken into account.

When conducting transfer pricing audits, the AFIP has not only sought to challenge the interest rate on intercompany loans, but they have tried to re-characterise the nature of the transactions as well, aiming to not only reject the deduction of interest expense, but also any foreign exchange loss that might exist. Thus, being able to prove that the formal aspects of the transaction (a written agreement which date could be proved as certain in terms of the Civil Code), the terms and conditions and the economic rationale under the transaction are at arm’s length is a key element to support the taxpayer’s position.
Argentina

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?

Internal Instruction 747/2005 by AFIP provides guidance to the tax auditors on how they should evaluate financial transactions. Among other things, they should deem that the relevant transaction is not a loan when: (1) there is not a written agreement (through public or private instrument) with certain date in terms of the Civil Code; (2) the transaction has no maturity and it has not been repaid; (3) it is obvious that the lender does not expect repayment; (4) the loan has no relation with assets (paragraph 25 of Article 10 of OECD Model Tax Convention); and (5) lack of evidence of the inflow of the funds in the country.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>×</td>
</tr>
</tbody>
</table>

According to PwC experience, so far the AFIP has not accepted methods other than the CUP in their transfer pricing audits. The AFIP has informally expressed that they will not accept bank quotes as comparable transactions. Nevertheless, taxpayers could use bank quotes as additional evidence (not as primary documentation method).

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
</tbody>
</table>

There are neither regulations in this respect nor practical experience on the approaches preferred/accepted by the AFIP. General transfer pricing practice indicates that any of the above-mentioned approaches might be useful, depending on the facts, circumstances and available information to a particular transaction.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

There are neither regulations in this respect nor practical experience on the approaches preferred/accepted by the AFIP.

Are foreign comparables accepted?

Although the AFIP prefers the use of domestic comparables (e.g. information published by the Central Bank), foreign comparables are accepted as well.
**Cash pool**

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?**

Although there is no clear guidance from the AFIP in this respect, applying the external CUP method is common practice.

The interest rates applied must be aligned with the terms and conditions of the transactions. For example, the AFIP has not challenged a short term low interest rate in a cash pool where the taxpayer was able to prove that most parts of the investment of the cash pool leader (CPL) were in low risk and highly liquid assets (e.g. treasury bills, commercial papers of AAA-rated companies, etc.). On the other hand, the AFIP has re-characterised the transaction into a medium term loan when no significant movements have taken place in the taxpayer’s account.

The AFIP has focused their transfer pricing audits on the arm’s length nature of the management behaviour; i.e. they have required evidence that the management performed ex-ante an opportunity cost analysis, evaluating whether to invest in the cash pool vis-à-vis alternative investments (in assets or liability reduction).

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?**

The CPLs are typically outside of Argentina; and the tested party must always be the local entity by local rules.

**Intercompany guarantees**

**What is your tax authority’s approach towards recognising guarantees?**

The AFIP only recognises explicit financial guarantees that comply with the applicable contractual formalities and provided that the guarantee fee and terms and conditions of the guarantee are at arm’s length. The tax deduction of fees relating to implicit guarantees or explicit guarantees lacking proper contractual formalities is likely to be challenged by the AFIP.

**How is a guarantee fee characterised?**

Guarantees are generally considered as services and treated separately from the interest expense. For example, given that the source of the guarantee income is determined by the location of the assets that backs such guarantee, if a foreign related party guarantees a loan received by a local company from other foreign entity, the interests would be deemed as Argentine-source income while the guarantee fees would be considered as foreign-source income. Nevertheless, a recent Tax Court ruling regarding WHT has established that guarantees are accessory to the principal, since they are dependent for their existence upon the principal obligation guaranteed.

**To what extent are implicit guarantees recognised?**

There have been no precedents so far and there is no guidance from the AFIP on this point.

---

6 Hidroeléctrica el Chocón S.A. vs. Administración Federal de Ingresos Públicos.
How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
There is no guidance from the AFIP or specific practical experience regarding this matter.

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
The comments made above for intercompany loans are applicable to intercompany guarantees as well, in the sense that not only the guarantee fee must be at arm’s length, but also the other terms and conditions of the guarantee, and there must be an economic rationale for the guarantee.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?
There is no guidance from the AFIP regarding the analysis of guarantee fees. There is no tax audit experience either. Nevertheless, considering financial transactions audit experience, even though the CUP would be preferred, any other approach could be followed provided that they are applicable to the facts, circumstances and information available.

Are foreign comparables accepted?
Foreign comparables are generally accepted by the AFIP.

Documentation

Documentation requirements
A report containing the following information must be prepared and submitted yearly to the AFIP by the taxpayer:

- Activities and functions performed by the taxpayer;
- Risks borne and assets used by the taxpayer in carrying out such activities and functions;
- Detail of elements, documentation, circumstances and events taken into account for the transfer pricing analysis;
- Detail and quantification of transactions performed covered by General Resolution 1122/01;
- Identification of the foreign parties with which the transactions being declared were carried out;
- Method used to justify transfer prices, indicating the reasons and ground for considering them to be the best method for the transaction involved;
- Identification of each of the comparables selected for the justification of the transfer prices;
- Identification of the sources of information used to obtain such comparables;
- Detail of the comparables selected that were discarded, with an indication of the reasons considered;
- Detail, quantification and methodology used for any necessary adjustments to the selected comparables;
- Determination of the median and the inter-quartile range;
- Transcription of the income statement of the comparable parties corresponding to the fiscal years necessary for the comparability analysis with an indication as to the sources of the information;
• Description of the business activity and features of the business of comparable companies; and
• Conclusions reached.

The report must be signed by the taxpayer and an independent public accountant whose signature must be authenticated by the corresponding professional body.

There are no specific documentation requirements for intercompany loans or guarantees. Special attention must be paid on formal agreements.

**When does documentation need to be available?**
Transfer pricing documentation must be submitted to the tax authorities on the eighth month after the fiscal year ending. Nevertheless, any adjustment that might be applicable must be included in the taxpayer’s income tax return, due in the fifth month after the fiscal year ending; thus, the transfer pricing analysis should be performed prior to this date.

**What is the deadline for submitting the documentation?**
Documentation together with a special tax return detailing intercompany transactions must be submitted between day three and seven of the eighth month after the taxpayer’s fiscal year ending.

**In which language should the documentation be prepared?**
Documentation must be in Spanish. Any document in a foreign language must be accompanied by its public translation.

**Advance certainty**

*Are APAs/ATRs available?*
There are no APAs or ATRs available.
Brazil

Transfer pricing rules and regulations
Rules by means of legislation
• Law 9, 430/1996.

Rules by means of regulations (decrees, manuals, position papers etc.)
• Normative Ruling 1,312/2012.

Specific rules PE context
There is no specific provision in the Brazilian legislation regarding PE characterisation. This subject is usually treated in tax treaties settled with other countries and such provisions only apply to those countries.

Thin capitalisation
Rules by means of legislation and regulations
• Law 12.249/2010 and Normative Ruling 1.154/2011. As a general rule, a 2:1 Debt-to-Equity ratio must be observed in order to treat interest that is due to foreign related companies as deductible for Brazilian tax purposes (Corporate Income Tax and Social Contribution on Net Income). This is a general rule for countries where the foreign related company is not located in a tax haven jurisdiction. In this regard, it is necessary to compare the total debt (on both a standalone and a consolidated basis) with the respective equity participation of the foreign company in the Brazilian company. If such debt exceeds 2 times the equity participation, the difference is considered as an ‘unnecessary expense’ and is therefore not deductible for local income tax purposes. If the related entity has no participation in the Brazilian entity equity, a 2:1 Debt-to-Total Net Equity ratio must be observed.

A stricter limit has been created whenever interest is owed to individuals or entities that are resident, domiciled or incorporated in tax havens. Where the total debt with a tax haven based lender exceeds 30% of the total net equity of the Brazilian company (also calculated on both a standalone and consolidated basis), the respective excess is considered as an unnecessary expense and therefore is not deductible for tax purposes in Brazil.

The thin capitalisation rules also apply when the related person is not the creditor, but simply acts as a guarantor, surety provider, representative or intervening party.

What is the effect of the rules on the deduction of interest?
A tax deduction relating to the interest expense associated with debt which is over and above the limits provided by legislation will be disallowed for corporate tax purposes and the excess of interest will be adjusted in the income tax calculations.

Are there additional rules on the deductibility of interest/guarantee fees (e.g., safe harbours)?
As a general rule, payments to beneficiaries residing in tax haven jurisdictions or to legal entities with privileged tax regime will be treated as non-deductible expenses, unless the following requirements are met:
1. identification of the actual beneficiary of the entity abroad that will receive the payments made by the Brazilian payer;
2. evidence of the operational capacity of the individual or legal entity abroad to carry out the transaction (substance); and
3. documentary evidence of payment of the respective price and receipt of the goods or rights or the use of services.

**Intercompany loans**

**How is the arm’s length nature of an intercompany loan evaluated?**

The Brazilian transfer pricing legislation only establishes minimum revenue and maximum expenses in relation to the loan agreements subject to transfer pricing rules. As of 2013, where the lender is abroad and therefore interest is paid to a related party abroad, or to a beneficiary located in a low tax jurisdiction or under a privileged tax regime, the interest will be deductible up to the amount that does not exceed the rate determined based on the following rules, plus a spread of 3.5%:

1. in the case of a transaction in US dollars subject to fixed interest rate: rate of Brazilian sovereign bonds issued in US dollars in foreign markets;
2. in the case of a transaction in Brazilian Reais subject to fixed interest rate: rate of Brazilian sovereign bonds issued in Brazilian Reais in foreign markets; and
3. in all other cases: LIBOR for the period of 6 (six) months, considering the specific LIBOR rate for each currency.

Also, the deductibility limit must be verified on the contract date and it will apply during the full contract term.

The tax authorities are expected to issue further regulations with respect to the criteria for the selection of the Brazilian sovereign bonds that should be considered as benchmark for the interest rates, considering that there are several types of bonds in the market. This further guidance has not been issued until now.

It should be noted that for loan transactions in which a Brazilian entity is the lender, for the calculation of the minimum interest income, the same rates described above will apply however the spread to be added to them is 2.5% for contracts settled from the 3 August 2013 onwards. The spread for the transactions contracted between 1 January to 2 August 2013 is 0%.

**Cash pool**

**How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?**

There are no specific provisions on the Brazilian transfer pricing legislation regarding cash pools.

**Intercompany guarantees**

**What is your tax authorities approach towards recognizing guarantees?**

Guarantees granted or contracted are not subject to specific Brazilian transfer pricing rules. The only exception is if guarantees are contracted as service; in this case they would be subject to the Brazilian services transfer pricing rules.
Brazil

**Documentation**

**Documentation requirements**
The taxpayers should provide information regarding the transactions (importation of goods, services and rights) carried out, the ones subject to transfer pricing, the transfer pricing methods adopted and the transfer pricing adjustments on the income tax calculations once a year through the Income Tax Return.

The taxpayers should also maintain all the documents related to the transfer pricing transactions and make it available to the tax authorities if requested in an audit.

**When does documentation need to be available?**
The documentation should be available during the statute of limitations, which is 5 years from the register of the expense or revenue derived from the loan agreements.

**What is the deadline for submitting the documentation?**
The Income Tax Return for a specific fiscal year should be usually submitted by the taxpayers to the tax authorities on or before 30 June of the following year. Therefore, in the case that the loan agreements are subject to transfer pricing adjustments, they should be disclosed in the Income Tax Return.

**In which language should the documentation be prepared?**
Portuguese.

**Advance certainty**

**Are APA’s/ATR’s available?**
There are no APAs and ATRs available.
Canada

Transfer pricing rules and regulations
Canadian transfer pricing legislation and administrative guidelines are generally consistent with the OECD Guidelines. Statutory rules require that transactions between related parties occur under arm’s length terms and conditions. Penalties may be imposed where contemporaneous documentation requirements are not met. In the area of financial transactions (i.e. intercompany loans, guarantees, accounts receivable factoring and cash pooling structures), three transfer pricing cases have been litigated; this is expected to increase given the number of relevant cases currently working their way through the courts.

Rules by means of legislation

• **Section 247 – general transfer pricing guidance:** The Canadian statutory rules on transfer pricing in section 247 of Canada’s Income Tax Act (ITA) are effective for taxation periods beginning after 1997. These rules embody the arm’s length principle.

  ‘Transfer price’ is broadly defined to cover the consideration paid in all related party transactions, including intercompany loans, guarantees, accounts receivable and cash pooling structures.

  Transactions between related parties will be adjusted where the terms and conditions differ from those that would have been established between arm’s length parties. That is, the nature of the transaction can be adjusted (or re-characterised) in circumstances where it is reasonable to consider that the primary purpose of the transaction is to obtain a tax benefit. A reduction, avoidance or deferral of tax (or increase in a refund of tax) will be viewed to be a ‘tax benefit’.

  The legislation does not provide specific guidelines or safe harbours to measure arm’s length; rather, it leaves scope for the application of judgment. The best protection against a tax authority adjustment and penalties is to maintain contemporaneous documentation. The nature of the documentation required to avoid penalties is described in the legislation.

  Note that subsection 247(7) excludes certain intercompany loans from these arm’s length requirements, i.e. intercompany loans made by a Canadian corporation to certain controlled foreign affiliates (CFA), provided that the CFA uses the funds loaned to earn income from an active business. In addition, the proposed subsection 247(7.1) extends these exclusions to guarantee fees provided in similar circumstances (i.e. the guarantee is provided by a Canadian corporation to certain CFAs and the funds guaranteed are used to earn income from an active business). While the proposed subsection has not yet been ratified, both the Department of Finance and the CRA are following the proposed legislation.

• **Other general provisions:** Section 67 of the ITA contains a general provision restricting the deductibility of expenses to amounts that are reasonable in the circumstances, and section 18(1)(a) restricts the deduction of expenses to those incurred for the purpose of gaining or producing income from a business or property.
A general anti-avoidance rule (GAAR) (ITA section 245) can apply to any transaction considered to be an avoidance transaction. The CRA may apply this section in transfer pricing situations if section 247(2) does not apply.

- **Legislation relating to intercompany debt:** The following legislation applies to intercompany debt and interest charges:

  - **Section 20(1)(c) – Deductibility of interest:** This provision applies to all loans and indebtedness owed by a Canadian taxpayer. Simple interest is deductible under section 20(1)(c) when it is paid or payable in respect of the year (depending upon the method regularly followed by the taxpayer) pursuant to a legal obligation. Furthermore, the loan or indebtedness giving rise to the interest must have been borrowed to be used for the purpose of earning income from a business or property, to acquire property for the purpose of gaining or producing income from the property, or to acquire property for the purpose of gaining or producing income from a business. In addition to meeting the above criteria, interest on borrowed money will be deductible only to the extent that it is reasonable under the circumstances. In determining whether an interest rate is reasonable, consideration should be given to prevailing market rates for debts with similar terms and credit risks (Shell Canada Limited v. Canada, [1999] 3 S.C.R. 622).

  - **Section 20(1)(d) – Deductibility of compound interest:** This provision limits the deductibility of compound interest to only when it is paid (as opposed to simple interest, which is deductible when payable). Compound interest is not ‘interest on borrowed money’ as defined in section 20(1)(c) and is therefore covered under section 20(1)(d).

  - **Section 20(1)(e) and 20(1)(e.1):** Deductibility of financing expenses and annual fees – These provisions allow deductions related to financing expenses incurred “in the course of borrowing of money used by the taxpayer for the purpose of earning income from a business or property.”

  - **Section 15(2) – Loan treated as a dividend:** This provision applies where a loan or any other indebtedness owing to a corporation resident in Canada by a non-resident shareholder or a non-resident person not acting at arm’s length with a non-resident shareholder has not been repaid within one year (i.e. 365 days) from the end of the corporation's tax year in which the indebtedness arose. Where this provision applies, the amount is deemed to have been paid as a dividend and is subject to non-resident withholding tax of 25%. The withholding tax may be reduced depending on the provisions of a relevant tax treaty.

  - **Section 17 – Deemed interest income:** Where a loan or other indebtedness owing from a non-resident to a corporation resident in Canada is outstanding for one year (i.e. 365 days) or longer without a reasonable rate of interest being charged, the corporation is deemed to earn income from the loan or other indebtedness computed at a prescribed rate of interest and this amount, net of any interest actually received, is included in the corporation’s income for tax purposes. Section 17 does not apply, however, if section 15(2), as described above, applies to the loan or indebtedness and a refund of the withholding tax has not been received by the non-resident.

  - **Section 18(4) – Thin capitalisation:** The thin capitalisation rules can result in the permanent denial of an interest expense deduction to a corporation resident in Canada (see Thin capitalisation section, below).
Rules by means of regulations (decrees, manuals, position papers, etc.)
The legislation is supported by administrative guidelines in the CRA's Information Circular 87-2R (IC 87-2R) and Transfer Pricing Memoranda (TPM-02 through TPM-12). IC 87-2R is cross-referenced to the OECD Guidelines.

IC 87-2R describes the following five arm's length pricing methods recognised by the CRA: comparable uncontrolled price (CUP), cost plus, resale price, profit split and the transactional net margin method (TNMM). The CRA examines the application of the method selected by a taxpayer to ensure that it produces the most reliable measure of an arm's length result (IC 87-2R paragraphs 47 to 63).

IC 87-2R is general in nature and does not provide specific guidance with respect to intercompany loans, guarantees and cash pooling arrangements.

Relevant transfer pricing case law
• General Electric Capital Canada Inc. v. The Queen 2009 TCC 563 (FCA decision at 2010 FCA 344)

• Facts: This transfer pricing case involves the deductibility of guarantee fees paid by a subsidiary to its parent. During its 1996 to 2000 taxation years, General Electric Capital Canada Inc. (GECC) deducted CAD136 million in guarantee fees paid to General Electric Capital Corporation (GECUS), its US-based parent company, for explicitly provided financial guarantees. The Minister disallowed the deductions on the basis that the fees provided no value to the taxpayer. The Tax Court of Canada (TCC) allowed GECC's appeals and ordered that the Minister's reassessments be vacated, finding that the 1% guarantee fee paid was equal to or below an arm's length price. The Crown appealed, contending first that the TCC judge made a number of legal and factual errors and second that his behaviour during the trial gave rise to a reasonable apprehension of bias against the Crown's position. The Crown asked that the matter be remitted for a new trial before a different judge. The Federal Court of Appeal (FCA) dismissed the Crown's appeal, finding no errors of fact or law and no procedural bias.

• TCC decision: The TCC decision was in many ways a compromise between the position of the Crown and that of the taxpayer. The Crown argued that GECC did not benefit from the explicit guarantee because of the 'implicit' guarantee that existed by virtue of the parent-subsidiary relationship and, therefore, no payment was required for the explicit guarantee. GECC argued that although such implicit support is recognised in the market, it is a factor inherent in a non-arm's length relationship and as such cannot be considered under the arm's length principle. The TCC rejected both positions, finding that the implicit support derived from GECC being a member of the GE family was a relevant factor that should be considered as part of the circumstances surrounding the transaction. However, even after considering the implicit support, the TCC found, using the 'yield' approach, that there was significant benefit from the explicit guarantee. Because the benefit exceeded the price charged for the guarantee, the TCC found in favour of the taxpayer.
• **Crown’s appeal:** The Crown identified the following four errors of law:

1. The judge failed to identify the relevant transaction because he took into account a fact that did not exist, namely the removal of the explicit guarantee and its impact on GECC’s cost of borrowing.
2. The judge erred in preferring the evidence of GECC’s expert to that of the Crown’s insofar as the GECC expert failed to address certain significant characteristics relevant to assessing the value of the guarantee.
3. The judge failed to conduct a reasonableness check.
4. The judge should not have relied on the business judgment of a former GECC executive because it was subjective.

As noted above, the Crown also contended that the judge’s behaviour during the trial gave rise to a reasonable apprehension of bias against it.

All of these arguments were dismissed by the FCA. The bias argument was rejected on the grounds that the behaviour in question (i.e. the TCC judge engaging in ‘excessive pursuit’ of the possible impact of a removal of the guarantee) related to an issue that had ‘no substantial connection with the outcome’ of the trial.

• **GECC’s appeal:** GECC argued that the judge misapplied the relevant transfer pricing law when he reduced the arm’s length price of the guarantee on account of implicit support. Specifically, implicit support cannot arise if the parties are assumed to be truly arm’s length. It arises only as a result of the non-arm’s length relationship that must be ignored under the arm’s length principle. GECC also argued that the TCC judge erred by adopting the yield or ‘benefit to the borrower’ approach instead of focusing on a market price for the guarantee. Because market participants would have charged up to 300 basis points to guarantee the debt, the yield approach undervalued the guarantee.

The FCA rejected both arguments, stating that the concept underlying subsections 69(2) and 247(2)(a) and (c) is simply “to ascertain the price that would have been paid in the same circumstances if the parties had been dealing at arm’s length.” This determination involves “taking into account all the circumstances which bear on the price, whether they arise from the relationship or otherwise.”

The FCA discussed the statutory objective, “which is to prevent the avoidance of tax resulting from price distortions which arise in the context of non-arm’s length relationships.” Further, “the elimination of these distortions by reference to objective benchmarks is all that is required to achieve the statutory objective.” In this case, because implicit support is a factor that an arm’s length person would find relevant in pricing a guarantee, the FCA’s view was that it had to be considered, and that ignoring it would be turning “a blind eye on a relevant fact and deprive the transfer pricing provisions of their intended effect.”

The FCA judge also cited another transfer pricing case, the GlaxoSmithKline Inc. decision, which found that all relevant circumstances must be taken into account when determining an arm’s length price, and that “there is no doubt that the existence of the implicit guarantee is relevant to the inquiry and must be considered in identifying the arm’s length price.”

On the matter of which approach is appropriate, the FCA took the view that if the explicit guarantee provided no benefit, “an arm’s length party standing in the
shoes of [GECC] would not have paid anything towards it.” It further found that “the assessment of the benefit is but a means to ascertain whether a guarantee fee would have been paid by an arm’s length party.”

This responded to only one question – whether an amount should be paid at all – but did not address whether the yield approach should on its own be used to establish the arm’s length price.

In conclusion, the FCA rejected all appeal issues raised by both the Crown and GECC and dismissed the appeal.

• **Other cases:** Two other financial transaction cases were heard by Canadian courts in 2011/2012.

At issue in *McKesson Canada Corporation v. The Queen* was whether the discount rate for factoring accounts receivable agreed to by related parties differed from the rate that would have been agreed to had the parties been dealing at arm’s length. A decision is pending.

In *The Queen v. GE Canada Company*, the Crown is seeking to disallow guarantee fees paid by the taxpayer’s predecessors to their US parent, arguing that the guarantees serve no commercial purpose and as such would not have been entered into by arm’s length parties. (See GECC case, above; GE Company is the successor to GECC by amalgamation and inherited its debts).

**Specific rules in the PE context**

The PE rules are provided in Income Tax Regulations (ITR) 400, and the Canadian tax authorities follow the guidance provided by the OECD in its position papers on the allocation of profits to a PE.

**Thin capitalisation**

**Rules by means of legislation and regulations**

The thin capitalisation rules are provided in section 18(4) of the ITA. These rules can result in the permanent denial of an interest expense deduction to a corporation resident in Canada.

For taxation years beginning on or after January 1, 2013, where a corporation resident in Canada has average ‘outstanding debts to specified non-residents’ that exceed one and a half times the corporation’s equity (as defined for the purposes of the thin capitalisation rules), a portion of the related interest expense is not deductible in computing the corporation’s income for tax purposes. It should be noted that the disallowed portion of the interest expense is permanently disallowed.

For taxation years starting before January 1, 2013, the thin capitalisation rules specified a debt-to-equity limit of two to one.

‘Outstanding debts to specified non-residents’ is a defined term and generally refers to interest bearing debts or other obligations owed either to non-resident shareholders who own (together with related persons) 25% or more of the voting shares of the corporation, or to persons related to such shareholders. The average of such debts is determined using the greatest amount of such debt outstanding at any time during each calendar month that ends in the year.
‘Equity’ is defined to include:

- the retained earnings of the corporation as at the beginning of the year, except to the extent that those earnings include retained earnings of any other corporation;
- the average of all amounts, each of which is the corporation’s contributed surplus (determined, in the CRA’s view, in accordance with Canadian generally accepted accounting principles) at the beginning of each calendar month that ends in the year, to the extent that it was contributed by a specified non-resident shareholder of the corporation; and
- the average of all amounts, each of which is the corporation’s paid-up capital at the beginning of each calendar month that ends in the year, excluding the paid-up capital in respect of shares of any class of the capital stock of the corporation owned by a person other than a specified non-resident shareholder of the corporation.

International groups whose Canadian operating company is a holding company should be cautious when a related non-resident makes a loan directly to the Canadian operating company. The Canadian operating company may not have direct non-resident shareholders and, accordingly, a portion or the entire amount of the interest could potentially become non-deductible under the thin capitalisation rules. Under certain circumstances the thin cap rules can apply in respect of loans received by a Canadian-resident corporation from a CFA. However, special taxation rules apply in respect of the passive income earned by a CFA, which can give rise to required inclusions in the income of Canadian-resident shareholders for tax purposes. The combined application of such rules with the thin cap rules may also trigger double taxation.

It should also be noted that because of the difference in timing with respect to including debt and equity in the statutory averaging formula, interest may become non-deductible even where equity and debt are contributed concurrently because the thin capitalisation calculation does not recognise increases in equity amounts until the beginning of the next calendar month.

What is the effect of the rules on the deduction of interest?
For taxation years beginning on or after January 1, 2013, where a corporation resident in Canada has average ‘outstanding debts to specified non-residents’ that exceed one and a half times the corporation’s equity (as defined for the purposes of the thin capitalisation rules), a portion of the related interest expense is not deductible in computing the corporation’s income for tax purposes. The interest expenses disallowed under the thin cap rules are deemed to be dividends for non-resident withholding tax purposes.

**Intercompany loans**

How is the arm’s length nature of an intercompany loan evaluated?
As with the OECD Guidelines, the Canadian transfer pricing rules do not provide specific guidance with respect to evaluating the arm’s length nature of an intercompany loan. However, the Canadian transfer pricing rules provide general guidance that applies to all intercompany transactions, such that transactions between related parties will be adjusted where the terms and conditions differ from those that would have been established between arm’s length parties.

The Canadian tax and transfer pricing rules are considered to be more form-based than substance-based. There is no requirement to demonstrate that the borrower would have been able to secure the borrowing from a non-arm’s length party, insofar as the
borrower’s debt-to-equity ratio is not higher than the maximum prescribed by the thin cap rules (see above) for the purposes of deductibility.

Once the interest is considered to be deductible under the thin cap rules, the terms and conditions of the loan – including the interest rate – should be consistent with what would have been established between arm’s length parties. There is no specific guidance provided by the law or administratively on how an arm’s length interest rate should be determined. In Shell Canada Ltd. v. Canada, [1999] 3 S.C.R. 622, the Supreme Court of Canada (SCC) found that when a rate of interest is “established in a market of lenders and borrowers acting at arm’s length from each other, it is generally a reasonable rate.” Where the parties are not dealing at arm’s length, an interest rate established by reference to “a market of lenders and borrowers acting at arm’s length from each other” is expected to provide an arm’s length result.

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?
The Canadian transfer pricing rules under section 247 refer specifically to the terms and conditions of the intercompany transaction in evaluating the arm’s length nature and setting the arm’s length price. The CRA has increasingly focused on the arm’s length nature of the general terms and conditions of intercompany loans, such as the term to maturity and the prepayment option. For example, recently (i.e. in a declining interest environment), the CRA has routinely questioned whether a borrower dealing at arm’s length would have refinanced high interest rate debt to take advantage of record low market interest rates.

Furthermore, all terms and conditions of an intercompany loan should be considered in evaluating an arm’s length interest rate.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>×</td>
</tr>
<tr>
<td>Build-up approach</td>
<td>□</td>
</tr>
<tr>
<td>Other</td>
<td>√</td>
</tr>
</tbody>
</table>

Internal and external CUP information is preferable when evaluating an arm’s length interest rate. Generally, the CRA follows a hierarchy of methods where the CUP method is given priority over other methods and internal CUPs are given priority over external CUPs. In addition, the CRA, at field audit level, has proposed a build-up approach (i.e. risk free rate, plus credit risk premium, plus term risk premium). It should be noted, however, that the components of the build-up approach also necessarily rely on internal and external CUP data.

While a bank quote might be used as an indication of an arm’s length price, unconsummated transactions are generally not accepted as evidence of comparable uncontrolled prices. Any other method may be acceptable under the Canadian transfer pricing rules as long as it can be demonstrated to provide a more reliable indication of an arm’s length price than the CUP method.
What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td></td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
<tr>
<td>Other</td>
<td>√</td>
</tr>
</tbody>
</table>

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

The consideration of passive association, or implicit support, was a cornerstone of the TCC’s decision in the GECC case. The credit rating methodology espoused by the court, which was later upheld by the FCA, is to adjust the standalone credit rating estimate for the borrower for consideration of passive association benefits. The court did not provide guidance on how such passive association or implicit support should be quantified, suggesting that the adjustment depends on the unique facts and circumstances of each case.

Are foreign comparables accepted?

Yes, to the extent the market is sufficiently comparable. Given that Canadian markets are significantly smaller than US markets and that larger Canadian borrowers regularly raise debt in US markets, the use of US-based comparables is fairly common.

Cash pool

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?

The terms and conditions of the deposits and borrowings should be at arm’s length for both the debtor and the creditor. The pricing of any non-arm’s length aspect of a cash pooling arrangement may be adjusted if it creates an advantage to the Canadian taxpayer (i.e. imputation of interest income or disallowance of interest expense). Long-term balances with the cash pool may be re-characterised into long-term loans.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?

Borrowing and deposit rates should be established based on the specific facts and circumstances of the transaction (creditworthiness, terms and conditions, etc). The transfer pricing methodologies generally accepted in this respect are the same as those generally accepted in establishing the arm’s length interest rates on intercompany loans.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the cash pool leader?

In the case of a notional cash pool, remuneration for the cash pool leader is typically considered a service fee. In the case of a target balancing cash pool, remuneration is typically considered the difference between interest income and interest expenses (and other related financial expenses).
**Intercorporate guarantees**

What is your tax authority’s approach towards recognising guarantees?
As discussed above, guarantees are recognised on a facts and circumstances basis and are therefore considered a contentious transaction in Canada.

How is a guarantee fee characterised?
Generally, financial guarantees are recognised as interest. However, for withholding tax purposes, a disallowed guarantee fee is considered a deemed dividend and withholding tax rates applicable to dividends would apply.

To what extent are implicit guarantees recognised?
As discussed in the context of intercompany loans, the consideration of passive association, or implicit support, was a cornerstone of the TCC’s decision in the GECC case.

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
As noted above, the credit rating methodology espoused by the TCC and upheld by the FCA is to adjust the standalone credit rating estimate for the borrower for consideration of passive association benefits. The court did not provide guidance on how such passive association or implicit support should be quantified, suggesting that the adjustment depends on the unique facts and circumstances of each case.

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
The terms and conditions of the guarantee should be arm’s length. If this is not the case, the relevant terms and conditions may be amended, which could result in a disallowance of the deduction made for the guarantee fees paid.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>√</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>√</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>×</td>
</tr>
<tr>
<td>CUP approach</td>
<td>√</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>√</td>
</tr>
<tr>
<td>Other</td>
<td>√</td>
</tr>
</tbody>
</table>

Any approach that provides a reliable indication of an arm’s length result is expected to be acceptable under the Canadian transfer pricing rules. In the GECC case, the TCC preferred the benefit approach using a yield analysis for its simplicity. Despite rejecting the other approaches for their various shortfalls and perceived complexity, the court did not suggest that these methods were inherently poor determinants of an arm’s length guarantee fee.
Are foreign comparables accepted?
Yes, to the extent the market is sufficiently comparable. Given that Canadian markets are significantly smaller than US markets and that larger Canadian borrowers regularly raise debt in US markets, the use of US-based comparables is fairly common.

Documentation
Documentation requirements
The CRA continues to pursue a relatively aggressive programme of transfer pricing enforcement. Any transfer pricing adjustment may be subjected to a 10% penalty, with some de minimis exceptions, unless the taxpayer has made reasonable efforts to determine and use arm’s length prices. This requires contemporaneous documentation to be on hand when the tax returns for the year are due (i.e. six months after the end of the taxation year for corporations).

At a minimum, the taxpayer should have a complete and accurate description of the following:

• The property or services to which the transaction relates.
• The terms and conditions of the transaction and their relationship, if any, to the terms and conditions of other transactions entered into between the participants in the transaction.
• An organisation chart – the identity of the participants in the transaction and their relationship to each other at the time the transaction was entered into.
• A functional analysis – the functions performed, property used or contributed and the risks assumed in respect of the transaction by the participants in the transaction.
• The data and methods considered and the analysis performed to determine the transfer prices or the allocations of profits or losses or contributions to costs, as the case may be, in respect of the transaction.
• The assumptions, strategies and policies, if any, that influenced the determination of the transfer prices or the allocation of profits or losses or contributions to costs, as the case may be, in respect of the transaction.

Where contemporaneous documentation has been prepared for a prior year, the ITA provides that only those items that pertain to a material change in respect of a transfer pricing transaction must be addressed.

Are there any specific documentation requirements for intercompany loans/guarantees in addition to the regular documentation requirements?
There are no specific documentation requirements for intercompany loans and guarantees in addition to the regular documentation requirements.

When does documentation need to be available?
The documentation should be prepared by the tax-return filing deadline (i.e. six months after the end of the taxation year for corporations).

What is the deadline for submitting the documentation?
The documentation does not need to be submitted to the CRA unless requested. To safeguard against transfer pricing penalties, the taxpayer is required to submit documentation to the CRA within three months a formal written request from the CRA for contemporaneous transfer pricing documentation.
In which language should the documentation be prepared?
Where the documentation submitted is in a language other than English or French, the taxpayer must provide an official translation within 30 days of a request from the CRA.

Advance certainty
Are APAs available?
A Canadian business may request an APA for any intercompany transaction, including intercompany loans and guarantees.

Where does the request for the APA need to be filed?
The request for an APA should be filed with the Director General of the International Tax Division of the CRA and the Assistant Director of Compliance Programs of the responsible tax services office.

What information is typically required?
The following information is typically required:

- The global organisational structure of the multinational enterprise and the industry in which it operates.
- The parties, participants, transactions and transaction flows proposed to be covered.
- The transfer pricing, audit and reassessment history and related domestic or foreign tax audit issues and status.
- The history of competent authority issues, requests and settlements.
- The reasons for requesting the APA.
- Relevant transfer pricing policies, methodologies, practices and accounting systems and policies.
- The TPMs contemplated under the APA and the underlying rationale.
- The impact of the proposed TPMs on taxable income.
- Relevant key interpretative or technical taxation issues.
- The reasons for requesting a bilateral or multilateral APA, the countries involved and the nature and extent of previous communications with those tax administrations.
- The key individuals (including taxpayer’s officials or employees and any experts, advisors and other representatives) who will be involved throughout the APA process.
- Other information considered pertinent.

Term of the APA
Typically five years, but no set term.
Colombia

**Transfer pricing rules and regulations**

**Rules by means of legislation**
- Articles 260-1 to 260-11 of the Tax Code.

**Rules by means of regulations (decrees, manuals, position papers etc.)**
- Article 260-4, section 1, paragraph a) of the Tax Code states the following in relation to loan/funding transactions: “To determine whether the transactions are comparable or significant differences exist, the following attributes will be taken into consideration, depending on the transfer pricing method selected:

  In the case of loan/funding operations, elements such as the principal amount, term, risk rating, warranty, the creditworthiness of the lender and interest rate [are relevant]. Interest payments, regardless of the agreed rate, shall not be deductible if the comparability criteria announced [as above] are not fulfilled. The above, due to the fact that if the terms and conditions of the loan/funding operations are such that they are not in accordance with market practices, such transactions will not be considered as loans or interest, but as capital contributions and will be treated as dividends.”

**Specific rules PE context**
As of 1 January 2013, the Colombian internal legislation (Article 20-1 of Tax Code) incorporates the concept of PE. This concept follows the OECD criteria and means ‘a fixed place of business throughout which an entity carries out its activity, whether partially or totally’. A PE will also be incorporated when a person (other than an independent agent) has the capacity to conclude contracts on behalf of the foreign entity, except for preparatory and auxiliary activities. If a PE is incorporated, taxation is limited to domestic income attributable to the PE.

**Thin capitalisation**

**Rules by means of legislation and regulations**
As of 1 January 2013, the Colombian Tax Regime (Article 118-1 of Tax Code) has incorporated thin capitalisation rules, which establish a ratio of 3:1 for related or unrelated party interest-bearing debt (whether cross-border or domestic).

**What is the effect of the rules on the deduction of interest?**
The interests that are allocable to debt in excess of this ratio are considered to be permanently non-deductible. An exception applies for public services infrastructure projects, subject to a special purpose vehicle being used.

**Are their additional rules on the deductibility of interest/guarantee fees (e.g. safe harbours)?**
A withholding tax on the interest must be applied (33% on loans that have a term of less than one year, 14% on loans with a term of one year or more).
Inter-company loans

How is the arm’s length nature of an inter-company loan evaluated?
Although there are no specific provisions as to what methodology should be used, the Tax Administration in Colombia has focused audits on the analysis of the interest rate by applying the CUP method.

How is the arm’s length nature of the specific terms and conditions of an inter-company loan evaluated?
In the particular case of funding transactions between related companies, Article 260-4 from the tax code (paragraph 1, clause a) establishes the following comparability criteria for determining the arm’s length nature in such operations:

• Amount of the principal;
• Term;
• Risk rating;
• Guarantee;
• Solvency of the debtor; and
• Interest rate.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not Accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank Quotes</td>
<td>×</td>
</tr>
</tbody>
</table>

In the case of funding operations, the market conditions and comparability criteria mentioned in the preceding paragraph should be considered.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not Accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratio’s to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
</tbody>
</table>

There are no rules regarding this and very few audit experiences to determine whether there is a preferred approach accepted by the Tax Administration (DIAN). However, TP practice and general rules suggest that the above mentioned may be helpful.

How is passive association/implicit support taking into account in substantiating the arm’s length interest rate?
There are no rules regarding this and very few audit experiences to determine whether there is a preferred approach accepted by the Tax Administration (DIAN).
Are foreign comparables accepted?
Yes, foreign comparables are acceptable.

**Intercompany guarantees**

**What is your Tax Administration approach towards recognising guarantees?**
The guarantee, as a complementary agreement to a loan transaction, must be taken into account to evaluate whether the loan is arm’s length in nature. However, currently there are no other rules about related company guarantees.

**How is a guarantee fee characterised?**
Although there is no specific regulation, experience has shown that in most cases guarantees are not charged separately from the interest rate and the loan agreement, but rather as part of a combined interest rate.

**To what extent are implicit guarantees recognised?**
They are recognised if they are part of the loan contract and affect the determination of the remuneration rate.

**How is passive association/implicit support taking into account in substantiating the arm’s length guarantee fee?**
There are no transfer pricing rules in this matter.

**Documentation**

**Documentation requirements**
In general the supporting documentation must contain the following information as a minimum:

**General Information**
- Description of the taxpayer’s organisational and functional structure;
- General description of the business;
- Equity composition with name, Tax ID and ownership percentage of partners or shareholders;
- General description of the industry or sector where the company belongs to, indicating the taxpayer’s position in it; and
- Name, Tax ID, domicile, description of the business purpose and activity of the related parties including the cases of control or holdings. The fact that gives rise to the linking must be informed to DIAN and explicitly evident in the documentation.

**Specific Information**
- Detailed description of each type of transaction;
- For contracts or agreements: parties, purpose, term and prices must be specified;
- For transactions with residents or domiciled in tax havens: a copy of the documentation that certifies that the transaction was executed must be included;
- Functional analysis by type of transaction, including a short description of the activities, classification of used assets and inherent risks of the transactions, amongst others;
- General information about commercial strategies;
- Information of the industry and description of substitute goods or services;
- Political or legislative changes that could affect the result of the transaction;
- Method used by the taxpayer in the Transfer Pricing analysis, selected in accordance with the “best method” rule;
- Profit level indicator used in the analysis;
• Identification and determination of the comparable companies, information sources, inquiry dates and indication of the rejection criteria of non-accepted comparable companies;
• Description of technical adjustments and when needed, generic description of the principal differences between Colombian accounting practice and the accounting practices in those countries where the comparable companies are domiciled; and
• Detailed conclusions of the level of compliance with the arm’s length standard.

Annex Information
• Financial Statements.
• Balance Sheet, Profits and Losses statement, Production Costs Statement and Sales Costs Statement segmented by the type of transaction;
• Copy of the contracts or agreements engaged with foreign related parties; and
• In economic or special business situations, pertinent supporting information, such as marketing studies, projections and any other relevant reports must be attached.

Are there any specific documentation requirements for inter-company loans/guarantees in addition to the regular documentation requirements?
No.

When does documentation need to be available?
The supporting documentation must be submitted to the Tax Administration on a yearly basis, on the dates determined by the national government. This is usually the following July/August after fiscal years ending on 31 December.

In which language should the documentation be prepared?
The supporting documentation must be prepared and filed in Spanish.

Advance certainty
Are APA's/ATR’s available?
Article 260-10 of Tax Code establishes that the Tax Administration can execute APA’s with taxpayers in order to agree prices or profit margins of the different operations carried out with related parties.

Where does the request for the APA/ATR need to be filed?
The request for an APA must be filed at the Tax Administration’s offices.

Term of the APA
From 1st of January 2006 taxpayers have been able to request an APA. The regulations refer to:
• time limits with regard to the duration that an APA may be authorized by the Tax Administration;
• time limits for when a taxpayers could request an APA;
• rules relating to modification of an APA; and
• the cancellation of the agreement (amongst others).

The agreement can relate to transactions in the year that the APA is signed, the previous year and up to the three subsequent fiscal years.

The Tax Administration has a maximum term of nine months following the submission of the unilateral agreement application in order to perform the corresponding
analysis, request and receive amendments and clarifications, and to accept or reject the application. For bilateral or multilateral agreements, the term will be jointly defined between the competent authorities of the two or more States.

After agreeing to an APA, the taxpayer must present an annual report regarding the transactions covered by the agreement in the terms as established by the regulations.
Mexico

**Transfer pricing rules and regulations**

**Rules by means of legislation and regulations**

- 2013 tax provisions for transfer pricing documentation: Articles 215, 216 and sections XII, XIII and section XV of article 86 of the Mexican Income Tax Law (“MITL”), as well as article 260 of the MITL Regulations. There are no specific transfer pricing rules for loans, guarantees and/or cash pools.

- As of October 31st 2013, the Mexican Congress approved the 2014 Mexican tax reform package. The reform entered in force in January 2014, and as a result of the aforementioned, the order of the articles changed. For 2014, in the MITL there have been the following changes regarding the articles mentioned above:
  - Article 215 will became article 179.
  - Article 216 will became article 180.
  - Article 86 (sections XII, XIII and XV) became article 76 (sections IX, X and XII).

**Specific rules/cases in PE context**

PEs of foreign corporations are taxed on Mexican-sourced income (and other income under the rules of attribution, basically following the rules that apply for resident corporations).

PEs or branches in Mexico are common in the financial services industry. In general, establishing branches in Mexico was more common in the past, but has waned in recent years, for several reasons such as decreasing economic benefits and the uncertainty regarding the taxation of branch profits; in particular, the determination of branch profits and flat tax laws.

When arriving at the attributable profit subject to tax for the Mexican Branch of a foreign entity, an approach consistent with the substance based view presented in the OECD PE Report should be maintained.

As a consequence of the increasing interest by the Mexican Tax authorities to value substance over form in transactions, an approach that looks at KERT functions has become more important to ensure compliance with the intent of the law. Therefore, when using a branch in Mexico, a careful review of the guidance in the OECD PE Report would be advisable when setting the terms for these transactions. Nevertheless, consideration should be given to using the OECD PE Report due to Mexico’s reservation in paragraph 96 of in the commentary on article 7 of the OECD’s Model Tax Convention.

**Thin capitalisation**

**Rules by means of legislation and regulations**

Interest expense is deductible for regular corporate income tax purposes.\(^1\) Cross-border debt is often used as a financing alternative for business and tax reasons. However, interest generated by excess debt coming from a foreign related party is non-deductible for most entities if the amount of debt exceeds a 3-to-1 Debt-to-Equity ratio,\(^2\) based on the figures presented in the taxpayer’s balance sheet. All liabilities are considered for the purposes of calculating the disallowed interest expense amount and in determining

---

1. Art. 29 MITL 2013 / art. 25 MITL 2014
2. Art. 32 sec.26 MITL 2013 / art. 28 MITL 2014
the annual average liabilities, certain liabilities may be excluded if certain requirements are met. Moreover, the taxpayer may apply for permission to exceed the 3-to-1 ratio.

The taxpayer can also compare the liabilities multiplied by three, to either:

1. the equity (following the Mexican generally accepted accounting principles); or
2. the sum of the tax basis equity accounts (which consists of the account of contributed capital (CUCA) plus the net profits account (CUFIN) balances).

The CUCA account is a computation that provides a result similar to the tax basis in the shares and the CUFIN account is similar to a tax basis cumulative retained earnings account. Both accounts are adjusted for inflation.

**Example**

**Information from the Financial Statement**

<table>
<thead>
<tr>
<th>Assets</th>
<th>Liabilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cash</td>
<td>USD 50</td>
</tr>
<tr>
<td>Foreign related party</td>
<td>USD 30</td>
</tr>
<tr>
<td>Mexican related party</td>
<td>10*</td>
</tr>
<tr>
<td>Equity</td>
<td>10*</td>
</tr>
<tr>
<td>Total</td>
<td>USD 50</td>
</tr>
</tbody>
</table>

1. **Annual average debt accruing interest**

   - Foreign related party USD 30 (a)
   - Mexican related party 10* (b)
   - Total debts accruing interest USD 40 (c)

2. **Limitation of indebtedness (3:1 debt-to-equity thin cap rule)**

   - Annual average shareholders’ equity USD 10 (d)
   - Three times shareholders equity (d) *3 USD 30 (e)

3. **Excess indebtedness**

   - Total debts accruing interest minus three times shareholder’s equity (b) – (e) USD 10 (f)

4. **Non-deductible annual interest**

   - Non-deductible annual interest factor (f)/(a) 0.33 (g)
   - Non-deductible interest (c) *(g) USD 1 (h)

* = USD equivalent

Note: For the purposes of this example, it is assumed that in calculating the annual average of debt accruing interest and the annual average of shareholder’s equity, both debts and equity were the same amount all year.

An exception applies to exempt certain financial services companies from the thin capitalisation requirements, such as commercial banks, insurance companies, brokerage firms etc. Similarly, but more rarely applicable, companies that acquire debt from related parties can exclude that debt from their thin capitalisation calculations if they are engaged in the construction, maintenance or operation of “productive capital” that is in the national interest (the literal translation of the law is “strategic areas for
An example of this activity might be an infrastructure company engaged in an important energy production project. However, there is no explicit guidance regarding what constitutes productive capital in this case. Furthermore, this section of the law makes reference to articles 27 and 42 of the Constitution, presumably as guidance for the interpretation of the words “strategic areas for the country”.

The transfer pricing rules could limit the deductibility of interest to related parties if the interest rate is not considered arm’s length. The portion of interest paid above an arm’s length rate would not be deductible and would be reclassified as a dividend. Furthermore, if the taxpayer does not prepare contemporaneous transfer pricing documentation, the interest is not deductible for income tax purposes.

**Are there additional rules on the deductibility of interest (e.g. safe harbours)?**

Mexican entities that have an excessive Debt-to-Equity ratio due to loans with related parties can apply for an APA from the Mexican tax authorities to determine the arm’s length nature of the loan so as to maintain the excessive ratio. The basis for applying for the APA can be found in the Tax Code of the Federation (Código Fiscal de la Federación or CFF) and several companies have successfully obtained a ruling on the deductibility of interest exceeding the 3-1 Debt-to-Equity ratio. Specific requirements exist for filling an APA related to thin capitalisation.

Notwithstanding compliance with thin capitalisation rules, the transfer pricing rules could operate to reclassify the debt as capital when the economic substance differs from the form based on the principles in paragraphs 1.64 and 1.65 of the OECD Guidelines.

Interest that is considered in excess of the thin capitalisation rules will be treated as non-deductible and the underlying debt will be recharacterised for tax purposes as a capital injection, with the resultant interest payments treated as dividends subject to tax (if not paid from CUFIN). Also, loans can be recharacterised as equity when the economic substance differs from the form, based on the principles in paragraphs 1.64 and 1.65 of the OECD Guidelines.

**Intercompany loans**

**How is the arm’s length nature of an intercompany loan evaluated?**

At a minimum, pursuant to article 31 of the 2013 MITL (article 27 MITL 2014), interest payments abroad must be strictly indispensable to the company’s activity. A taxpayer enjoying robust profits and having cash on hand which is not engaged in capital acquisitions to further expand its operations should be able to explain why it is paying interest on intercompany loans abroad. Furthermore, taxpayers taking on loans from related parties abroad should monitor their balance sheets to ensure that they do exceed the MITL’s 3-to-1 Debt-to-Equity thin capitalisation ratio and the initial structuring of the loan should be clearly established as complying with the OECD Guidelines on restructurings.

Section VIII of article 31 of the 2013 MITL (article 27 MITL 2014) generally provides that the deduction for interest fee paid cannot be higher than the lowest interest fee that would be charged to third parties, employees and shareholders.
As described above, the most essential requirements in Mexico’s transfer pricing laws can be found in:

- Articles 86 (sections XII and XV);
- 215 and 216 of the 2013 MITL (articles 76 [sections X and XII]; and
- 179 and 180 of the 2014 MITL).

However, none of these articles provides a safe harbour for loan/interest transactions and therefore a taxpayer should consider when setting the terms of an intercompany loan that there are no shortcuts in preparing the transfer pricing documentation for the transaction.

**How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?**

Of particular interest for intercompany loans is article 215 of the 213 MITL (article 179 MITL 2014), which, among other things, sets forth the regulations for the determination of prices for operations carried out with related parties and comparability requirements that must be applied when seeking transactions or companies to compare against the tested transactions. Article 215 of the 2013 MITL (article 179 MITL 2014) provides that taxpayers must determine their income and deductions derived from intercompany transactions using compensation rates/amounts that would have been set by independent parties in comparable transactions. Article 215 of the 2013 MITL (article 179 MITL 2014) identifies the issues that should be considered when evaluating if a transaction or entity is comparable. For financial transactions, the MITL explicitly provides that at least the following issues must be analysed when determining comparability:

- the principal amount of the loan;
- term of the loan (the length of time between the start of the loan and the date when the principal and all accrued interest should be repaid);
- debtor solvency;
- interest rate; and
- guarantee (if any).

The MITL does not specify how these issues should be addressed when determining comparability; it only lists them. How these issues should be applied is open to interpretation.

Although not explicitly mentioned, any comparability analysis must consider the currency in which the financial intercompany transaction was agreed upon. A different currency usually distorts comparability of credit instruments and, if a comparable cannot be obtained in the same currency (contractual terms), then certain adjustments will be required to maintain comparability. Article 215 of the 2013 MITL (article 179 MITL 2014) also states that the following must be considered for comparability in general:

- functions performed, risks assumed and assets used;
- the contractual terms;
- economic circumstances; and
- business strategies, including those related to market penetration/share.

Article 215 of the 2013 MITL (article 179 MITL 2014) also makes reference to a business cycle analysis.
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Other (Build.up)</td>
<td>√</td>
</tr>
</tbody>
</table>

The Mexican tax authorities would expect an analysis that includes the characteristics of the loan arrangement including the creditworthiness of the borrower, key terms of the agreement, duration, guarantees, and the loan amount. Other factors may be considered such as the industry of the borrower and the location of the borrower.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratio’s to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring tool (e.g., Moody’s RiskCalc, Z Score)</td>
<td>√</td>
</tr>
</tbody>
</table>

How is passive association/implicit support taking into account in substantiating the arm’s length interest rate?

There are currently no transfer pricing regulations in this respect. Nevertheless, in the Mexican tax context, an argument can be made for implicit support (sometimes referred to as passive association) from the application of the OECD Guidelines, considering that article 215 of the 2013 MITL (article 179 MITL 2014) refers to the OECD Guidelines for interpretation. Support for passive association can be found in Chapter VII (Special Considerations for Intra-Group Services) of the OECD Guidelines, given that it argues that an incidental benefit that accrues solely from being part of larger concern should not be considered to constitute an intra-group service. However, the OECD Guidelines in Chapter I (The Arm’s Length Principle) provides support in discrediting a claim of implicit support, given that certain sections of the Chapter explicitly argue that treating member companies of an MNC as part of a single entity is not compatible with the arm’s length principle.

If a taxpayer in Mexico needs to seek or provide explicit credit support, or relies on what it considers an implicit guarantee, the documentation containing the financial analysis used to support the decision should be complete.

Are foreign comparables accepted?
Foreign comparables are acceptable to the extent that the market is sufficiently comparable.

---

6 OECD Guidelines, paragraph 7.13.
7 OECD Guidelines, paragraph 1.6 and 1.7.
**Intercompany guarantees**

**What is your tax authorities approach towards recognizing guarantees?**
There are currently no regulations on intercompany guarantees. Also there is no knowledge about any court cases to date.

**How is a guarantee fee characterised?**
The MITL does not provide an explicit definition of a guarantee fee (garantia por aval); however, the law explicitly states that when seeking comparable transactions for a loan between related parties, a taxpayer must evaluate whether the potential comparable contains a guarantee term similar to that signed with the related party.\(^8\) Other types of guarantee fee transactions between Mexican taxpayers and related parties are somewhat common (i.e. a parent guaranteeing the debt of a wholly owned group company that is unable on a stand-alone basis to borrow the debt funding it needs). The Mexican tax authorities has not issued explicit guidance for these transactions. If a guarantee is included or excluded in a related-party loan, the specific situation must be considered when searching for comparable transactions when applying the CUP method and adjustments should be carried out, if applicable.

**How is passive association/implicit support taking into account in substantiating the arm’s length guarantee fee?**
There are currently no transfer pricing regulations in this respect.

**How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?**
These kinds of transactions should generally be accepted, although the transaction should make overall commercial sense, on the basis that the actions undertaken are what would be expected between independent enterprises and in addition to the provision of evidence that this guarantee was strictly indispensable. Otherwise, the Mexican tax authorities would have grounds to consider compensation made to the parent for the guarantee as not complying with arm’s length terms and therefore could be deemed as not deductible.\(^9\) For example, if the subsidiary is bankrupt with no evidence indicating they could repay the debt, an independent party might not be willing to serve as guarantor.

There is no limitation on choosing to use a related party versus third parties in providing debt funding, except that related party loans require transfer pricing documentation proving the transaction is arm’s length. Here, a guarantee fee (to a party other than the lender) can be supported provided that the guarantee can be shown to obtain a more favourable interest rate for the Mexican entity. It would be expected that the guarantee fee could be shown to be less than the reduced interest cost. When establishing debt transactions, which can or cannot include a guarantee payment, it is always important to consider the substance of the transaction to support its indispensability and therefore its deductibility in Mexico.

A parent funding a subsidiary would represent an intercompany loan, thus, requiring arm’s length terms. It must be reasonably shown that the subsidiary will be able to fund the principal and interest from its cash flow. Here, a related party guarantee from a person other than the lender might be necessary if the subsidiary is not able to borrow the funds based on its own borrower status.

---

8 Art. 215 sec I-a MITL 2013 / art. 179 MITL 2014
9 Art. 29 MITL 2013 / art. 25 MITL 2014
In this situation, the Mexican tax authorities would accept a guarantee fee provided that the guarantee can be shown to obtain a more favourable interest rate for the Mexican entity. It would be expected, however, that the guarantee fee should be less than the reduced interest.

Third party lenders often look to the credit standing of the global entity rather than that of the subsidiary without an explicit guarantee. Neither the MITL, nor any other relevant Mexican law provides guidance regarding the implications of explicit credit support and implicit credit support. Similarly, the Mexican tax authorities has not provided guidance on the matter and there is no known tax audit case where this has been an issue of contention. At a minimum, taxpayers must ensure that the position taken is properly documented and the rationale behind the decision for adopting either of the two options (regarding explicit or implicit credit support) follows the arm’s length principle.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>x</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>x</td>
</tr>
<tr>
<td>CUP/CUT approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>✓</td>
</tr>
</tbody>
</table>

Are foreign comparables accepted?
Foreign comparables are accepted.

**Cash pool**

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?

In Mexico, there are a number of variants regarding how cash pools are structured. This depends on the needs of the group and particular arrangements with outside financial institutions. For example, a cash pool arrangement could be performed solely within the group of Mexican affiliates with a local related or unrelated party administrator or structured through a foreign related or unrelated party administrator. The administrators have at times acted as a financial institution or mere agent managing excess or shortage of funds for particular entities, remitting benefits back to net lenders. For non-Mexican administrators, the withholding tax issues for Mexican borrowers can affect the structure, especially if the lender is in a low-tax jurisdiction, as the Mexican withholding tax rates on interest from these jurisdictions can be as high as 40%.

Another issue surrounding cash pools here relates to the unintended application of the back-to-back loan rules according to the MITL. However, the back-to-back loan rules set out in the MITL should also be considered, given that there are instances where the Mexican tax authorities has attempted to use the definitions of back-to-back loans to attempt to recharacterise a cash pool operation as a back-to-back loan scheme. Nevertheless, during a tax audit, it has been useful to have documentation on the

10 Art. 92 MITL 2013 / art. 11 MITL 2014
rationale followed when determining the cash pool compensation. Cash pooling would generally be considered with unrelated parties and thus transfer pricing requirements can be met in Mexico and documented on an arm’s length basis for borrowers and lenders, provided the underlying terms are appropriate and comparable to an arm’s length arrangement.

The Mexican tax authorities generally expect that when a cash pool transaction is being established, the net borrower must have the liquidity and financial strength to be eligible for the borrowings to justify an interest expense deduction. The administrative entity (particularly if the Mexican affiliate is the administrative entity) must also ensure that it has sufficient capital to start up the cash pool operations or access to debt funding to ensure that there is sufficient cash on hand if initial credit line demands outstrip initial deposits.

In practice, the Mexican tax authorities would expect that the allocation of the benefit be commensurate with the functions, risks and assets used. In some cash pool schemes there will be a central administrative entity and the entities will make deposits or withdrawals as needed.

Mexican affiliates might be participants, not administrators, of cash pool systems. Here, the Mexican affiliate must prove that the terms of the cash pool system are arm’s length. In other words, for deposits, it should earn an interest rate akin to what it would earn from a commercial institution for the length of time it held excess liquidity in a cash pool account. Similarly, when the Mexican affiliate withdraws credit to cover cash flow needs, it should establish in its transfer pricing documentation that it did not pay more interest than a third party would have demanded for the time it took out the short-term credit(s). Public information for short-term deposits and credits in Mexico is available.

**Documentation**

**Documentation requirements**

Mexican transfer pricing requirements are generally in line with the OECD Guidelines. Article 86 of the MITL states that all companies engaged in transactions with related parties should determine their taxable revenues and their authorised deductions by considering for transfer pricing purposes the prices and the amounts of compensation used between independent parties in comparable operations. All related party transactions are subject to contemporaneous transfer pricing documentation requirements.

As mentioned earlier Article 86-XII of the 2013 MITL (article 76-IX MITL 2014) requires taxpayers to prepare contemporaneous transfer pricing documentation supporting that all transactions entered with foreign based related parties were executed similarly to third party market values. This documentation has to be ready by the time the Tax Compliance Report (Dictamen Fiscal) is due, generally this is June 30. The same article of the MITL requests taxpayers to prepare transfer pricing documentation separately for each kind of transaction they have entered into with its related parties.

Requirements for intercompany transactions performed with foreign based related parties are more extensive than the ones required for inter-company transactions performed between Mexican entities.

Please note that based on article 215 of the 2013 MITL (article 179-IX MITL 2014) in absence of transfer pricing documentation, Mexican Tax authorities can determine
the taxable income for such transaction based on their own criteria. Additionally (as requested by the MITL) having transfer pricing documentation is a requirement for the treatment of payments made to foreign based related parties to be considered deductible.

**When does documentation need to be available?**
As mentioned earlier, article 86-XII of the 2013 MITL (article 76-IX MITL 2014) requires taxpayers to prepare contemporaneous documentation supporting that all transactions entered with foreign based related parties were done executed similarly to third party market values. It is not clear when the documentation must be available; however a strict interpretation would require it to be prepared by the due date of the corporation income tax return (i.e., the end of March after the end of the calendar year). In any event, this documentation must be ready by the time Dictamen Fiscal is due, generally this is June 30. What is the deadline for submitting the documentation?

Taxpayers in Mexico have the obligation to prepare and have in place transfer pricing documentation, however the transfer pricing documentation should be submitted upon written request.

**In which language should the documentation be prepared?**
Documentation needs to be prepared in Spanish.

**Advance Certainty**

*Are APA's/ATR's available?*
APAs can be obtained in relation to thin capitalisation

*Where does the request for the APA/ATR need to be filed?*
The taxpayer needs to file the request with the Servicio de Administración Tributaria.

*What information is typically required?*
The requirements for filling an APA for thin capitalisation purposes are:

- If the taxpayer forms part of a multinational group, a description of the primary activities of the firms that make up the group should be included, together with a description of the physical location where these activities take place as well as a description of the operations carried out by the taxpayer with related parties;
- Copy of the Dictamen Fiscal, the financial statements filed with the Dictamen, and the annexes filed with the Dictamen of the taxpayer; if the company is not subject to the Dictamen then the balance sheet and the income statement of the firm should be provided as well as the annual tax return, any complementary tax returns and the Multiple Informative Return (“DIM”) pertinent to the years in which the APA will be in effect. It is also necessary to provide a copy of the financial statements of the related parties which the company has a business or contractual link with;
- The modifying resolution makes a distinct emphasis on the need to provide all the intercompany contracts carried out with related parties (both national and international) in Spanish;
- Cases in which a related party resident abroad is the subject of a transfer pricing audit by the tax authorities must be disclosed with a description of the stage at which the audit is at. Cases must also be disclosed in which a related party is the subject of tax related controversy with the authorities or a tribunal, with a pertinent description of the stage at which the controversy is at; and in case that a sentencing has been
reached, the request ought to summarise the most important elements as well as detail of resolutions reached;

- The taxpayer should provide the transfer pricing documentation that supports the assertion that local and international transfer pricing transactions were carried out at arm's length, including the transactions relevant to debts entered into with related parties who are resident abroad. It is important to note that this documentation should include a description of the functions performed, assets used and risks borne by the company in its intercompany transactions (functional analysis);

- The information used to calculate:
  1. the average balance for the year of the total debts the taxpayer has that generated interests charged to it;
  2. the average amount for the year of the debts accrued with related parties resident abroad;
  3. the yearly average of stockholder’s equity for the fiscal year used to determine the non-deductible interest payments;
  4. the total amount of the taxpayer’s debts which exceed the limit; and
  5. the amount of the deductible interest payments.

- Documentation that supports the contention that the activity carried out by the taxpayer, given the conditions in the market, require a greater level of debt leverage than what is contemplated in article 32, fraction XXVI of the 2013 MITL (article 28-XXVII MITL 2014);

- The taxpayer should present a transfer pricing study that supports the interest rate related to the financing contracts carried out with related parties resident abroad;

- The taxpayer should specify whether the interest payments made to related parties resident abroad should be treated as dividend payments; and

- The amounts withheld for income tax related to interest payments to related parties resident abroad. Specifying the rates applied and the dates on which the withholdings took place.

These are some of the most relevant points mentioned in the modifying resolution in respect to APA requests related to thin capitalisation. These issues lead us to believe that the authorities are looking to obtain a great deal of information from the taxpayer and will seek to determine that all the intercompany transactions were carried out arm’s length.

In light of this, it is important that companies which require an APA related to thin capitalisation, ensure they are in compliance with the MITL in regards to transfer pricing, with complete documentation for transactions carried out with related parties both in Mexico and resident abroad, including a detailed functional analysis.

**Term of the APA**

An APA is an alternative which might be useful depending on a number of factors, especially considering relative certainty on the treatment for the applicable period being negotiated. Considering that a “plain vanilla” APA for toll manufacturing activities can take up to 2 years to complete, an APA negotiation for complex financial activities might be longer and more complex.

The term of the APA can be for 5 years:

- the year that the APA was requested;
- the year immediately prior to the year that APA was requested; and
- up to three years following the year that the APA was requested.
**Peru**

**Transfer pricing rules and regulations**

**Rules by means of legislation**

- **Peruvian Income Tax Law (PITL) in Articles 32 and 32-A and Chapter XIX of the Regulations** – there are no specific transfer pricing rules for loans, guarantees or cash pools. Article 11o of the regulations contains a brief description of the elements that a comparability analysis should include.\(^1\)

**Rules by means of regulations (decrees, manuals, position papers etc.)**

- **SUNAT (Local Tax authorities) Report N° 119-2008** – in the case of loans between related parties in which there is no interest rate, the transfer pricing rules must be applied to determine the interest rate which should be charged in such transactions. Also, these transactions are excluded in determining the amounts of transactions for compliance with the obligation to submit the tax declaration and a technical transfer pricing study.

- **SUNAT Report N° 005-2002** – the maximum amount of debt with related companies is a fixed limit during the course of the fiscal year (3 to 1 Debt to Equity ratio). The calculation of the proportion of the interest to be deducted will be made on the date when the total amount of debt with related parties exceeds the 3 to 1 Debt to Equity ratio, regardless of the frequency of the interest rate.

**Rules by means of case law (Most relevant ones)**

- **Passive Interest Case** – implications regarding the evaluation of the loans arm’s length nature and misuse of passive rates for the analysis of financial transactions (bank deposits and cash pooling) between related parties.

- **Cash Pool Case** – the Peruvian Tax Authorities will recharacterise cash pool deposits as loans in cases where the cash pool entity does not have a banking license or the right to act as a bank under the country of residence rules.

**Specific rules PE context**

PEs of non-residents entities are subject to the same rules as resident entities, except for the following rules:

- **Article 6 of the PITL** – resident individuals and entities are subject to tax on their worldwide income. The residence status of resident entities will also be applicable to their PEs. PEs of non-residents will only be subject to their Peruvian sourced income.

- **Article 24 of the PITL Regulations** – a non-resident entity is considered a related party with its PEs in Peru and other PEs incorporated abroad. The same applies to resident entities.

- **Article 56 of the PITL** – in case of PEs of non-resident entities, its profit is deemed as paid or distributed to a non-resident entity at the date of maturity when filing the Annual Income Tax Return. Its disposable income is considered as the distributed amount.

\(^1\) It is important to note that from the year 2013 the adjustments made to the taxable income shall apply to the withholding tax.
**Thin capitalisation**

**Rules by means of legislation and regulations**

- **Article 37 of the PITL** – interest arising from related party debt is deductible when the amount of debt does not exceed the result of applying a coefficient of 3 on the taxpayer’s equity. The effect of applying the coefficient is that there is a threshold level of a 3 to 1 Debt to Equity ratio. Where the related party debt is above this level, the interest that relates to the proportion of the loan that is in excess of this ratio is not deductible.

**What is the effect of the rules on the deduction of interest?**

Interest on debt exceeding the prescribed ratio Debt to Equity (3:1) cannot be recognised as a deductible expense.

**Intercompany Loans**

**How is the arm’s length nature of an inter-company loan evaluated?**

Peruvian legislation does not have any specific rules regarding the treatment of intercompany loans. However, Article 110 of the Regulation of the PITL, there is guidance to determine whether financial transactions are comparable or not to analyse if the transaction between related parties complies with the arm’s length principle.

**How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?**

Although Peruvian Legislation does not have any specific regulation about the evaluation of intercompany loans, Article 110 of the ITL sets out (among other things) the following elements that must be considered when determining comparability for financial transactions with related parties:

- Principal amount;
- Term;  
- Guarantees;
- Debtor creditworthiness;
- Interest rate;
- Loan fees;
- Credit rating/Risk Classification;
- Debtors country of residence;
- Currency;
- Date; and,
- Any other payments or charges.

The PITL does not specify how these elements should be addressed when determining comparability. The consideration of these elements and analysis are included as part of the general transfer pricing framework. Article 32 of the PITL appoints the following factors to be considered when analysing any intercompany transaction:

- Functions or economic activities (such as assets used and operation risks assumed);
- Contractual terms;
- Economic circumstances; and
- Business strategies.

---

2 As at the date of this publication, the maximum amount of debt with related parties is determined by applying a coefficient of 3 (three) to the taxpayer’s net equity at the end of last year.

3 The length of time between the start of the loan and the date when the principal and all accrued interest should be repaid.
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not Accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP*</td>
<td>√</td>
</tr>
<tr>
<td>Bank Quotes</td>
<td>Maybe**</td>
</tr>
</tbody>
</table>

* It should be noted that according to PwC Peru experience, SUNAT accepts and takes into account interest rate data published by the local financial regulator (SBS) as reliable comparable transactions. ** The Peruvian tax authorities may or may not accept this approach, there is no jurisprudence.

In PwC Peru’s recent experience of transfer pricing audits, the local tax authorities (SUNAT) has only accepted the CUP (internal and external) method.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not Accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Risk classification using Peruvian regulatory entity’s (SBS) standard*</td>
<td>√</td>
</tr>
<tr>
<td>Parent credit rating</td>
<td>Maybe***</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>Maybe***</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratio’s to borrower’s ratios</td>
<td>Maybe****</td>
</tr>
<tr>
<td>Use of other credit scoring tool</td>
<td>Maybe****</td>
</tr>
</tbody>
</table>

* The information presented by the SBS of local interest rates are by type of credit, according to the following classification: Commercial credit, Micro-enterprise credit, Consumption credit and Mortgage credit. Also, the SBS active rates are classified under two criteria: amount of sales and the amount of indebtedness. Under the first criterion there are corporate loans (loans to companies with annual sales of over 200 million nuevos soles in the past two years according to the most recent audited financial statements) and large business loans (loans to companies with sales exceeding 20 million nuevos soles, but no more than 200 million nuevos soles in the last two years, or debtors who have maintained in recent years debt instruments in the capital market). The second criteria is the amount of the debt for which the loans are classified as medium enterprise loans (loans to legal entities which have a total debt in the financial system of over 300 thousand nuevos soles in the past six months and do not meet the characteristics to be classified as corporate or large companies), small businesses (loans for financing production activities, trading or services provided to individuals or companies whose total debt in the financial system is more than 20,000 nuevos soles, but not more than 300,000 nuevos soles in the past six months) and micro (loans for financing production activities, trading or services provided to individuals or companies whose total debt in the financial system is not more than 20 thousand nuevos soles in the last six months). ** Idem. *** Idem. **** Idem.

Even though the risk classification of the SBS (the Peruvian regulatory standard) is the most accepted approach to establish the creditworthiness of the borrowing entity; this scoring tool may have certain limitations, such as not being able to take into account the term and currency of the loan (amongst other factors).

For example, regarding the term, the rates published by the SBS are presented as follows:

- Less than 30 days;
- Between 31 and 60 days;
• Between 61 and 180 days;
• Between 181 and 360 days; and,
• More than 360 days.

Intercompany loans usually have a longer term (i.e.: 2, 3, 5 or 10 years) than the terms published by the SBS. Therefore, if the SBS rates are used, the analysis is less accurate.

Regarding the currency, SBS publishes interest rates only in Nuevos Soles (Peruvian currency) and American Dollars. Since intercompany loans may be in different currencies than the two mentioned above, an interest rate parity approach may be applied to improve the accuracy of the analysis.

In this context, when applying risk classification approach, the use of the interest rates published by the SBS may not be the most accurate approach to provide the most appropriate comparables. Where the SBS approach is not appropriate, then an international benchmarking analysis is commonly used. This benchmark would include the use, of bond yields, LIBOR or prime rates obtained from the Bloomberg platform.

**How is passive association/implicit support taking into account in substantiating the arm’s length interest rate?**

Currently, there are no transfer pricing regulations in this respect. Nevertheless, in the Peruvian context, an argument can be made for implicit support (sometimes referred to as passive association) from the application of the OECD Guidelines. Support can be found in Chapter VII (Special Considerations for Intra-Group Services) of the OECD Guidelines for passive association, given that it argues that an incidental benefit that accrues solely from being part of larger concern should not be considered the result of an intra-group service. On the other hand, the OECD Guidelines in Chapter I (The Arm’s Length Principle) provide support for someone wishing to discredit a claim of implicit support, given that certain sections of the Chapter explicitly argue that treating member companies of a multinational company as part of a single entity is not compatible with the arm’s length principle.

**Are foreign comparables accepted?**

As it was mentioned before, the debtor country of residence is one of the elements to take into account when determining comparability. Furthermore, Article 110 of the PITL sets the purposes of determining comparable transactions. If local information is not available, the taxpayer can use information from foreign comparables; however, there should be adjustments to reflect differences in the market (e.g. country risk).

**Cash pool**

**How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?**

The PITL has not issued any guidance on cash pooling arrangements and therefore, the general transfer pricing principles applying to loans and the OECD Guidelines would be the most suitable guidance. Although there is no clear guidance from the local tax authorities in this respect, from PwC Peru experience, applying the external CUP method is common practice.

The application of passive interest rates in order to analyse the arm’s length nature of cash pooling may be not accepted locally.
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?
There is no specific guidance on which transfer pricing methodologies are preferred in substantiating the arm’s length interest rate on cash pool arrangements. Similar to intercompany loans, it is expected that the local tax authorities accept the CUP method and question the use of other transfer pricing methods.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?
There are no specific rules regarding this issue as Peruvian transfer pricing rules do not provide guidance with respect to cash pooling. Each case must be determined according to its own facts and circumstances.

According to local PwC Peru experience, in the case of notional cash pooling, the remuneration for the CPL is typically considered as a service fee. In case of target balancing, the remuneration typically considers the difference between interest income and interest expenses.

**Inter-company guarantees**

What is your tax authorities approach towards recognizing guarantees?
There is no formal guidance from the PITL on guarantee fees. However, as a general rule, explicit guarantees with appropriate legal documentation will be recognised as long as the economic conditions and benefit test are passed.

How is a guarantee fee characterised?
They are characterised as service fees in intercompany loan guarantee transactions.

To what extent are implicit guarantees recognised?
There are no specific transfer pricing regulations or jurisprudence on implicit guarantees. According to our experience, in the absence of specific local regulations, the OECD Guidelines may be used as a reference.

How is passive association/implicit support taking into account in substantiating the arm’s length guarantee fee?
There is no specific guidance on the impact of passive association/implicit support on guarantees fees.

How is the arm’s length nature of the specific terms and conditions of an inter-company guarantee evaluated?
There is no legislative guidance on how the arm’s length nature of specific terms and conditions of an intercompany guarantee should be evaluated.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?
There is no definitive guidance on which methods would be accepted by the local tax authorities. Notwithstanding, there is no precedence of rejection of any of the followings methods.
From our experience, the CUP approach is the only one widely used and accepted by the Peruvian tax authorities.

**Are foreign comparables accepted?**
Local comparables are preferred; however, to the extent that local comparables are not available and to the extent that an overseas market is sufficiently comparable, foreign comparables may be accepted. Please note, Article 110 allows the use of foreign comparables, but there should be adjustments to reflect differences in the market (e.g. country risk).

**Documentation**

**Documentation requirements**
According to Article 117 of the PITL, a report containing the following information must be prepared and submitted yearly to the local tax authorities by the taxpayer:

- Information of the transactions carried out with related parties;
- Taxpayer economic and financial information;
- Functional information; and
- Analysis to selection of transfer pricing method and comparability analysis.

This list of minimum information referred to is not, in any case, a limitation to provide further information to ensure a better support to the value or range of prices that result from the application of the method chosen.

**Are there any specific documentation requirements for inter-company loans/guarantees in addition to the regular documentation requirements?**
The documentations required are contracts and bank account debit/credit notes.

**When does documentation need to be available?**
The documentation needs to be available at the time the informative tax return is due.

**What is the deadline for submitting the documentation?**
Transfer pricing documentation must be submitted to the local tax authorities in June.\(^4\)

**In which language should the documentation be prepared?**
Documentation must be prepared in Spanish.

\(^4\) Due date for May tax deadlines.
**Advance certainty**

**Are APA's/ATR’s available?**
There are APA rules when a double tax treaty exists or when a company applies for an APA with the Peruvian Tax Administration.

**Where does the request for the APA/ATR need to be filed?**
Taxpayers must make a proposal to the local tax authorities for the assessment of transactions with related parties. The local tax authorities have a period of 24 months to approve or disapprove it.

**What information is typically required?**
To enter into an APA, the information that the taxpayer should consider providing is as follows:

- The interest in carrying out an APA;
- Taxpayer’s identification and their legal representatives;
- The name and identification of each related parties participating in the intercompany transactions. The tax residence of each entity and their relation with the taxpayer should also be mentioned;
- Summary information regarding the organizational structure of the economic group, financial situation and also the functions, assets and relevant risks of the transactions mentioned in the proposal;
- Definition of the transactions mentioned in the proposal;
- Summary description of each transaction, including the transfer pricing methods used, and the prices or range of prices or the markup or the amounts paid as compensation. When the transactional net margin method is used, the financial ratio should be included in the proposal of the taxpayer;
- The names and ID numbers of the authorized people that are going to represent the company in the process, including their telephone numbers and e-mail addresses in order to receive the notifications; and
- Signature of the taxpayer or legal representative.

**Content of the APA proposal:**

- The financial and economic basis to justify the proposal;
- A description of the functions, activities, risks and assets of the related parties that would have transactions within the company group;
- The organisational structure of the economic group and its related parties that would be involved in the relevant transactions of the agreement;
- The audited financial statements of the past three years before the presentation of the proposal, in addition, projected financial statements for the next three years must be included;
- Description of the transactions mentioned in the proposal, as well as the original currency and a copy of the agreements related to them;
- A description of the transactions that could be included in the proposal, but are not, including an explanation why they were not included;
- An informative statement about the current APA in other jurisdictions; and
- Any other information that the taxpayer considers important.
Term of the APA
According to point d) of Article 118 of the Regulation of the PITL, the APA will be applicable from the year the proposal is accepted and from then for an additional three years. The APA will not be enforceable more than 4 fiscal years.
United States

Transfer pricing rules and regulations

Rules by means of legislation

- **Section 482 of the Internal Revenue Code**: Deals with loans; there are no specific transfer pricing rules for guarantees.

Rules by means of regulations (decrees, manuals, position papers, etc.)

- **Treas. Reg. § 1.482-2**: Addresses transfer pricing regulations for loans or advances and allows taxpayers to use three alternatives to document intercompany interest rates.\(^{18}\)
  - **Applicable Federal Rate (AFR) safe haven**: Treas. Reg. § 1.482-2(a)(2)(iii) provides for a safe haven for bona fide debt, which may consist of term loans, advances, or demand loans, between members of a group of controlled entities, provided that the following conditions are met: (i) the loan or advance must be denominated in US dollars, (ii) the lender in a loan or advance transaction must not be in the trade or business of making loans or advances to unrelated parties at or about the time the loan or advance was made to a related party, and (iii) the situs of the borrower rule does not apply. Under the AFR safe haven, an arm’s length rate of interest in the case of a loan or advance between members of a group of controlled entities ranges from 100% and 130% of the appropriate AFR.

- **Situs of the borrower rule\(^{19}\)**: The situs of the borrower rule provides that if the loan represents the proceeds of a loan obtained by the lender at the situs of the borrower, an arm’s length rate is equal to the rate actually paid by the lender plus an amount that reflects the costs incurred by the lender in borrowing such amounts and making such loans, unless the taxpayer establishes a more appropriate rate.

- **Arm’s length/market-based pricing of interest**: Outside of the AFR safe haven and the situs of the borrower rule, there are no specific methods to evaluate an arm’s length interest rate. Under Treas. Reg. §1.482-2(a)(2)(i), the general rule is that an arm’s length rate of interest shall be a rate of interest which was charged, or would have been charged, at the time the indebtedness arose, in independent transactions with or between unrelated parties under similar circumstances and that “all relevant factors shall be considered, including the principal amount and duration of the loan, the security involved, the credit standing of the borrower, and the interest rate prevailing at the situs of the lender or creditor for comparable loans between unrelated parties.”\(^{20}\)

Rules by means of case law (most relevant ones)

Several cases exist related to the characterisation of debt as bona fide (see thin capitalisation section).

Specific rules/cases in PE context

National Westminster Bank (NatWest): NatWest is a UK corporation engaged in international banking activities. For the tax years 1981 through 1987, NatWest conducted wholesale banking operations in the US through six PEs. On its federal

\(^{18}\) The following discussion operates under the premise that the debt is bona fide per Treas. Regs. § 1.482-2(a) and is not subject to reclassification, e.g., equity, under § 385. Thin capitalisation is a critical element to consider in the structuring of bona fide internal debt, but beyond the scope of this section. For a discussion of bona fide internal debt, see 552. T.M., Section 482 Allocations: Specific Allocation Methods and Rules in the Code and Regulations (US Income Series).

\(^{19}\) Treas. Reg. § 1.482-2(a)(2)(ii).

income tax returns, NatWest claimed deductions for accrued interest expenses as recorded on the books of the US PEs. On audit, the IRS recomputed the interest expense deduction using a formula set forth in §1.882-5(a)(5) that excludes consideration for inter-PE transactions for the determination of assets, liabilities, and interest expenses. This resulted in an increase of USD155 million to NatWest’s taxable income, which would result in an additional tax liability of at least USD37 million in the US. NatWest successfully argued that the IRS’s application of §1.882-5 to an international bank such as NatWest violated the terms of the 1975 Income Tax Treaty between the US and the UK. The Federal Circuit found that the signatories to the 1975 Treaty expected that the interest expenses incurred by a PE of an international financial enterprise would be deductible to the extent the expenses were related to the PE’s ordinary course of business. As such, the court held that §1.882-5 and the corporate yardstick as applied, violated the 1975 Treaty.

**Thin capitalisation**

**Rules by means of legislation and regulations**

- **Section 385 of the Internal Revenue Code:** Covers thin capitalisation. In the absence of detailed regulations, the issue of whether debt is bona fide is based on case law precedent. The rules and courts have not provided a specific, bright-line thin capitalisation test. IRS Field Service Advice 200205031, 2/1/02, focused on Internal Revenue Code §385, summarises some key court decisions regarding bona fide debt.

  Case law precedent focuses on the ‘could’ and ‘would’ arguments, as well as the borrower’s ability to service the debt (including repayment of interest and principal). The arm’s length nature of each transaction should be assessed on a case-by-case basis. Borrowing capacity should be established on a ‘separate entity’ basis.

  The arm’s length borrowing capacity should ideally be determined based on comparable market evidence as of the date of the issue of debt, including via a review of comparables. Identifying concluded loan market transactions being observed in the market to evaluate current leverage addresses whether someone ‘could’ obtaining lending. Key financial ratios should be used to evaluate the financial position of the borrower (in terms of its profitability, coverage, leverage and cash flow) versus comparable peers of the borrower and can addresses financial competitiveness and the related ‘would’ argument. Financial modelling should also be performed to evaluate the anticipated free cash flow and the ability to service the debt. Court cases provide guidance relating to how these factors may impact the evaluation of the borrowing capacity and characterisation of debt.

**What is the effect of the rules on the deduction of interest?**

A tax deduction relating to the interest expense associated with debt which is over and above the arm’s length borrowing capacity will be disallowed for corporate tax purposes. In practice, the evaluation of the arm’s length quantum of debt is often an ‘all or nothing’ evaluation which results in acceptance or disallowance of interest deductions.

**Are there additional rules on the deductibility of interest (e.g. safe harbours)?**

There are earnings stripping rules, under Internal Revenue Code Section 163(j), which limit the deductibility of interest expense. The interest limitation rule under Section 163(j) is determined by two tests: (1) if the interest expense is in excess of 50% of the
adjusted taxable income for the tax year; and (2) if the Debt-to-Equity ratio is greater than 1.5:1. If a corporation meets these two tests, then the amount of disqualified interest must be determined. Interest expense subject to this limitation may be carried forward and deducted in future years when the limitation threshold limits are not reached.

**Intercompany loans**

**How is the arm’s length nature of an intercompany loan evaluated?**

In terms of the rate of interest on an intercompany loan, one of the three approaches specified above should be used (i.e. AFR safe haven, situs of the borrower, or market-based pricing). With respect to characterisation as debt, as mentioned above, case law precedent focuses on the ‘could’ and ‘would’ arguments, as well as the borrower’s ability to service the debt (including repayment of interest and principal). The arm’s length nature of each transaction should be assessed on a case-by-case basis. Borrowing capacity should be established on a ‘separate entity’ basis.

**How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?**

Terms and conditions should represent those that would be observed in arm’s length transactions and are also relevant in determining an appropriate arm’s length interest rate. As discussed above, the §482 regulations specify that “all relevant factors shall be considered, including the principal amount and duration of the loan, the security involved, the credit standing of the borrower, and the interest rate prevailing at the situs of the lender or creditor for comparable loans between unrelated parties.” Terms and conditions that would impact the interest rate being evaluated include those mentioned in the §482 regulations (e.g. the security involved) or they may include other terms/conditions such as options on the loan. In general, any terms and conditions that could materially affect the interest rate of the loan under review should be considered. If necessary, comparability adjustments may be applied to control for differences between the terms and conditions of the loan under review and the comparable loans/bonds. Approaches to comparability adjustments differ based on the facts and circumstances of the analysis.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFR safe haven</td>
<td>✓</td>
</tr>
<tr>
<td>Situs of the borrower rule</td>
<td>✓</td>
</tr>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>×</td>
</tr>
<tr>
<td>Unspecified method</td>
<td>×</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>×</td>
</tr>
</tbody>
</table>

As mentioned, one of the three approaches specified above should be used (i.e. AFR safe haven, situs of the borrower, or market-based pricing). Regarding the market-based pricing approach, in accordance with the general rule mentioned above, the interest rate of an intercompany loan should reflect prevailing market rates at the
loan origination date and should consider the characteristics of the loan arrangement including the creditworthiness of the borrower, key terms of the agreement, duration, level of security/collateral, and the loan amount. Other factors may be considered that are not specifically mentioned in the §482 regulations such as the industry of the borrower and the location of the borrower (i.e. reflecting local credit market conditions).

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>✓</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>✓</td>
</tr>
<tr>
<td>Use credit scoring tool (e.g. Moody’s RiskCalc)</td>
<td>✓</td>
</tr>
</tbody>
</table>

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

Treas. Regs. § 1.482-9(l)(3)(v) states that “a controlled taxpayer generally will not be considered to obtain a benefit where that benefit results from the controlled taxpayer’s status as a member of a controlled group.” However, in the context of intercompany financing and establishing creditworthiness, no specific guidance exists. It is clear that a standalone approach is essential to establish the bona fide characterisation of the transaction as debt. On the subsequent pricing and creditworthiness estimation, the specific facts may or may not warrant consideration of membership in a group.

Are foreign comparables accepted?

Although foreign comparables may be acceptable to the extent that the market is sufficiently comparable, including foreign comparables should be carefully considered and strong comparability should be established before using such comparables.

Intercompany guarantees

What is your tax authority’s approach towards recognising guarantees?

While the §482 regulations do not provide specific guidance on the appropriate treatment of guarantees for transfer pricing purposes, there is general consensus that the arm’s-length standard is central for determining related party guarantee fee pricing. In the absence of clear statutory and regulatory guidance for pricing intercompany guarantees via the §482 regulations, widely different positions have been assumed with regard to the pricing and treatment of guarantees.

How is a guarantee fee characterised?

Depending on the context, guarantee fees can be characterised as akin to the pricing of interest on debt, a service fee\textsuperscript{22}, or an insurance premium.

To what extent are implicit guarantees recognised?

To the extent that an implicit guarantee results from passive association to related parties, see the discussion on the transfer pricing guidance related to passive association above.

\textsuperscript{22} See FSA 1995 WL 1918236, TAM 7822005; GCM 38499. Also see recent case on Container Corp.
How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?

In the absence of specific guidance, the treatment of implicit support/passive association in the context of guarantees remains uncertain. On the one hand, given the implications on the characterisation of underlying debt, the analysis of guarantee fees may be done on a standalone basis. There is case law that is supportive of this (e.g. Plantation Patterns). On the other hand, certain IRS/US Treasury pronouncements indicate passive association may be taken into account. However, there is no definitive guidance on this issue.

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?

The terms and conditions should reflect those made in comparable arm’s length transactions for guarantees (e.g. letters of credit, credit default swaps, etc.). If the terms and conditions are not deemed to be arm’s length, the IRS could re-characterise the transaction.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>✓</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>×</td>
</tr>
<tr>
<td>CUP/CUT approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>✓</td>
</tr>
<tr>
<td>Put option approach²³</td>
<td>Maybe</td>
</tr>
<tr>
<td>Loss given default framework²⁴</td>
<td>Maybe</td>
</tr>
</tbody>
</table>

Primary methods are the benefit approach, cost of capital approach, and the CUP/CUT approach. Credit default swaps, the put option approach, and the loss given default framework have been utilised if the appropriate facts exist.

Are foreign comparables accepted?

Foreign comparables are only accepted to the extent that the market is sufficiently comparable.

Documentation

Documentation requirements

All related party transactions are subject to contemporaneous documentation requirements.

There or no formal documentation requirements for intercompany loans/guarantees, other than ensuring that relevant loan/guarantee agreements exist.

---

²³ This approach calculates the guarantee fee as the value of the put option.
²⁴ The guarantee fee is the multiplication of the expected default frequency (EDF), the underlying asset valuation, and the loss given default (LGD) of the asset.
When does documentation need to be available?
The IRS can require any person to provide it with information or to produce documents by way of a written notice during audit. It is now mandatory for the IRS to request TP documentation as part of any international audit.

What is the deadline for submitting the documentation?
Upon written request, documents need to be provided within 30 days.

In which language should the documentation be prepared?
Documentation needs to be prepared in English.

Advance certainty
Are APAs/ATRs available?
Revenue Procedure 2006‑9 allows US businesses to request multilateral, bilateral and unilateral APAs. Also, effective 9 June 2008, the APA procedures (through Revenue Procedure 2008‑31) were modified to expand the scope to include other issues for which TP may be relevant, including attribution of profits to a PE, determining the amount of income effectively connected with the conduct by a taxpayer of a trade or business within the US, and determining the amounts of income derived from sources partly within and partly without the US.

Where does the request for the APA/ATR need to be filed?
The taxpayer needs to file the request with the Internal Revenue Service.

What information is typically required?
• Description of the general history of business operations, worldwide organisational structure, ownership, capitalisation, financial arrangements, principal businesses, the place or places where such businesses are conducted, and major transaction flows of the parties to the proposed covered transactions;
• Description and analysis of the transactions covered by the APA request, as well as the estimated dollar value of each proposed covered transaction for each year of the proposed term of the APA;
• Detailed analysis of the functions and economic activities performed, assets employed, economic costs incurred, risks assumed, contractual terms, economic conditions and non‑recognition transactions;
• Copies of the principal written agreement(s);
• Representative financial and tax data of the parties to the proposed covered transactions for the last three taxable years;
• Taxable year of each party to the proposed covered transactions;
• Economic analysis of functions performed within the markets and geographical areas covered by the APA request, including taxpayer’s competitors and a discussion of any uncontrolled transaction, as well as an explanation of the proposed TP methodologies;
• Critical assumptions for the proposal and implications of changes to critical assumptions.

Term of the APA
Typically three‑five years, but no set term requirement. Additionally, APAs, at the taxpayer’s request and at the agreement of the IRS, prior to the conclusion of an APA, may be rolled back to cover prior tax years; three years is typical.
Uruguay

Transfer pricing rules and regulations

Rules by means of legislation

- **Law 18.803** incorporates the regulations of Income Tax on Economic Activities (IRAE as per Uruguayan abbreviation in Spanish) which is a specific chapter on transfer pricing (Chapter VII of Title 4 of the 1996 Coordinated Tax Compilation-CTC) in force for fiscal years starting from 1 July 2007 onwards:
  - Article 38 of Chapter VII of Title 4 of the 1996 CTC – transactions subject to transfer pricing rules and the arm's length principle.
  - Article 39 of Chapter VII of Title 4 of the 1996 CTC – definition of a related party.
  - Article 41 of Chapter VII of Title 4 of the 1996 CTC – the methods for determining the pricing of intercompany transactions.
  - Article 44 of Chapter VII of Title 4 of the 1996 CTC – empowers the Executive Power to establish special notional profit regimes (safe harbours).
  - Article 44 of Chapter VII of Title 4 of the 1996 CTC – empowers the Executive Power to establish an APA regime with taxpayers.
  - Article 46 of Chapter VII of Title 4 of the 1996 CTC – documentation requirements and special tax return.

- **Article 6 of the Tax Code** contemplates the “substance over form” principle which, beyond different positions as to its scope, the General Tax Bureau (GTB) has broadly interpreted that operations may be re-characterized when it believes that the operations are not reflecting the economic substance of the transaction.

Rules by means of regulations (decrees, manuals, position papers etc.)

- **Regulatory decree of IRAE 56/009** – provides criteria for transfer pricing analysis (i.e. definition of the methods, comparability factors and comparability adjustments, the mandatory use of the interquartile range, lists countries which are considered tax havens and specific regulations on the transfer pricing method applicable to commodities and intermediaries and the specific documentation requirements for this).

- **Regulatory decree of IRAE 392/009** – defines the concept of customs areas and regimes of low-tax or nil taxation, more dispositions related to commodities and states that the GTB may execute APAs with taxpayers.

- **General Resolution 2084/009 by GTB** – provides an in-depth description of the circumstances under which a company will be deemed a related party, set further regulations on commodities transactions and regulates on the main aspects of documentation and other formalities to be fulfilled (taxpayers obliged to submit annual information, minimum content for documentation, filing dates, etc.).

- **General Resolution 2269/009 by GTB** – creates a Registry of Contracts specifically related to commodities transactions.

- **Consultation 5.581 by GTB** – in order to assess whether the threshold beyond which taxpayers must file TP Documentation before the GTB is met, the amount of interests accrued (and not the amount of capital) should be considered.

Rules by means of case law (most relevant ones)

There have been very few transfer pricing issues submitted to the courts in Uruguay. To date, few verdicts of the Court on Administration Matters (CAM) concern transfer pricing issues:
• Verdict 8/982 issued in February 1982 - defines ‘economic group’ and determines the tax effects regarding this figure.
• Case: Philips Uruguay S.A. (Verdict issued on 19 February 2005) - the Tax Court used the OECD Guidelines for interpretative guidance.

Specific rules PE context
• Law 18.803 also incorporates the concept of PE broadly following the provisions of the OECD Model and in some cases the UN Convention:
  • Article 10 of Chapter I of Title 4 of the 1996 CTC – definition of PE
  • Article 11 of Chapter I of Title 4 of the 1996 CTC – profits attributable to PE and subject to IRAE

• Decree 572/009 regulates transactions executed between head offices and PE regarding different aspects, such as expenses incurred abroad, the determination of income distribution between head offices and PE, ratification of the arm’s length principle and the withholding tax regime.

Thin capitalisation
Rules by means of legislation and regulations
Specific thin capitalisation rules do not apply in Uruguay. However, regulating the subject are:

1. specific regulations on liabilities and interest;
2. specific provisions included in the bilateral agreements; and
3. specific regulations on the treatment of partners’ accounts in partnerships and head office accounts in branches.

• Article 19 of Chapter IV of Title 4 of the 1996 CTC – provides that to determine net taxable income, evidence of duly documented accrued expenses are required for the generation of Uruguayan source income to be allowed as deductions.
• Article 20 of Chapter IV of Title 4 of the 1996 CTC – states that interest paid abroad will be deductible provided they are taxable under the income tax on non-residents or subject to effective income tax imposed abroad. Should they be levied under those taxes at an overall rate of less than the Uruguayan income tax on economic activities rate (i.e. 25%), their deduction for local income tax purposes will be proportional.
• Article 25 of Chapter IV of Title 4 of the 1996 CTC – when companies derive both income subject to IRAE and either income exempt or not included in IRAE (eg. from a foreign source), interest expenses associated to the former (ie. deductible interest) will be determined by applying a proportion based on assets.
• Article 15 of Title 14 of the 1996 CTC – for capital tax purposes, only debts that meet certain prerequisites are deductible.
• Articles 37 and 63 of Regulatory Decree 150/07 – establishes that interests between head office and PE are not deductible for IRAE tax purposes. Capital contributions balances, loans and in general, any financial transaction as well as capital withdrawal accounts, related to transactions between head office and PE will be deemed capital accounts in all cases.

Intercompany loans
How is the arm’s length nature of an inter-company loan evaluated?
• In order to determine the arm’s length nature of intercompany loans, in principle the transfer pricing methods of Article 41 of Chapter VII of Title 4 of the 1996 CTC
should be applicable; however, with regards to loans granted there are specific notional provisions to be considered which are mentioned below. Furthermore, according to Article 6 of Regulatory Decree 56/009, to assess the comparability in the case of financial transactions, factors such as the amount, term, collateral, debtor’s creditworthiness and capacity of repayment, the interest rate, commissions and any other administrative fee must be taken into account.

- When conducting transfer pricing audits, the GTB has not only sought to challenge the interest rate on intercompany loans, but they have tried to re-characterise the nature of the transactions as well, aiming to not only reject the deduction of interest expense, but also reject any foreign exchange loss that might exist. Thus, being able to prove that the formal aspects of the transaction, the terms and conditions and the economic rationale under the transaction are at arm’s length is a key element to support the taxpayer’s position.

- Paragraph i, Article 17 of Chapter III of Title 4 of the 1996 CTC – establishes notional interest for loans granted or deposits.

- Article 20 of Regulatory Decree 150/07 – Defines the market rate to be applied to loans granted or deposits for purposes of Paragraph i, Article 17 of Chapter III of Title 4 of the 1996 CTC. When the real interest accrued is higher than the notional interest, the latter will not be computed.

How is the arm’s length nature of the specific terms and conditions of an inter-company loan evaluated?

There are no specific rules in this regard except for Article 6 of Regulatory Decree 56/009 which was described as above.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not Accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank Quotes</td>
<td>X</td>
</tr>
</tbody>
</table>

So far the GTB has accepted the CUP methodology as the most appropriate for testing this kind of transactions.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not Accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring scoring tool</td>
<td>√</td>
</tr>
</tbody>
</table>

There are no rules in this regard, and very few audit experiences to determine whether there is a preferred approach accepted by the GTB. However, TP practice and general rules suggest that the above mentioned approaches may be helpful to establishing creditworthiness of the borrowing entity.
Uruguay

**How is passive association/implicit support taking into account in substantiating the arm’s length interest rate?**
There are no regulations or practical experience to be able to comment on the approaches accepted by the GTB.

**Are foreign comparables accepted?**
Although the GTB prefers the use of domestic comparables (e.g. information published by the Central Bank), foreign comparables are accepted as well.

**Cash pool**
**How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?**
Except for the provisions mentioned under the previous section the rules do not define an approach to determine specifically the arm’s length nature of cash pooling transactions. However, applying the CUP method is common practice.

**Inter-company guarantees**
**What is your tax authorities approach towards recognizing guarantees?**
The GTB only recognises explicit financial guarantees that comply with the applicable contractual formalities. Also it must be ensured that any guarantee fee and associated terms and conditions are arm’s length in nature.

All accrued expenses that are necessary for the generation of Uruguayan-source income and that are duly documented are allowed as deductions. Additionally, a taxpayer may deduct expenses from its gross income if such expenses are subject to taxation (either via foreign or local taxation) in the hands of the other party. A compulsory proportional deduction must be calculated if the tax is at a rate that is lower than the CIT rate of 25%.

**How is a guarantee fee characterised?**
Guarantees are generally considered as services and treated separately from the interest expense.

**To what extent are implicit guarantees recognised?**
There are no regulations or practical experience to be able to comment on the approaches accepted by the GTB.

**How is the arm’s length nature of the specific terms and conditions of an inter-company guarantee evaluated?**
There are no specific rules in this regard.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?**
There are no regulations or practical experience to be able to comment on the approaches accepted by the GTB.

**Are foreign comparables accepted?**
Although the GTB prefers the use of domestic comparables, foreign comparables are accepted as well.
Documentation

Documentation requirements
Although law does not impose mandatory preparation of formal transfer pricing documentation, it does provide that detailed regulations and the GTB may require additional information for purposes of compliance and tax audits.

Regulatory Decree 56/009 states that taxpayers (as determined by the GTB) must file special tax returns in the form established by this authority. The GTB may require them to file documentary evidence (such as vouchers and receipts) supporting the transfer prices as well as the comparison criteria used to analyse the prices, as well as any detail explaining any amounts of consideration or profit margins reported in this special tax return.

According to Resolution 2084/009, taxpayers will be required to file annual information if they meet any of the following conditions:

- The transactions subject to transfer pricing rules are in excess of 50 million indexed units (equivalent to approximately 6 million United States dollars).
- They have been notified for filing by the GTB.

The information referred to above will have the following contents:

- Informative tax return stating the details and amounts of transactions of the period subject to the transfer pricing regime; and
- Copy of the financial statements for the fiscal period, if not submitted previously in compliance with other regulations. Transfer pricing study with the following minimum content:
  - Activities and functions performed by the taxpayer;
  - Risks borne and assets used by the taxpayer in carrying out such activities and functions;
  - Detail of elements, documentation, circumstances and events taken into account for the transfer pricing analysis;
  - Detail and quantification of transactions performed covered by the transfer pricing rules;
  - Identification of the foreign parties with which the transactions being declared were carried out;
  - Method used to justify transfer prices, indicating the reasons and ground for considering them to be the best method for the transaction involved;
  - Identification of each of the comparables selected for the justification of the transfer prices;
  - Identification of the sources of information used to obtain such comparables;
  - Detail of the comparables selected that were discarded, with an indication of the reasons considered;
  - Detail, quantification and methodology used for any necessary adjustments to the selected comparables;
  - Determination of the median and the inter-quartile range;
  - Description of the activities and relevant features of the comparables selected; and
  - Conclusions of the Report.

In addition, Resolution 2084/009 states that taxpayers who are not required to file the annual information referred to above must still keep on file the supporting evidence and associated receipts justifying the transfer prices used and the comparison criteria.
applied during the period of limitations of taxation, in order to duly demonstrate and justify the correct determination of those prices and the amounts of the considerations fixed or the profits margin declared.

**Are there any specific documentation requirements for inter-company loans/guarantees in addition to the regular documentation requirements?**

There are no specific documentation requirements for inter-company financial transactions.

**When does documentation need to be available?**

The documentation must be submitted to the GTB on the ninth month after the fiscal year ending. However, any transfer pricing adjustment that might be applicable must be included in the taxpayer’s income tax return, which is due in the fourth month after the fiscal year ending.

**What is the deadline for submitting the documentation?**

The documentation must be submitted on the ninth month after the fiscal year ending. The deadline changes every year and depends of the identification number of each company.

**In which language should the documentation be prepared?**

Documentation needs to be prepared in Spanish.

**Advance certainty**

**Are APA’s/ATR’s available?**

APAs were introduced by Decree 392/2009 (Article 314 of Law 18996 granted legal status to the APA provisions) and states that the GTB may execute APAs with taxpayers. The APA must be signed before performing the transactions under analysis. APAs may not exceed the term of the three years, beginning in the fiscal year from which the APA was signed. The term will be applicable to fiscal years closing after the year in which this regime becomes in force.

The GTB will establish the conditions and formalities required for subscribing such agreements.

During 2011, the first APA was executed in Uruguay.

**Where does the request for the APA/ATR need to be filed?**

APA requests should be filed with the GTB.

**What information is typically required?**

The GTB has not yet established the conditions and formalities required for proposing APAs.

In practice, the information provided to the GTB for proposing an APA has been similar to the one provided in a documentation report but before the transactions occur.

**Term of the APA**

3 years.
Venezuela

Transfer pricing rules and regulations

Rules by means of legislation
• Articles 111-170 of the Venezuelan Income Tax Law (VITL).

Rules by means of regulations (decrees, manuals, position papers etc.)
Since 2003, Administrative Ruling N° SNAT/2003/2424 of the Venezuelan Tax Administration established that taxpayers must submit the transfer pricing tax return six (6) months after the end of the fiscal year.


In late December 2010, through the Official Gazette N° 39.577, the Venezuelan Tax Administration introduced the procedure for the calculation of the arm’s length range. The procedure confirms the use of the interquartile range. Also, the procedure establishes that when the price, margin or amount of the transaction carried out between the taxpayer and foreign related parties is not within the arm’s length range, the taxpayer must adjust the results to the median.

Specific rules PE context
The Venezuelan Income Tax Law (VITL) Article 7 - third paragraph provides that non-domiciled companies are liable for taxes to the extent the cause or source of the income is located within the country. Non-domiciled companies having a PE in Venezuela will be liable for taxes on all income from territorial and foreign source attributable to the PE.

According to the Venezuela Income Tax Law (VITL), generally, a passive party is deemed to be carrying out operations in Venezuela through a PE when:

1. The passive party owns, directly or through an agent, employee, or representative in the Venezuelan territory:
   • an office, fixed place of business, or an activity centre where its activities are totally or partially carried on;
   • management headquarters, branches, offices, factories, shops, facilities, warehouses, stores, construction, installations, or assembling works, when the duration thereof exceeds six months; or
   • agencies or representatives authorised (according to the VITL) to contract in the name of or on behalf of the passive party.

2. The passive party performs, directly or through an agent, employee, or representative in the Venezuelan territory, professional, artistic activities.

3. The passive party possesses, directly or through an agent, employee, representative, or other contracted personnel in the Venezuelan territory, other work places where the operations are wholly or partially performed.

Any agent acting independently shall be excluded from this definition, except if such representative has the power to conclude contracts in the name of the principal.
With regard to rules on determination of profits attributable to PEs, from the domestic income tax regulations perspective, the only rule that refers to the attribution of benefits to PEs is Article 3 of the Regulations to the Income Tax Law. This article basically provides that “National or foreign source income attributable to a fixed place of business or a permanent establishment shall be that which results from the development or specific nature of the activity carried out, directly or indirectly, in the country or abroad or from the said permanent establishment or fixed place of business.”

In accordance with the above translated rule, the foreign entities that own a PE within the national territory will pay income tax on all attributable income, regardless of the place they were obtained from, that is to say, whether there is national or foreign source income.

**Thin capitalisation**

**Rules by means of legislation and regulations**

On the 16 February 2007, the partial reform of the Venezuelan Income Tax Law included Article 118 to introduce thin capitalisation rules. These rules state that the interest paid directly or indirectly to related parties will be tax deductible only if the amount of the debts with the related parties (directly or indirectly received) plus the debts with independent parties does not exceed the amount of the taxpayer’s equity.

**What is the effect of the rules on the deduction of interest?**

This Debt to Equity ratio of 1:1 is the strictest in Latin America, where most of the countries require a 3:1 ratio.

**Are their additional rules on the deductibility of interest/guarantee fees (e.g. safe harbours)?**

Moreover, to determine if a debt was received at arm’s length conditions, the tax authorities will consider:

1. the level of debt of the taxpayer;
2. the possibility that the taxpayer could have obtained the loan from an independent party without the intervention of a related party;
3. the amount of debt that the taxpayer could have obtained from an independent party without the intervention of a related party;
4. the interest rate that the taxpayer would have obtained from an independent party without the intervention of a related party; and
5. the terms and conditions of the debt that the taxpayer would have obtained from an independent party without the intervention of a related party.

**Intercompany loans**

**How is the arm’s length nature of an intercompany loan evaluated?**

Although there are no specific provisions as to which particular methodology should be used, the Venezuelan Tax Authorities have focused its audits on an analysis of the interest rate by applying the CUP method.

**How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?**

Considering Article 118 of the Venezuelan Income Tax Law, the interest, directly or indirectly paid to related parties will be deductible only on the extent that the amount
of debt contracted with related parties and the amount of debt contracted with independent parties does not exceed the taxpayer’s net capital.

In Venezuela, for Transfer Pricing analyses regarding interest transactions, the commonly accepted approach by the Tax Administration considers the following conditions:

- Interest rate;
- Term date; and
- Amount of the principal.

### What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not Accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td></td>
</tr>
<tr>
<td>Bank Quotes</td>
<td>√</td>
</tr>
</tbody>
</table>

### What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not Accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>X</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratio’s to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring scoring tool</td>
<td>√</td>
</tr>
</tbody>
</table>

However, please note there are no rules regarding this.

### How is passive association/implicit support taking into account in substantiating the arm’s length interest rate?

There are no rules regarding this, and there are very few audit experiences to determine whether there is a preferred approach accepted by the tax authorities.

### Are foreign comparables accepted?

In Venezuela, foreign comparables are acceptable.

### Cash pool

**How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?**

There are no specific rules related to cash pooling, however, it has been accepted by tax authorities that as long as these operations are classified as financial placements that could be supported by market value rates of comparable loans (treasury bills, negotiable certificates of deposit, commercial papers etc.), it will be recognised as income for loans granted by a Venezuelan related party (or conversely a tax deduction for interest expenses).
**Intercompany guarantees**

**What is your tax authorities approach towards recognizing guarantees?**
The guarantee is recognised as a complementary agreement to a loan transaction and therefore must be taken into account to evaluate it is arm’s length in nature.

Currently there are no other rules about related company guarantees.

**How is a guarantee fee characterised?**
Although there are no specific regulations, experience has shown that in most cases, guarantees are not charged separately from the interest rate and the loan agreement, but rather as part of a combined interest rate.

**To what extent are implicit guarantees recognised?**
They are recognized if they are an explicit part of the loan contract and affect the determination of the interest rate.

**How is passive association/implicit support taking into account in substantiating the arm’s length guarantee fee?**
There are no transfer pricing rules in this matter.

**Documentation**

Transactions and arrangements with foreign related parties must be reported to the tax authorities through an informative return, which must be filed within six months following the end of the fiscal year. This informative return must illustrate the types of intercompany transactions, the dates on which the transactions were executed, the amounts of each type of transaction, the transfer pricing method applied, and the result of each transaction (i.e. profit or loss). Further appendices require the taxpayer to disclose a related and unrelated party segmentation of the profit and loss statement.

Moreover, the taxpayer must develop and maintain a transfer pricing study to document the analyses of its intercompany transactions. The Venezuelan rules also require an extensive list of transfer pricing documentation (background documentation) that includes, among others, the following items:

- An analysis of fixed assets and the commercial and financial risks related to the transaction, including documentation to support the acquisition and use of assets;
- An organisational and functional overview of the taxpayer, including information about the relevant departments and/or divisions, strategic associations and distribution channels;
- Information regarding the foreign related parties, including type of business, main clients and shareholdings in group companies;
- An overview of the controlled transactions, including activities carried out, dates, prices paid or charged and the applicable currency;
- Information on the main activities carried out by each of the relevant group companies as well as data on any changes affecting the group as a whole, such as capital increases or mergers;
- Financial statements for the taxpayer’s fiscal year, prepared according to generally accepted accounting principles, including balance sheet, income statement, stockholders equity statement and statement of cash flow;
• Agreements, conventions or treaties entered into between the taxpayer and foreign related parties, including agreements pertaining to distribution, sales, credits, guarantees, licences, know-how, use of trademarks, copyrights, industrial property, cost allocation, research and development, advertising, trusts, stock participation, investments in securities, and other transfers of intangible assets;
• Any method or methods used to set the transfer prices, indicating the criteria and objective elements considered to determine that the method used is the most appropriate one;
• Information regarding the operations of the uncontrolled comparable companies;
• Specific information as to whether foreign related parties are or were subject to a transfer pricing audit or if they are involved in procedures by a transfer pricing competent authority or a court. Should a resolution be issued by competent authorities or any final verdict issued by the courts, a copy of the findings must be filed; and
• Any other information that may be deemed as relevant or required by the Tax Administration in Venezuela.

Are there any specific documentation requirements for intercompany loans/guarantees in addition to the regular documentation requirements?
The there are no such documentation requirements.

When does documentation need to be available?
The supporting documentation must be submitted to the tax authorities on a yearly basis, on the dates determined by the national government which is 6 months after the end of the fiscal year as applicable.

In which language should the documentation be prepared?
The supporting documentation must be prepared and filed in Spanish.

Advance certainty
Are APA’s/ATR’s available?
The Codigo Organico Tributario (Organic Tax Code) enables the Tax Administration to approve or reject APAs and establishes the formal rules governing the APA application procedure. This procedure includes a list of the various documents that must be provided along with a taxpayer’s application.

Where does the request for the APA/ATR need to be filed?
The taxpayer should present a proposal to the SENIAT (National Integrated Customs and Tax Administration Service) for the valuation of one or more transactions, providing evidence that such transactions comply with the arm’s length standard. The proposal should be prepared by the taxpayer and should be based on an accepted transfer pricing methodology. The SENIAT can determine the format of the documents to be provided by the taxpayer in the proposal. The APA proposal can be bilateral in cases involving the territories of tax treaty partners.

Term of the APA
The APA process must be concluded by the end of the third year after the year of application. This period may be extended if the APA is being negotiated through a competent authority procedure under a double tax treaty.

Either party may terminate the APA application process if commercial or operational changes occur in the assets, functions or risks of the relevant parties.
Venezuela

The SENIAT may terminate the APA if it concludes that fraud was committed or false information was provided in the APA proposal. The SENIAT may terminate an APA in the event of non-compliance with the agreed terms and conditions. If the SENIAT rejects an APA application, a taxpayer cannot seek any of the administrative remedies included in the COT or other law. The only course of action available is to initiate a new APA application.
Asia Pacific
Australia

Transfer pricing rules and regulations

Rules by means of legislation

• Division 13 – Part III of the Income Tax Assessment Act 1936 (ITAA36) – ss 136AA to 136AF: incorporates the arm’s length principle into Australian tax law. There are no specific provisions for loans.

• Division 815-A: Division 815-A has become law following Royal Assent on 8 September 2012. Division 815-A is the first part of an overall rewrite of the Australian transfer pricing legislation. Division 815-A applies to transactions with international related parties based in countries that have a double tax treaty with Australia and stands alongside Division 13 as an additional power. Division 815 enables the equivalent to Article 9 of an international tax treaty to be used by the Commissioner to make adjustments to transfer prices. There is however recognition that Division 815 cannot be applied to override the domestic thin capitalisation rules. Division 815 is retrospective, applying from 1 July 2004 onwards. Specifically, Division 815-A is intended to reflect the ATO’s position as outlined in TR 2010/7 (see below).

• Division 815-B to 815-E: In November 2012 the Australian Government released Exposure Draft (ED) legislation with the intention of modernising Australia’s transfer pricing law and aligning it with the OECD guidelines. If passed into law, the ED would insert Divisions 815-B to 815-E into the Income Tax Assessment Act 1997. This proposed law would replace Division 13 of the Income Tax Assessment Act 1936 and Division 815-A would cease to have effect.

Division 815-B will apply to separate entities and is proposed to operate on a self-assessment basis. Division 815-C deals with Permanent Establishments (PEs) and the methodology to be adopted in attributing arm’s length profits. The proposed law also introduces documentation requirements and associated amendments to the penalty provisions. The ED will be subject to public consultation and is expected to be introduced to Parliament in 2013. The remainder of this document focuses on the transfer pricing law as it currently stands.

Rules by means of regulation

From a financial transactions transfer pricing perspective, the significant Australian Tax Office (ATO) taxation rulings are as follows:25

• TR 92/11: Application of the Division 13 transfer pricing provisions to loan arrangements and credit balances;

• TR 97/20: Arm’s length transfer pricing methodologies for international dealings;

• TR 98/11: Documentation and practical issues associated with setting and reviewing transfer pricing in international dealings; and


Rules by means of case law (most relevant ones)

To date, there has been no transfer pricing court case in Australia dealing specifically with financial transactions. The key Australian transfer pricing court cases are:

25 Taxation rulings are binding on the Commissioner.
• Roche Products Pty Ltd v Commissioner of Taxation (2008): The court expressed a preference for transactional methods over profit methods.

• Commissioner of Taxation v SNF Australia Pty Ltd (2011): The court expressed a preference for transactional methods, accepted a lower standard of comparability for CUPs than the standard proposed by the Commissioner of Taxation and held that the fact that the taxpayer had incurred losses over a prolonged period did not in itself provide evidence to support the Commissioner’s argument that the prices paid by the taxpayer were excessive.

**Specific rules for PE context**
In a PE context, the significant legislation and ATO taxation rulings are as follows:

- SS 136AE(4), (5) and (6) of ITAA36: Incorporates the PE concept into Australian tax law. The legislation adopts a 'relevant business activity' approach as opposed to a 'functionally separate entity' approach. In principle, the legislation only allows for the allocation of third party income and expenditure.


- TR 2005/11: Branch funding for multinational banks.

- Division 815-C: The Exposure Draft explained above, would also affect the application of the arm's length principle in the context of PEs if passed into law.

**Thin capitalisation**
*Rules by means of legislation and regulations*

- Division 820 of the Income Tax Assessment Act 1997 (ITAA97): Sets out Australia's thin capitalisation rules. A number of taxation rulings have been issued in relation to thin capitalisation as well.

Under Division 820, a taxpayer is permitted to establish the maximum allowable debt amount using three methods. The maximum allowable debt is calculated as the greater of the:

- **Safe-harbour debt amount**: i.e. Debt-to-Equity ratio of 3:1 for non-authorised deposit-taking institution (ADI) and financial service entities.

- **Arm’s length debt amount**: i.e. apply the arm’s length debt test.

- **Worldwide gearing debt amount**: only applicable for outward investing entities.

While Australia’s thin capitalisation legislation enables a taxpayer to defend its debt amount based upon an arm’s length debt test (ALDT), the legislation itself does not provide specific guidance on how a taxpayer should conduct such an analysis. The ATO provides guidance in TR 2003/1 on how to apply the ALDT.

The ATO has adopted a position (in TR 2010/7) that where a taxpayer has debt within the safe harbour, but in excess of the amount it could otherwise achieve at arm’s length, the TP rules may be used to reduce the interest rate on the loan to the rate which would have been available to the taxpayer at the lower (arm’s length) level of debt. This position is reflected in Division 815-A.

In June 2012, the Australian Government announced a review of the potential impacts of Australia adopting the Authorised OECD Approach (AOA) for profit attribution to permanent establishments (PEs). The review will involve consultation with various stakeholders and is due to be completed by 30 April 2013. This timeframe suggests that the current branch profit attribution rules are likely to remain unchanged until then.

See the OECD PE Report for a discussion of the differences.
What is the effect of the rules on the deduction of interest?
Tax deductions will be disallowed to the extent that the amount of adjusted average debt used to fund an entity’s Australian operations exceeds the prescribed maximum allowable debt.

Are there additional rules on the deductibility of interest (e.g. safe harbours)?
The thin capitalisation rules apply differently to an entity depending on whether the entity is:

- An inward investing entity or an outward investing entity;
- A general entity or a financial entity (e.g. finance companies or securities dealers);
- An ADI (e.g. Australian banks and foreign banks with branches in Australia).

Intercompany loans
How is the arm’s length nature of an intercompany loan evaluated?
As noted above, the ATO has adopted a position that where a taxpayer has debt within the safe harbour, but in excess of the amount it could otherwise achieve at arm’s length, the transfer pricing rules may be used to reduce the interest rate on the loan to the rate which would have been available to the taxpayer at the lower (arm’s length) level of debt.

Division 815 inserts wording such that any arrangement which confers a transfer pricing ‘benefit’ to a party may be at risk of adjustment by the ATO. Although this could potentially mean that the ATO is seeking to extend its adjustment powers beyond merely the terms and conditions of the loan arrangement, it remains to be seen how the ATO’s interpretation and treatment of a transfer pricing ‘benefit’ will apply to the terms of an intercompany loan arrangement.

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?
The actual terms and conditions of an intercompany loan need to be properly considered in setting an arm’s length interest rate. The ATO has provided (in TR 92/11) that the following terms and conditions are to be carefully examined in determining an arm’s length interest rate for cross border funding:

- The nature and purpose of the loan;
- The market conditions at the time the loan was granted;
- The amount, duration and terms of the loan;
- Currency in which the loan is provided and the currency in which repayment has to be made;
- Security offered by the borrower;
- Guarantees involved in the loan;
- Credit standing of the borrower;
- Situs of lender and borrower; and
- Prevailing interest rates for comparable loans.

A TP analysis should be performed and documented taking into account the above factors and, in addition, TR 2010/7. As noted above, Division 815-A was drafted with the intention of achieving consistency with the Commissioner’s position in TR 2010/7.
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>x</td>
</tr>
</tbody>
</table>

The terms and conditions of the tested loan (see above) should be used to identify internal and external CUPs. Additionally, under the guidance outlined in TR 2010/7, the outcome of the application of comparable data should result in commercially realistic outcomes.

The application of transactional methods is supported by recent Australian case law (see above).

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity if no formal credit rating is available?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>✓</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>✓</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>✓</td>
</tr>
<tr>
<td>Use credit scoring tools</td>
<td>✓</td>
</tr>
</tbody>
</table>

There is no specific guidance from the ATO as to preferred approaches to determining creditworthiness of the borrowing entity. All of the above approaches may result in reasonable outcomes depending on the circumstances. Considerations in the selection of an approach are may include the availability of reliable information, the businesses of the borrower in the group context, the circumstances of the loan and the parties involved. The key is documenting the rationale for the approach taken and why it results in the most appropriate estimation of the creditworthiness of the borrower under the circumstances.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

The ATO’s view is expressed in TR 2010/7, “where, for example, the operations of the borrower are core to the group in the sense that, its functions were a vital part of an integrated business, it would generally be expected that the borrowing company would have the same credit standing as its parent.”

Until further clarification through a court decision, the current uncertainty as to the impact of passive association will remain. Taxpayers should take care to at least consider whether the association with the MNE group has an impact on its credit quality. Documentation should be prepared to support any conclusion about the impact of passive association on the credit standing of the subsidiary.
Are foreign comparables accepted?
Foreign comparables may be accepted; however, it is considered prudent to carry out adjustment calculations for market differences / differences in currency where appropriate and where reliable data is available.

Cash pool
The ATO has not issued any guidance on cash pooling arrangements and, therefore, the general transfer pricing principles applying to loans and the OECD Guidelines would be the most applicable guidance.

Intercompany guarantees
What is your tax authority’s approach towards recognising guarantees?

There is no formal guidance from the ATO on guarantee fees. As a general rule, formal guarantees with appropriate legal documentation will be recognised and respected. The key issue of contention will be the extent to which a guarantee fee should be payable, and if so, the arm’s length amount.

How is a guarantee fee characterised?
For Australian corporate tax purposes, a guarantee fee payment by an Australian taxpayer to an international related party can, in certain circumstances, be characterised as an insurance premium. In this case, the Australian taxpayer is deemed to be an agent of its international related party and, therefore, is liable for tax equal to 3% of the premium. Given that guarantee fees are not typically considered ‘interest’ for Australian tax purposes, there will generally be no withholding tax payable. Australia’s thin capitalisation rules should still apply to guarantee fees.

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
As noted above, there is no formal guidance from the ATO on how passive association or implicit support should or should not be taken into account in the case of guarantees. The only formal guidance is in relation to loans where, as noted above, the ATO is of the view that passive association should be taken into account in pricing the loan.

Informally PwC is aware that the ATO has challenged guarantee fees where it has formed the view that they have been priced without regard to passive association or implicit support. This is a contentious area of transfer pricing and it is unlikely to be clarified without a court decision or a change in law.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?
Given the level of guidance on pricing of guarantee fees and our understanding of the ATO’s position in a number of audits, it could not be said that there is any preferred or generally accepted approach.\(^{28}\)

The most common approach, in the absence of CUPs, is to consider the benefit to guaranteed entity and adopt a method that prices the guarantee in a way that ensures the benefit is shared between the guarantor and guarantee.

\(^{28}\) Draft guidance on the transfer pricing analysis of guarantee fees has been withdrawn by the ATO and not been replaced with other relevant guidance.
Are foreign comparables accepted?
Yes, in principle; however, it is considered prudent to carry out adjustment calculations for market differences / differences in currency where appropriate and where reliable data is available.

Documentation
Documentation requirements
Taxpayers are not required to prepare documentation to support the arm’s length nature of their transactions. However, documentation will minimise penalties in the event of an adjustment provided that the position taken is ‘reasonably arguable’.

TR 98/11 sets out the regulation and practical issues surrounding documentation.

There are no specific documentation requirements for intercompany loans/guarantees. In addition to TP documentation, it is also recommended that an intercompany loan agreement is executed at the time the loan is entered into, to evidence the intention of the parties regarding important terms and conditions.

When does documentation need to be available?
According to TR 98/11, documentation needs to be made available to the ATO within a ‘reasonable time when requested’. Typically requests for documentation allow a 21-28 day period, however, requests for extensions can be made.

What is the deadline for submitting documentation?
Documentation does not need to be submitted, but it does need to be complete, or 'substantially' complete, in order to support positive disclosures on the Schedule 25A/International Dealings Schedule (IDS)29 that is submitted with the taxpayer’s tax return.

In which language should the documentation be prepared?
English

Advance certainty
Are APAs/ATRs available?
Yes; PS LA 2011/1 provides guidance on Australia’s APA process.

Where does the request for the APA/ATR need to be filed?
The request needs to be filed with the ATO's TP Gatekeeper.30

What information is typically required?
Information requirements vary depending on what APA ‘product’ a taxpayer is under. There are simple, standard and complex APAs which vary depending on the size and complexity of the taxpayer’s transactions. The ATO would often seek to cover all international related party transactions of a taxpayer in an APA, and not solely individual transactions.

29 The IDS is the replacement for the Schedule 25A, for 2012 tax returns filed after 30 June 2012.
30 The TP Gatekeeper is the central point in the ATO whereby all inbound TP work is directed (see paragraph 15 of PS LA 2006/9).
Australia

Typically, the ATO will require:

- A functional analysis and industry analysis; for financial transactions, this includes an analysis of the key terms of the arrangement;
- Details of the proposed transfer pricing methodology;
- The terms and conditions governing the application of the transfer pricing methodology including critical assumptions;
- Data showing that the transfer pricing methodology will produce an arm’s length result; and
- Information/documentation as agreed in the pre-lodgement meeting.

**Term of the APA?**
Typically three to five years.
China, People’s Republic of

Transfer pricing rules and regulations
China’s transfer pricing framework consists of the following rules and regulations, some of which also include guidance with respect to intercompany loans and thin capitalisation:

- Corporate Income Tax (CIT) law, together with its Detailed Implementation Regulations (DIR);
- Circular Guo Shui Fa [2009] No. 2: containing the latest version of the Implementation Measures of Special Tax Adjustments (Trial Version) (the Measures);
- Circular Cai Shui [2008] No. 121 (Circular 121);
- Guo Shui Han [2009] No. 363 (Circular 363); and

Rules by means of legislation
The highest level of legislation in China is represented by ‘laws’ which can only be enacted by the National People Congress (NPC). The new CIT law was promulgated on 16 March 2007 by the NPC and became effective on 1 January 2008. Articles relevant to transfer pricing are found mainly in Chapter 6 ‘Special Tax Adjustment’. The CIT law provides the arm’s length principle as the guiding principle for related party transactions and empowers the tax authorities in China to adjust a taxpayer’s taxable income if it fails to comply with the arm’s length principle in its dealings with related parties.

The second level of tax legislation is represented by the DIR which is promulgated by a super-ministerial organisation known as the State Council. The DIR of the CIT law, promulgated on 6 December 2007, provides more specific guidance relating to all aspects of the CIT law. Specifically, with respect to Chapter 6, the DIR provides guidance not only to various concepts (such as cost sharing, controlled foreign corporations, thin capitalisation and general anti-avoidance), but also imposes contemporaneous transfer pricing documentation requirements.

Rules by means of regulations (decrees, manuals, position papers, etc.)
The third level of tax legislation is represented by circulars issued by the State Administration of Taxation (SAT). The formal circulars issued by the SAT are usually designated as Guo Shui Fa and the SAT also issues less formal letter rulings known as Guo Shui Han that can take the form of replies by the SAT to specific issues raised by one of their underlying tax bureaus.

The Measures, promulgated by the SAT under Circular 2 in January 2009 (with an effective date of 1 January 2008), lay out the detailed rules on administering almost all aspects of China’s transfer pricing regime, including details of methods that may be applied and documentation that should be retained.

Circular 121, jointly published by the Ministry of Finance and SAT in October 2008, sets out prescribed debt-to-equity ratios and other rules related to thin capitalisation. Circular 363 re-emphasises the SAT’s position towards losses incurred by companies with limited functions and risks, and goes one step further than Circular 2 by requiring
that all loss-making companies with limited functions and risks must prepare and submit contemporaneous transfer pricing documentation by 20 June following the loss-making year.

Announcement 34, issued by the SAT and effective from 1 July 2011, provides updated guidance on the steps that non-financial services taxpayers need to take in order to determine and substantiate the deductible portion of interest expenses for related party loans from a Chinese corporate income tax perspective.

**Rules by means of case law (most relevant ones)**
Under the current civil law regime in China, although court cases can play a role in daily judicial administration as persuasive authority (especially those by higher courts as the Supreme People’s Court), these cases have yet to be recognised formally as a source of law.

**Specific rules PE context**
In the case of a deemed PE of an overseas company in China, income arising directly or indirectly through or from the PE is generally taxable under Article 2 of the CIT law.

**Thin capitalisation**

**Rules by means of legislation and regulations**
Guidance specific to thin capitalisation is contained in the CIT law, the Measures and Circular 121.

Article 46 of the CIT Law disallows the deduction of excessive related party interest expenses pertaining to the portion of debt where the ratio of related party debt to equity investment exceeds a prescribed standard. Specifically for companies in the financial and non-financial industries, these prescribed standards are related party debt-to-equity ratios of 5:1 and 2:1, respectively.

Article 119 of the DIR of the CIT Law defines related party debt investment while Chapter 9 of Circular 2 provides further guidance on the ‘Administration of Thin Capitalisation’ which includes the following:

- Detailed guidance on how to calculate the debt-to-equity ratio; and
- Related party interest that is not arm’s length will be subject to a transfer pricing investigation and adjustment before being evaluated for thin capitalisation purposes.

Circular 121 also emphasises that excessive interest from related party financing may still be deductible if an enterprise can provide contemporaneous thin capitalisation documentation to support that the intercompany financing arrangement complies with the arm’s length principle. Alternatively, the excessive interest may still be deducted if the effective tax burden of the Chinese borrower is not higher than that of the related party lender so long as the lender is also a Chinese taxpayer.

Any non-deductible outbound interest expense paid to overseas related parties would be deemed as a dividend distribution and subject to withholding tax.
Inter-company loans

How is the arm’s length nature of an inter-company loan evaluated?
The authorities are likely to focus on whether both the interest charged on a loan as well as the specific terms and conditions are at arm’s length. Although there is no prescriptive legislative guidance, the SAT issued Announcement 34 on 9 June 2011, which outlines some of its thoughts in this area. The key points contained in Article 1 of Announcement 34 are:

• Taxpayers are required to produce evidence of the ‘rationality’ of their interest expenses and to file a ‘statement of interest rates of financial enterprise loans of the same type and with the same term’ in order to claim a tax deduction;
• The statement should include information on interest rates of loans of the same type and with the same term provided by financial institutions in the same province when the loan contract in question is signed;
• The rates may be either the average rates of loans of the same type and with the same term released by financial institutions or the actual rates at which financial institutions provide loans to some enterprises.

Announcement 34 seems to imply more stringent comparability requirements than previously described under the transfer pricing guidelines outlined in Circular No.2 [2009]. In particular, industry benchmarks such as the People’s Bank of China (PBOC), Shanghai Interbank Offered Rate (SHIBOR) or LIBOR rates, non-China comparables or comparables from different provinces or time periods might all be rejected under the Announcement 34 provisions.

How is the arm’s length nature of the specific terms and conditions of an inter-company loan evaluated?
There is no specific guidance on how to evaluate the arm’s length nature of the terms and conditions of an intercompany loan. Rather, the tax authorities are likely to examine whether third parties would have entered into similar loan arrangements under comparable circumstances.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>TBC</td>
</tr>
</tbody>
</table>

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?
There is neither any specific guidance in the Chinese transfer pricing rules or regulations, nor sufficient practical experience through tax audits as to what approaches are acceptable for the tax authorities to establish the creditworthiness of the borrowing entity.

31 If indicative only and not executed.
How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?
There is neither any specific guidance in the Chinese transfer pricing rules or regulations nor sufficient practical experience through tax audits as to the question of passive association.

Are foreign comparables accepted?
The Chinese tax authorities have a strong preference for local comparables. Where no local comparables exist, taxpayers in practice do reference other Asian comparables. The SAT’s comments in Announcement 34 indicate that non-Chinese interest rate comparables may not be accepted by the Chinese tax authorities.

Cash pools
How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?
The Chinese tax authorities are likely to focus on whether the terms and conditions of borrowings/deposits are rational vis-à-vis the borrowings/deposits of the same type and with the same term released by financial institutions or the actual rates at which financial institutions enter into such arrangements with enterprises. Nonetheless, since Chinese cash pools are often small and only domestic entities are able to participate, a practical perspective is required in applying the rules.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?
Typically, a CUP approach is most appropriate to substantiate the arm’s length interest of borrowings/deposits. As mentioned above, the authorities commonly focus on the rationality of the arrangement and will (in theory at least) compare the rates applied to the borrowings/deposits of the same type and with the same term released by financial institutions or the actual rates at which financial institutions enter into such arrangements with enterprises.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the cash pool leader?
There is neither any specific guidance in the Chinese transfer pricing rules or regulations nor sufficient practical experience through tax audits as to what transfer pricing methodologies are acceptable to the Chinese tax authorities. In practice, we expect that the CUP or Cost Plus/TNMM will be most often used to substantiate the remuneration of the cash pool leader.

Inter-company guarantees
What is your tax authority’s approach towards recognising guarantees?
There is no specific guidance on how to recognise guarantees in China, other than the recognition that debt from a bank that is guaranteed by a related party will be treated as related party debt for thin capitalisation purposes.

How is a guarantee fee characterised?
There is no specific guidance on how to characterise a guarantee fee, either as a shareholder transaction or a service. In terms of the related party and transfer pricing disclosures that taxpayers are required to make at the point of submitting their tax returns, financial guarantees most naturally fit in the form relating to financing.
To what extent are implicit guarantees recognised?
There is neither any specific guidance in the Chinese transfer pricing rules or regulations nor sufficient practical experience through tax audits as to the question of implicit guarantees.

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
There is neither any specific guidance in the Chinese transfer pricing rules or regulations nor sufficient practical experience through tax audits as to the question of passive association.

How is the arm’s length nature of the specific terms and conditions of an inter-company guarantee evaluated?
There is neither any specific guidance in the Chinese transfer pricing rules or regulations nor sufficient practical experience through tax audits as to what transfer pricing methodologies are acceptable to the Chinese tax authorities.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?
There is neither any specific guidance in the Chinese transfer pricing rules or regulations nor sufficient practical experience through tax audits as to what transfer pricing methodologies are acceptable to the Chinese tax authorities. Having said that, whenever its application is possible, the CUP method is generally preferred.

Are foreign comparables accepted?
The Chinese tax authorities have a strong preference for local comparables. Where no local comparables exist, taxpayers in practice do reference pan-Asian comparables.

**Documentation**

**Documentation requirements**
Chinese taxpayers generally are required to have contemporaneous transfer pricing documentation in place unless they meet any of the following criteria:

- The annual amount of related party purchases and sales transactions is less than RMB 200 million and the annual amount for all other types of transactions is less than RMB 40 million;
- The related party transactions are covered by an APA;
- The foreign shareholding of the enterprise is below 50% and the enterprise only has domestic transactions.

If taxpayers are required to have contemporaneous transfer pricing documentation in place then it is required to cover 27 different areas as outlined by the SAT in the Measures. The 27 areas should theoretically be covered for both financing and non-financing transactions.

According to Announcement 34, non-financial services taxpayers are also required to file a ‘statement of interest rates of financial enterprise loans of the same type and with the same term’ in order to claim a tax deduction for loans from related parties. This statement is an additional form of documentation that must be created.
Are there any specific documentation requirements for inter-company loans/guarantees in addition to the regular documentation requirements?

Where taxpayers want to claim a deduction for excessive interest from related party financing, they are generally required to provide contemporaneous thin capitalisation documentation to support that the intercompany financing arrangement complies with the arm’s length principle. Otherwise, intercompany loans/guarantees need to be covered by contemporaneous transfer pricing documentation if it is prepared.

When does documentation need to be available?

The national requirements state that enterprises must finish their contemporaneous documentation by 31 May of the year following the year during which their related party transactions occurred. Taxpayers must submit the aforementioned documentation within 20 days upon request from the tax authorities. In practice, some provincial and municipal tax authorities may impose earlier deadlines or give taxpayers less time to submit their documentation. Unlike in many other jurisdictions, documentation is regularly collected by the tax authorities.

In which language should the documentation be prepared?

Contemporaneous documentation shall be prepared in Chinese. If the source materials are provided in English, a Chinese copy shall be attached.

Advance certainty

Are APAs/ATRs available?

Circular 2 provides guidance with respect to the various requirements and procedures associated with applying for, negotiating, implementing and renewing APAs. In summary, both unilateral and bilateral APAs may be arranged and the tax authorities are experienced at negotiating with taxpayers and other tax authorities.

Where does the request for the APA/ATR need to be filed?

Per Chapter 6 of Circular 2, APAs shall be handled by tax authorities at the municipal or equivalent level (e.g. cities divided into districts or autonomous prefectures) or above. Enterprises applying for bilateral or multilateral APAs shall submit a written letter of intent to both the SAT and the local in-charge tax authorities. The SAT then organises the pre-filing meeting and discusses the details of the application.

• What information is typically required?
• Contents of the written application package for an advance pricing arrangement include the following:
  • Descriptions of relevant group structure, internal organisational structure of the enterprise, related party relationships, and related party transactions;
  • Financial and accounting reports of the enterprise for the most recent three years, and information on product performance and assets (including intangible and tangible assets);
  • Types of related party transactions and tax years to be covered under the advance pricing arrangement;
  • Allocation of functions and risks among related parties, including the allocation bases used such as entities involved, personnel, expenses, assets, etc.;
  • Proposed transfer pricing methodology and calculation method in the advance pricing arrangement, and the functional and risk analysis, comparability analysis and assumptions used for supporting such methodology and method;
  • Market conditions, including industry development trend and competitive environment;
• Annual information on business scale, business result forecasts and business plans for the period covered under the advance pricing arrangement;
• Information regarding relevant related party transactions, business arrangements and financial results such as profit levels, etc., involved in the arrangement;
• Whether there are double taxation issues; and
• Relevant issues in relation to domestic and international laws and tax treaties.

**Term of the APA**
An advance pricing arrangement typically covers related party transactions for a period of three to five years. Taxpayers can also apply for retroactive coverage under a rollback in the case of bi- or multilateral APAs.
**Hong Kong**

**Transfer pricing rules and regulations**
While there are no specific Hong Kong transfer pricing rules and regulations on the treatment of intra-group financing transactions, the arm's length principle is adopted as the basis for the pricing of related party transactions and the Inland Revenue Department (IRD) has stated that the Commissioner of Inland Revenue (the Commissioner) will seek to apply the principles in the OECD Guidelines except where they are incompatible with the express provisions of the Inland Revenue Ordinance.

**Rules by means of legislation**
- Up to 2009, section 20(2) of the Inland Revenue Ordinance (IRO) was perceived to be the main transfer pricing legislation making reference to transactions between a resident person (defined to include corporation, partnership and sole proprietorship) and a 'closely connected' non-resident.
- The IRD has since stated that it may seek to make transfer pricing adjustments by denying tax deduction claims on costs and expenses which are not reasonably incurred in the production of assessable profits of the taxpayer using section 16 or 17 of the IRO.
- Alternatively the IRD can make transfer pricing adjustments by invoking section 61A of the IRO, an anti-avoidance provision for adjusting transactions designed to avoid a Hong Kong liability for tax. Using this section of the IRO, the IRD can adjust the profits or losses of a Hong Kong resident by re-computing the mispriced transaction as if the transaction had been conducted at arm's length.

**Rules by means of regulations (decrees, manuals, position papers, etc.)**
- **DIPN 45:** Sets out the IRD's views and practices on granting relief arising from double taxation as a result of transfer pricing or profit reallocation adjustments.
- **DIPN 46:** Outlines the IRD's view of the legislative framework for transfer pricing in Hong Kong, the transfer pricing methodologies that may be applied, documentation that should be retained, etc.
- **DIPN 48:** Outlines the Advance Pricing Arrangement program in Hong Kong.

**Rules by means of case law (most relevant ones)**
- **Ngai Lik Electronics Company Limited v. CIR, FACV No. 29 of 2008:** The case, while complex in detail, essentially involved a reorganisation which resulted in profits arising in British Virgin Islands (BVI) entities which had related party transactions with a Hong Kong related party. The IRD asserted that tax had been avoided by way of transfer pricing. The IRD raised additional assessments for the years under review under the anti-avoidance provisions of section 61A by assessing 50% of the profits of the BVI entities as those of the Hong Kong taxpayer. After losing at the Board of Review, the High Court and the Court of Appeal, the taxpayer was allowed an appeal at the Court of Final Appeal (CFA) whereby the CFA remitted the case to the Board of Review directing that a section 61A assessment be raised on the basis of an estimate of the assessable profits which would have been earned by the taxpayer if it had hypothetically paid an arm's length price for the goods. The case is important as the CFA has incorporated the arm's length principle into Hong Kong legal precedence.
Specific rules PE context
As Hong Kong adopts a territorial basis of taxation, the issue of a PE in international
terminology comes into play where a person is carrying on a profession, business
or trade in Hong Kong. Where there is a taxable presence in Hong Kong, the
determination of profits for the Hong Kong branch will be determined under:

- **Rule 3, Chapter 112A of the Inland Revenue Rules**: Outlines the method of
  ascertainment and determination of profits for a Hong Kong branch of an overseas
  headquatered bank.
- **Rule 5, Chapter 112A of the Inland Revenue Rules**: Outlines the method of
  ascertainment and determination of the profits for a Hong Kong branch of a person
  whose head office is outside of Hong Kong.

Where a DTT is in place between Hong Kong and the country in which the home
office is located, Article 7 of the DTT will apply to determine the profits attributable to
the Hong Kong PE. The IRD has also included guidance on this topic in DIPN 45 and
DIPN 46.

Thin capitalisation
Rules by means of legislation and regulations
The deduction of interest expenses is subject to stringent and complex rules contained
within section 16 of the IRO which are designed to guard against loan arrangements
entered into with the intent of avoiding Hong Kong profit taxes. DIPN 13 and 13a
provide further guidance on the provisions set out in section 16 of the IRO.

The key points that come through when examining the deductibility of interest
payments to related parties are as follows:

- The money borrowed was incurred in the production of chargeable profits or used to
  finance the acquisition of plant and machinery or used to purchase trading stock;
- The interest income would be subject to Hong Kong profits tax in the hands of the
  lender if the lender is a financial institution or an overseas financial institution
  (section 15(1)(i) provides a definition of what constitutes a financial institution
  which, in broad terms, includes an authorised institution within the meaning of the
  Banking Ordinance);
- The borrowings were not secured by a deposit or loan made by the borrower/an
  associated person with the bank where the interest generated by such a deposit/
  loan is not taxable.
- There is no arrangement in place such that the interest payment is ultimately
  paid back to the borrower or a person connected to the borrower other than a
  financial institution;
- Although section 16 lays down specific rules for the deductibility of interest
  expenses, it does not preclude the application of the general anti-avoidance
  provision, s61A, which seeks to deny the deductibility of interest expenses for Hong
  Kong taxpayers when triggered.

Are there additional rules on the deductibility of interest/guarantee fees (e.g.
safe harbours)?
There are no formal safe harbour ratios for the deductibility of interest payments.
**Intercompany loans**

How is the arm’s length nature of an intercompany loan evaluated?
As previously mentioned, there are no specific Hong Kong transfer pricing rules and regulations that address the topic of intra-group financing transactions, but the arm’s length principle is the basis for pricing related party transactions and in DIPN 46 it is stated that the Commissioner will seek to apply the principles in the OECD Guidelines except where they are incompatible with the provisions of the local IRO. In this regard, the assessment of the arm’s length nature of intercompany loans would need to be made by reference to the arm’s length principle which is to compare what a Hong Kong taxpayer has transacted with its related party with what a truly independent entity would have done in the same or similar circumstances.

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?
The arm’s length principle requires the examination of all the conditions made or imposed between related parties in all related party transactions, including intercompany loan transactions, and adjustments for any differences in those conditions when compared with third party transactions. Industry practice has been to identify the key conditions that affect the comparability of the controlled and uncontrolled transactions. These differences include but are not limited to:

* Nature and purpose of the loan;
* Market conditions at the time the loan was granted;
* Currency the loan was denominated in;
* Guarantees or collateral.
* Whether any fees were charged (such as upfront fees);
* The size of the loan; and
* Duration of the loan.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>TBC</td>
</tr>
</tbody>
</table>

Hong Kong’s main transfer pricing guidance, DIPN 46, is broadly consistent with the OECD Guidelines and therefore there is an emphasis on the comparability analysis in selecting an appropriate transfer pricing method. DIPN 46 also indicates that the CUP method will often be most appropriate when evaluating the interest rate charged on intercompany loan transactions.

As there is a lack of detailed guidance on the pricing of intra-group financing transactions, any other approaches that evidence the Hong Kong taxpayer’s adherence to the arm’s length principle may be acceptable by the IRD.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?
There is no definitive guidance on which methods would be accepted by the IRD.
How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?
There is no formal guidance from the IRD on whether the arm’s length principle requires the arm’s length interest rate to be substantiated on a standalone basis or taking into account parental affiliation.

Are foreign comparables accepted?
Local comparables are preferred but to the extent that local comparables are not available and to the extent that an overseas market is sufficiently comparable, foreign comparables are also accepted.

**Cash pool**

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?
The IRD has not published any guidance on determining the arm’s length nature of cash pool transactions. The taxability/deductibility of interest payments derived from cash pools follow the same rules described earlier in this chapter.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?
There is no specific guidance on which transfer pricing methodologies are preferred in substantiating the arm’s length interest rate in cash pool arrangements. Similar to intercompany loans, it is expected that the IRD would prefer the CUP method when it and another transfer pricing method can be applied in an equally reliable manner.

**Intercompany guarantees**

What is your tax authority’s approach towards recognising guarantees?
There are no specific provisions in the IRO regarding the deductibility of guarantees nor is there an explicit definition of what a guarantee is. However, we note that the IRD may consider guarantee fees to be a ‘related expense’ of interest payments and as such the provisions that govern interest expense deductions may also apply for guarantee fees.

DIPN 46 does not specifically address the concept of guarantees.

How is a guarantee fee characterised?
There is no formal guidance on the characterisation of a guarantee fee. However, we note that Hong Kong’s transfer pricing framework generally seeks to apply the principles of the OECD Guidelines. On this basis, the OECD Guidelines suggests that an intra-group service would usually exist where a higher credit rating were due to a guarantee by another group member.

To what extent are implicit guarantees recognised?
There is no specific guidance on the extent to which implicit guarantees are recognised. By reference to the OECD Guidelines, implicit guarantees would not be recognised as an intra-group service where it is by reason of affiliation alone that the affiliate has a credit rating higher than if it would if it were unaffiliated.
How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
There is no specific guidance on the impact of passive association/implicit support on guarantee fees.

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
There is no definitive guidance on which specific terms and conditions of an intercompany guarantee should be evaluated.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?
There is no definitive guidance on which methods would be accepted by the IRD.

Are foreign comparables accepted?
Local comparables are preferred but to the extent that local comparables are not available and to the extent that an overseas market is sufficiently comparable, foreign comparables are also accepted.

**Documentation**

**Documentation requirements**
Hong Kong’s main transfer pricing guidance, DIPN 46, encourages taxpayers to prepare contemporaneous transfer pricing documentation. DIPN 46 provides detailed guidance on the key documents it considers that Hong Kong enterprises should maintain to support their transfer pricing arrangements. At the least, these are the documents that the IRD would expect taxpayers to provide in the event of an enquiry, audit or investigation. This includes details of:

- Any relevant commercial or financial relations falling within the scope of IRO sections 20, 20A, 61 and 61A;
- The nature, terms, prices and quantum of relevant transactions or series of transactions;
- The method or methods by which the nature, terms and quantum of relevant transactions were arrived at including comparable data;
- Evidence as to the basis on which the selected method has resulted in an arm’s length result; and
- The terms of relevant commercial arrangements with both third and related parties. This includes contemporaneous commercial agreements, budgets, forecasts or other information relied on in arriving at arm’s length terms.

There are no specific requirements for intercompany loans/guarantees. However, as with all related party transactions, a legal agreement should be in place governing the transactions, and records such as invoices and payment receipts should be retained.

**When does documentation need to be available?**
Upon an enquiry, audit or investigation, a taxpayer may be requested to justify their transfer prices and the amount of profits or losses returned for tax purposes.

**What is the deadline for submitting the documentation?**
Upon written request, documents need to be provided in the timeframe specified (usually within one month).
In which language should the documentation be prepared?
The documentation can be prepared in Chinese or English, both of which are the official languages of Hong Kong.

Advance certainty
Are APAs/ATRs available?
In April 2012, the IRD published DIPN 48 which introduced an APA regime to Hong Kong.

The IRD specifically noted that applications for APAs will be (initially) limited to bilateral APAs rather than unilateral APAs and that Mainland China would likely be one of the first jurisdictions that Hong Kong would work with on a BAPA. It is also anticipated that in the early stages of the APA program only cases involving significant amounts of tax will be entertained.

Where does the request for the APA/ATR need to be filed?
Requests for an APA would need to be filed with the IRD.

What information is typically required?
Typical information required for an APA application includes the following:

- General information concerning the related parties involved in the APA such as their names, addresses and tax residences, the nature of their business and industry environment, the organisational chart, etc.;
- Terms of the APA, including the proposed years to be covered, whether there would be retrospective application of the APA methodology, and details of any issues affecting prior years along with proposals for the resolution of those issues;
- Details on the related party transactions such as the size, nature/characterisation, value, etc.
- Functional analysis and industry analysis;
- Details of the proposed transfer pricing methodology;
- Terms and conditions governing the application of the transfer pricing methodology including critical assumptions;
- Data showing that the transfer pricing methodology will produce an arm's length result; and
- Any other information/documention that the IRD has requested for.

Term of the APA
An APA will generally apply for three to five years.

The IRD is open to considering taxpayer requests for rollbacks of the agreed transfer pricing methodology under the APA for years prior to the start of the APA, depending on the specific circumstances of the case and whether back year assessments can be reopened under Hong Kong’s domestic tax laws and the relevant DTT.
India

Transfer pricing rules and regulations

Rules by means of legislation

Indian transfer pricing regulations, while being wide-ranging, are rather general in nature and do not address specific positions and treatments on all types of transactions. The definition of international transactions includes borrowing and lending of money and any transaction that has an effect on the profits, losses, incomes and assets of an enterprise. Moreover, as per the Finance Act of 2012, an explanation has been added to the existing definition which includes transactions like capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business. Accordingly, all kinds of financial transactions, e.g. loans, guarantees, cash pooling arrangements, etc., would appear to be covered by the ambit of the transfer pricing regulations. However, there are no defined positions around the treatment of financial transactions from a transfer pricing perspective.

Thin capitalisation

Rules by means of legislation and regulations

Unlike as per Article 9 of the DTTS which permits thin capitalisation questions to be asked, under the Indian transfer pricing rules, it would be sufficient compliance if one were to establish that the rate of interest paid on international related party debt is arm’s length. The Indian tax authorities may not be permitted to question the arm’s length nature of the transaction itself, namely whether, given the creditworthiness of the Indian subsidiary, a third party lender would have at all advanced the loan; and accordingly re-characterise the entire amount between loan and equity, by applying judicious transfer pricing methodology.

Incidentally, the new Direct Tax Code (DTC) which is scheduled to come into operation soon, contains provisions for the introduction of General Anti Avoidance Rules (GAAR), which if enacted, would expressly empower the Indian tax authorities to inter-alia re-characterise loans into equity, which the Indian tax authorities at present are not authorised to do under the existing Indian transfer pricing Rules.

Intercompany loans

How is the arm’s length nature of an intercompany loan evaluated?

The Tribunal in a recent ruling (Aithent Technologies Pvt. Ltd.) has opined that the CUP method is the most appropriate method to ascertain the arm’s length price for determining the price of an intercompany interest-free loan. Moreover, for the purpose of determination of this price, assessment of the credit quality of the borrower, estimation of a credit rating and evaluation of the terms of the loan are relevant.

However, so far there have been no detailed judgments where aspects such as creditworthiness of borrower, liquidity position, market conditions, etc., have been evaluated and the tax courts have not commented on the appropriateness of margin charged over an inter-bank rate (i.e. spread over LIBOR).

32 The Income Tax Appellate Tribunal is the second level appellate authority in India, and the last fact finding authority.
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

There are some precedents on outbound loans granted by an Indian group entity to an overseas affiliate borrower wherein the Tribunal held that outbound interest-free loans could not be regarded as being arm’s length and instead determined the rate of interest based on evaluating the internal comparable rates, applying prevailing LIBOR/ LIBOR plus certain margin, etc.

In one of the cases, the Tribunal made a passing reference stating that the internal rate of interest pertaining to the borrowing by the Indian company could be used as a CUP for determining arm’s length interest rate on lending to its overseas affiliate borrower, thus, considering credit rating of the overseas subsidiary at the same level as that of the Indian lending affiliate.

Further, as mentioned earlier, in some cases Tribunal has applied prevailing LIBOR/ LIBOR plus certain margin to determine arm’s length interest rate.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

There is nothing specific in this regard mentioned in the legislation or by way of judicial precedence. However, as mentioned above, the Tribunal has mentioned the relevance of such exercises during computation of the arm’s length price, in one of the recent rulings.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

There is no guidance arising out of Indian regulations or judicial precedents on this particular aspect, and one would need to take guidance from international regulations/case laws on the subject.

The Tribunal however in one of the rulings (Perot Systems TSI (India) Ltd.), has expressed that funding assistance without arm’s length interest would not satisfy the arm’s length test irrespective of commercial expediency, thus effectively ruling out the zero interest – quasi equity angle.

Are foreign comparables accepted?

There is no specific guidance in the Indian regulations on the subject. However, based on experience, revenue authorities have not challenged the use of foreign comparables.

Cash pool

India has an exchange control regime that does not specifically provide for participation in cash pooling arrangements. Hence, these arrangements are not commonly seen in practice in India and accordingly there is no specific guidance around cash pooling arrangements. Further, borrowings from overseas that are referred to as External Commercial Borrowings, require reporting to the Reserve Bank of India and come with end-use restrictions, in the sense they cannot be used for funding working capital requirements. There are also all-in-cost ceilings prescribed for

33 Recently (17-Nov-2011) there has been a policy change announced by the Reserve Bank of India concerning setting off of export receivables against import payable from the same counter-party. The impact of the same on opportunities available for cash pooling arrangements needs to be examined.
payment of interest on such borrowings. This further limits the possibility of using cash pools as sources of short-term finance.

**Intercompany guarantees**

What is your tax authority’s approach towards recognising guarantees?

In one of its recent rulings (Asian Paints Limited), the Tribunal has recognised that provision of guarantee constitutes performance of service, i.e. to cover risk of default and hence warrants a charge. Moreover, it has been observed that the guarantee fee, under no circumstances, can exceed the rate of interest charged on the loan. The use of bank and other third party quotes to analyse the arm’s length nature of the guarantee fee has also been discouraged.

Apart from the above basic guidance, the area of guarantees has not witnessed any significant rulings from the Indian Tax Courts nor is there any specific guidance in the legislation. Guidance would need to be drawn from international regulations/case laws such as detailed guidelines of the ATO and also the Canadian Federal Court ruling in the case of GE Capital.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>x</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>x</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>x</td>
</tr>
</tbody>
</table>

While these are practical approaches to determining a guarantee fee that may find acceptance by the Indian Revenue, tax authorities in India might be inclined to follow relatively simpler and more quantitative methods as opposed to a Cost of Capital approach which could be more complex. Accordingly, the CUP and Benefit approaches may find more favour with the Revenue.

Are foreign comparables accepted?

There is no guidance arising out of Indian regulations on the subject.

**Documentation**

Documentation requirements

Taxpayers are required to maintain, on an annual basis, a set of extensive information and documents relating to all international transactions (including intercompany loans/guarantees) undertaken with associated enterprises. Rule 10D of the Income Tax rules prescribe detailed information and documentation that has to be maintained by the taxpayer.

When does documentation need to be available?

Within 30 days after request of the Indian tax authorities.
Advance certainty

Are APAs/ATRs available?
The government of India has recently introduced APA allowing anonymous pre-filing consultations; Bilateral, Multilateral APAs and Unilateral APAs.
Indonesia

Transfer pricing rules and regulations

Rules by means of legislation

- **Article 18(3) – the Income Tax Law No.36/2008**: The rules authorise the Director General of Taxation (DGT) to re-determine the amount of income and deduction, as well as re-characterise debt as capital, in order to calculate the amount of taxable income for taxpayers on related party transactions that are not at arm's length.
- **Article 18(3A) – the Income Tax Law No.36/2008**: The rules authorise the DGT to enter into agreements with taxpayers and to promote cooperation with tax authorities of other countries with respect to determining the prices of related party transactions that are in force for a certain period and to supervise the implementation as well as re-negotiate following the end of the certain period.

Rules by means of regulations (decrees, manuals, position papers, etc.)

- **Government Regulation No.80/2007**: Requirement to maintain documentation.
- **DGT Circular Letter No, SE-04/PJ.7/1993**: Guidelines to review transfer pricing cases.

Rules by means of case law (most relevant ones)

As a civil law jurisdiction, Indonesia does not apply jurisprudence principle. Therefore, a tax court decision is not binding for other cases although, in practice, the tax auditor may consider tax court decisions in reviewing tax disputes.

Specific rules PE context

- **Article 2 (1a) – the Income Tax Law No.36/2008**: PEs are tax subjects for which the tax treatment is similar to corporate tax subjects.

Thin capitalisation

Rules by means of legislation and regulations

There is neither specific tax nor transfer pricing regulation on thin capitalisation in Indonesia.

The DGT issued internal letter No.S-153/PJ.04/2010, which serves as a guideline for tax offices in examining affiliated transactions. Based on this letter, Debt-to-Equity ratios should be taken into account during the examination of the loan value. In a few audit cases, the tax auditor referred to the Corporate Establishment rule, which stipulates that the maximum Debt-to-Equity ratio allowed at the commencement of a company is 3:1.
### Inter-company loans

**How is the arm’s length nature of an inter-company loan evaluated?**

The arm’s length nature of an inter-company loan is not specifically regulated; however, based on DGT Internal Letter No.S-153/PJ.04/2010 to tax offices, the evaluation of the arm’s length nature of inter-company loan comprises examinations of:

- **The existence of loans:** A loan is said to exist if there is cash in-flow to the account owned by the taxpayer and the loan provides benefit for the taxpayer.
- **The fairness of the loan value:** The Debt-to-Equity ratio should be taken into account during the examination of the fairness of the loan value.
- **The arm's length nature of the loan interest rate:** In order to implement the arm’s length principle, a comparability analysis should be performed to identify whether there is any difference in the terms of loan compared to those between independent parties.

**How is the arm’s length nature of the specific terms and conditions of an inter-company loan evaluated?**

As mentioned earlier, there is no specific guidance on the arm’s length nature of an intercompany loan; however, from a practical standpoint, comparability analyses should be performed to identify whether there is any difference in the terms of loans between related and independent parties. The analyses include but are not limited to identifying the terms and conditions regarding the currencies used, principal amount, duration of the loan, security of the loan, credit standing of the borrower, etc.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>Not clearly regulated</td>
</tr>
</tbody>
</table>

Indonesia transfer pricing regulations adopt the ‘most appropriate method’ principle in selecting the transfer pricing methodology. While the internal and external CUP methods are preferred (taken into account the creditworthiness of the borrowing entity and the terms and conditions of the transaction), if the internal CUP method can be applied, it is the most preferable method. With respect to external CUP methods, comparable loan transactions entered into between companies within the Asia Pacific region are preferable. There is no specific regulation regarding the allowance of bank quotes as comparable transactions.

**What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?**

There is no specific regulation with respect to establishing the creditworthiness of borrowing entities. Based on our experience, in the absence of specific local regulations, the OECD Guidelines may be used as a reference.
How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?
There are no specific tax or transfer pricing regulations on passive association. Based on our experience, in the absence of specific local regulations, the OECD Guidelines may be used as a reference.

Are foreign comparables accepted?
Yes, foreign comparables are accepted in consideration of the terms and conditions regarding the currency used, principal amount, duration of the loan, security of the loan, credit standing of the borrower, etc. From a practical standpoint, it is preferable to rely on comparables within a similar geographical region, i.e. the Asia Pacific region.

Cash pool
How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?
There are no specific tax and transfer pricing regulations on cash pools. Based on our experience, in the absence of specific local regulations, the OECD Guidelines may be used as a reference.

Although we have seen several clients are starting to enter into cash pool arrangements, based on our experiences, cash pools have not been widely applied by Indonesian taxpayers and therefore not subject to scrutiny by the Indonesia Tax Office (ITO) in the context of the transfer pricing applied. Considering the potential growth of the cash pool business in Indonesia, the ITO may look at the transfer pricing aspects relevant to it in the near future.

Inter-company guarantees
What is your tax authority’s approach towards recognising guarantees?
There are no specific tax and transfer pricing regulations on guarantees. Based on our experience, in the absence of specific local regulations, the OECD Guidelines may be used as a reference. From a practical standpoint, payment of guarantee fees may be acceptable by the ITO if it provides commercial economic benefits to the Indonesian entity. Furthermore, the payment should be in accordance with the arm’s length principle.

How is a guarantee fee characterised?
Based on the Indonesia Income Tax Law, guarantee is characterised as interest. However, the characterisation of guarantee fee will have to be determined based upon the definition of interest in the respective tax treaty.

To what extent are implicit guarantees recognised?
There are no specific tax and transfer pricing regulations on implicit guarantees. Based on our experience, in the absence of specific local regulations, the OECD Guidelines may be used as a reference.

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
There are no specific tax and transfer pricing regulations on passive association. Based on our experience, in the absence of specific local regulation, the OECD Guidelines may be used as a reference.
**Documentation**

**Documentation requirements**

Formal Transfer Pricing documentation should include the following items:

- Detailed overview of the company such as group structure, organisation chart, shareholding structure, business operations, list of competitors and description of business environment;
- Pricing policy and/or cost allocation policy;
- Comparability analysis of the characteristics of the traded products, functional analysis, economic conditions, contractual terms, and business strategy;
- Selected comparables; and
- Notes on application of the selected arm's length pricing/profit method.

**When does documentation need to be available?**

At the time when it is requested by the tax office, normally during a tax audit.

**What is the deadline for submitting the documentation?**

There are no specific tax and transfer pricing regulations on the deadline for submitting the documentation; however, in reference to Tax Administration Law No.16/2009, all documentation requested during a tax audit must be delivered within one month of the request.

Please note that there is a related party disclosures form that needs to be submitted along with the Corporate Income Tax Returns (“CITR”) submission. The deadline for submission of the CITR is 4 (four) months after the year end of the relevant tax year i.e. April 30 for the January-December tax year.

**In which language should the documentation be prepared?**

There are no specific tax and transfer pricing regulations on the language to be used for documentation. While Bahasa Indonesia is preferable, English is permissible.

**Advance certainty**

**Are APAs/ATRs available?**

Yes, APA was introduced in December 2010 under the DGT Regulation No.PER-69/PJ/2010.

**Where does the request for the APA/ATR need to be filed?**

The request needs to be filed with the DGT of Indonesia.

**What information is typically required?**

- Details of the transaction;
- Details – entities/PEs involved;
- Relevant jurisdictions involved;
- Details of worldwide group structure;
- Functions, assets and risks analysis;
- Financial information;
- Proposed methodology, including comparables analysis;
- Critical assumptions for the proposal and implications of changes to critical assumptions;
- Accounting years involved; and
- The arm’s length price or profit, or arm’s length price or profit range for any goods/services or transactions covered.
Indonesia

**Term of the APA**
The term of the APA is typically three years. APAs can be rolled back to prior years if certain conditions are fulfilled.
Japan

Transfer pricing rules and regulations

Rules by means of legislation

- Ordinance for Enforcement of the Act on Special Measures Concerning Taxation (the ASMT Ministerial Order) Articles 22-10 and 22-74 (Articles 22-10 and 22-74 of the ASMT Ministerial Order): Contains documentation requirements specified by Ordinance of the Ministry of Finance.

Rules by means of regulations (decrees, manuals, position papers, etc.)

- The Commissioner’s Directive on Interpretation of the ASMT (ASMT Directive) and the Commissioner’s Directive on the Operation of TP (Administrative Guidelines) (Commissioner’s Directive on the OTP): Specific references to intercompany financing. No specific legislative rules or guidelines have been issued in relation to intercompany guarantees.

Specific rules PE context

Funding costs by the home office can be allocated to the PE only if such funding was used primarily for that particular PE.

Thin capitalisation

Rules by means of legislation and regulations

- Act on Special Measures Concerning Taxation Article 66-5: In broad terms, Article 66-5 (1) sets out that if the annual average balance of interest bearing debt owed to a foreign controlling shareholder exceeds the capital contributed by that foreign controlling shareholder by a ratio in excess of a 3:1 safe harbour; the excess interest expense paid or payable to the foreign parent shareholder is not tax deductible. In addition, interest paid to a third party may also be subject to the thin capitalisation rules if the loans are guaranteed or bonds are provided as collateral by the foreign controlling shareholder.

Article 66-5 (3) allows the use of a different ratio (i.e. in excess of the 3:1 Debt-to-Equity ratio safe harbour) if it can be shown that that ratio is consistent with the Debt-to-Equity ratio of a Japanese corporation with comparable characteristics in the same business as the Japanese borrower.

However, it is only possible to apply the Debt-to-Equity ratio of a comparable company if the Japanese borrower states that it is applying Article 66-5 (3) in its final tax return. Moreover, the Japanese borrower should retain additional documentation that justifies the level of the Debt-to-Equity ratio applied, identifying the company that is deemed to be comparable to the Japanese borrower, and outlining in detail why the selected ratio is therefore appropriate.
What is the effect of the rules on the deduction of interest?
Partial interest paid on debt to a controlling foreign shareholder is disallowed if it exceeds the 3:1 Debt-to-Equity ratio.

Are there additional rules on the deductibility of interest (e.g. safe harbours)?
In addition to the above, from the tax years beginning on or after April 1, 2013, an earning stripping rule will be introduced (Article 66-5-2 of the ASMT). Under this rule, the deductible portion of a corporation’s Net Interest expense (as defined) to a related party will be restricted to 50% of Adjusted Income. Where interest expense is not deductible, it may be carried forward for seven years and deducted in a fiscal year up to the 50% threshold in that fiscal year.

Net Interest is calculated as interest expense to related parties less corresponding interest income. Adjusted Income is defined as taxable income, adding back interest expense, depreciation expense and exempted dividend income, but excluding extraordinary income or loss.

**Intercompany loans**

How is the arm’s length nature of an intercompany loan evaluated?
There is no legislative guidance in this respect.

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?
There is no legislative guidance on how the arm’s length nature of specific terms and conditions of an intercompany should be evaluated.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>✓</td>
</tr>
<tr>
<td>Other</td>
<td>✓</td>
</tr>
</tbody>
</table>

The CUP method is the preferred methodology for evaluating an intercompany loan transaction.

According to the ASMT Directive 66-4, (7)-4, and 68-88, (7)-4, where the same method as the CUP or the cost plus method is to be applied, the following factors should be taken into account:

- The currency of the loan;
- Timing and term of the loan;
- Manner of setting interest rate (i.e. setting of fixed or variable rate, or simple or compound rate);
• Method of payment interest (i.e. method of advanced or deferred payment and so on);
• The credibility of the debtor; and
• The conditions of collaterals and guarantees and other factors affecting the arm’s length rate.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
<tr>
<td>Other</td>
<td>√</td>
</tr>
</tbody>
</table>

If the creditworthiness of the subsidiary cannot be reasonably deduced on a standalone basis, then the credit rating of the parent can be adopted instead. This, however, does not apply to financial services companies.

Another issue that should be noted is that of fund matching. For example if a Japanese parent company sources funds on a long term basis and lends all or part of those funds to its overseas subsidiary on a short-term basis at a lower rate, the tax authorities may argue that the costs of sourcing of the funds are not adequately accounted for.

The tax authorities may also challenge an arrangement whereby a related party makes a perpetual deposit to another related party. In such a case, the tax authorities may re-characterise the deposit as a loan.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

Officially, the arm’s length interest rate should be determined by reference to the borrower’s credit rating on a standalone basis. However, in practice, if the estimated borrower’s credit rating is deemed to be unreasonably low, the tax authorities may challenge the rating and argue that the passive/implicit support of the group/parent company warrants a higher rating for the borrower.

Are foreign comparables accepted?
In practice yes, but depending on the case and provided the key terms, such as currency and base rate, are sufficiently comparable or can be adjusted for comparability.

Intercompany guarantees
What is your tax authority’s approach towards recognising guarantees?
Guarantees are recognised and a fee is justified.

How is a guarantee fee characterised?
Guarantees are generally considered to be services which provide a benefit to the guaranteed entity. However in certain cases, guarantees are treated as the assumption of risk or a part of an internal risk transfer arrangement.
To what extent are implicit guarantees recognised?
An implicit guarantee on its own is not recognised as a transaction for which transfer pricing compensation is due; however, it may affect the assessment of the credit standing of the guaranteed entity as discussed below.

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
Although the credit rating of the guaranteed entity should generally be lower than that of the guarantor, if it is unreasonably low, the tax authorities may challenge the credit rating on the basis of implicit support.

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
There is no legislative guidance on how the arm's length nature of specific terms and conditions of a guarantee should be evaluated.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>✓</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>x</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>✓</td>
</tr>
<tr>
<td>Yield spread</td>
<td>✓</td>
</tr>
<tr>
<td>Other</td>
<td>✓</td>
</tr>
</tbody>
</table>

Although it is not yet official, it is expected that the tax authorities may issue guidance in relation to the arm's length pricing of guarantee fees in the future.

Are foreign comparables accepted?
In practice yes, but depending on the case and subject to comparability factors.

Documentation

Documentation requirements
There are no contemporaneous documentation requirements at the time of filing the tax return; however, documents necessary to support a taxpayer’s transfer pricing must be provided upon request from the tax authorities in an audit in order to provide protection against the use of ‘taxation by estimation’ and/or the use of secret comparables.

There are no specific requirements for intercompany loans/guarantees in addition to the regular documentation requirements.

When does documentation need to be available?
Documentation needs to be available upon request from the tax authorities in an audit. General disclosures on the quantum, type of transaction, and the counterparty to the related party transaction are also required as a schedule to the tax return.
What is the deadline for submitting the documentation?
There is no formal deadline. Upon request by the tax authorities, documentation must be provided ‘within a reasonable period’ (typically estimated as three to four weeks.)

In which language should the documentation be prepared?
The documentation can be provided in either English or Japanese.

Advance certainty
Are APAs/ATRs available?
APAs are available; however, in practice, an APA would generally not be for a loan or guarantee transaction on its own. Usually such transactions would be incidental or additional to the main transaction covered in an APA.

Where does the request for the APA/ATR need to be filed?
The request for the APA must be submitted directly to the department of MAP within the National Tax Agency office.

What information is typically required?
The following should be attached to the APA request:

• Organisation outline and description of the transactions subject to APA request;
• Transfer pricing method to be confirmed and explanation of the reason for proposed method;
• Material business and economic conditions essential to the APA;
• Details of the transaction subject to the APA, e.g. cash flow, currency type, etc;
• Capital relationships and substantial control relationships with foreign-related party/parties;
• Functions performed by each transaction party;
• Operational and accounting information for the prior three taxable years;
• Outline of transfer pricing examinations, appeals, lawsuits and similar procedures pertaining to applicable foreign-related party/parties, and details of past taxation in their country/countries;
• Results determined by applying the proposed transfer pricing method to the prior three taxable years; and
• Miscellaneous documents that are considered necessary for the APA.

Term of the APA
Typically for three to five year terms. Rollback is available in the bilateral context.
**Korea, Republic of**

**Transfer pricing rules and regulations**

**Rules by means of legislation**
The Korean Transfer Pricing regulations are contained in the Law for the Coordination of International Tax Affairs (LCITA).

**Rules by means of regulations (decrees, manuals, position papers, etc.)**

- Presidential Decree of the LCITA;
- Basic tax commentary under the LCITA (effective from 15 June 2004); and
- Tax rulings upon request by taxpayers.

**Rules by means of case law (most relevant ones)**

There have been no court cases specifically relating to transfer pricing of financial transactions, although a few cases have been reviewed by the National Tax Tribunal. These mainly relate to arm’s length interest rate for loans or deeming certain transactions as loans on which arm’s length interest should be charged.

**Specific rules PE context**

In relation to the attribution of profits to PE, the significant provisions prescribed in the Corporate Income Tax Law (CITL) are as follows:

- **Article 91, 92 of the CITL:** Calculation of tax base of a PE.
- **Article 129 of the Presidential Enforcement Decree (PED) of the CITL:** Calculation of Korean source income
- **Article 129 – 3 of the PED of the CITL:** Allocation of funding costs to PE/branch of a foreign bank
- **Article 130 of the PED of the CITL:** Head office expenses that relate to the derivation of PE’s business income should be allocated to PE and deductible.

**Thin capitalisation**

**Rules by means of legislation and regulations**

According to Article 14 of the LCITA, interest expense attributable to borrowings in excess of the safe harbour debt to equity ratio (3 to 1 generally or 6 to 1 for financial institutions or the ‘arm’s length’ amount) from a Foreign Controlling Shareholder (FCS) and debt borrowed from a third party based on the guarantee of the FCS shall not be allowed as deductible interest expenses in computing taxable income of a domestic corporation or a Korean PE of a foreign corporation.

**What is the effect of the rules on the deduction of interest?**

Disallowed interest expenses shall be regarded as a dividend payment to the FCS in case of borrowings from the FCS.

**Are there additional rules on the tax deductibility of interest/guarantee fees (e.g. safe harbours)?**

Bank branches are also subject to the ‘deemed capital’ rule which broadly deems borrowings in excess of head office’s gearing ratio to be capital on which the interest expense is not deductible. Where both the thin capitalisation and deemed capital rule applies, only the excess of non-deductible interest expense under the deemed capital...
rule over the non-deductible interest expense under the thin capitalisation rule is not deductible.

**Intercompany loans**

How is the arm’s length nature of an intercompany loan evaluated?

According to the LCITA, the arm’s length interest rate applied in monetary transactions is the rate applied (or applicable) in normal third party transactions and it should be calculated taking into consideration the following factors:

- Principal;
- Availability of guarantee;
- Credit worthiness of issuer; and
- Maturity.

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?

The LCITA specifically makes reference to principal, availability of guarantee, credit worthiness of issuer and maturity. The above factors should be considered in the pricing analysis.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td></td>
</tr>
<tr>
<td>Bank quotes</td>
<td>Maybe</td>
</tr>
</tbody>
</table>

Internal and external CUP information is preferable since the creditworthiness of the borrowing entity and the terms and conditions of the transaction are taken into consideration for transfer pricing analysis.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>Maybe</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
</tbody>
</table>

In practice, the generally accepted approach is to use the credit rating information provided by independent credit rating agencies (e.g. S&P, Moody’s, etc).

34 The Korean tax authorities may or may not accept this approach.

35 The Korean tax authorities may or may not accept this approach.
How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?
According to the LCITA, the arm’s length interest rate should be established on a ‘separate entity’ basis and no account should be taken of any guarantees, explicit or implicit, from related companies.

Are foreign comparables accepted?
Under the Korean tax law, there is no provision on whether the use of foreign comparables is acceptable or not. However, in practice, the Korean tax authorities prefer to use local comparables in determining the arm’s length nature of the transaction in concern. A use of foreign comparables would only be considered in cases where local comparables are not readily identifiable and the market condition of the foreign comparables is sufficiently comparable to the local market.

Cash pool
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?
There is no specific guidance in Korea relating to transfer pricing for cash pooling. Generally, interest rate on related party borrowings/deposits is compared with that of comparable third-party borrowings/deposits to determine the arm’s length nature of such transactions.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?
Please refer to the above comments.

Intercompany guarantees
What is your tax authority’s approach towards recognising guarantees?
As a general rule, formal guarantees with appropriate legal documentation will be recognised. However, in practice, the substance-over-form principle applies to the inter-company guarantees. Inter-company guarantees could be recognised regardless of whether legal documentation exists, types of the legal documentation and guarantee methods.

How is a guarantee fee characterised?
Guarantee fees are characterised as service fees in inter-company loan guarantee transactions.

To what extent are implicit guarantees recognised?
As noted above, the Korean tax authorities will adopt a substance over form approach in reviewing such arrangements and hence may challenge that a guarantee fee should be paid.

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
There is no specific guidance in Korea in relation to transfer pricing of passive association/implicit guarantees.
How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?

The Korean tax authorities use a credit evaluation model to determine the arm’s length nature of guarantee fees. As a first step for applying the model, a credit score using financial data for the tested companies is calculated. Based on the credit score calculated, a credit rating and the applicable credit spread are determined. The probability of default is also taken into account for calculating the applicable credit spread. Finally, the arm’s length guarantee fees are calculated using the credit spread.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>√</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>Maybe*</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>×</td>
</tr>
<tr>
<td>CUP approach</td>
<td>√</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>Maybe**</td>
</tr>
</tbody>
</table>

Are foreign comparables accepted?
Please refer to the above comments.

**Documentation**

**Documentation requirements**

The Korean tax authorities may request taxpayers to submit the relevant documents and data, such as the computation method of transaction prices, etc. The following information should be contained in documentation submitted:

- Various agreements relating to transfer or purchase of assets;
- Details of transactions by item segregated into transactions with related parties and those with unrelated parties;
- Organisational chart of a corporation and a table for segregation of duties;
- Documents relating to the process of determination of international transaction prices;
- Internal guidelines for pricing arrangements among the related parties;
- Standards or methods for accounting treatment of the relevant transactions;
- Details of business activities of the parties involved in the relevant transactions;
- Current status of mutual investments with the specially related parties;
- Forms or items omitted when filing corporate tax and income tax returns;
- Other documents to facilitate the understanding of the details of service transactions:
  - Service agreements;
  - Ownership structure between the resident (i.e. local taxpayer) and overseas related parties;
  - Organisational structure and explanation for transaction parties; and
  - Details of costs incurred for the provision of the services.
- Other documents relating to determining reasonable transaction prices.

---

*While it is possible to use this approach, it is generally not applied in practice.*

**The Korean tax authorities may or may not accept this approach.**
When does documentation need to be available?
The Korean tax authorities may request taxpayers certain information by way of a written notice.

What is the deadline for submitting the documentation?
Upon written request, the documentation should be provided within 60 days, subject to one-off extension of 60 days.

In which language should the documentation be prepared?
In general, the tax officials in Korea request transfer pricing documentation in Korean language, and it is specified under the relevant tax regulation that taxpayers should duly follow the instructions provided by the tax officials. However, the tax officials would accept transfer pricing documentation in English where they had explicitly communicated to taxpayers that documentation in English language would be accepted. Further, even if the tax officials accepted the documentation in English, they could still request a Korean summary of the documentation.

Advance certainty
Are APAs/ATRs available?
APAs are available in Korea.

Where does the request for the APA/ATR need to be filed?
APA applicants should submit an application form to the International Cooperation Division of the National Tax Service.

What information is typically required?
• Overview of business: Business profile, organisation, and ownership structure;
• Financial statements for the past three years, a copy of tax returns, copies of contracts and relevant documents;
• Documents detailing suggested transfer pricing methodology as listed below:
  • Methods used to evaluate comparability and methods for adjustment of difference in factors determining comparability as provided in LCITA;
  • Where the financial statements of comparable companies are used, the difference in the accounting principle and the adjustment method;
  • Where financial or cost data segmented by transaction item are used, segmentation standards;
  • Where two or more comparables are used, the arm's length range and the calculation method; and
  • Information explaining conditions or assumptions for calculating arm's length prices.
• The method used to adjust differences between the actual transaction price and the arm's length price;
• Where the taxpayer requests a Mutual Agreement Procedure (MAP), the MAP application form; and
• Other data supporting the appropriateness of the TP method for an APA.

Term of the APA
Typically five years. There is no set term requirement for APA.
Malaysia

Transfer pricing rules and regulations

Rules by means of legislation

- **Section 140A of the Malaysian Income Tax Act 1976 (the Act):** Specific provision on adjustments to the price for transactions of goods, services or financial assistance between related companies based on the arm's length principle.

- **The Income Tax (Transfer Pricing) Rules 2012 (Rules):** The Rules were gazetted on 11 May 2012 and are deemed to have retrospective effect from 1 January 2009, in line with the introduction of specific transfer pricing legislation; i.e. Section 140A of the Act. Introduction of the Rules provides taxpayers with further guidance as well as certainty as to how the arm's length standard will be applied, and the type of documentation that taxpayers are expected to maintain. There is now a clear requirement under the Rules for taxpayers to prepare and maintain contemporaneous transfer pricing documentation at the point of developing, implementing and reviewing controlled transactions.

- **Section 138c of the Malaysian Income Tax Act 1976:** Deals with APA procedures.

- **The Income Tax (Advance Pricing Arrangement) Rules 2012 (APA Rules):** The APA Rules were gazetted on 11 May 2012 and are deemed to have come into operation on 1 January 2009. The APA Rules are to be read in conjunction with the Act, specifically Section 132, Section 138C and Section 140A and the Transfer Pricing Rules. The APA Rules are designed to provide clarity on the APA application process in Malaysia, and sets out the terms and conditions for a taxpayer to apply for an APA, and outlines the application process, post agreement compliance requirements and other matters that relate to an APA in Malaysia.

Rules by means of regulations (decrees, manuals, position papers, etc.)

The new Malaysian Transfer Pricing Guidelines 2012 (the New Malaysian Guidelines) as well as the OECD Guidelines which form the basis for the New Malaysian Guidelines.

The New Malaysian Guidelines were issued on 20 July 2012 to replace the previous Transfer Pricing Guidelines 2003. The New Malaysian Guidelines provide further assistance to the taxpayers in their efforts to determine transfer prices which are consistent with the arm’s length principle espoused in the Act. Consequently, taxpayers now have clearer guidance in terms of the acceptable transfer pricing arrangements as well as the extent of administrative requirements pertaining to the transfer pricing legislation and the Rules.

Rules by means of case law (most relevant ones)

To date, there is no relevant transfer pricing case law in Malaysia relating to loans/guarantees/cash pools. However, it is made known to the public and as stated in the annual report of Malaysian Bulk Carrier Berhad (Maybulk)’s annual report for year 2010 that on 15 August 2008, the Malaysian Inland Revenue Board (MIRB) has raised a tax assessment of approximately RM58,400,000 on deemed interest income for all interest‑free loans which Maybulk provided to its wholly owned subsidiaries covering financial years 2003 to 2005. Maybulk objected to this assessment and the case has gone to the Court of Special Commissioner of Income Tax. First and second hearings were in September 2010 and January 2011, respectively, and the final hearing was scheduled on 1 April 2011.
Specific rules PE context
Not applicable

Thin capitalisation
Rules by means of legislation and regulations
Thin capitalisation legislation was incorporated into the Malaysian income tax legislation with effect from 1 January 2009 by way of a new Section 140A (4). However the effective date of implementation of the thin capitalisation legislation has been deferred until further notice and the rules thereon will be issued separately at a later date when the legislation becomes effective again.

What are the main points of the rules?
Section 140A (4) empowers the tax authorities to disallow the amount of any interest, finance charge, other consideration payable for or losses suffered in respect of the financial assistance which is deemed to be excessive in relation to the fixed capital.

What is the effect of the rules on the deduction of interest?
As mentioned above, the effective date of implementation of the thin capitalisation legislation has been deferred until further notice and the rules thereon will be issued separately at a later date when the legislation becomes effective again.

Intercompany loans
How is the arm’s length nature of an intercompany loan evaluated?
Based on the New Malaysian Guidelines, there is specific focus on certain controlled transactions, namely:

• Intragroup services;
• Cost contribution arrangements;
• Intangible properties; and
• Intra-group financing.

In relation to intra-group financing transactions, the comparability factors to consider when searching for and analysing financial transactions and the determination of arm’s length interest rate include:

• The nature and purpose of the financial assistance;
• The amount, duration and terms of the financial assistance;
• The type of interest rate (e.g. fixed or floating interest rate);
• Embedded options;
• Guarantees involved in financial assistance;
• Collateral for the financial assistance;
• Creditworthiness of the borrower; and
• Location of the lender and borrower.

When ascertaining the arm’s length interest rate, appropriate indices such as Kuala Lumpur Inter Bank Offered Rate (KLIBOR), prime rates offered by bank.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?
There is no focused scrutiny on implicit support.
Are foreign comparables accepted?
Generally, regional or global foreign comparables are not recommended since the MIRB has a preference for Malaysian comparables. In Malaysia, audited financial statements of the local private limited companies are readily available at the Companies Commission of Malaysia (CCM).

Cash pool
How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?
Under the Rules and the New Malaysian Guidelines, the taxpayer is expected to charge or pay its related party interest in relation to financial assistance arrangements at a rate that would have been charged in a similar transaction between third parties dealing at arm’s length.

Hence, if the cash pool leader is treated as a service provider providing cash pooling services, the arm’s length remuneration would be on a cost plus basis.

Intercompany guarantees
What is your tax authority’s approach towards recognising guarantees?
Provision of guarantees forms part of intra-group financing arrangements under the Rules and Guidelines where the MIRB expects an arm’s length interest rate to be charged or paid for such financial assistance provided between related parties.

Documentation
Documentation requirements
There is a clear requirement under the Rules for contemporaneous transfer pricing documentation to be prepared:

• At the point when the taxpayer is developing or implementing any arrangement or transfer pricing policy with its associated person; and
• If there are material changes when reviewing these arrangements prior to, or at the time of, preparing the relevant tax return of his income for the basis year for a year of assessment.

The New Malaysian Guidelines outlines the specific documents taxpayers should maintain to support the basis used in arriving at their transfer prices for related party transactions. These documentation requirements can be broadly grouped into three areas:

• Company details: This includes the ownership and organisation structure as well as an overview of the operations of the company.
• Transaction details: The components of this would include details of transactions with related parties and identification of similar transactions with third parties (if any), the pricing policy adopted by the company and how it has been applied as well as the economic circumstances during the time of the transaction.
• Determination of arm’s length price: Companies are required to provide a functional analysis, evaluation of the various methods and the reason why a particular method is chosen over the others as well as details of how this method has been applied including a comparability analysis.
The documentation requirements for intra-group loans and/or guarantees or any other type of intra-group financial assistance include the following:

- Loan agreement;
- Documents supporting all items covered under the specific transfer pricing documentation requirements under the New Malaysian Guidelines as mentioned in the above;
- Currency of loan; and
- A copy of the accounts of the borrower (where the Malaysian entity is the lender).

**When does documentation need to be available?**
The transfer pricing documentation will have to be made available to the MIRB upon request. Such requests are usually a precursor to a desk audit or field audit to review the company's transfer prices.

**What is the deadline for submitting the documentation?**
Upon receiving formal letter from MIRB requesting the transfer pricing documentation, the company has 14 days to furnish the document.

**In which language should the documentation be prepared?**
English

**Advance certainty**

**Are APAs/ATRs available?**
Yes

**Where does the request for the APA/ATR need to be filed?**
The request needs to be filed with the MIRB.

**What information is typically required?**
The written request for an APA must include the taxpayer’s contemporaneous TP Documentation containing the following:

- Names, addresses and tax file references of taxpayer or all parties to the proposed APA (both in Malaysia and overseas);
- Proposed covered transaction;
- Period covered by the APA;
- Details of the taxpayer including ownership structure, organisation chart and operational aspect of the business;
- General information concerning the taxpayer such as the nature of its business, its industry environment and worldwide organisational structure;
- Functional analysis of each entity, details and analysis of the proposed transfer pricing methodology (TPM) together with its rationale;
- Information and analysis needed to produce the arm’s length results for the related party transactions;
- A description of the critical assumptions under which the proposed TPM and analysis will operate and the events that should be taken into account when considering the said assumption; and
- Any other necessary information including proof of similar application or notification by foreign entity for application for a bilateral APA/multilateral APA.
Term of the APA
The APA Rules provide that the covered period of an APA is a minimum of three years and a maximum of five years. The APA may be renewed to a further period as agreed upon by parties to the APA, subject to the requirement of the covered period as stated in the APA Rules.
Middle East

Egypt
The Egyptian thin capitalisation rules provided by the Egyptian income tax law dictate that the Debt-to-Equity ratio starting from the year 2009 going forward is 4:1. Accordingly, the law disallows the deductibility of debit interests of Egyptian companies on loans and advances if such loans and advances are in excess of fourfold the equity average (which is calculated according to the financial statements prepared pursuant to the Egyptian accounting standards).

The debit interest includes all amounts chargeable by the company in return for the loans; advances of any kind obtained thereby, bonds and bills. The loans and advances include, for purposes of this item, bonds and any form of financing by debts through securities with fixed or variable interest.

For determining the equity, the following items represent the basis for the calculation: the paid up capital in addition to all reserves and dividends reduced by retained losses, provided that the differences of the adjusted account is not included in the reserves account and is determined to be non taxable. In case of retained or carry-forward losses, they must be used to reduce retained profits and reserves solely; the percentage is calculated on basis of total loans and advances in proportion to the remaining equity amount, after deducting the retained losses with a minimum of the paid up capital.

Jordan
Interest and Murabaha that are paid by any taxpayer other than banks and financial institutions and finance leasing companies shall be accepted as a deduction provided that the deduction shall not exceed the following rates of relative value (i.e. total debt to the paid capital or average owners’ equity, whichever is higher):

<table>
<thead>
<tr>
<th>Tax period</th>
<th>Relative value</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>6:1</td>
</tr>
<tr>
<td>2011</td>
<td>5:1</td>
</tr>
<tr>
<td>2012</td>
<td>4:1</td>
</tr>
<tr>
<td>2013 and following</td>
<td>3:1</td>
</tr>
</tbody>
</table>

Kingdom of Saudi Arabia
There is no special legislation governing thin capitalisation for tax purposes. A Saudi company may deduct interest payments to affiliates, but not the head office, provided that the amount of debt and rate of interest are at arm’s length and that interest deductibility formula is met. A Saudi company may be financed with minimum capital, and there is no limit to the amount of debt that may be used.

Oman
The tax law proposes to issue executive regulations that will define the thin capitalisation rules. Although there are no defined policies on thin capitalisation, the tax authorities review the terms of loans and interest payments in most cases.
Lebanon

Intercompany financing
Related entities may enter into financial agreements. These agreements have to obey the arm's length principle. A more common constellation, however, would involve a Lebanese holding company which has entered into financial agreements with its subsidiaries. The holding company is restricted in its permissible operations, but offers several tax benefits (inter alia: no tax on income and no withholding tax obligation on distributed dividends).

Thin capitalisation rules
There are no specific thin cap rules for regular companies. However, a debt: equity ratio of 2:1 should not be challenged by the Lebanese tax authorities for joint stock companies, based on our experience. The holding company law enforces a Debt-to-Equity ratio of 5 to 1. If this threshold is not met by the holding company, the holding company may lose its preferential tax status.

Qatar

QFC
The Qatar Financial Centre (QFC) intends to shortly issue a Practice Note in regard to thin capitalisation. They have indicated that their general approach will be to accept Debt-to-Equity ratios of 1:1 and challenge Debt-to-Equity ratios of 3:1. The prospect of challenge for anything in between will depend on the circumstances. The QFC have also said that they accept that financial institutions may have a higher Debt-to-Equity than non-financial institutions.

State of Qatar
The State of Qatar has not issued any guidance to date on the application of its tax avoidance regulations to Thin Capitalisation and we have not yet seen the tax authorities challenge any arrangements on the basis of the debt: equity ratio.
New Zealand

Transfer pricing rules and regulations

Rules by means of legislation
• Sections GB 2 and GC 6 to GC 14 of the Income Tax Act 2007: Contains the current transfer pricing legislation. The legislation closely follows the current OECD Guidelines.

Rules by means of regulations (decrees, manuals, position papers, etc.)
• Inland Revenue's guidelines: Inland Revenue issued final transfer pricing guidelines in October 2000. The guidelines serve as a practical guide rather than prescriptive rules, and are intended to supplement the OECD Guidelines rather than supersede them. Inland Revenue's guidelines specifically do not apply to PEs (these are covered by section YD 5 of the Income Tax Act 2007).
• Inland Revenue's practice issues: Inland Revenue recently advised that it will not be updating the transfer pricing guidelines in the future. Instead, Inland Revenue has referred taxpayers to the practice issues available on its website. Like the guidelines, the practice issues serve as a practical guide to common transfer pricing issues, and are intended to supplement the OECD Guidelines.

Rules by means of case law (most relevant ones)
No court cases have arisen in connection with New Zealand’s transfer pricing rules. Most transfer pricing disputes are settled by negotiation.

Specific rules PE context
Where a PE is concerned, attribution of profit should be a fair reflection of the real economic functions performed and assets utilised. New Zealand's double tax agreements are given effect as per the Income Tax Act 2007 section BH 1(4). In the absence of a double tax agreement, section YD 5 of the Income Tax Act 2007 applies to branches.

It is worth noting that New Zealand has not adopted the new Article 7 of the 2010 update of the OECD Model Tax Convention. The new Article 7 will only apply if and when it is adopted in New Zealand’s double tax agreements. This is unlikely to occur in the near future, and the recently renegotiated DTA’s with Australia and the United States, do not include the new Article 7.

Thin capitalisation

Rules by means of legislation and regulations
• Section FE of Income Tax Act 2007: Contains New Zealand's thin capitalisation provisions. The legislation deals with the apportionment of interest. It is designed to discourage the excessive debt-funding of New Zealand operations of multinational enterprises, by reducing tax deductions for interest in extreme cases. It requires the consistent treatment for a number of items such as controlling interests for grouping purposes and applicable measurement dates.

The thin capitalisation rules apply differently to an entity depending on whether the entity is:
• An inward investing entity or an outbound investing entity; or
• A general entity or a reporting bank.
An excess debt entity that is an inward investing entity must apportion its interest expenditure for the income year if the debt ratio (calculated as total interest bearing debt/total group assets) of the New Zealand group is greater than 60% and the New Zealand group’s debt percentage is greater than 110% of the debt percentage of the worldwide group.

An excess debt outbound company (i.e. an outbound investing entity) must apportion its interest expenditure for the income year if the debt ratio (calculated as total interest bearing debt/total group assets) of the New Zealand group is greater than 75% and the New Zealand group’s debt percentage is greater than 110% of the debt percentage of the worldwide group.

New Zealand’s safe harbour threshold under the thin capitalisation rules for inward investing entities has recently reduced, moving from 75% down to 60% with effect from the 2012 tax year (i.e. from 1 April 2011 for standard balance date taxpayers). The threshold for outbound investing entities remains at 75%.

It is important to note that on 14 January 2013 Inland Revenue released an officials’ issues paper proposing a number of changes to the thin capitalisation rules. The main proposals are to:

- Extend the current rules to apply also to New Zealand businesses controlled by a group of non-residents acting together; and to
- Disregard some shareholder debt when calculating the worldwide debt ratio.

Submissions on the officials’ issues paper are due for submission to Inland Revenue by 15 February 2013.

**What is the effect of the rules on the deduction of interest?**

Tax deductions for interest expense associated with debt which is above the threshold and therefore does not satisfy the thin capitalisation rules will be disallowed.

As a matter of routine, Inland Revenue will not deny interest deductions to taxpayers carrying debt levels that satisfy the thin capitalisation rules, provided the interest on this amount of debt has been priced in accordance with the arm’s length standard.

Inland Revenue warns however, that where a loan transaction would not have taken place in the open market, then the commerciality of the financing arrangement between associated parties may be called into question. In such extreme circumstances, serious consideration may be given by Inland Revenue to call upon the general anti-avoidance provision.

**Are there additional rules on the deductibility of interest/guarantee fees (e.g. safe harbours)?**

An excess debt outbound company is exempt from the thin capitalisation rules where the ratio of its total New Zealand group assets to its total worldwide group assets exceeds 90%.

If an excess debt outbound company’s deductible interest expense is less than NZ$1,000,000, the thin capitalisation rules effectively do not apply at all.

For excess debt outbound companies with interest expenses of between NZ$1,000,000 and NZ$2,000,000, a concession applies.
New Zealand

**Intercompany loans**

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>√ (if under NZ$10m principle)</td>
</tr>
</tbody>
</table>

In striking a balance between protecting the tax base and containing compliance costs, Inland Revenue provides taxpayers with the use of the following administrative practices in relation to loan balances less than NZ$10,000,000 principal:

- For small value loans (i.e. less than NZ$2,000,000 principal), Inland Revenue currently accepts 300 basis points (3%) over the relevant base indicator as broadly indicative of an arm’s length interest rate.
- For loans up to NZ$10,000,000 principal, independent banker quotes are generally acceptable.

For loans with a higher level of principal, Inland Revenue expects taxpayers to be able to support their interest rate pricing with detailed documentation, including agreements and benchmarking.

Most interest rate benchmarking analyses begin with an appropriate reference rate or base indicator. The key factor in then determining an appropriate arm’s length margin to apply over the base indicator is credit risk.

Determining the arm’s length nature of a loan requires a process for evaluating the credit quality of the borrower. The amount of margin charged over the appropriate base indicator is determined by the credit rating of the borrower. Key terms and conditions of the tested loan should be used to identify internal and external CUPs.

**What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>√ – depending on circumstances. Please see comments in next section on implicit / passive support</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>x – generally Inland Revenue expects more robust analysis to be undertaken to support a subsidiaries credit rating than simply notching up / down from the parent credit rating</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratio’s to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
</tbody>
</table>

There is no specific guidance from Inland Revenue as to preferred approaches to determining creditworthiness of the borrowing entity. The key is documenting the rationale for the approach taken and why it results in the most appropriate estimation of the creditworthiness of the borrower under the circumstances. However, for material size loans Inland Revenue should expect detailed credit scoring analysis (both qualitative and quantitative) to be undertaken.
How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

In determining an appropriate interest rate, Inland Revenue generally evaluates the credit risk of the company in question on the basis that it is a stand-alone entity, rather than as an inseparable part of a single unified business. Well-performing subsidiaries may be more robust financially than their wider multinational groups, and Inland Revenue therefore advises that notching down subsidiary credit ratings should be done with some care.

Inland Revenue acknowledges that some subsidiaries in a multinational group are so central (or core) that, even absent any formal financial guarantees, if the subsidiary should be unable to repay its debt, the parent will intervene with the necessary financial support. This parental intervention will occur either due to reputation concerns or in order for the parent to ensure that its own credit rating is not jeopardised by the rumour mill.

The following factors need to be weighed up:

- Relative size and profitability of the New Zealand operation compared with the global group;
- Whether the New Zealand operation is strategic to the global group;
- Whether the New Zealand operation is part of a wider integrated supply chain;
- Whether valuable name and/or brand flows through the group; and
- Level of visibility and awareness that the New Zealand operation is likely to attract internationally.

The arm’s length principle which underpins international transfer pricing practice does not operate in a vacuum. Would bank credit approvals of a subsidiary in the local New Zealand market take into account the wider multinational group’s creditworthiness? If so, then this market condition must be factored into the transfer pricing analysis in just the same way as third party banks and rating agencies do currently in their decision-making.

Are foreign comparables accepted?
Yes, so long as they are sufficiently comparable.

Cash pool
Inland Revenue has not issued any guidance on cash pooling arrangements and, therefore, the general transfer pricing principles applying to loans and the OECD Guidelines would be the most applicable guidance.

Intercompany guarantees
What is your tax authority’s approach towards recognising guarantees?
Inland Revenue requires an explicit written guarantee in the form of a letter of guarantee or irrevocable letter of credit before a guarantee fee will be recognised. Inland Revenue does not accept that any financial service has been received merely because the credit rating of a subsidiary is higher by reason of affiliation alone. Letters of comfort are also not sufficient to create legal obligations.

Inland Revenue will as a matter of course check the financial capacity of the offshore guarantor to meet its obligations in the event of a default. Inland Revenue will seek to verify that there is sufficient capital available to support the risk guaranteed.
New Zealand

**How is a guarantee fee characterised?**
There is no specific guidance from Inland Revenue on this issue. We are not aware of any circumstances where the guarantee fee has been subject to withholding tax.

**To what extent are implicit guarantees recognised?**
As noted above, Inland Revenue requires an explicit written guarantee in the form of a letter of guarantee or irrevocable letter of credit before a guarantee fee will be recognised.

**How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?**
There is no formal guidance from Inland Revenue on how passive association or implicit support should or should not be taken into account in the case of guarantees. See above for general practice.

**How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?**
There is no formal guidance from Inland Revenue on how the specific terms and conditions of an intercompany guarantee should be evaluated.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?**
Inland Revenue’s preferred approach to pricing guarantee fees is based on interest rate savings, with the interest spread (pre-guarantee less post-guarantee) quantifying the total benefit from the financial service provided. In theory, arm’s length parties would look to share the economic benefit of this interest rate reduction according to their relative contributions. Inland Revenue has advised that in their experience non-bank guarantors generally share such savings on a 50 / 50 basis.

**Are foreign comparables accepted?**
Foreign comparables are accepted so long as they are sufficiently comparable.

**Documentation**

**Documentation requirements**
There is no explicit statutory requirement to prepare and maintain transfer pricing documentation. However, if prepared, this displaces the burden of proof to Inland Revenue and also provides penalty protection.

Taxpayers are not expected to prepare levels of documentation that are disproportionate to the amount of tax revenue at risk in their transfer pricing transactions. The cost of preparing documentation should be weighed against the risk that Inland Revenue will make a transfer pricing adjustment in determining the extent to which documentation should be prepared.

There are no specific documentation requirements for intercompany loans and/or guarantees.
When does documentation need to be available?
As noted above there is no explicit statutory requirement to prepare and maintain transfer pricing documentation. Ideally, a taxpayer will set and document its actual prices for a transaction in accordance with the arm’s length principle when or before the relevant transaction occurs. Transfer pricing documentation should be prepared before the time the relevant income tax return is lodged.

What is the deadline for submitting the documentation?
Documentation is not required to be submitted to Inland Revenue unless a specific request is made of the taxpayer. Documents would need to be provided within a reasonable time (generally one – three months) of receiving an Inland Revenue request.

In which language should the documentation be prepared?
English

Advance certainty
Are APAs/ATRs available?
Yes, APAs are available. There is no formal process set out for obtaining an APA, and the taxpayer or the taxpayer’s representative should contact the Inland Revenue’s International Audit Team in the first instance.

Where does the request for the APA/ATR need to be filed?
With the Inland Revenue’s International Audit Team.

What information is typically required?
A short written proposal should first be submitted discussing the business background, the international associated party transactions in question, and suggested transfer pricing methodology to be applied.

A pre-application meeting will follow shortly afterwards with a Principal Advisor (Transfer Pricing) to informally discuss the proposal.

As a result of the pre-application meeting, the APA request should be formalised and submitted for consideration. The formal APA application should contain the following:

- Identification of the tested parties;
- Analysis of key profit drivers and value added;
- A full functional analysis;
- The choice of transfer pricing methodology;
- A study of comparables;
- A proposed application of methodology and comparables; and
- Copies of all intercompany agreements.

Term of the APA
Most commonly five years, but this can vary.
**Singapore**

**Transfer pricing rules and regulations**

**Rules by means of legislation**

- **Section 34D of the Income Tax Act**: Empowers the Inland Revenue Authority of Singapore (IRAS) to make transfer pricing adjustments if it is of the view that related party transactions are not carried out at arm’s length.
- **Section 53(2A) of the Income Tax Act**: Applies where a resident and a non-resident are closely connected and conduct business in such a way that produces profits to the resident that are less than the ordinary profits that might be expected to arise in such transactions. In such a case, IRAS may assess and charge the non-resident tax in the name of the resident, as if the resident were an agent of the non-resident.
- **Section 33 of the Income Tax Act**: The IRAS may also invoke the general anti-avoidance provisions in this section of the Income Tax Act to vary or disregard an arrangement if it is of the view that there is a tax avoidance motive.

There is no specific tax law with respect to loans/guarantees/cash pools.

It is worth noting that Singapore tax legislation exempts certain cross-border payments from withholding tax, but in some cases the exemption is premised on the payment being made at arm’s length.

**Rules by means of regulations (decrees, manuals, position papers etc.)**

Relevant regulations in Singapore include:

- Transfer Pricing Guidelines.
- Supplementary Administrative Guidance on Advance Pricing Arrangements.
- Transfer Pricing Consultation.

In December 2012 the Monetary Authority of Singapore issued a consultation paper related to the requirement for banks to conduct their transactions at arm’s length. Although the requirements should for the most part co-incide with the requirements stipulated by the Inland Revenue Authority of Singapore in relation to dealing at arm’s length, the regulatory authority has approached this with a slightly different focus to that of the tax authorities and, once the relevant regulations are enacted, banks will need to ensure that they meet both the MAS and IRAS requirements.

**Specific rules PE context**

The same transfer pricing rules set out above apply to PEs.

**Thin capitalisation**

**Rules by means of legislation and regulations**

Singapore does not have any thin capitalisation provisions. That said, it is important to ensure that the arm’s length requirement is met.
Are there additional rules on the deductibility of interest/guarantee fees (e.g. safe harbours)?

Loans must reflect arm’s length conditions. However, if a related party loan is between two domestic entities (defined as any business entity that is incorporated or registered in Singapore and is carrying on a business in Singapore), IRAS is willing to accept as a proxy for the arm’s length principle the practice of restricting the interest expense claimed on loans made to related entities that are interest-free or at interest rates not supported by a transfer pricing analysis. This practice will not apply if the lender is in the business of borrowing and lending funds, e.g. banks or other financial institutions, finance and treasury centres. If the related party loan is a cross-border loan, the loan must reflect arm’s length conditions.

Intercompany loans

How is the arm’s length nature of an intercompany loan evaluated?

In determining the arm’s length nature of an intercompany loan, Singapore transfer pricing rules require that all relevant facts and circumstances relating to the loan be considered including:

- The nature and purpose of the loan;
- The market conditions at the time the loan is granted;
- The principal amount, duration and terms of the loan;
- The currency in which the loan is denominated;
- The exchange risks borne by the lender or borrower;
- The security offered by the lender or borrower;
- The guarantees involved in the loan;
- The credit standing of the borrower;
- The interest rate prevailing at the situs of the lender or borrower for comparable loans between unrelated parties.

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?

Singapore transfer pricing rules specifically cover the arm’s length nature of all terms and conditions.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>x</td>
</tr>
</tbody>
</table>

The CUP method is the preferred method for determining the arm’s length pricing for related party loans. However, taxpayers could rely on another method provided they maintain documentation to justify why that method is more suitable. As practical guidance for the arm’s length analysis, IRAS suggest that taxpayers rely on a suitable reference rate, such as LIBOR or the Singapore Inter-Bank Offered Rate (SIBOR), prime rates offered by banks or specific rates quoted by banks for similar loans. Adjustments could then be made to the reference rate, based on the outcome of the comparability analysis undertaken, to arrive at the appropriate arm’s length rate or range of rates.
What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Map S&amp;P/Moody's ratios to borrower's ratios</td>
<td>✓</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>✓</td>
</tr>
</tbody>
</table>

Singapore transfer pricing rules do not specifically address this issue. However, in practice, it should be possible to map the borrowing entity's financial ratios against S&P/Moody’s financial ratios or to use a credit scoring tool.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

There is no guidance from IRAS with respect to passive association/implicit support.

Are foreign comparables accepted?

Guidance provided by IRAS explicitly mention “the interest rate prevailing at the situs of the lender or borrower for comparable loans between unrelated parties” as a factor to be taken into account in determining whether a loan is at arm’s length. If a foreign loan outside of Singapore met the conditions of comparability, it could potentially be used as a comparable in determining whether a loan is at arm’s length.

Cash pool

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?

There are no specific rules governing the taxation of cash pooling in Singapore. The terms and conditions of the deposits and borrowings should be at arm’s length for both the debtor and the creditor. The evaluation of the arm’s length nature of the specific terms and conditions depends on the structure of the cash pool.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?

There are no specific rules governing the taxation of cash pooling in Singapore so the above rules relating to related party loans would also apply to cash pooling. The CUP method adjusted for allocation of the benefits from a cash pool could be used for determining the arm’s length interest rate on borrowings/deposits within a cash pool.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?

There are no specific rules governing this issue. Each case must be determined according to its own facts and circumstances.

Intercompany guarantees

What is your tax authority’s approach towards recognising guarantees?

Guidance provided by the Singapore tax authorities explicitly mention guarantees as a factor to be taken into account in determining whether a loan is at arm’s length.
is no more detailed guidance. Whether a service is rendered or a benefit is conferred for which a charge is required, will need to be evaluated on a case-by-case basis, including whether there is a legally binding agreement to make good losses.

**How is a guarantee fee characterised?**
Under Singapore tax practice, a guarantee is generally regarded as a service. As such, a guarantee fee is generally characterised as a service fee.

**To what extent are implicit guarantees recognised?**
There is no guidance from IRAS with respect to implicit guarantees. Foreign case law like the GE Case may be persuasive, but they are not binding on Singapore courts.

**How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?**
There is no guidance from IRAS with respect to passive association/implicit support.

**How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?**
This would be determined with respect to comparable guarantee transactions in the market place and similar factors would be considered as with loans, e.g. fees charged for comparable guarantees.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>✓</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>x</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>✓</td>
</tr>
</tbody>
</table>

In the absence of comparable guarantees, any other factors that illustrate the arm’s length value of the guarantee might be considered.

**Are foreign comparables accepted?**
If a foreign guarantee met the conditions of comparability, it could potentially be considered in determining an arm’s length fee.

**Documentation**

**Documentation requirements**
The burden of proof to show that transfer prices are at arm’s length falls on the taxpayer. The Transfer Pricing Guidelines provide guidance on the type of documentation that taxpayers should keep demonstrating that reasonable efforts have been taken to comply with the arm’s length principle. These include:

- General information on the group;
- Information on each related party in Singapore (Singapore entity);
- Details of transactions between the Singapore entity and all related parties; and
Transfer pricing analysis.

The Guidelines recognise that keeping robust documentation may result in compliance and administrative costs for taxpayers. In this respect, the guidelines indicate the following principles with regard to documentation:

- Taxpayers are required to prepare or obtain documents necessary to allow a reasonable assessment of whether they have complied with the arm’s length principle.
- Singapore currently does not impose a penalty specifically for the lack or insufficiency of documentation. However, if the taxpayer violates the record-keeping requirements under Sections 65, 65A and 65B of the Income Tax Act, the IRAS would not in any way be precluded from enforcing these relevant provisions.

There are no specific documentation requirements for intercompany loans/guarantees.

**When does documentation need to be available?**
The IRAS does not require documentation to be submitted when the tax returns are filed. Taxpayers should retain the documentation and submit it to IRAS only when requested to do so.

**What is the deadline for submitting the documentation?**
Upon written request, the documentation should be provided in a reasonable timeframe.

**In which language should the documentation be prepared?**
English.

**Advance certainty**

**Are APAs/ATRs available?**
APAs are available and can be obtained for loans/guarantees/cash pools. Singapore allows for unilateral, bilateral as well as multilateral APAs. IRAS has set out additional guidance for taxpayers seeking to enter into APAs in the Supplementary Administrative Guidance on Advance Pricing Arrangements.

**Where does the request for the APA/ATR need to be filed?**
The general PwC practice is to contact the competent authority within IRAS directly. For bilateral and multilateral APAs, the taxpayer should submit his APA application at the same time to both IRAS and the competent authorities of the relevant foreign tax jurisdictions.

**What information is typically required?**
- General information concerning the taxpayer such as the nature of its business and its industry environment, worldwide organisational structure etc.;
- Details and explanation of the proposed transfer pricing methodology and analysis;
- All information and analyses needed to produce the arm’s length results for the related party transactions;
- The set of critical assumptions under which the proposed transfer pricing methodology and analysis will operate;
- Period covered by the APA, including whether the APA would be rolled back to prior years; and
- Any other information that IRAS or the other tax authorities have requested.
Term of the APA
There is no set term requirement for APAs; however, the typical term is three to five years.
Taiwan

Transfer pricing rules and regulations
Rules by means of legislation
• Income Tax Act, Article 43-1
• Assessment rules for non-arm’s length transfer pricing of profit-seeking enterprises (TP Assessment Rules).

Rules by means of regulations (decrees, manuals, position papers, etc.)
• Tax Ruling Tai- Tsai Shuei No. 09704555160: The safe harbour rules under the TP Assessment Rules were announced on 6 November 2008.

Rules by means of case law (most relevant ones)
To date, there is no specific case law regarding intercompany loans/guarantees.

Specific rules PE context
• Tai- Tsai Shuei No. 09904504820: Article 18 of the Regulations Governing the Application of Agreements for the Avoidance of Double Taxation with Respect to Taxes on Income was issued by the Ministry of Finance on 7 January 2010.

Thin capitalisation
Rules by means of legislation and regulations
• Tax Ruling Tai- Tsai Shuei No. 10004904070: Assessment rules for implementation of thin capitalisation rule issued by the Ministry of Finance (MOF) on 22 June 2011 (Thin-cap Assessment Rules).

The thin capitalisation rules are only applicable to non-financial institutions. The profit-seeking companies shall disclose their Debt-to-Equity ratio with relevant documents upon tax filing from taxable years 1 January 2011 forward.

What is the effect of the rules on the deduction of interest?
Interest on debt exceeding the prescribed ratio (3:1) cannot be recognised as an expense.

Are there additional rules on the deductibility of interest/guarantee fees (e.g. safe harbours)?
The safe harbour rules under the Thin-cap Assessment Rules was announced on 26 September 2011 (Tax Ruling Tai- Tsai Shuei No. 10000367210) and shall apply where (i) the annual aggregate amount of net sales and non-operating income reported in the corporate income tax return is below the threshold prescribed by the MOF; (ii) both ‘total interest expense’ and ‘interest expense from intercompany debt’ reported in the income tax return are below the threshold(s) prescribed by the MOF; (iii) an enterprise has incurred tax loss prior to the deduction of interest expense, and such loss is not carried-forward as provided under Article 2 of the Income Tax Act.
Intercompany loans

How is the arm’s length nature of an intercompany loan evaluated?
While there are no clear regulations with respect to rules on the arm’s length nature of intercompany loans, Taiwan’s tax regulations do state that interests on loans that are not used for a company’s operation cannot be charged as deductible expenses.

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?
The transfer pricing assessment rules require taking into account the contractual terms and risks affecting the degree of comparability when determining the arm’s length nature of a transaction. There are no specific rules governed by the Taiwan tax authorities with respect to evaluating the specific terms and conditions of the intercompany loan.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>×</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>×</td>
</tr>
</tbody>
</table>

Based on the relevant transfer pricing laws and regulations, the arm’s length principle requires compensation for any intercompany transaction to conform to the level that would have applied had the transaction taken place between unrelated parties.

The creditworthiness of the borrowing entity and credit characteristics are taking into account when applying internal and external CUP approach. Price quotation from banks may be viewed as one of the supporting documents in determining arm’s length basis of intercompany interest rate charged.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>×</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
</tbody>
</table>

The general practice approach is to use a credit scoring tool to establish the credit rating of the borrowing entity or map the borrowing entity’s financial ratios against Moody’s/S&P financial ratios.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?
While there is no guidance/rules addressing this subject, the arm’s length interest rate generally has been established based on the financial strength of the borrowing entity as a stand-alone entity.
Are foreign comparables accepted?
Domestic comparables are generally preferred by the Taiwan tax authorities. When there are insufficient local comparables, regional or global foreign comparables will be considered to the extent there is strong comparability of such comparables.

**Cash pool**

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?
There are no special rules governing cash pooling arrangements in Taiwan. Under current Taiwan legislations, cash pooling activities are regarded as borrowing and lending of loans from a regulatory perspective. Taxation on cash pooling is treated accordingly.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?
Generally the transfer pricing method would not differ from the approach for evaluating interest rates on intercompany loans.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?
No specific transfer pricing methodologies are preferred or generally accepted as Taiwan transfer pricing rules do not provide guidance with respect to cash pooling arrangements.

**Intercompany guarantees**

What is your tax authority’s approach towards recognising guarantees?
There has been a news release on the tax authorities’ view that taxpayers need to report guarantee fee income. It is not a regulation, but tax authorities are making adjustments if income is not reported, or if there is no transfer pricing documentation support.

How is a guarantee fee characterised?
A guarantee fee seems to be treated as a service fee for tax purposes in Taiwan. However, when the subsidiary of the parent company is located outside of Taiwan, the guarantee fee will be treated as a form of interest payment. The Small and Medium Enterprise Credit Guarantee Fund of Taiwan (SMEG Taiwan), a non-profit organisation administered by Ministry of Finance, offers the publicly applicable ‘reference rate’, which can be used for Taiwan’s transfer pricing benchmarking and documentation requirements.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>×</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>√</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>×</td>
</tr>
<tr>
<td>CUP approach</td>
<td>√</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>×</td>
</tr>
</tbody>
</table>
Are foreign comparables accepted?
There is no guidance from the Taiwan tax authority in this respect.

**Documentation**

**Documentation requirements**
Documentation requirements are covered under Article 22 of the TP Assessment Rules; there are no specific documentation requirements for intercompany loans/guarantees.

**When does documentation need to be available?**
In general practice, business enterprises prepare the documentation for tax compliance purposes and submit within one month of receiving a request from the tax authorities.

**What is the deadline for submitting the documentation?**
Those who cannot present the requested documentation within the prescribed time period, notwithstanding special circumstances, must apply for an extension before the end of that period. The extension may not exceed one month, and is limited to one time only.

**In which language should the documentation be prepared?**
Chinese translation should be provided if the original documentation is provided in a foreign language, unless otherwise agreed by the tax authorities with the provision of the English documents.

**Advance certainty**

**Are APAs/ATRs available?**
Taiwan has established APA application guidelines for unilateral, bilateral or multi-lateral APAs as per 2007. In theory, the applicant can apply for an APA relating to any financial transaction as long as it meets the requirements.

**Where does the request for the APA/ATR need to be filed?**
The total amount of the transactions that will be covered in the APA must exceed NTD 1 billion (approx. USD 33 million) or the annual amount of the transactions exceed NTD 500 million (approx. USD 17 million).

**What information is typically required?**
Below is a list of documentation/information request stipulated in the Taiwan transfer pricing rules:

- A comprehensive business overview;
- Structure chart for all related parties;
- Relevant information (e.g. tax report, financial report, industry analysis) of the related parties involved in the transactions being applied for APA;
- Relevant information (e.g. name, transaction type, period) concerning the transaction applying for an APA;
- A copy of transfer pricing report;
- The pricing information of the same or similar transactions;
Taiwan

• The annual forecast of the operation results and business plans within the effective period of the APA;
• Information on discussion and/or conclusion made for pricing methods with local or foreign competent authorities or APA that have been approved; and
• Information on whether there is potential double taxation and whether bilateral or multilateral APAs of tax treaty countries are involved.

Term of the APA
The applicants usually apply for APA for a term of three to five years. The applicants can also apply for a renewal before the APA expires.
Europe
Austria

Transfer pricing rules and regulations
Rules by means of legislation and by means of regulations (decrees, manuals, position papers, etc.)

- Verrechnungspreisrichtlinien 2010, TPG: As a member of the OECD, Austria subscribed to the principles contained in the OECD Guidelines. In addition, the Austrian Ministry of Finance published transfer pricing guidelines (Verrechnungspreisrichtlinien 2010, TPG) in November 2010 with the intention to facilitate the implementation of the OECD Guidelines in Austria.

Austria has general statutory rules which are aimed at dealing with transfer pricing. Consequently, the statutory authority for addressing transfer pricing issues is found in the application of general legal concepts, such as substance over form and anti-avoidance regulations, as well as the application of other regulations to deal with issues such as fictitious transactions, hidden capital contributions and constructive dividends. The requirements to apply the arm’s length principle on intercompany dealings and for adequate documentation of transfer prices are constituted in various sections of the Austrian tax law.

Rules by means of case law (most relevant ones)
There are some Austrian court cases dealing with aspects of transfer pricing, e.g. specific documentation requirements for related party transactions. However, as the cases deal with specific issues, they generally do not allow drawing general conclusions relevant for determining the arm’s length interest rate.

Specific rules PE context
In general, the OECD’s AOA approach is applied in this regard. In case of an Austrian PE of a foreign company, income arising directly or indirectly through or from the PE is taxable under the Austrian regulations.

Thin capitalisation
Rules by means of legislation and regulations
There are no statutory rules on permissible Debt-to-Equity ratios in Austria. However, according to fiscal practice Austrian tax authorities generally tend to accept a Debt-to-Equity ratio of approximately 3:1. The arm’s length nature of each transaction should be assessed on a case by case basis.

What is the effect of the rules on the deduction of interest?
A tax deduction relating to the interest expense associated with debt which is over and above the arm’s length borrowing capacity will be disallowed for corporate tax purposes. WHT payments should be taken into account.

Are there additional rules on the deductibility of interest (e.g. safe harbours)?
Interest costs on debt financing to acquire shares in a company are not deductible in Austria if the shares are acquired from a related party.
**Intercompany loans**

**How is the arm’s length nature of an intercompany loan evaluated?**

Austrian rules require that account has to be taken of all factors of a transaction when establishing whether it has been established in accordance with the arm’s length principle, including:

- The question whether the loan would have been made at all in the absence of the relationship;
- The amount which the loan would have been in the absence of the relationship; and
- The rate of interest and other terms which would have been agreed in the absence of the relationship.

The deduction of any interest over and above the arm’s length amount will be disallowed for Austrian corporate income tax purposes.

Interest rate on intra-group loans has to be determined individually and defined based on a function and risk analysis of the lender and debtor and the conditions of the loan.

**How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?**

The TPG contain specific guidance in this regard. Inter alia, the currency, the maturity date, creditworthiness, etc., should be taken into consideration.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td><strong>External CUP</strong></td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>×</td>
</tr>
</tbody>
</table>

Internal and external CUP information is preferable taking into account the creditworthiness of the borrowing entity and the terms and conditions of the transaction.

**What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity, if no formal credit rating is available?**

There is no clear fiscal practice established in this regard.

**How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?**

There is no clear rule in this regard. Generally, the OECD Guidelines are followed that implicit support should not be remunerated as intra-group service. Still, all relevant factors concerning the intercompany transaction should be considered while determining the arm’s length interest rate.

**Are foreign comparables accepted?**

Yes, to the extent the market is sufficiently comparable.
Austria

**Cash pool**
**How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?**
The treatment of cash pool agreements in Austria is generally determined in the TPG. According to the TPG, the synergies resulting from the cash pool need to be allocated to all participating companies. Therefore, no residual profit should be left at the master company.

Long term balances with the cash pool may be re-characterised into long term loans.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?**
Borrowing and deposit rates should be established based on the specific facts and circumstances of the transaction (creditworthiness, terms and conditions, etc). The transfer pricing methodologies generally accepted in this respect are the same as the transfer pricing methodologies generally accepted in establishing the arm’s length interest rates on intercompany loans.

Generally, the Austrian tax authorities like to emphasise in the course of tax audits that concerning intercompany financial transactions it should be clearly differentiated between long-term and short-term transactions. The duration of the financial transaction needs to be considered on determining the interest rate to be applied.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?**
The service rendered by the CPL can be remunerated based on the CPM. If the CPL has to bear inevitable intercompany risk, this needs to be remunerated adequately as well.

**Intercompany guarantees**
**What is your tax authority’s approach towards recognising guarantees?**
Generally, intercompany guarantees should be remunerated on an arm’s length basis. If, however, the sole reason for the guarantee is to increase the creditworthiness of the debtor as it is poorly capitalised, no guarantee fee would be appropriate.

**How is a guarantee fee characterised?**
At arm’s length, a company will not take on the extra cost of a guarantee unless that guarantee makes the overall cost of finance cheaper than it would be on a standalone basis. If the cost of the guarantee itself is greater than the saving it brings, it will be disallowed to the extent that it causes the total finance costs relating to the guaranteed debt to exceed the standalone arm’s length price.

**To what extent are implicit guarantees recognised?**
The guidance in this area is not definitive; however, we note that significant development can be recognised in this area. If it can be clearly demonstrated that the involvement of a related party has affected the cost of borrowing for the related party, it may be possible to impute a fee. Commissions in connection to guarantee fees need to be determined according to the arm’s length principle.
How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
The arm’s length guarantee fee should be established on a ‘separate entity’ basis (i.e. borrower and its subsidiaries) and no account should be taken of any implicit guarantees from related companies.

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
The terms and conditions of the guarantee should be at arm’s length. If this is not the case, the relevant terms and conditions may be amended to the extent that they meet the arm’s length standards or an adjustment should be made in the pricing of the guarantee.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?
There is no established approach in this regard.

Are foreign comparables accepted?
There is no fiscal practice in this regard. We assume that to the extent the market is sufficiently comparable, foreign comparables should be accepted.

**Documentation**

**Documentation requirements**
There are only general documentation requirements. However if no appropriate documentation is available, the burden of proof that transfer prices are at arm’s length falls on the taxpayer.

Are there any specific documentation requirements for intercompany loans/guarantees in addition to the regular documentation requirements?
In principal, all factors determining the interest rate/guarantee fee should be documented based on the general documentation requirements in the TPG. However, for example, in case of a cash pool, the Austrian tax authorities might expect especially the following information and documents in addition to the general documentation parts (e.g. Business Overview, Functional Analysis, Economic and Financial Analysis, Overview Transactions):

- Group Framework; Group Treasury Guidelines;
- Cash Pooling Framework Agreement;
- Intercompany Loan Agreements;
- Financial situation of the company at the beginning of the cash pool;
- Benefit for each participating company (especially for the Austrian company);
- Alternative options that have been assessed prior to decision to participate in the cash pool;
- Intercompany liabilities and securities arising from the cash pool;
- Detailed description how the interest rate is derived; and
- Financial statement of the CPL.
When does documentation need to be available?
The Austrian Ministry of Finance requires having a proper transfer pricing documentation for each fiscal year concerned ready at the time the respective tax returns are filed.

What is the deadline for submitting the documentation?
There is no deadline set by the Austrian provisions in this regard. However, the transfer pricing documentation has to be provided to the tax authorities on request within a reasonable time (three-four weeks).

In which language should the documentation be prepared?
According to Austrian law, the documentation has to be prepared in German language. However, the Authorities accept English language documentation. They are allowed to ask for a translation of the document.

Advance certainty
Are APAs/ATRs available?
Austria introduced the APA/advance (binding) ruling regulations as of 1 January 2011. These regulations allow taxpayers to apply for binding, unilateral APAs in Austria. Bilateral agreements remain possible under the mutual agreement procedure clause of the applicable double tax agreements.

Please note that fees will occur for filing an APA.

Where does the request for the APA/ATR need to be filed?
The application should be filed to the competent tax authorities.

What information is typically required?
Taxpayers wanting to have a binding ruling/APA must submit a written application which includes the relevant facts, the critical assumptions as well as a legal assessment of the facts.

The application should be made in German. English applications are not accepted by the authorities.

The requirements to be included in the application should be checked on a case-by-case basis. Below are typical examples:

• Comprehensive and complete explanation of the relevant facts;
• Particular interest of the applicant to agree on a binding ruling;
• Explanation of the legal problem and questions arising in this regard;
• Legal assessment of the questions arising due to the legal problem; and
• Information to determine administrative fees.

Term of the APA
The term of an APA is generally three to five years.
Belgium

Transfer pricing rules and regulations

Rules by means of legislation

- Article 185 §2 of the Belgian Income Tax Code (BITC): Codification of the arm's length principle. This paragraph is the transposition of Article 9 of the OECD Model Tax Convention into the BITC.
- Other articles of the BITC relating to transfer pricing are:
  - Article 26: Granted abnormal or benevolent advantages are added back to the tax base;
  - Article 49: General conditions for the deductibility of expenses;
  - Article 54: Deductibility of the payments of interest, royalties and management/services fees to tax havens or to recipients benefiting from a favourable taxation regime for these payments;
  - Article 55 and 56: Deductibility of interest paid;
  - Article 79 and 207: Non-deductibility of certain items such as current and carried forward tax losses, dividend received deduction, investment deduction being made from that part of the profit relating to abnormal of benevolent advantages received; and
  - Article 344, §1: General anti-abuse rule according to which a legal deed (or a set of legal deeds) is not opposable towards the tax authorities if the tax authorities can demonstrate that there is tax abuse (substance over form approach).
- Article 344, §2: Sale, transfer or contribution of shares, bonds, accounts receivable or other titles to tax havens or to recipients benefiting from a favourable taxation regime need to have economic substance.

Rules by means of regulations (decrees, manuals, position papers, etc.)

The Belgian tax administration has issued three circular letters on transfer pricing:

- The first circular letter of 28 June 1999 describes the general guidelines regarding transfer pricing. The guidelines are broadly based on the OECD Guidelines.
- The third circular letter issued on 14 November 2006 deals with transfer pricing audits and documentation whereby the Belgian tax authorities refer to the Code of Conduct on TP Documentation and its embedded EU TPD concept.

Rules by means of case law (most relevant ones)

- ECJ, 21 January 2010, C-311/08 (SGI). The ECJ ruled on a case where a Belgian company granted an interest-free loan to its French subsidiary (absent any legitimate purpose). The Belgian tax authorities first increased the Belgian company's tax base by 5% deemed interest because the borrower was associated with the lender. The taxpayer challenged the profit adjustment on the grounds that the Belgian rule is incompatible with the EU freedom of establishment because there is no analogous rule that applies in purely domestic situations. The ECJ concluded that, on the issue of freedom of establishment, the Belgian State's decision to tax the company constitutes a justified restriction of the freedom of establishment due to the balanced allocation of power to tax and the prevention of tax avoidance.

The Court remitted the case back to the referring court to consider whether the way in which the national legislation was applied met the test of proportionality.
ECJ, 5 July 2012, C-318/10 (SIAT). Incorporated under the laws of Belgium, SIAT established a joint subsidiary with a Nigerian group for the exploitation of palm plantations. The second shareholder of the joint subsidiary was Megatrade International SA (MISA), to which SIAT paid commission for the introduction of business based on profits generated. MISA had the status of a holding company governed by the Luxembourg Holding 1929 regime and was accordingly not liable to pay any similar tax than the corporate tax applicable in Belgium. As a consequence, the Belgian tax authorities applied Article 54 BITC and did not allow the commissions paid to MISA to be deducted as business expenses. The Belgian supreme court, having doubts about the compatibility of the Belgian legislation with EU law, referred the case to the ECJ via a request for a preliminary ruling.

The ECJ confirmed that the specific Belgian anti-abuse provision embodied in Article 54 BITC constitutes a breach of freedom of establishment governed by Article 49 EC. The Court held that while the legislation could be justified by the need to prevent tax evasion or avoidance, ensure the effectiveness of fiscal supervision, and preserve the balanced allocation of taxing powers between Member States, the legislation goes beyond what is necessary to attain those objectives.

Belgian court cases on waiver of debt. Belgian courts have confirmed on various occasions that companies can have legitimate economic reasons for providing financial assistance to affiliated companies having financial difficulties. Indeed, such aid might allow those companies to secure their own current and/or future profits and to safeguard the financial reputation of their group (see, amongst others: Supreme court, 28 September 1984; Court of Appeal of Antwerp, 20 November 1982; Court of Appeal of Bergen, 3 November 1989; Court of Appeal of Bergen, 18 May 2001).

In parallel, the Belgian Ruling Office has granted rulings in this respect, on the condition that the company can demonstrate that the financial assistance is motivated by genuine business and/or economic reasons, such as safeguarding the commercial and financial reputation of the group (no. 900.017 of 21 April 2009), maintaining employment in Belgium (no. 800.390 of 16 December 2008) and securing the continuity of the activities of the affiliated company involved (no. 800.161 of 1 July 2008).

Specific rules PE context
The Belgian tax authorities follow the guidance provided by the OECD in its PE Papers on the allocation of profit to PE’s.

Thin capitalisation
Rules by means of legislation and regulations

- Article 198 (11) BITC

The Program Act of 29 March 2012 introduced a general thin cap rule in Belgian legislation, providing for a maximum allowed debt/equity ratio of 5:1 (instead of the 7:1 which existed under the old rule).

For the purposes of this thin cap rule, equity is defined as the sum of the taxed reserves at the beginning of the taxable period and the paid-up capital at the end of the taxable period. Debt is defined as:
• All loans under which the beneficial owner is not subject to income taxation or, with regard to the interest income, is subject to a tax regime that is substantially more advantageous than the Belgian tax regime;
• All intra-group loans (where group should be interpreted in accordance with Article 11 of the Belgian Companies Code).

Interest payments or attributions in excess of the 5:1 ratio are not tax deductible. The new thin cap rule is generally not applicable to loans contracted by leasing and factoring companies and to bonds and other publicly issued securities, as well as loans granted by financial institutions.

The Program Act of 22 June 2012 softens the general thin cap rule for certain finance companies/activities in Belgium. More specifically, for companies responsible for the ‘centralised treasury management’ of their group (e.g. cash-pooling entities) the interest in scope of the thin cap rule will be calculated as the positive difference between:

• All intercompany interest paid or attributed under a framework agreement for centralised treasury management; and
• All intercompany interest received under the aforementioned framework agreement.

For the above netting computation, interest received from among others certain credit and insurance institutions are excluded. Furthermore, interest received from group companies that are not subject to corporate income tax (or a taxation with a similar character) or that are established in a country with a considerably more advantageous tax treatment than that resulting from the provisions of ordinary law applicable in Belgium, will also not be taken into account for netting purposes.

It is up to the tax payer to demonstrate that both paid/attributed interest and received/acquired interest relate to the centralised treasury management of a group and result from a framework agreement for such management.

• Article 18 (4) BITC: According to Article 18(4) BITC interest due on advances or loans granted to a Belgian company (i) by shareholders of that company, (ii) by any person (not being a Belgian tax resident company) acting as a director, manager, payments to liquidators or those exercising a similar function in the company, or (iii) by the spouse or minor children of such persons may be re-characterised as dividend income to the extent that the interest rate exceeds the applicable market rate or the amount of such advances or loans exceeds the sum of the paid-up capital (at the end of the fiscal year) and taxable reserves (at the beginning of the fiscal year) of the Belgian company.

What is the effect of the rules on the deduction of interest?
Interest on the surplus of debt is non-deductible.

Are there additional rules on the deductibility of interest (e.g. safe harbours)?
Besides this thin capitalisation legislation, there are some additional rules regarding the non-deductibility of interest.
Belgium

- **Article 54 BITC**: According to Article 54 BITC, interest paid or attributed to a foreign establishment that, by virtue of the legislation of the country where it is established, is not subject to income taxation or for such income is subject there to a significantly more advantageous tax regime than to which that income would be subject in Belgium, are not considered as tax deductible business expenses. However, this provision does not apply if the taxpayer demonstrates that the payments relate to actual, proper transactions and provided they do not exceed normal limits. Following the SIAT case, the tax authorities should in principle no longer be allowed to invoke Article 54 BITC as it currently stands (cf. above).

- **Article 55 BITC**: According to Article 55 BITC interest paid is not tax deductible to the extent that it exceeds an amount corresponding to the market rate, taking into account factual circumstances proper to the appraisal of the risk linked to the operation and particularly the financial situation of the debtor and the duration of the loan.

**Intercompany loans**

**How is the arm’s length nature of an intercompany loan evaluated?**

As there are no specific transfer pricing guidelines in Belgium as to intra-group financing arrangements, guidance can be sought for instance in APAs and in the OECD Guidelines. In practice, discussions often focus on how to reflect the related borrower’s credit risk in the benchmark exercise.

**How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?**

As the terms and conditions of the intercompany loan can significantly impact the interest rate, it is important to consider the terms and conditions as stipulated in the loan agreement which should be at arm’s length. Hereeto, the Belgian tax authorities can for instance analyse whether the type of financing reflects the business needs, whether the tax payer acts at arm’s length in case of e.g. prepayments options, etc.

In this respect, the Belgian tax authorities could potentially try to invoke the general anti-avoidance provision as set out in Article 344 §1 BITC, which states that a legal deed (or a set of legal deeds) is not opposable towards the tax authorities if the tax authorities demonstrate, on the basis of objective circumstances, that there is tax abuse.

If the tax authorities uphold that a legal deed or a set of legal deeds can be considered as tax abuse, it is up to the taxpayer to prove that the choice for the legal deed or the set of legal deeds is triggered by other reasons than tax avoidance (reversal of burden of proof).

Article 344 §1 BITC gives the tax administration the power to analyse the financing set up by the taxpayer and to impose a taxation in line with the purposes of the income tax code, as if the tax abuse had not taken place, provided the tax authorities demonstrate that the transaction constitutes tax abuse.
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm's length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>×</td>
</tr>
</tbody>
</table>

Internal and external CUPs should take into account the creditworthiness of the borrowing entity and the terms and conditions of the transaction. Quotes provided by banks can be used as a second line of defence upon a potential tax audit.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

The practice of the Belgian Ruling Office provides some informal guidance on the determination of the risk profile of a borrower for the purpose of an intra-group loan.

In this context, one can observe a clear trend that the use of the group’s credit rating is usually rejected, except if the taxpayer can demonstrate that the related borrower has a similar credit rating as the group. Consequently, the starting point will often be the assessment of a standalone rating. The following options to estimate such a standalone rating have been accepted:

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating by default</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>✓</td>
</tr>
<tr>
<td>Map S&amp;P/Moody's ratios to borrower's ratios</td>
<td>✓</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>✓</td>
</tr>
</tbody>
</table>

Once a standalone rating has been determined, some further refinement can be performed. The most important refinement consists for the probability that a parent company would intervene if a subsidiary risks to go in default. However, the parent is not legally obliged to intervene, as there is no formal guarantee. Based on the willingness and the ability of the parent to intervene, the standalone rating may be adjusted (and could in some cases be close to the groups rating). This is commonly referred to as the 'implicit guarantee' or 'passive support'. As indicated above, the terms and conditions as stipulated in the loan agreement should also be considered, as these can have an impact on the interest rate.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

There is no formal guidance from the Belgian tax authorities as to whether the arm’s length principle requires the borrower’s relationship with its parent to be disregarded (i.e. the standalone approach) or to be regarded as having an impact on the interest rate (i.e. implicit guarantee support). However, taking into account the passive association/implicit guarantee support in determining an interest rate is in line with the approach used by independent banks and credit rating agencies and is commonly accepted by the Belgian tax authorities. However, this should be supported by a detailed factual analysis.
Are foreign comparables accepted?
Yes, to the extent the market is sufficiently comparable.

**Intercompany guarantees**

What is your tax authority’s approach towards recognising guarantees?
Within the Belgian legislative context there are no specific regulations concerning the transfer pricing treatment of guarantees. The Belgian tax authorities take the OECD Guidelines as guidance when it comes to the treatment of guarantees.

Given the lack of Belgian-based guidance, two key topics are often discussed with the tax authorities:

- The approach used to value the intra-group guarantee fee; and
- The potential split of the value of the guarantee between the guarantor and the guaranteed entity.

How is a guarantee fee characterised?
It is common practice to treat the explicit guarantees as a service. Therefore an arm’s length remuneration for the service rendered should be paid.

To what extent are implicit guarantees recognised?
The implicit guarantee is recognised by the Belgian tax authorities. It is necessary to document why the standalone credit rating of the subsidiary is affected by that of the parent and how this impacts the value of the explicit guarantee provided by that same parent.

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
Similar as for intercompany interest payments, there is no formal guidance from the Belgian tax authorities as to whether the arm’s length principle requires the beneficiary’s relationship with its parent to be disregarded (i.e. the standalone approach) or to be regarded as having an impact on the guarantee fee (i.e. passive association/implicit support approach).

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
The terms and conditions of the guarantee should be at arm’s length. These conditions should reflect the business rationale of the transaction.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>✗</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>✓</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✗</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>✓</td>
</tr>
</tbody>
</table>
With respect to the valuation of the formal guarantee, several approaches referred by the literature are generally accepted by the Belgian tax authorities, e.g. an option-pricing model, interest differential, etc. This being said, the most common methodology is based on the interest rate differential between the interest rate on a loan without guarantee and the interest rate on a loan benefiting from a formal guarantee. This differential is often divided between the guarantor and the guaranteed entity to obtain the guarantee fee (i.e. benefit approach). There are no formal rules on the application of the ‘Credit Default Swaps’ approach.

**Are foreign comparables accepted?**
Yes, to the extent the market is sufficiently comparable.

**Documentation**

**Documentation requirements**
Belgium does not formally impose upfront documentation requirements. As such, entities that do not prepare upfront contemporaneous documentation do not expose themselves to penalties.

However, in two practice notes (i.e. the practice note of June 1999 and of 14 November 2006), the Belgian tax authorities urge taxpayers to prepare contemporaneous transfer pricing documentation to support the arm’s length nature of intercompany transactions. Indeed, the Belgian TP Guidelines urge tax inspectors to carry out in-depth transfer pricing audits where the taxpayers fails to show ‘documentary evidence’ and that substantial efforts have been made to establish arm’s length intercompany prices.

In terms of the content of the documentation, reference is made to the EU Code of Conduct on transfer pricing documentation.

There are no specific documentation requirements for intercompany loans/guarantees.

**When does documentation need to be available?**
Documentation needs to be available upon request during a tax audit.

**What is the deadline for submitting the documentation?**
The deadline for replying to an information request is one month. This deadline can only be postponed if legally accepted reasons are provided. Experience shows that a two month deadline is regarded as reasonable for answering a transfer pricing information request.

**In which language should the documentation be prepared?**
In theory, all correspondence with the tax authorities should be in one of the three national languages (depending on the statutory address of the taxpayer). In practice, the Belgian tax authorities mostly accept documentation prepared in English.

**Advance certainty**

**Are APAs/ATRs available?**
Yes, a taxpayer could apply for a unilateral ruling in all cases unless there is a specific exclusion (e.g. rulings involving tax rates, computations, returns and audits). Also bilateral and multilateral rulings are admitted.
Belgium

**Where does the request for the APA/ATR need to be filed?**
Unilateral rulings should be filed at the Belgian Rulings Office. The latter works independently of the Central Tax Authorities. Bilateral and multilateral APA's/ATR’s should be filed at the Central Tax Authorities.

**What information is typically required?**
An application for an advance decision must be in writing and must include the following:

- The identity of the taxpayer and, as the case may be, the identity of the parties and third parties involved;
- A description of the business activities of the taxpayer;
- A full description of the particular situation or transaction;
- Reference to the statutory or regulatory provisions that will constitute the basis of the decision; and
- A TP study in case of a transfer pricing ruling.

**Term of the APA**
The decision remains valid for a maximum of five years, except in cases justified by the subject matter of the decision.
**Denmark**

**Transfer pricing rules and regulations**

**Rules by means of legislation**
- Section 2 of the Danish Tax Assessment Act. Introduces the arm’s length principle between related parties when dealing with each other.
- Section 3B of the Danish Tax Control Act. Determines the Danish documentation requirements and the content of the documentation.
- Order no. 42 of 24 January 2006. Determines the minimum requirements for transfer pricing documentation.

**Rules by means of regulations (decrees, manuals, position papers, etc.)**
The Danish tax assessment guidelines provide guidance on general tax questions, including guidance on applying the arm’s length principle in Danish tax law. Furthermore, the Danish tax authorities have published guidelines on Documentation and Valuation; however, not specifically aimed at intercompany financing.

**Rules by means of case law (most relevant ones)**
There is some case law in Denmark; however, none which can be considered significant in the sense that it defines the way financial transactions are priced. In TFs 1998, 199, the Danish Supreme Court concluded that the most appropriate rate for intercompany loans is the discount rate + 4%, this has, however, been questioned in later rulings, i.e. it has been argued that the discount rate + 4% should only be used as a last resort when pricing loans between related parties. In TFs 2011, 397 and in a reply from the Danish Minister of Taxation to the Danish Parliament’s tax Committee (No. 356 of 30th May 2006), it was further underlined that this approach should only be used when all other options had been explored. In addition to this, three other methods where described, this being the, CUP, loan margin method, and the usage of bank quotes.

**Specific rules PE context**
There are no specific regulations on loans to PE’s, other than what is mentioned in Section 3B of the Danish Tax Control Act and in the guidelines from the Danish tax authorities. However, it should be noted that the principles outlined by the OECD for the allocation of profit to a PE has been enacted in the Danish Tax Code with a note that the treaty in place prevail in disputes. Further, the Danish rules on limitation of tax relief on interest expenses apply.

**Thin capitalisation**

**Rules by means of legislation and regulations**

Danish resident companies and Danish PEs are subject to three sets of restrictions, each of which may seriously limit or disallow Danish tax relief for financing costs. There is no re-characterisation of interest as dividends, but there seems to be an appetite with the Danish tax authorities to pursue this route.

- Firstly, there is the thin capitalisation rule. The rule limits the gross interest costs and capital losses on related party debt to the extent the overall Debt-to-Equity ratio exceeds 4 to 1. Related party debt is defined so as to include external bank debt if group member companies or shareholders have provided guarantees.
to the bank. This rule does not apply if the controlled debt is less than DKK 10 million. When calculating the 4 to 1 ratio, a special consolidation rule applies if two or more companies are considered affiliated (note that the definition of affiliated companies differs from the definition under the Danish rules on joint taxation);

• Secondly, there is an asset-based rule. To the extent a Danish company on a standalone basis or, if part of a joint tax group, together with group companies has net financing costs in excess of DKK 21.3 million (full-year amount for 2010 and 2011), tax relief may be obtained only within an amount equal to 5% (rate applicable for 2010) of the tax basis of certain assets of the group (rate applicable for 2011 is 4.5%). Net financing costs consist of, among other things, interest income/expenses, taxable gains/losses on debt, receivables and financial contracts, taxable gains/losses on shares, and taxable dividend; and

• Thirdly, there is an earnings before interest and tax (EBIT) based rule that works to limit interest relief to an amount equivalent to 80% of the Danish company’s/tax group’s taxable EBIT income. This rule applies the same definition of net financing costs as the asset-based rule, and it also allows for a minimum deduction of DKK 21.3 million in cases where EBIT is too low or negative.

**Inter-company loans**

**How is the arm’s length nature of an inter-company loan evaluated?**

In Denmark, the most recognised method is the CUP method, but the Danish tax authorities accept other methods as well; this including the loan margin method, bank offer and discount rate + 4%.

• **CUP:** The CUP method is accepted. The Danish tax authorities have access to Moody’s RiskCalc and Bloomberg databases which are used to establish prices on loans on a standalone basis.

• **Loan margin method:** This method takes a loan from a third party and sells it to a subsidiary by adding a mark-up to the company handling the loan. This approach is officially recognised by the tax authorities, but no guidance on how to determine the risk premium for handling and carrying the risk of default has been provided.

• **Bank offer/quote:** Is recognised, but it is very unlikely that it can be used without support from secondary methods. It is most likely that it can be used to support adjustments to a benchmarked price, discounts, etc. Further, it depends on how long the offer is in the process, if it has been through the banks credit committee, basically how close the offer is to a final deal.

• **Discount rate + 4%:** This method is still recognised, but only when all other options have been explored. Some discussions center on whether it can be used as a safe harbour approach; this however, would not be recommended.

**How is the arm’s length nature of the specific terms and conditions of an inter-company loan evaluated?**

There is no specific guidance on this area, but the taxpayer should be able to demonstrate the economic rationale behind the transaction. This includes both the ability to support the financial obligations related to the loan and what the intended use of the loan is. Please note that it is not a requirement to document that the terms and conditions are at arm’s length unless it is a special case related to e.g. mezzanine loans or loans with a repayment profile that is somewhat unusual.
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>✓</td>
</tr>
<tr>
<td>Loan margin method</td>
<td>✓</td>
</tr>
<tr>
<td>Discount rate + 4%</td>
<td>✓</td>
</tr>
</tbody>
</table>

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>✓</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>✓</td>
</tr>
</tbody>
</table>

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

The Danish tax authorities are following the OECD Guidelines on this. Implicit guarantees as a consequence of the group relationship should not be considered as an intra-group service. But so far PwC has seen no signs that the implicit support should affect the interest rate on loan arrangements. Thus, pricing of loans is based on a separate entity approach basis, not taking the relationship into consideration.

Are foreign comparables accepted?
Yes, if appropriate adjustments for differences in the risk free rate and other relevant factors can be made.

**Cash pool**

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?

Neither specific transfer pricing guidelines nor regulations on cash pooling exist in Denmark, nor have there been any tax cases or court decisions in relation to cash pooling. This means that the general documentation requirements and the OECD Guidelines constitute the basis for evaluating the arm’s length nature of transactions relating hereto.

Cash pool members are assumed only to participate in a cash pooling arrangement if the term and conditions are better than or equal to the terms and conditions which the cash pool member could have obtained on a standalone basis. The terms and conditions which the cash pool members could have obtained on a standalone basis, therefore, needs to be taken into account when allocating the economic profit between the members. The allocation of economic profits should be done according to the individual member’s contribution to the economic profit in respect to netting and volume effects. The credit default risk, and hence the individual cash pool members’ credit ratings, may be considered of less importance in cash pools compared to...
inter-company loans due to the short-term maturity of cash pools. Long-term balances with the cash pool may be re-characterised into long-term loans.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?
The preferred methods for determining the interest rates on cash pools are CUP or Profit Split. The Profit Split Method is very useful in relation to cash pooling arrangements due to the interrelatedness of individual cash pooling transactions and the joint generation of the economic profit deriving from cash pools. A CUP is useful when data on short term interest rates for bank overdrafts and deposits is available and it can be argued that the cash pool member’s contribution to the economic profit generated in the cash pool is small and, hence, the interest rate should be close to the interest rate which the entity could have obtained on a standalone basis. The credit default risk may be considered of less importance in cash pools compared to inter-company loans due to the short-term maturity of cash pools.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?
In case of a notional cash pool, the remuneration for the cash pool leader is typically considered a service fee. In case of physical pooling, the remuneration is typically considered the difference between interest income and interest expenses (and other related financial expenses) or a service fee could be calculated on a cost plus basis.

Inter-company guarantees

What is your tax authority’s approach towards recognising guarantees?
There is no recognised approach for either pricing or recognising guarantees. But an intercompany guarantee has to be justified in such a way that it covers a real risk as well as the price cannot exceed what the receiver could have paid to a third party.

The Danish tax authorities recognise the principles in the OECD Guidelines, thus an implicit guarantee should not be paid for.

How is a guarantee fee characterised?
There are no specific requirements. It is expected that it follows the ‘normal procedures’ for guarantees. If the most common approach for any given guarantee is to pay an upfront lump sum payment, that is what would be easiest justified.

To what extent are implicit guarantees recognised?
They are recognised as something that is there and should not be paid for.

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
Often it is not taken into consideration. If a guarantee is in place which puts the guarantee receiver in a better position than the implicit guarantee – a price for the full guarantee is mostly used.

How is the arm’s length nature of the specific terms and conditions of an inter-company guarantee evaluated?
The terms and conditions of the guarantee should be at arm’s length. If this is not the case, the relevant terms and conditions may be amended which could result in
disallowing a loss due to the not at arm’s length terms and conditions or in making an adjustment in the pricing of the guarantee.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>√</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>√</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>×</td>
</tr>
<tr>
<td>CUP approach</td>
<td>×</td>
</tr>
</tbody>
</table>

Are foreign comparables accepted?
Yes, if appropriate adjustment can be made to the price or if the markets are sufficiently comparable.

Documentation

Documentation requirements
General transfer pricing documentation requirements exist and Order no. 42 of 24 January 2006 stipulates certain minimum information that must be included in a transfer pricing documentation to meet Danish requirements. The burden of proof that transfer prices are at arm’s length falls on the taxpayer.

When does documentation need to be available?
Documentation needs to be available at the time of filing the income tax return and should be submitted within 60 days upon request from the tax authorities.

In which language should the documentation be prepared?
The documentation may be prepared in Danish, Swedish, Norwegian or English.

Advance certainty

Are APAs/ATRs available?
There is not an official APA programme, but it is possible to obtain a binding ruling which has similarities to a unilateral APA. If the transaction concerns a treaty country, it will be possible to enter into a Bilateral APA by reference to the treaty in place.

Where does the request for the APA/ATR need to be filed?
The Danish tax authorities (the Danish Competent Authorities).

What information is typically required?
A description of the transaction and an economic analysis. The application is complicated and extensive.

Term of the APA
Usually between three and five years.
Finland

Transfer pricing rules and regulations

Rules by means of legislation

- Article 31 of the Assessment Procedure Act (VML): Codification of the arm’s length principle.
- Articles 14a-14c of the Assessment Procedure Act (VML): Documentation requirements.

Rules by means of legislation

The Assessment Procedure Act (VML) includes provisions:

- Arm’s length principle (Article 31);
- Transfer Pricing documentation requirements (Articles 14a-14c);
- General Tax Avoidance Provision (Article 28);
- Hidden dividend distribution (Article 29);
- Preliminary ruling (Article 84); and
- Advance ruling (Article 85).

Rules by means of regulations (decrees, manuals, position papers, etc.)

On 19 October 2007, the Finnish Tax Authorities published guidelines dealing specifically with documentation. The OECD Guidelines on transfer pricing, while not legally binding in Finland, are quite strictly followed by Finnish Tax Authorities in practise. Decisions of the Finnish courts, although they do not specifically refer to the OECD Guidelines, are compatible with them. Finnish legal commentary also follows the principles in the Guidelines.

Rules by means of case law (most relevant ones)

The Supreme Administrative Court, 3 November 2010 (KHO 2010:73). The Supreme Administrative Court applied the standalone principle when evaluating the creditworthiness of a group company. The Court held that the interest rate on an intra-group loan cannot be determined based on the average interest rate on the group’s external lending, in the situation where the debtor company’s creditworthiness and other circumstances would have made it possible for the debtor company to receive external debt financing at a lower interest rate.

Specific rules PE context

It is especially mentioned in Article 31 of the Assessment Procedure Act that the arm’s length principle should be applied when allocating profits, costs, etc. to PEs. The allocation of profits is based on tax treaties. Finnish national legislation includes provision according which foreign corporation is liable to tax of all its profits that are related to the PE herein (Article 9.3 of Income Tax Act).

Thin capitalisation

Rules by means of legislation and regulations

There are no special provisions concerning thin capitalisation in Finland. Until 2014 valid provisions that may allow reducing the amount of tax deductible interests are Articles 28, 29 and 31 of the Assessment Procedure Act. However, the need to revise the legislation concerning the amount of tax deductible interest was identified and changes
to the Business Income Tax Act (18 §) and Tax Assessment Act (65 §) came into effect in January 2013 and will be applied from 2014 onwards.

Articles 28, 29 and 31 of Assessment Procedure Act do not directly concern thin capitalisation and are thus discussed only in general level. Article 28 of the Assessment Procedure Act includes general tax avoidance provision; Article 29 concerns hidden dividend and Article 31 transfer pricing adjustments.

The new regulations will bring a general restriction concerning interest deductibility to Finland. The regulations limit the tax deductibility of interest payments between directly or indirectly associated enterprises. Regulations are applicable both to domestic and cross border situations.

**What is the effect of the rules on the deduction of interest?**

According to the Articles 28, 29 and 31 of Assessment Procedure Act, it is possible to limit or reject the tax deductibility of interest. The interest is not deductible if the loan is reclassified as equity based on the arm's length principle. I.e. both the amount of the loan and the interest must be at arm's length. According to Art. 18 of the Business Income Tax Act interest deduction limitations concern only intra-group funding thus excluding external funding (e.g., loans from banks unless those bank loans are back-to-back arrangement etc.).

Limitations are made on an individual company level and the calculations are made at the same level. The target of the limitation is net interest that is interest income less interest expenses. Restriction concerns net interest when it is over 30 % of taxable EBITDA. The taxable EBITDA is company's profit before interest, write offs and other losses and depreciations of financial assets (received group contribution between Finnish subsidiaries will be added to the taxable EBITDA normally.) The exceeded part of interest costs is non-deductible during the tax year in question.

According to the new regulations, up to EUR 500,000 net interest is always tax-deductible (so called protected portion). Also interest rates of external funding are calculated to the EUR 500,000 limit. However, those external interest rates are taken into account only when calculating the protected portion. The tax-deductibility of external interest rates will not be limited. If interest costs are some year considered as non-deductible, it is possible to deduct the non-deductible interest from the future profits provided that the 30 % EBITDA-rule allows the deduction.

The interest deduction limitations are not applied, if Company's debt to equity ratio is equal to or higher than the debt to equity ratio calculated on the basis of a consolidated balance sheet. However, this is only applicable in case the consolidated balance sheet has been prepared in an EU or EEA Member State or a state with which Finland has a tax treaty is in force.

**Inter-company loans**

**How is the arm’s length nature of an inter-company loan evaluated?**

All factors of the loan arrangement should be taken into account when evaluating the arm's length nature of the transaction. The arm's length nature of interests is in principle determined by borrower's creditworthiness and other conditions of the loan arrangement. Both the arrangement and the interest must be at arm's length.
Finland

How is the arm’s length nature of the specific terms and conditions of an inter-company loan evaluated?

There are no special rules how to determine the arm’s length nature of intra-group financing transactions. In practice the Finnish Tax Authorities typically pay attention to the time frame of the loan (i.e. date, typically withdrawing date), currency, borrower’s domicile and the creditworthiness of parties. In addition, attention should be paid towards the conditions of guarantees.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes (preferably binding)</td>
<td>✓</td>
</tr>
</tbody>
</table>

Internal CUPs are preferable taking into account the creditworthiness of the borrower and the terms and conditions of the transaction. The Finnish Tax Authorities may also use bank quotes as a suitable comparable.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>✓</td>
</tr>
<tr>
<td>Use credit scoring tool (e.g. Moody’s RiskCalc)</td>
<td>✓</td>
</tr>
</tbody>
</table>

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

There is no formal guidance whether passive association should be taken into account.

Are foreign comparables accepted?

Depending on the case, the Finnish Tax Authorities might accept foreign comparables but typically the Finnish Tax Authorities prefer local comparables (Finnish or Nordic comparables). Foreign comparables are accepted provided that all five OECD comparability factors are met.

Cash pool

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?

Cash Pools have become a hot topic in Finland in tax audits and assessments. The arm’s length nature of the transaction is typically tested with the following questions:

- What kind of items exists in a cash pool: long term or short term?
- Would an independent party have invested in a long term instrument?
- Should the arrangement be considered as a loan to group company instead of a deposit?
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?

Normally the Finish Tax Authorities analyse what amount the interest rate would have been if the company had borrowed money from a third party (bank). The Finnish Tax Authorities try to analyse the indicative credit rating of the debtor (on a separate entity basis) and prepare interest rate benchmarking (margin for the applicable reference rate) for comparable loan arrangements applying the indicative credit rating.

The defendable interest rates for cash pool deposits/withdrawals have to be determined on a case by case basis. In some cases the Finnish Tax Authorities have, for example, re-characterised cash pool receivables or liabilities as long term receivables or liabilities. However, the Finnish Tax Authorities’ practice has not been consistent.

If there is long term deposit of high balance (exceeding the need of working capital), it should be analysed what would be available interest rate from third party borrower (or bank deposit) in such circumstances (mainly long term loan granted) and consider whether lower rate could be defendable before the Finnish Tax Authorities.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the cash pool leader?

There is no clear tax practice.

**Inter-company guarantees**

What is your tax authority’s approach towards recognising guarantees?

There is a wide variety in the terms of guarantees in Finland. The juridical binding of guarantees varies which has essential effects on the pricing of the guarantees. The following list describes examples of guarantees:

- Formal guarantee;
- ‘Comfort letter’; and
- Notional guarantee by parent company which is based only on company belonging to the Group.

How is a guarantee fee characterised?

The following aspects should be taken into account when evaluating the amount of guarantee fee:

- Debtor’s creditworthiness (the bigger the default risk, the more valuable the guarantee);
- Creditworthiness of guarantor (if guarantor cannot manage its guarantee obligation, the guarantee is worthless);
- Maturity date of the guarantee;
- The price of the risk in credit markets and creditor’s willingness to take certain kind of credit risks; and
- Uncertainty depending on debtor’s (and also guarantor’s) creditworthiness.

To what extent are implicit guarantees recognised?

The Finnish Tax authorities have stated that they apply the stand alone principle, and thus implicit guarantees are not necessarily taken into account. However, there is not any practice yet.
How is the arm’s length nature of the specific terms and conditions of an inter-company guarantee evaluated?

The terms and conditions of the guarantee should be at arm’s length. The Finnish Tax Authorities typically pay attention to the conditions of the financial transactions, and thus not only the pricing of the guarantee but also other conditions should be taken into account.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>×</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
</tbody>
</table>

Are foreign comparables accepted?

Depending on the case, the Finnish Tax Authorities might accept foreign comparables but typically the Finnish Tax Authorities prefer local comparables (Finnish or Nordic comparables). Foreign comparables are accepted provided that all five OECD comparability factors are met.

Documentation

Documentation requirements

According to the rules Assessment Procedure Act (Articles 14a-14c), the Finnish transfer pricing documentation should include the following:

1. Description of the business;
2. Description of related party relationships;
3. Details of controlled transactions;
4. Functional analysis;
5. Comparability analysis including information on comparables if available; and
6. Description of the pricing method and its application.

The information related to in points 4 – 6 is not required to be documented if transactions between two related parties do not exceed EUR 500,000 per year (at arm’s length level).

There are no specific documentation requirements for financial transactions.

When does documentation need to be available?

Documentation should be submitted to the tax authorities from a request. However, the taxpayer would not be required to submit documentation earlier than six months after the end of the accounting period in question.

What is the deadline for submitting the documentation?

The Taxpayer must provide the documentation within 60 days after tax authorities’ request of documentation. Any additional information requests should be complied with within 90 days of the request. These deadlines can be extended on the basis of justified request of the taxpayer. Further, while transfer pricing documentation is not a part of the annual tax return, there is no need to submit the documentation to the tax authorities without a request.
In which language should the documentation be prepared?
Possible languages are English, Finnish and Swedish. A translation to Finnish or Swedish should be required only when it is necessary for the purposes of conducting the taxation of the entity in question.

Advance certainty
Are APAs/ATRs available?
There is no domestic legislation in force concerning APAs in Finland, but the procedure can be based on tax treaties concluded between Finland and its treaty partners. In practice the process follows frames of mutual agreement procedure as regulated normally in Article 25 of the treaty. Please note that there have not been any APAs in Finland yet, but tax authorities have expressed their interest towards it. Due to the lack of experience, discussions are needed with the Finnish Tax Authorities in order to be able to engage them to the APA process.

There are two types of ATRs in Finland: preliminary rulings and advance rulings. Preliminary ruling (Article 84 of Assessment Procedure Act) is a legal tool for tax certainty regarding the tax treatment of a transaction open to various interpretations of law. ATRs cannot be obtained for the cases concerning the valuation or the applicability of GAAR regulations. Further, in the advance ruling (Article 85 of Assessment Procedure Act) the tax office will confirm how it will manage with the requested question in FY’s taxation. The Advance ruling may also concern valuation issues.

Where does the request for the APA/ATR need to be filed?
Regarding the APAs, the ultimate power of competent authority is furnished with the Ministry of Finance (MOF). However, the MOF has delegated its power to tax administration. On a practical level, the office of Finnish competent authority is located in Large Tax Payers Office where the application for an APA should be filed.

ATRs can be requested either from the Central Tax Board (preliminary rulings), or from the local tax office (advance rulings)

What information is typically required?
Typically the following information is needed:

• Identification of the parties;
• Years that the request concerns. It is uncertain whether the Finnish competent authority would accept drawbacks or retrospective applications;
• Description of the transactions covered in the request;
• Reasoning why APA procedure is necessary;
• Critical requirements of APA (e.g. content of tax regulations or tax treaties, customs regulations, functions and risks of parties, etc.);
• Description of the transfer pricing method applied concerning transactions under request and reports how transfer prices are considered to be at arm’s length;
• Description of the functions of companies under APA request;
• Analysis of the relevant industry and market circumstances;
• Suggestion for schedule;
• Group chart including all group companies which have transactions with the companies under APA request;
• Brief description of already reached APA decisions concerning companies under APA request;
Finland

- Brief description of transfer pricing tax audit procedures concerning companies under APA request (during previous three years);
- Financial information of the companies under APA request from the previous three years; and
- All other information that the Competent Authority considers necessary.

**Term of the APA**
There have not been any APAs in Finland yet so it is not possible to determine the term of typical APA. Based on our experience with pending processes, it is more likely that the term is several years. However, there are no set term requirements.
France

Transfer pricing rules and regulations

Rules by means of legislation

- Section 57 of the French Tax Code (CGI – Code Général des Impôts), and the concept of ‘abnormal act of management’: Statutory rules on TP adopt the arm’s length principle for cross-border related-party transactions.
- Sections 39 and 212 of the CGI: Intercompany financing transactions and thin capitalisation issues.

Rules by means of regulations (decrees, manuals, position papers, etc.)

- Administrative regulation 4 H-8-07 (BOI-IS-BASE-30-30-20120912): The FTA issued an administrative regulation on 31 December 2007 providing for its interpretation of Section 212 of the CGI.
- Administrative regulation 4 H-3-11 (BOI-IS-BASE-30-30-30-10-20120912, n°180): Published on 5 January 2012, comments on thin capitalisation issues related to third party debt guaranteed by a related entity.

Rules by means of case law (most relevant ones)

- Société d’acquisitions immobilières, CE, 22 January 2010.

The above cases deal with interest charges. The interest rate charged to a subsidiary by a French entity must be comparable with the interest rate the French entity would receive from a third party bank for an investment similar in terms and risk. The interest rate used by the courts as a reference in Montlaur Sakakini is the rate that the lender could have obtained from a third party bank. In the France Immobilier Group decision, the Court of Appeal considered that the level of the interest rate should not be assessed by reference to the debts contracted by the lender, but should be based on the financing conditions that the lender could have obtained from a third-party bank. In the Société d’acquisitions immobilières decision, the High Court decided that the cash advance granted by a sub-subsidiary to its ‘grandmother’ in difficulty, even accompanied by the payment of interest could constitute an abnormal act of management if the amount lent is clearly disproportionate to the creditworthiness of the borrowing company.

In practice, when an interest rate has to be set up, reference should be made to the rate that would be obtained by the borrower (stand alone approach), which is in line with the rules set by Article 212 of the French Tax Code (see below).

- Baker International, CAA Bordeaux 6 April 1994: Payment deferral: If interest is not charged in respect to deferrals of payments granted to a related company, it is considered either an abnormal act of management or is subject to Section 57 of the tax code.
- Soladi, CAA Nancy 30 April 1998 and Carrefour, CE, 17 February 1992: It is deemed to be an abnormal act of management to provide an explicit financial guarantee free of charge, unless direct actual benefit for the entity providing this support can be justified. In a decision of 17 February 1992, the French Supreme Court considered as arm’s length a rate of 0.25% for this service, while the FTA was seeking 1%. The remuneration asked for this service should be commensurate with.
France

the risk incurred as well as with the market value of this service, irrespective of the actual cost.

- **Sodefra Finances, CAA Paris, 13 mars 2012:** The guarantee for foreign exchange losses that a French company has granted without compensation to a related party in Luxembourg in connection with a loan in foreign currency and the deduction of resulting foreign exchange losses represents a transfer of profits justifying the application of Article 57 of the French Tax Code.

- **SA Les Editions JC; CE, 11 February 1994.**
- **Télécoise, CE, 16 May 2003.**
- **Guerlain, CE, 11 April 2008.**
- **Beauté Créateurs SAS, CAA Paris, 12 May 2010.**
- **Société Générale, CAA Versailles, 29 June 2010.**
- **Delpeyrat Chevallier, CAA Bordeaux, 15 March 2011.**

The arm’s length principle also applies to debt waivers. France-based entities may waive all or part of outstanding loans to related foreign entities to the extent that they can justify some own benefit as a result of this financial assistance.

In Télécoise, the High Tax Court determined that a French company is allowed to deduct a provision for bad debt in relation to its foreign branch whenever the debt is related to its foreign business operations carried out through the branch. However, the French company must establish that the operation has a direct commercial benefit on the business activities carried out in France.

In the Guerlain decision, a French company waived its receivables towards two foreign branches in Australia and Singapore of its Hong Kong subsidiary. The judge made a reference to the consolidated results of the subsidiary (including those of the two branches), which were positive despite the financial difficulties of the branches; this was one of the arguments put forward by the judge to reject the deductibility of the waiver of the receivables in France.

In the Beauté Créateurs SAS case, the Court of Appeals applied the principle settled in the Télécoise and Guerlain cases. In this case, the court permitted the deduction of the debt waiver granted to its foreign branch by the headquarters in France because the branch provided services for the benefit of the French headquarters, which increased the sales in France and thus developed the business in France.

In the Société Générale case, the parent company granted an advance to a foreign subsidiary to face its financial difficulties and to meet the capital ratio requirements demanded by the local authority. The parent company granted a debt waiver to its subsidiary. The court ruled that such a debt waiver of a financial nature did not constitute an abnormal act of management if it allowed the parent company to avoid suffering a negative impact on its reputation from the bankruptcy of its subsidiary, even where the subsidiary in question is a small one.

In the Delpeyrat Chevalier case, in order to refuse the deductibility of the debt waiver, the Court of Appeals took into account the turnover generated by the operations conducted with the foreign subsidiary, which was very limited.
The terms of Section 57 of the CGI do not have the purpose, nor the effect, of allowing the administration to assess the ‘normal’ nature of the choice made by a foreign company to finance through a loan, rather than equity, the activity of an owned or controlled French company, and to deduce, if the need arises, tax consequences (cf. Article 212 of the CGI – thin capitalisation).

In the Banca di Roma case, the Court of Appeals reiterated that the FTA is not allowed to decide whether a business is to be financed through debt or equity.

**Specific rules PE context**

The administrative regulation 4 H‑8‑07 states that Section 212 is applicable to PEs of foreign companies. It provides clarification on how the Debt-to-Equity ratio would be applied in the case of PEs where the entities do not have a share capital, per se.

Interest payments made by PEs to the home office are in general not accepted (Rep. Min. Mesmin, Député, Joan January 19, 1981). However, in certain cases, such as for banks, special considerations allow for the deduction of interests. In addition, if a company borrows exclusively to provide its French branch the necessary resources to exert its activity, it may be possible for the branch to deduct an appropriate share of the interests in France.

**Thin capitalisation**

**Rules by means of legislation and regulations**

- The Administrative regulation 4 H‑8‑07 (BOI-IS-BASE-30-30-20120912): provides the FTA’s interpretation of Section 212 of the French tax code relating to thin capitalisation rules. This regulation clarifies the legal provisions and provides practical guidance on deductibility.

The French 2006 Finance Bill adopted new measures, applicable from January 2007, which cover the interest rate and thin capitalisation issues. These new thin capitalisation rules apply to all types of financing granted to a French entity by any French or foreign-related party.

In addition, the 2010 Finance Bill brought all financings (including bank loans) secured by a ‘related party’ within the scope of the thin capitalisation limitations.

**What are the main points of the rules?**

All financings (including bank loans) secured by a ‘related party’ fall within the scope of the thin capitalisation limitations. Thus, any financing in respect to which a related party grants a guarantee or security is treated as related-party debt.

Interest paid to related parties (if above €150K within a given year) that meets the maximum deductible interest rate test is deductible up to the highest of the three following thresholds:

- Related party debt not exceeding 1.5 times the net equity of the borrower at the start or end of the fiscal year;
- 25% of adjusted EBITDA; and
- The interest received from related parties.
Excess interest which is not tax deductible immediately can be carried forward for future deduction under certain conditions.

Thin capitalisation limit does not apply where the entity can demonstrate that the Debt-to-Equity ratio of the group is equal to or greater than its own Debt-to-Equity ratio.

Specific rules applicable to tax groups may allow further deductions.

**What is the effect of the rules on the deduction of interest?**

Under Article 212 of the French tax code, the tax deduction of interest paid to related parties is generally limited to the higher of (i) the average annual interest rate charged by lending institutions to companies for medium-term (two years or more) variable-rate loans, or (ii) the interest that the indebted company could have obtained from a third party financial institution under similar circumstances (e.g. bank quote – although no formal position has been taken on this point, the FTA typically requests binding bank quotes). In practice, when such bank quotes cannot be obtained, benchmarking studies should be performed.

The arm’s length criterion mentioned in (ii) is a new feature for France. This provision is likely to shift the burden of proof to the taxpayer, as the FTA, in practice, likely will seek to apply the average annual interest rate.

**Are there additional rules on the deductibility of interest/guarantee fees (e.g. safe harbours)?**

The portion of the interest expense that is not immediately deductible by the French company in the accounting period in which it is incurred may be carried forward without a time limit for relief in subsequent years. However, the excess amount is reduced by 5% each year, from the second accounting period following the one in which the interest expense was incurred.

The new provisions provide for several exceptions:

- The new rules do not apply to interest payable by banks and lending institutions, or to certain specific situations (e.g. interest in connection with intercompany cash pools or in connection with certain leasing transactions); and
- In addition, the thin capitalisation rules do not apply if the French indebted company can demonstrate that the Debt-to-Equity ratio of the worldwide group to which it belongs exceeds its own Debt-to-Equity ratio. Also, deductibility of interest is facilitated within a French tax-consolidated group.

**Intercompany loans**

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes (preferably binding)</td>
<td>✓</td>
</tr>
</tbody>
</table>
The interest rate applied to an intercompany loan between a French entity and a foreign related party must either (i) correspond to the average annual interest rate charged by lending institutions to companies for medium-term (two years or more) variable-rate loans, or (ii) must be supported by a comparables analysis. For example, if the French entity is the lender, the interest rate must be comparable with the interest rate the French entity would receive from a third party bank for an investment similar in terms and risk. In some cases, the interest rate used by the courts as reference is the Banque de France’s loan rate (Cf. thin capitalisation rules above). As mentioned above, in the absence of a bank quote, a benchmarking study should be performed using a financial database.

The arm’s length interest rate is considered as the market rate for comparable transactions at the date of the loan. The comparability depends on a combination of criteria, such as the amount of the loan, maturity, purpose, currency, guarantees offered, and the counterparty risk related to the financial situation of the borrower.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>✓</td>
</tr>
<tr>
<td>Use credit scoring tool (e.g. Moody’s RiskCalc)</td>
<td>✓</td>
</tr>
</tbody>
</table>

The credit rating is generally estimated using a standalone approach. Although there is no formal position on this subject (and no case law), the calculated credit rating of the borrowing entity, which is established on a standalone basis, might be adjusted by a notch in order to account for the implicit guarantee provided by the parent.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

Although there is no formal position on this subject (and no case law), the calculated credit rating of the borrowing entity, which is established on a standalone basis, might be adjusted by a notch in order to account for the implicit guarantee.

Are foreign comparables accepted?

Foreign comparables are accepted to the extent that the market is sufficiently comparable. However, local comparables are generally preferred by the FTA.

Cash pool

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?

The arm’s length principle applies to intercompany cash pools. The terms and conditions of the borrowings need to be at arm’s length for both the debtor and borrower entities.

The Cash Pool Leaders (CPL) are exempted from the thin capitalisation regulations for the cash pooling activity.
Borrowings from cash pools may be qualified by the FTA as long term loans or even equity if an entity consistently displays a net borrowing position over a long period of time.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?**
The approach for evaluating the arm's length interest rates on cash pools is similar to the one for intercompany loans provided above.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?**
In the case of a notional cash pool, the CPL may be considered as a service provider. In the case of a target balancing cash pool, the CPL may be remunerated with the difference in interest income and interest expenses.

**Intercompany guarantees**

**What is your tax authority’s approach towards recognising guarantees?**
The French Supreme Tax Court (Conseil d’Etat) considers that the non-remuneration of the guarantees constitutes an indirect transfer of benefits abroad under Section 57 of the French tax code. In this respect, guarantees are subject to transfer pricing adjustments since they constitute a service rendered to a related company which would normally be remunerated between independent enterprises.

**How is a guarantee fee characterised?**
A guarantee is justified if it brings down the cost of financing compared to a loan obtained on a standalone basis. In this respect, a guarantee provided by a parent company to its subsidiary (which brings down the overall cost of financing) is characterised as a service which should be remunerated proportionately to the risk assumed by the parent company.

**To what extent are implicit guarantees recognised?**
There is no specific guidance or formal position on implicit guarantees.

**How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?**
The guarantee fee should be established on a standalone basis.

**How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?**
There are not any specific terms and conditions on guarantees, but they need to be at arm's length and be proportionate to the risks assumed by the parent company. The existing case law points out a remuneration that varies between 0.25% and 1% of the guaranteed amount. In addition, the cost of the guarantee should not exceed the savings that it provides.
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>✓</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>×</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>✓</td>
</tr>
</tbody>
</table>

There is no case law to support or challenge the use of the benefit approach, cost of capital approach or credit default swaps. In our view they may be used if no other option is available.

Are foreign comparables accepted?
Foreign comparables are accepted to the extent that the market is sufficiently comparable. However, local comparables are generally preferred by the FTA.

**Documentation**

**Documentation requirements**

The documentation requirements apply to companies:

a. With turnover or gross assets on the balance sheet exceeding EUR 400 million;
b. That hold directly or indirectly more than 50% of capital or voting rights of a legal entity mentioned in (a);
c. With more than 50% of their capital or voting rights held directly or indirectly by a legal entity mentioned in (a);
d. That benefit from a ruling granting a worldwide tax consolidation regime; and
e. That are part of a French tax group in which at least one legal entity of the tax group meets one of the requirements mentioned under (a), (b), (c) or (d).

Companies outside the scope would remain subject to documentation requests during tax audits. Even if penalties are lower and deadlines not so strict, these companies would still be at risk of arbitrary reassessments for not having transfer pricing documentation in place.

Following the adoption of the new documentation requirements, the FTA released specific guidance to clarify the transfer pricing documentation law (Regulation 4 A-10-10). The regulations state that the permanent establishments are also within the scope of the transfer pricing documentation requirements.

The documentation requirements conform to the recommendations elaborated by the European Union’s Joint Transfer Pricing Forum. Two levels of information are required (i) general information relative to the group of companies, and (ii) specific information on the French company.
Are there any specific documentation requirements for intercompany loans/guarantees in addition to the regular documentation requirements?
No specific documentation requirements exist for intercompany loans or guarantees; the documentation must cover all intercompany transactions, including intercompany loans or guarantees that took place within the audited period.

When does documentation need to be available?
The complete set of documentation should be maintained and provided immediately upon request (which could be the first day of a tax audit). The regulations, however, provide for a 30-day extension if the documentation is not available or incomplete, with a possible additional extension of 30 days.

The FTA may assess a maximum penalty of 5% on the transfer pricing adjustment in the case of missing or incomplete documentation, with a minimum of EUR 10,000 per audited year. If there is no transfer pricing adjustment, the penalty imposed is EUR 10,000 per audited year for missing or incomplete documentation.

Therefore, it is advisable for companies within the scope of the new regulations to maintain contemporaneous documentation in anticipation of tax audits considering the stricter deadlines and penalties.

What is the deadline for submitting the documentation?
There is no deadline to submit documentation, but in the case of a tax audit, the transfer pricing documentation must be available upon request from the tax auditor. A 30-day delay is provided by the tax administration if requested by the taxpayer, with a possible additional extension of 30 days.

In which language should the documentation be prepared?
The documentation may be prepared in English or in French. If it is in English, the tax auditor may eventually request a French translation of all or parts of the documentation.

Advance certainty
Are APAs/ATRs available?
French tax regulations provide for official APA procedures. Between 1999 and 2004, only bilateral APAs were accepted. The rectifying Finance Bill of 2004 (Article 20) codifies the legal basis for APAs and extends their scope to unilateral APAs. The APA procedure is now included in the Tax Procedures Code (see Article L. 80 B 7° of the Livre des procédures fiscales).

Where does the request for the APA/ATR need to be filed?
APA: Direction générale des finances publiques ; Bureau CF 3 – Affaires particulières internationales.

What information is typically required?
The application may cover all transactions or only certain transactions, covering all or part of the companies' operations (product, function, type of transaction or line of business). Through preliminary meetings with the FTA, the exact scope of the information (tax, financial, legal, industrial, commercial, etc.) to be provided is defined. A formal request may then be addressed to the FTA. Within two months of this
application, the same application must be submitted to the other tax administration. An indicative list of information to be provided is included in this regulation, but the basic idea behind this list is to establish constant debate and exchange of information with the FTA as part of the review of the application. Once the review is completed, a draft ruling is issued for final approval by the taxpayer.

The ruling defines the parties, transactions, TP method(s) selected, assumptions used, revision formula, date of application of the ruling and its duration (three to five years), and contents of the annual report to be issued by the taxpayer. The ruling may not have a retroactive effect, except within the limit of the financial year during which the application is made.
Germany

Transfer pricing rules and regulations

Rules by means of legislation

- Article 8 Corporation Tax Act and Article 1 Foreign Tax Act: In general Germany follows the OECD Guidelines. In the domestic laws are two relevant pieces of legislation when dealing with transfer pricing. The first relevant piece of legislation is the Corporation Tax Act (Körperschaftsteuergesetz), with Section 8 Subsection 3 relating to deemed profit distributions and deemed capital contributions. Essentially, where the price is not arm's length, Section 8 Sub-section 3 stipulates that an adjustment is required to bring the price to an arm’s length level. Both terms are defined in the tax guidelines: deemed profit distribution includes the reduction of assets or the prevention in the increase of assets, while deemed capital contribution deals with a contributable pecuniary advantage.

In order to determine whether an adjustment is required, there is a two-stepped approach:

- First, any transaction with a controlling related party requires a pre-agreed contract to be in place. If this is not the case, the remuneration in respect of the related-party transaction is treated as a deemed profit distribution, and may be subject to withholding tax at approximately 30%.
- Second, irrespective of whether the transaction is with a controlling related party (i.e. includes transactions with non-controlled companies), the remuneration in respect of the transaction is required to be at arm's length. Where the remuneration is not at arm's length, an adjustment is required. The difference between the actual amount paid/received and the appropriate arm’s length amount that should have been paid/received is treated as a deemed profit distribution or a deemed capital contribution (if there is a contributable pecuniary advantage).

Further, the deemed profit distribution is treated as non deductible for tax purposes. In addition, where the adjustment results in a tax liability, interest is charged at 6% p.a.

The second relevant piece of legislation that requires consideration is the Foreign Tax Act (FTA). The FTA governs the transfer pricing between cross boarder business relationships of related parties and stipulates the arm’s length principle and applicable transfer pricing methods.

Certain related-party transactions which do not fall within Section 8 Sub-section 3 of the Corporation Tax Act may be captured by Article 1 of the FTA. Under the FTA each transaction is qualified as a business transaction as long as there is no explicit statement (e.g. shareholder resolution) from the taxpayer that the transaction is an equity contribution. Thus deemed capital contributions without a contributable pecuniary advantage can be adjusted under the FTA. Where an adjustment results in a tax liability, interest is charged at 6% p.a.

Rules by means of regulations (decrees, manuals, position papers)

The Administrative Principles contain certain guidance on the pricing of intercompany loans and guarantees. It is stated that:

- First of all an intercompany loan must be proven as recoverable, otherwise an interest payment would not be appropriate (Section 4.1);
- An intercompany loan should be remunerated as in an uncontrolled transaction between a bank and a third-party customer (Section 4.2.1), while the relevant parameters are motioned in detail, such as credit amount, purpose, and securities (Section 4.2.2); and
- An intra-group guarantee shall only be remunerated if a guarantee fee is paid between two unrelated parties in a comparable situation (Section 4.4).

- Administrative Principles of 2011 – “Write-downs on Loans Granted to Foreign Related Parties”: Through the publication of the set of administrative principles on 19 March 2011, the German authorities positioned themselves on a number of key transfer pricing aspects on intra-group loans.

Despite that by wording the principles solely address outbound loans, i.e. loans given from a German lender to a foreign related-party borrower, they are likely to have an impact also on inbound loans.

Despite that the administrative principles tend to addresses the question whether a write-down on the principle amount of an intercompany loan is tax deductible and the pre-conditions for deductibility, it has more profound implication on the determination of the arm’s-length nature of the terms of intra-group loans in general, especially on whether intercompany security is required for a loan and in what context implied parent/group support should be assumed.

The administrative principles provides three scenarios of intercompany loans: a) the granting of the loan is made by agreeing on a factual security and the interest rate takes into account the security; b) the granting of the loan is without agreeing on a factual security and the absent security shall be taken into account through a risk premium added on to the interest rate; and c) the granting of the loan is made without agreeing on a factual security and the risk premium shall not be considered due to the implicit support within the group. Scenario a) and b) would hold if all circumstances around the loan comply with the arm’s length principle. More discussions were given on the determination of Scenario c) and its implication on loan principal write-down and interest determination. It primarily follows the concept that if the absence of intercompany factual security is not arm’s length or that a third party would have assumed group support should exist in the same circumstances, an implicit parental/group support should be assumed and no interest premium should be considered.

The ruling generally consents the principle adopted in the historical court cases of 1994 and 1997 (as described below), but also provides exceptional circumstances to this principle.

**Rules by means of case law (most relevant ones)**

- **The Federal Tax Court, 28 February 1990**: The Federal Tax Court ruled on the determination of interest rates for intercompany loans. The case involved an interest-free loan which was granted by a limited liability company (GmbH) to its sole shareholders, a brother and his sister. The court stated that the determination of the appropriate interest would follow a two-stepped test. As a first step, the
determination would depend on whether the corporation did borrow money from external banks. If the corporation had borrowed funds externally and extends related-party loans, then the interest rate on the related-party loan should depend on the external financing rate (if one could assume it would have otherwise used the funds (available for the intra-group loan) to repay its own external loan). If the company had not borrowed funds from external banks, then – as a second step – the credit interest (Habenzinsen) paid by banks on credit balances would represent the lower limit, and the debit interest (Sollzinsen) paid to banks on debit balances would represent the upper limit, for a range of appropriate intercompany interest rates. The final interest rate should then be determined by an estimate and, if no other indications are available for such estimate, one could apply “the typical experience that private lenders and borrowers would share the spread between debit interest and credit interest”. It is somehow uncertain whether conclusions still can be drawn from the 1990 decision to present intra-group financing structures for large MNCs. The decision addresses a particular fact pattern around a family-owned business. In addition, the notion that interest rates could be determined by reference of bank debit rates and credit rates has been questioned, and it is also not certain whether the court would still rule in this sense.

The case also noted that a pre-agreed written contract is necessary to prove a serious agreed loan between the shareholder and its controlled company. If no in-advance signed statement is in place a non-repayable grant (subsidy) would be assumed.

• **The Federal Tax Court, 21 December 1994**: This case concerned a Dutch trust, which incorporated two Dutch corporations and granted interest-bearing loans to such corporations. The structure involved further a real estate investment in Germany, and the interest paid by the corporations to the trust was claimed in German tax returns as deductions. In addition to matters such as an abuse of law, the decision discussed the necessity to have loans between related parties secured by, e.g. a pledge in real estate (as one would typically expect in the case of bank loans). However, the court ruled that a security is not per se necessary in an intra-group situation because a loan granted to a subsidiary can always be considered to be secured by a (majority’s) shareholder’s influence. Therefore, providing additional security for loans would be unusual between corporations within the same corporate group. The court also concludes that for intercompany loans “only the interest can be regarded to be appropriate, which is payable for secured loans”.

• **The Federal Tax Court, 29 October 1997**: This case confirms the findings of the 1994 decision. The latter case concerned an inbound loan received by a German limited liability company from a related-party Swiss shelf company which was wholly owned by a Swiss resident. Here, the court stated again that it is not necessary for the acceptance of an intercompany loan under the arm’s length principle that any security has been granted by the borrower to the lender. Such security would not be necessary, when the lender would have, from a factual perspective, the possibility to influence the borrower and to initiate a repayment of the loan. Furthermore it referred to “insufficient terms and conditions in a loan agreement that could lead to a discussion of seriousness of a loan agreement”.

Also with respect to the latter two cases decided by the Federal Tax Court, it is unclear which conclusions can still be drawn from the respective decisions. It can be noted in general, though, that court decisions in Germany (as a civil law country) tend to lose their importance over time, contrary to many case law countries where older decisions are often regarded as important landmark decisions which provide
clear guidance. However, the subsequent legislation of detailed rulings in 2011 (see above) provided more specific guidance in this matter.

Specific rules PE context
Administrative Principles on Permanent Establishments, 24 December 1999: There is no specific guidance provided in the German tax regulatory regime on the financing transactions between a PE and its head office or between two PEs of the same legal entity. The Administrative Principles on PE of 1999 provides certain high-level guidance on the attribution of profits, assets and capital to permanent establishments. It might be considered to have addressed partially the loan volume issue but not the interest rate issue.

The German Federal Government issued a draft bill on 19 June 2012 to amend the Article 1 Foreign Tax Act by incorporating PEs into the article and introducing a 'functionally separate legal entity' approach. This will bring the German transfer pricing regime on PEs closer to the Authorities OECD Approach (AOA) and it is yet to be observed how Germany would apply the guidance under AOA for intra-company funding activities in the future.

In addition, the German interest deduction ceiling rule (also known as the 'interest barrier rule' as discussed below) also applies to PEs.

Thin capitalisation
Rules by means of legislation and regulations
Generally speaking, unlike the thin capitalisation regime of other countries, e.g. the UK, the German thin capitalisation regime mainly deals with interest deductibility rather than the arm's length nature around the economic substance of the granting of the loan.

• Sec. 4h German Income Tax Act and Sec. 8a Corporation Income Tax Act:
  Germany's former thin capitalisation rule has recently been revised by a new interest deduction ceiling rule. This regulation also applies whether or not interests have been paid to third parties.

In general, interest paid to related parties needs to be based on the arm's length principle.

The interest deduction ceiling rule according to Sec. 4h German Income Tax Act; Sec. 8a Corporation Income Tax Act is based on earnings. The net interest expense on the overall debt cannot exceed 30% of the company's EBITDA. According to the interest deduction ceiling rule, interest expense is not tax deductible as much as the net interest expense exceeds 30% of the EBITDA. Nevertheless the net interest expense is fully tax deductible if the company (i) is not a member of a group and interest paid to any one shareholder of more than 25% does not exceed 10% of the net interest expenses, (ii) incurs net interest expense of not more than €3 million per year and (iii) is a member of the group, but its borrowings do not exceed the borrowing ratio (as shown by financial statements under common accounting convention such as IFRS or US GAAP) by more than 2% and interest paid to any one shareholder of more than 25% does not exceed 10% of the net interest expense. There is no exemption rule concerning banks or financial institutions.

With respect to the German trade tax there is a further restriction on deductibility; 25 % of the overall interest paid, which is deductible under the interest deduction
ceiling rule, might be non-deductible for trade tax purposes. However, most banks or financial institutions are not affected by this regulation due to an exemption rule.

Prior to 2008, the thin capitalisation regulation of Section 8a of the German Corporate Tax Act provided for a general available safe harbour Debt-to-Equity ratio of 1.5:1. Within this safe harbour, interest on loans received from (or guaranteed by) shareholders or affiliated companies were deductible for tax purposes. However, no safe harbour was allowed where the interest charged was based on profit or turnover rather than on a fixed percentage of the principal. In connection with the thin capitalisation legislation, there were complex anti-avoidance provisions, among others, on intra-group debt push-downs.

What is the effect of the rules on the deduction of interest?
As far as the new interest deductibility capping rule is applicable, interest expenses are not tax deductible in the current year, but they can indefinitely be carried forward to future years (interest carry forward). The net interest expense is then treated as a net interest expense of the year concerned, with the same conditions applying. Furthermore, there is also an EBITDA carry forward of five years in case the entity had a remaining EBITDA amount in the current year. There is no interest carry forward concerning non-deductible interest for trade tax purposes.

The restrictions concerning a shareholder change are also applicable for the interest carry forward and the EBITDA carry forward. Both might be completely lost if more than 50% of the shares of the company are directly or indirectly transferred to a new shareholder or on a pro rata basis if an amount between 25% and 50% of the shares are directly or indirectly transferred.

Are there additional rules on the deductibility of interest/guarantee fees (e.g. safe harbours)?
It should be noted that the guarantee fee is not a subject of the German interest deduction ceiling rule and the rule regarding denial of partial trade tax deductibility, both of which are mentioned in the above sections.

In case that at least a part of the interest/guarantee fee claimed for deduction at the level of the German affiliate is not considered to be at arm’s length by the German Tax Authorities, the authorities might successfully deny a tax deduction for at least a part of the interest/guarantee fee payable by the German affiliate to the affiliated company based on Sec. 8 para. 3 Corporation Income Tax Act (constructive dividends) or Section 1 Paragraph 3 Foreign Transaction Tax Act (FTA) (TP adjustment). As a result, a German affiliate could face an additional tax charge (average tax rate is about 30%) for the non-deductible expenses. Additionally, there will also be non-deductible interest for late payment of taxes (6% per annum starting 15 months after the respective tax year).

**Intercompany loans**

How is the arm’s length nature of an intercompany loan evaluated?
Based on the German Tax Code, companies can choose their form of financing (Finanzierungsfreiheit). Thus, it should be difficult for the German Tax Authorities to argue that the funding has been excessive and to reclassify the debt into equity.

Transfer pricing and thin capitalisation are two separate issues, i.e. the interest rate on a loan could be at arm’s length but not fully tax deductible due to thin capitalisation limitations.
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Hypothetical arm’s length test</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>×</td>
</tr>
</tbody>
</table>

Internal and external CUPs are often used to benchmark intercompany interest rates. In the past we have seen many cases where the German Tax Authorities have argued that the interest rate of the intercompany loan should equal the interest rates of the internal CUP.

According to the section 2.2 of the German Administrative Principles dated 23 February 1983; the following parameters need to be considered when determining arm’s length interest rates from a German TP perspective:

- Deal amount;
- Maturity;
- Nature and purpose of the loan;
- Securities and creditworthiness of the borrowing entity;
- Deal currency;
- Refinancing costs in case of passed-through loans; and
- Other circumstances.

It should be noted, Article 1 Foreign Tax Act provides for that in the absence of comparability data, the tax payer is obliged to conduct a hypothetical arm’s length test by analysing the maximum price for one transacting party and the minimum price of the other. In practice, it is also accepted and often used by the German tax authorities.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted (case-by-case basis)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Notching down parent credit rating</td>
<td></td>
</tr>
<tr>
<td>Establishing a standalone credit rating of subsidiary based on S&amp;P/Moody's ratios or based on credit scoring tools</td>
<td>√</td>
</tr>
<tr>
<td>Notching up from established standalone credit rating (implicit parental support)</td>
<td>√</td>
</tr>
</tbody>
</table>

In cases where a credit rating of the parent is publicly available and / or the credit rating of the borrower is difficult to determine, the credit rating used for the analysis could be somewhat based on the parent credit rating. In practice the group-rating is also accepted where the German entity is not placed in a less favourable position than on a stand-alone basis.
How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?
In a typical case, one should start with the standalone credit rating of the borrower. This standalone credit rating could then be adjusted in order to account for the circumstances where the market also values the implicit group support (Konzernrückhalt).

Are foreign comparables accepted?
Based on our experience, foreign comparables should be accepted as long as the foreign comparable loans are remunerated in the same currency.

Cash pool
How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?
The terms and conditions of the deposits and borrowings should be at arm’s length for both the debtor and the creditor. Based on our experience, long term balances with the cash pool may be re-characterised into long term loans and the interest rates adjusted accordingly.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?
Borrowing and deposit rates should be established based on the specific facts and circumstances of the transaction. The transfer pricing methodologies generally accepted in this respect are the same as those when establishing the arm’s length interest rates on intercompany loans.

The pricing of the cash pool should be based on the functions and risks of the cash pool leader and cash pool participant. Oftentimes a benefit test should be conducted to make sure that the benefit of the pool is allocated appropriately between the participants.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?
The remuneration for the CPL can be based on a cost-plus type service fee or a spread charged to the cash pool members. The choice of remuneration system should be based on a functional and risk analysis of the CPL.

Intercompany guarantees
How is a guarantee fee characterised?
Tax Administrative Principles of 1983 regard guarantees in the context of interests and similar payments (Zinsen und ähnliche Vergütungen). However, as we discussed in a previous section, the guarantee fee is not a subject of the German interest deduction ceiling rule and the rule regarding denial of partial trade tax deductibility.

To what extent are implicit guarantees recognised?
Please refer to the section on intercompany loans. The Federal Tax Court has stated that, if without an intercompany guarantee the borrower would not be able to obtain a loan from a third party, then it is questionable whether a guarantee fee should be charged at all. In these cases the guarantee could be seen as a substitute for equity.
How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?

One would expect that passive association/implicit support and guarantee fees are inversely related. Thus, the other financing transactions linked to the intercompany guarantee need to also be considered when evaluating the guarantee fee.

As an illustration, in order to derive an arm’s length intercompany guarantee fee, the risk premium that corresponds to the implicit support/guarantee needs to be deducted from a ‘guarantee fee’ which is computed as the difference between the hypothetical interest rate the borrower would have obtained from an external bank were it a standalone entity (non-group entity) and the interest rate actually obtained by the borrower from the external bank under explicit intercompany guarantee.

Alternatives:

a) Bank charges 100bps on EURIBOR (Subsidiary would be a stand alone company)
   The difference of 25bps belongs to the implicit guarantee (“Konzernrückhalt”)

b) Bank charges 750bps on EURIBOR (Subsidiary is part of a creditworthiness group)
   The difference of 25bps belongs to the implicit guarantee

c) Bank charges 50bps on EURIBOR (Subsidiary receives an explicit guarantee)

In the most extreme case, the intercompany guarantee fee could be equal to zero due to the passive association/implicit support.

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?

As in the case of intercompany loans, the terms and conditions of the intercompany guarantee should be considered when determining the guarantee fee. Based on our experience, the relevant terms and conditions are also considered by tax authorities.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>√</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>×</td>
</tr>
<tr>
<td>Accounting approach</td>
<td></td>
</tr>
<tr>
<td>CUP approach</td>
<td>√</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>√</td>
</tr>
<tr>
<td>Hypothetical arm’s length test</td>
<td>√</td>
</tr>
</tbody>
</table>
Are foreign comparables accepted?
Based on PwC experience foreign comparable should be accepted as long as the foreign comparable loan/guarantee is remunerated in the same currency.

Documentation
Documentation requirements
In 2003, additional transfer pricing legislation was passed by the German Parliament, incorporating the following new statutory references:

- **Section 90 (3) of the General Fiscal Code or Abgabenordnung (AO):** documentation requirements for cross-border transactions with related parties including PE;
- **Section 162 (3) of the AO:** consequences of inadequate or missing documentation (assumption of need for profit adjustment; income estimation by use of least favourable point in a price range);
- **Section 162 (4) of the AO:** penalty of 5%–10% of profit adjustment (with certain ceilings/restrictions) in case of non-compliance with documentation requirements.

Furthermore, with respect to transfer pricing, an ordinance was published in 2003, providing guidance and binding interpretation on the type, contents and scope of the documentation required (Gewinnabgrenzungs-aufzeichnungsverordnung – GAufzV).

As a matter of principle, the taxpayer has to prove compliance with German tax law for all business transactions, including transfer pricing. The taxpayer only has to prove the underlying facts of a transaction, which includes presentation of functions and risks and a description of how the transfer price for the transactions was determined. If the taxpayer should not fully comply with the obligation to present all facts, the tax authorities may conclude that the pricing has been determined by the affiliation of the parties; however, the latter does not in itself allow the tax authorities to conclude that the transfer price is not arm’s length, and the authorities are left with the need to determine the proper pricing by means of a comparability study or an appropriate estimation.

Are there any specific documentation requirements for intercompany loans/guarantees in addition to the regular documentation requirements?
Intercompany loans or guarantees are amongst the regular intercompany transactions which should be documented according to the German documentation requirement. If intercompany loans and guarantees are part of ‘extra-ordinary transactions’, the extraordinary transaction documentation should also be prepared. If a German entity prepares appropriate transfer pricing documentation regarding its intercompany financing transactions, the German tax authorities would have to bear the burden of proof in case they disagree with the interest rates/guarantee fees charged.

When does documentation need to be available?
As a matter of principle, the taxpayer is obliged to provide transfer pricing documentation when requested by the tax authorities within 60 days of an official request. For ‘extraordinary transactions’, the taxpayer should prepare documentation within six months of the end of the year in which the transaction takes place and provide such documentation within 30 days if requested by the tax authorities.
What is the deadline for submitting the documentation?
Documentation for all types of transactions must be presented to the authorities upon their request, typically in the course of a tax audit. The time limit for presentation is 60 days following this request (respectively, 30 days in case of so-called extraordinary transactions); extensions may be granted for special reasons.

In which language should the documentation be prepared?
German transfer pricing documentation should, in principle, be prepared in German language. However, on application by the taxpayer, the tax office can admit exceptions to this. The application may be filed before the documentation is prepared but must be filed without delay after the tax administration request the submission of the documentation. We would suggest awaiting such request. In any event the client should be advised on the risk that, based on the request of the tax authorities for submission of the transfer pricing documentation, it could be necessary to translate the transfer pricing documentation in whole or at least the relevant elements thereof into German language within 60 days or even within 30 day in case of extraordinary business transactions at its own expense. If the submission of the documentation is delayed due to an omitted translation, the tax administration may impose penalties.

Advance certainty
Are APAs/ATRs available?
The German Federal Ministry of Finance actively welcomes and supports APAs for transfer pricing purposes in Germany. However, it should be emphasised that the Federal Ministry of Finance is typically not prepared to grant unilateral APAs in transfer pricing issues. Therefore, the German Tax Authorities are instructed to only grant APAs on a bilateral or multilateral basis. This necessitates the respective other country to participate in the APA procedure and effecting APA proceedings on the legal basis of Article 25 OECD Model Tax Convention in the sense of an (anticipated) mutual agreement procedure.

Germany has APA guidelines in the sense of formal regulations on how to apply for, negotiate and grant APAs. On 5 October 2006, Germany's Finance Ministry released a circular on bilateral and multilateral APAs, which was designed to facilitate the processing of APAs and to establish more certainty for taxpayers. The circular offers tax payers and practitioners comprehensive guidance on obtaining an advance accord. With the new circular, the APA application process is also expected to be shorter: tax authorities are aiming to issue within nine months a German position paper in a bilateral APA, with a closed bilateral agreement expected in about 18 months.

Where does the request for the APA/ATR need to be filed?
In general the PwC practice would contact the competent authority directly. Within the Federal Ministry of Finance, the competence for APA applications and for granting an APA has been centralised in one department. It has to be considered that in addition to the Federal Ministry of Finance, the local tax office (including the tax auditor) is regularly involved in an APA procedure.

What information is typically required?
The applicant must explain his application in detail and submit all necessary records. At any time, the tax authorities may ask additional questions and request further information and documents.
The applicant can restrict his application to specified, precisely described types of transactions, to transactions with specified, precisely identified related parties, or to business dealings with related parties in certain states.

The following is a non-exhaustive list of the documents and records that in many cases will be necessary to bring an APA proceeding to a close:

- Definition of the area of the application, both by coverage and by time;
- Name of the other state with which the advance mutual agreement is sought;
- Description and explanation of the intended transfer pricing method (including all necessary documents and calculations for the application of the method. This will regularly include a detailed calculation model. Also, recent third data of at least limited comparability for the comparison is to be presented, and the adjustment calculation that might become necessary in the future is to be explained);
- Schedule of the shareholdings;
- Presentation of the organisational and operative structure of the group;
- Description of the activities, as far as necessary for the APA;
- Presentation of the business dealings with related parties (intended contractual relationships);
- Presentation and explanation of the functions and risks assumed;
- List and brief description of the significant assets (especially intangibles) of importance for the business dealings concerned;
- Presentation of the market and competitor position and of the business strategy chosen;
- Description and evaluation of the planned value chain and of the contribution from the companies concerned; and
- Disclosure of all open tax questions (also with other tax administrations) in connection with transactions to be covered by the APA.

Term of the APA
Since APAs are intended for the future, they usually run from the beginning of the business year in which the application is formally filed. An earlier beginning can be permitted where at the time of filing the APA application with the central tax office with a tax return for an earlier business year had not yet been submitted and the statutory filing date had not yet been reached. In general the term should not be less than three years or more than five years.
Greece

Transfer pricing rules and regulations

Rules by means of legislation

• Article 39 and 39a of the L.2238/1994 Corporate Income Tax Code (“CIT”): Sets the transfer pricing framework from the Ministry of Finance (tax) point of view.
• Article 26 of Law 3728/2008 published on the Government Gazette on 31/12/2008 (FEK 2709 B’): Provides the legislative transfer pricing documentation framework for market regulatory purposes (submission of an intercompany transactions list to the Ministry of Development, compilation of transfer pricing file, documentation of intra-group prices charges); Please note that based on the recently passed Law 4110/2013, as from 1 January 2013 the provisions of the aforementioned article will be in force only for FY 2008 and FY 2009.

Rules by means of regulations (decrees, manuals, position papers, etc.)

• Decision A2 8092/31.12.2008: Provides further explanations on the content of the transfer pricing file, of the usage of the documentation methods as well as further information (audit procedure, language of the transfer pricing file, fines);
• Interpretive Circular A2 2233/7.5.2009: Provides clarifications regarding Article 26 of L.3728/2008.

Please note that the above two documents (Ministerial Circular and Interpretive Decision), as from 1 January 2013, will apply for FY 2008 and FY 2009 only. A Ministerial Decision from the Ministry of Finance to provide further details and guidance on the new L.4110/2013, is expected to be issued within one month from the ratification of said Law, that is by end of February 2013.

Specific rules PE context

• Article 100 of Law 2238/1994 (CIT): Cites the cases when a foreign legal entity is considered to have a PE in Greece.

However, it should be noted that Greece has signed a number of DTTs with certain countries, where a relevant article is incorporated stating the exact conditions under which a PE issue arises. For PE issues arising in Greece for foreign companies which are established in a country with which a DTT is valid, the said DTT article is applicable.

Thin capitalisation

Rules by means of legislation and regulations

• Article 39 paragraph 3 of L.2238/1994 (CIT): Provides the legal framework, regarding the accounting calculation of the net income (and thus the deductibility of a company's paid interest) regarding loan agreements between related parties;
• POL 1161/2011: Provides clarifications of the financial statements that should be used during the calculation of the loan interests.
Again, according to the new L.4110/2013 and more specifically Article 39 paragraph 3, intends to pose a limit to the intercompany borrowing with regards to shareholder’ funds. This article indicates that a company, in order to have the right to deduct the interests paid for a loan which was granted by a related company, the total amount of the received loan should not exceed by three times the amount of the company’s net equity. That proportion should be followed at any times, in order for the company’s interest expenses to be recognised as tax deductible.

What is the effect of the rules on the deduction of interest?
A tax deduction relating to the interest expense associated with debt which exceeds the above fraction intercompany loans/net equity = 3/1, will be disallowed for corporate tax purposes. In case where the company has already deducted the total of the interest expenses, then a tax adjustment for the non deductible interest should take place.

How is the arm’s length nature of an intercompany loan evaluated?
There is no specific guidance issued by the Greek tax authorities by means of a Circular or a Ministerial decision, regarding the evaluation of the nature of an intercompany loan. Our experience so far indicated that the Greek tax authorities would take into account all the factors of the specific transaction, but above all, they would like to determine whether the interest rate charged to the intercompany loan is in accordance with the arm’s length principle and that there was no transfer of taxable income to another country.

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?
Currently, there are no specific rules issued regarding the evaluation of the terms and condition of an intercompany loan. As aforesaid, compliance with the arm’s length principle should be evidenced.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>✓</td>
</tr>
</tbody>
</table>

Generally, according to the Greek legislation, the usage of the CUP method (internal or external comparable data) is preferable. Only in cases where the CUP method cannot be applied, the reasons for which should be explained in the transfer pricing file, should other methods be examined.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>✓ (possible)</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>✓ (possible)</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>✓</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>✓</td>
</tr>
</tbody>
</table>
There are no written official guidelines regarding the treatment of a company’s creditworthiness in case of the absence of a formal credit rating evaluation. The usage of a commonly accepted credit scoring tool which is based on a credit rating company’s guidelines (Moody’s, S&P’s) should be accepted, provided that all calculations are correct and each step is explained thoroughly. The notching approach may also be accepted, provided that there is a logical explanation supporting it. The parent credit rating could not be simply adopted as the credit rating of the subsidiary (borrower) company; however, it could be used in order to determine the “ceiling” of the subsidiary’s credit rating. However, this might not always be the case as in the last years (2011, 2012) especially in the banking sector (where most Greek banks suffered a credit rating downgrade three times within a year, separately for 2011 and 2012), there were cases were a subsidiary seemed to have a better credit rating than the parent company (in cases of Greek MNEs).

**How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?**
There are no guidelines provided by the Greek tax authorities, regarding the treatment of passive association/implicit support. In practise however, we have used argumentation to improve a Greek’s subsidiary’s credit rating based on the implicit support is receiving by its parent company.

**Are foreign comparables accepted?**
Yes, provided that the data are comparable to the tested transaction.

**Cash pool**

**How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?**
The terms and conditions of the deposits and borrowings should be at arm’s length for both the debtor and the creditor. On the other hand, the cash pooling arrangement should have a ‘positive’ outcome for each participating entity, either as a borrower or as a lender; otherwise there would be no reason for participating. With regards to the borrowing section of the cash pooling scheme, the approach is closely related to the approach of an intercompany loan detailed above. In case of the borrowing section, the approach could be either similar to an intercompany loan or it could be compared to available statistical data (by the Bank of Greece) on term account deposit interest rates for companies.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?**
Borrowing and deposit interest rates charged on a cash pool structure should be based on specific facts and data. As such, in order to determine whether the interest rate set at the cash pool scheme (for deposit or loan section), follows the arm’s length principle, certain data should be extracted such as tenor (if determined), currency, amount, creditworthiness, etc. In general the transfer pricing methodologies adopted for the documentation of a cash pool transaction do not differ substantially to the methodologies used in documentation of intercompany loans.
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?

In case of a notional cash pool the remuneration for the cash pool header is typically considered a service fee. In case of a target balancing cash pool, the remuneration is typically considered the difference between interest income and interest expenses (and other related financial expenses).

**Intercompany guarantees**

What is your tax authority’s approach towards recognising guarantees?
The term guarantee could be defined as the promise that one undertakes (guarantor) to secure the counterparty of an agreement which has committed to fulfil an obligation. In case where the initial contractor fails to fulfil its obligation, then the guarantor should compensate the provider of the service in his place. It is considered to be a provision of service.

How is a guarantee fee characterised?
As stated above, a guarantee fee is considered to be a provision of service and thus intercompany guarantees are subject to transfer pricing documentation. The company that acts as a guarantor in the transaction suffers a cost which is the risk that the guarantee agreed will need to be undertaken.

To what extent are implicit guarantees recognised?
Implicit guarantees may not be considered as ‘strong’ as the cases of the explicit guarantees. Although there is no common practice, and in the absence of official guidelines the approach may differ, implicit guarantees are not taken into account as actual guarantees and in cases where no fee is charged, no documentation is made.

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
There are no guidelines provided by the Greek tax authorities, regarding the treatment of passive association/implicit support. However, as aforementioned, passive association/implicit support can be taken into account when documenting or deciding on guarantee fees.

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
No specific guidelines have been issued by the Greek tax authorities regarding the evaluation of the terms and conditions of an intercompany guarantee. In any case though, the terms and conditions of an intercompany guarantee should follow the arm’s length principle. Our typical approach is to document the fee earned by the guarantor, compared to third party fees of similar nature.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>√</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>√</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>possible</td>
</tr>
<tr>
<td>CUP approach</td>
<td>×</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td></td>
</tr>
</tbody>
</table>
Since a guarantee constitutes a provision of service, it should be that specific amount (fee received for the provision of the guarantee) that needs to be documented and not the object (i.e. loan) of the guarantee.

**Are foreign comparables accepted?**
Yes, provided that the data is comparable to the controlled transaction.

**Documentation**

**Documentation requirements**

Financial transactions are subject to documentation from a Greek transfer pricing perspective, either within a master or local transfer pricing documentation file. The burden of proof that the intercompany price charged follows the arm's length principle falls on the taxpayer. Moreover, according to the new Law 4110/2013 and more specifically Article 39B, the prices of the intra-group transactions are considered as not documented in the following cases:

i. Non-keeping or non-submission of the transfer pricing documentation file to the competent audit authority;

ii. Keeping of an insufficient or inaccurate transfer pricing documentation file, provided that the relevant audit checks for the accuracy of calculating or documenting prices of intra-group transactions cannot be performed, and which cannot be remedied by additional information provided to the audit authorities; or

iii. Not providing or providing of insufficient or inaccurate additional information, to the extent that the relevant audit checks of prices of intra-group transactions, cannot be performed.

The intra-group transaction prices which are considered as not-documented are designated by the respective tax authority according to the available data from every source. In cases where a range of prices or profits is derived and this range is accepted by the tax authorities, then the intra-group transaction prices are qualified in any price or profit margin within the accepted range. In case where the derived range is not accepted by the tax authorities, then the prices of the intra-group transactions will be determined as being the median price.

**When does documentation need to be available?**

A transfer pricing documentation file should be compiled before the issuance of the company’s annual tax certificate and in any case, within 50 days from the company’s accounting year end. Moreover, in case of a tax audit by the Greek tax authorities, the transfer pricing file should be provided within a 30 days period. Especially, for FY2012 the transfer pricing documentation file should be completed until 10 May 2013.

**What is the deadline for submitting the documentation?**

As stated above, the transfer pricing documentation file should be compiled before the issuance of the company’s annual tax certificate and in any case, within 50 days from the company’s accounting year end. The transfer pricing documentation file should be accompanied with a summarised table which provides transfer pricing information and is submitted to the General Secretariat of Information Systems of the Greek Ministry of Finance for balance sheets closing after 30 December 2011. This table should include information regarding the company’s operational profile, such as the group it belongs to, the functions performed and the risks assumed, as well as a list with the intra-group transactions that should be documented, along with a short description.
of the documentation method applied. In case of a tax audit, the transfer pricing file should be provided to the respective tax authorities within a 30 days period upon their request. Especially, for FY2012 the transfer pricing documentation file should be completed and the summarised table with transfer pricing information should be submitted electronically until 10 May 2013.

**In which language should the documentation be prepared?**
According to Article 10 of Decision 8092/2008 which is a Decision issued by the Ministry of Development and as from 1 January 2013 applies to FY 2008 and FY 2009, the transfer pricing file should be compiled in the Greek language. Moreover, any documents included in the transfer pricing file whose language is not Greek, should also be translated into Greek language.

The new L.4110/2013 provides that more specific issues, such as the language, will be clarified with the issuance of a relative Ministerial Decision by the Greek Ministry of Finance.

**Advance certainty**

**Are APAs/ATRs available?**
L.4110/2013 introduced APAs in the Greek legislation. The main points of said provisions are the following:

- The option for obtaining an APA on the methodology of specific future intra-group transactions, following an application submitted before the General Directorate of Tax Audits and Collection of Public Revenue of the Ministry of Finance. Object of the APA constitutes the total of the criteria used for the determining the prices of intra-group transactions, as well as every other matter concerning the pricing of such transactions, with the exception of the specific transactions price between affiliated enterprises and the specific profit margin, gross or net, of such transactions;
- The decision of the APA cannot exceed two years, whilst the option of its renewal, review, revocation or cancellation under certain circumstances is provided;
- The revision of the APA in case of a subsequent completion of mutual settlement proceedings on the basis of the respective DTT or EC Treaty on the avoidance of double taxation in case of profit adjustments of affiliated enterprises is provided;
- The obligation to retain the documentation concerning the APA for the whole duration of maintaining the respective transfer pricing file, is introduced; and
- The limitation of the tax audit, in case of granting an APA, to the verification of the terms of the decision, as well as the equal application of important assumptions, is provided.
Hungary

Transfer pricing rules and regulations

Rules by means of legislation
- Section 18 of the Hungarian Corporate and Dividend Tax Act 1996

Rules by means of regulations (decrees, manuals, position papers, etc.)
- Decree No.22/2009 (X.16) of the Ministry of Finance on the Documentation Requirements Pertaining to the Determination of the Arm’s Length Price

Specific rules PE context
The Hungarian tax authorities follow the principles set out in the OECD Guidelines.

Thin capitalisation

Rules by means of legislation and regulations
- Section 8 (1) of the Hungarian Corporate and Dividend Tax Act 1996: Under the current thin capitalisation rules, taxpayers must increase their taxable profit if their outstanding liabilities owed to non-financial institutions, on which interest is payable by the taxpayer during the tax year, exceed three times the value of the equity. From 2012, interest free loans count as outstanding liabilities.

What is the effect of the rules on the deduction of interest?
The interest on the surplus of debt is non-deductible from corporate income tax point of view.

Intercompany loans
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>x</td>
</tr>
</tbody>
</table>

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
</tbody>
</table>
How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?
There are no specific rules in Hungary regarding passive association.

Are foreign comparables accepted?
Yes, foreign comparables with appropriate adjustment are accepted.

**Cash pool**

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?
There is no guidance in Hungarian legislation and limited tax authority experience on borrowings/deposits within a cash pool.

**Intercompany guarantees**

There are no specific rules and limited tax authority experience with respect to intercompany guarantees.

**Documentation**

Documentation requirements
Yes, documentation should be prepared; however, there are no specific documentation requirements for intercompany loans or guarantees.

When does documentation need to be available?
In accordance with Hungarian transfer pricing regulations, a company is required to have transfer pricing documentation available by the time the tax return is filed but no later than 5 months after the end of the year in which the transaction occurred.

What is the deadline for submitting the documentation?
The transfer pricing documentation does not need to be filed, but the taxpayer must keep the documentation in its administration. In case of a tax audit, the tax inspector may request the documentation and if there is a failure to provide, the taxpayer could be subject to a default penalty.

In which language should the documentation be prepared?
The tax authorities may require taxpayers who have prepared their transfer pricing documentation in a language other than Hungarian, English, German or French to submit a Hungarian translation of the documentation.

**Advance certainty**

Are APAs/ATRs available?
Yes, APAs are available in Hungary. The APA is established in Section 132/B and 132/C of the Hungarian Rules of Taxation. Interpretation of these rules is provided in Decree 38/2006 of the Ministry of Finance. There are no specific rules for financial transactions.

Where does the request for the APA/ATR need to be filed?
The APA request should be filed at Directorate of Exclusive Taxpayers of the Hungarian tax authorities.
What information is typically required?
Details of the entities involved;

• Details of the relevant transactions;
• Years involved;
• The nature and the purpose of the transactions;
• Proposed methodology and the calculation of the arm’s length range;
• Draft agreement of the relevant transactions
• Declaration of the fee to be paid to the tax authority; and
• Other supporting information.

Term of the APA
The term of the APA is three to five years.
Iceland

Transfer pricing rules and regulations

Rules by means of legislation


There is a general anti-avoidance rule stating that business transactions between all parties should be based on the arm’s length principle. There are no collective statutory rules in Iceland which are specifically aimed at transfer pricing. The statutory authority for addressing transfer pricing issues is found in the application of general legal concepts, such as the anti-avoidance rule.

Rules by means of case law (most relevant ones)

Very few legal cases concerning transfer pricing have reached the State Internal Revenue Board. A few cases have also reached the District Courts and the Supreme Court of Iceland.

In those cases, it is established that transfer pricing issues can be addressed on the grounds of Article 57 of the Income Tax Act, even though the rule is considered a general anti-avoidance clause. These cases also establish the arm’s length principle for transactions between related parties.

Specific rules PE context

There are no specific rules for PEs.

Thin capitalisation

There are no collective statutory rules in Iceland which are specifically aimed at thin capitalisation.

Intercompany loans

How is the arm’s length nature of an intercompany loan evaluated?

There are no specific rules regarding this matter but based on experience, the Icelandic tax authorities evaluate if the loan would have been made in the absence of the relationship, and if the rate of interest and other terms of the loan would have been agreed between unrelated parties. By that evaluation it is common to look at average bank terms. Another component to the evaluation is sound business practice. There are no specific rules or guidance with respect to implicit support/passive association or the use of foreign comparables.

Cash pool

There are no specific rules or guidelines, and there is limited experience, regarding this matter.

Intercompany guarantees

What is your tax authority’s approach towards recognising guarantees?

There are no specific rules regarding this matter.
How is a guarantee fee characterised?
Guarantee fees are generally characterised as capital gains, but may be treated as general income if the guarantee is supplied to a related party.

**Documentation**
**Documentation requirements**
There are no specific documentation requirements. The tax authorities carry the full burden of proof when trying to establish that a transfer pricing adjustment is needed and have extensive authority to request the information they need in order to do so.

Are there any specific documentation requirements for intercompany loans/guarantees in addition to the regular documentation requirements?
There are no specific documentation requirements for intercompany loans or guarantees.

When does documentation need to be available?
Tax authorities can claim information and documents at any time.

What is the deadline for submitting the documentation?
There is no specific time frame for submitting documentation. Usually 15-30 days, but can in most cases be extended by request.

In which language should the documentation be prepared?
There are no specific documentation requirements, but requested documentation would probably need to be prepared in either Icelandic or English.

**Advance certainty**
**Are APAs/ATRs available?**
No APAs have been issued in Iceland and no formal procedure for obtaining such agreements exists. However, it is possible to obtain a binding ruling from the tax authorities or the Ministry of Finance according to Act 91/1998 in connection with a particular TP issue that has not yet been executed.
Ireland

Transfer pricing rules and regulations

Rules by means of legislation
- **Finance Act 2010**: Provides for incorporation of transfer pricing rules into Irish tax law with effect for accounting periods commencing on or after 1 January 2011; and
- **Part 35A, Section 835A to Section 835H, of the Taxes Consolidation Act 1997**: Contains Ireland’s transfer pricing rules. The rules endorse the OECD Guidelines and adopt the arm’s length principle and apply to the supply and acquisition of goods, services, money and intangibles. There is no specific legislation with respect to intercompany loans, cash pools or guarantees.

A unique characteristic of the Irish transfer pricing regime, which is important to note, is that the legislation contains a so called ‘grandfather’ clause whereby arrangements entered into between related parties prior to 1 July 2010 are excluded from application of the transfer pricing rules. For the grandfathering clause to be effective, the taxpayer would need to have evidence that the intercompany arrangements had been formalised before 1 July 2010 (ideally by means of an intercompany legal agreement). However, please note that any change to the agreement will likely act to ungrandfather the arrangement.

Another key point to note is that the rules only apply to intragroup dealings taxable at Ireland’s standard corporate tax rate of 12.5%.

Rules by means of regulations (decrees, manuals, position papers, etc.)
- **Tax Briefing Issue 07 of 2010**: The Irish Revenue has issued guidance on the documentation required to be prepared by taxpayers to be compliant with the transfer pricing rules; and
- **Ebrief No`62/2012**: The Irish Revenue released details of the Transfer Pricing Compliance Review (“TPCR”) programme under which they will monitor the degree of compliance with Ireland’s Transfer Pricing Rules.

Rules by means of case law (most relevant ones)
While there is no Irish case law relevant to the application of the transfer pricing rules on intercompany financing arrangements, Irish courts often refer to UK and ECJ cases when making decisions, and as such, the DSG Retail and others v HMRC case may be seen as a reference point.

Specific rules PE context
Irish transfer pricing rules only apply to arrangements between ‘associated persons’. Based on the definition of ‘person’ under Irish tax law, a branch and its head office cannot be considered as separate persons and as such, Irish TP rules do not apply to arrangements between a branch and its head office. However, we understand that Irish Revenue will refer to the relevant double tax agreement and the OECD Guidelines on attribution of profit to PE’s in analysing the appropriateness of income attributed to a PE.
**Thin capitalisation**

**Rules by means of legislation and regulations**

Ireland does not have any specific thin capitalisation rules, but some provisions in the Irish tax legislation can deny a full deduction for interest payments in certain circumstances.

Although Ireland does not have any thin capitalisation rules, Irish transfer pricing rules apply to the supply or acquisition of goods, services, money or intangibles assets, provided the transaction relates to a taxpayer's trade (i.e. is related to the taxpayer's business and taxable at the standard rate of corporation tax). As such, where interest payments are made by a taxpayer on borrowings which are used for the purposes of its trade, then the interest should be charged at an arm's length rate.

In addition, Section 81 Taxes Consolidation Act 1997 contains provisions with respect to the deductibility of expenses (including interest payments). Where interest payments are excessive or not incurred wholly and exclusively for the purposes of the taxpayer's trade, then deductibility may be restricted.

**What is the effect of the rules on the deduction of interest?**

The amount of interest which is tax deductible is restricted to an arm’s length amount that is wholly and exclusively incurred for the purposes of the entity’s trade.

**Intercompany loans**

**How is the arm’s length nature of an intercompany loan evaluated?**

Intercompany loans fall within the Irish transfer pricing rules (to the extent borrowings are applied or loans are made in the ordinary course of an entity’s trade) and taxpayers should adhere to the OECD Guidelines. We expect that the Irish Revenue would take account of all terms and conditions of the transaction when determining whether it is in accordance with the arm’s length principle.

**How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?**

There are no specific rules or guidance as to how the arm’s length nature of an intercompany loan would be evaluated. We expect Irish Revenue to require all key terms and conditions associated with the arrangement to be arm’s length.

**What TP Methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>✗</td>
</tr>
</tbody>
</table>

Although there is no specific rules or guidance on how to demonstrate the arm’s length interest rate, related party loans do fall within the Irish transfer pricing rules (to the extent they are considered trading in nature) and taxpayers should adhere to the OECD Guidelines. We expect that Irish Revenue would accept both internal and external CUPs as appropriate methodologies for substantiating the arm’s length interest rate.
What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>✓</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>✓</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>✓</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>✓</td>
</tr>
</tbody>
</table>

Credits ratings are not formally referred to in the Irish transfer pricing regulations. However, in order to support the interest rate as being arm’s length, it is advisable to obtain a credit rating for the borrowing party. Where no formal credit rating is available, best practice would be to use a credit scoring tool or to map the borrowing entity’s financial ratios against S&P/Moody’s financial ratios. While there has been no guidance from Irish Revenue as to what approaches it would deem as acceptable, we would expect in certain circumstances where it is cumbersome to follow either of these approaches, that they may be willing to accept the use of the parent credit rating or notch up/down from parent credit rating.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

There is no formal reference to passive association or implicit support in the Irish transfer pricing legislation. In determining whether any charge and what level of charge should be made for passive association or implicit support, all of the facts and circumstances should be considered. If a charge is made for such support, the taxpayer must in the first instance prove that the expense is incurred wholly and exclusively for the purposes of its trade in order to obtain a deduction for that expense for tax purposes.

Are foreign comparables accepted?
Foreign comparables should be acceptable provided the market is sufficiently comparable.

Cash pool
How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?

While there are no specific rules or guidance from Irish Revenue on this area, we would expect the Irish Revenue would want to see that the taxpayer has analysed the terms and conditions of the transaction when determining the arm’s length nature of the pricing sufficiently. If the pricing of a cash pooling arrangement leads to the understatement of profits for any Irish entity party to the arrangement, including an Irish cash pool leader, Irish borrower or lender, the Irish tax authorities in the event of an audit are likely to adjust the profits upwards of the Irish entity.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?
Although there are no specific rules or guidance on how to demonstrate the arm’s length interest rate, related party loans/deposits do fall within the Irish transfer pricing
rules (to the extent they are considered trading in nature) and taxpayers should adhere to the OECD Guidelines.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?**

Although there are no specific rules or guidance on how to demonstrate the arm’s length interest rate, taxpayers should adhere to the OECD Guidelines. In particular the risk profile of all parties would need to be carefully considered in determining the appropriate level of remuneration for the cash pool leader. We would expect that in the case of a cash pool arrangement, where the cash pool leader does not contractually or economically bear the risk associated with operating the cash pool arrangement, that the remuneration for the cash pool leader would typically be in the form of a service fee. In the case of a cash pool arrangement, where the cash pool leader contractually and economically bears the risk associated with operating the cash pool arrangement, we would expect the remuneration earned by the cash pool leader would typically be considered the difference between interest income and interest expenses (and other related financial expenses).

**Intercompany guarantees**

**What is your tax authority’s approach towards recognising guarantees?**

Guarantee fees would be subject to Ireland’s transfer pricing rules. To the extent they are arm’s length and are wholly and exclusively incurred for the purpose of the business, a tax deduction should be available.

**How is a guarantee fee characterised?**

Although there are no specific rules or guidance on how to demonstrate the arm’s length nature of a guarantee fee, related party loans do fall within the Irish transfer pricing rules (to the extent they are considered trading in nature) and taxpayers should adhere to the OECD Guidelines. We would expect Irish Revenue would want to see that the taxpayer has analysed the terms and conditions of the arrangement to determine the appropriateness and level of any guarantee fee.

**To what extent are implicit guarantees recognised?**

There is no formal reference to implicit guarantees in the Irish transfer pricing regulations and it is not clear how the tax authorities would approach this. In determining whether any charge and what level of charge should be made for an implicit guarantee, all of the facts and circumstances should be considered. If an expense is to be allowed for tax purposes for implicit guarantees, then the taxpayer must be able to prove that the expense is incurred wholly and exclusively for the purposes of its trade.

**How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?**

There is no formal reference to implicit support in the Irish transfer pricing regulations and it is not clear how the tax authorities will approach this. If an expense is to be allowed for tax purposes for implicit support, then the taxpayer must in the first instance prove that the expense is incurred wholly and exclusively for the purposes of its trade.
Ireland

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
As above, there is no specific reference in the legislation or guidance as to how the arm’s length nature of an intercompany guarantee would be evaluated. However, we would expect Irish Revenue to consider all key terms and conditions associated with the arrangement.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>✓</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>x</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>x</td>
</tr>
</tbody>
</table>

Although there is no specific rules or guidance on how to demonstrate the arm’s length nature of a guarantee fee, intercompany guarantees do fall within the Irish transfer pricing rules (to the extent they are considered trading in nature) and taxpayers should adhere to the OECD Guidelines. Given the infancy of the transfer pricing rules, it is as yet unclear what methodologies Irish Revenue would accept, but it is likely that the benefit approach, cost of capital approach and CUP approach would be considered most appropriate.

Are foreign comparables accepted?
Foreign comparables should be acceptable provided the market is sufficiently comparable.

Documentation
Documentation requirements
Companies need to prepare documentation ‘as may reasonably be required’ and should have documentation available for inspection if requested by the Irish Revenue, demonstrating compliance with the transfer pricing rules. The Irish Revenue has confirmed that documentation prepared in accordance with the OECD Guidelines or under the code of conduct adopted by the EU Council under the EUTPD will be acceptable. They have also set out a comprehensive list of specific information which must be included in the transfer pricing documentation.

Additionally, where documentation exists in another territory which supports the Irish arrangement, the Irish Revenue has stated that this will be sufficient from an Irish transfer pricing perspective, provided that documentation supports the Irish position as arm’s length.

There are no specific documentation requirements for intercompany loans/guarantees over and above the regular documentation requirements.
When does documentation need to be available?
The legislation provides that documentation should be prepared ‘on a timely basis’ and Irish Revenue has issued guidance stating that ‘it is best practice that the documentation is prepared at the time the terms of the transaction are agreed’. Additionally, in order for a company to be in a position to make a complete tax return, appropriate documentation should exist at the time the tax return is filed.

What is the deadline for submitting the documentation?
While documentation does not need to be submitted to Irish Revenue unless it is requested, it is advisable that documentation be prepared in a timely manner and is available at the time the company files its tax return, in line with the guidance issued by Irish Revenue as outlined above.


Companies that are selected will be contacted by an “authorised officer” of the tax authority, and provided with a notification to undergo a self-review of their compliance with the Irish Transfer Pricing rules. Companies selected will be requested to provide a report within three months to the tax authority in this regard.

The self-review to be documented in the report will need to incorporate:

- The group structure of the multinational;
- Details of related party transactions entered into by the Irish entity, specifying the type of the transaction(s) and the associated companies involved;
- The pricing policy and the Transfer Pricing methodology for each type of related party dealing;
- The functions, assets and risks of the parties to the transactions;
- A listing of the documentation available and reviewed in the context of the self review; and
- The basis for establishing that the arm’s length standard has been satisfied.

The outcome of the TPCR for a company selected as part of the programme will be a post-review letter from the tax authority. This letter will either:

i. state that the tax authority have no further enquiries on the self-review performed by the company; or
ii. list issues for further consideration or discussion that will also be addressed within the TPCR process.

It has also been clarified by the tax authority that the TPCR programmes are not tax audits covered by the “Code of Practice” for their audits and investigations.

In some instances, however, a case selected for TPCR may be escalated to an audit based on the tax authority’s risk assessment. Examples of where a TPCR may be escalated to an audit are stated as including instances where a company declines to complete a self-review or where the output from the review and any follow up queries indicates that the company’s Transfer Pricing policies may not be in accordance with the arm’s length standard.
Should a case escalate from a TPCR to an audit, the company will be issued with a separate audit notification letter.

**In which language should the documentation be prepared?**

English

**Advance certainty**

**Are APAs/ATRs available?**

Ireland does not have a formal APA procedure for Irish companies to agree prices with the Irish Revenue for international related party transactions. However, the Irish Revenue has been willing to negotiate and conclude bilateral APAs with treaty partners, and they are generally willing to consider entering such negotiations once a case has been successfully accepted into the APA programme of another jurisdiction. It should also be noted that upon request, the Irish Revenue may also be willing to provide companies with advance rulings on key tax issues.

**Where does the request for the APA/ATR need to be filed?**

General practice would be to contact the competent authority within the Irish Revenue directly.

**What information is typically required?**

- Identification of the parties and their historic financial data;
- A functions, assets and risks analysis, and projected financial data in relation to the issues at hand;
- Details on the worldwide group structure, ownership and business operations of the group to which the taxpayer belongs;
- Description of the records that will be maintained to support proposed methodology, including comparables analysis (in case of APA);
- A description of current tax inquiries or competent authority claims relevant to the issues covered in the APA;
- Chargeable periods to be covered by the APA;
- Critical assumptions for the proposal and implications of changes to critical assumptions; and
- The formal request for entering into the APA.

**Term of the APA**

There is no set term requirement.


**Italy**

**Transfer pricing rules and regulations**

**Rules by means of legislation**

- **Article 110, paragraph 7 of Italian Tax Income Code (Presidential Decree n. 917/1986):** Provides incorporation of transfer pricing in Italian tax law.
- **Article 9 of Italian Tax Income Code (Presidential Decree n. 917/1986):** Provides a definition of market value.
- **Article 8 of Law Decree 269/2003:** Sets the procedure for entering into an APA.
- **Article 26 of Law Decree 78/2010:** Establishes the non-application of penalties in case of a transfer pricing audit for taxpayers maintaining a proper documentation.

**Rules by means of regulations (decrees, manuals, position papers, etc.)**

- **Circular Letter No. 32/9/2267:** Dated 22 September 1980, issued by the Ministry of Finance, contains guidance on transfer pricing, including cross-border financing. The 1980 circular letter was released following the 1979 OECD Report and it is considered de facto outdated by current practice. Indeed, jurisprudence as well as more recent administrative practice constantly refers to the 1995 or 2010 OECD Guidelines.
- **2010 Circular Letter:** Illustrates the Italian transfer pricing documentation rules, expressly states that Italy follows the guidance contained in the 2010 OECD Guidelines.

**Rules by means of case law (most relevant ones)**

- **Judgment No. 253 of the Tax Court of Ravenna (2002):** Concerned a non-interest-bearing loan made to a controlled non-resident entity. An Italian entity (ItaCo) granted a non-interest-bearing loan to a controlled company resident in Luxembourg. Italian tax authorities assessed interest income at the arm’s length principle based on the Italian Bankers Association (ABI) prime rate. ItaCo was not able to justify the reasons for having granted a significant non-interest-bearing loan to its foreign affiliate, when ItaCo bore interest costs on its own external debt. The tax court recognised that the intercompany loan should create income for the Italian company and considered that the amount of interest calculated by Italian tax authorities was correct.
- **Judgment No. 113 of the Tax Court of Milan (2010):** Concerned the calculation of the arm’s length interest rate on a loan. The case concerned the calculation of the arm’s length interest rate on a loan. The facts, as described in the decision, do not allow a detailed analysis of the reasoning or of the Court, nor of the criteria applied. It is, however, to be reported that the judges accepted the TP claim challenged by the tax authorities, which was based on an interest rate equal to Euribor plus a certain spread.

**Specific rules PE context**

In case of an Italian PE of a foreign entity, income arising directly or indirectly through or from the PE is taxable according to the rules contained in the Italian Tax Income Code as applicable also to resident companies.

---

38 Results are per 1 July 2012
**Thin capitalisation**

**Rules by means of legislation and regulations**
There are no specific corporate income tax rules on thin capitalisation; however, loans should be economically sustainable.

**Are there additional rules on the deductibility of interest/guarantee fees (e.g. safe harbours)?**

* Article 96 Tax Income Code: Interest expenses exceeding interest income are tax deductible up to 30% of the EBITDA\(^{39}\) (interest deduction capacity) as reported in the financial statements. Net interest expenses in excess of the yearly limitation are carried forward indefinitely. If net interest expenses are lower than the annual limit (i.e. 30% of EBITDA), this difference can be carried over to increase the company’s interest deduction capacity in future years. These rules are not applicable for financial institutions, such as banks and insurance companies, where the deductibility of interest expense is limited to a fixed amount of 96% of the interest expense shown in the income statement.

**Intercompany loans**

**How is the arm’s length nature of an intercompany loan evaluated?**
According to Italian tax rules, interest rates have to be established in accordance with the arm’s length principle. There are no specific provisions, apart from some references in the 1980 circular letter.

However, in line with the international practice, the arm’s length nature of an intercompany loan should be determined mainly considering the credit risk of the borrower, any guarantees or collaterals, the seniority and duration of the loan and the currency in which it is stipulated. Then, a benchmark exercise using public databases should be performed.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>✓</td>
</tr>
<tr>
<td>Yield curves</td>
<td>✓</td>
</tr>
</tbody>
</table>

The transfer pricing methodology generally preferred by Italian tax authorities with respect to the pricing of intercompany loans appears to be the CUP method.

\(^{39}\) EBITDA is defined as the difference between operating revenues and expenses excluding depreciation of tangible and amortisation of intangible assets and charges for leased assets as stated in the profit and loss account.
What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>x</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>x</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>✓</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>✓</td>
</tr>
</tbody>
</table>

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?
There are no specific provisions with respect to passive association/implicit support.

Are foreign comparables accepted?
Foreign comparables are accepted if the markets are sufficiently comparable.

**Cash pool**

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?
There are no specific provisions in this respect. The terms and conditions of the deposits and borrowings should be at arm’s length for both the debtor and the creditor. The pricing of any ‘non arm’s length’ aspect of a cash pooling arrangement may be adjusted if it creates an advantage to the Italian taxpayer (i.e. imputation of interest income or disallowance of interest expense).

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?
Borrowing and deposit rates should be established based on the specific facts and circumstances of the transaction (creditworthiness, terms and conditions, etc.). The transfer pricing methodologies generally accepted in this respect are the same as the transfer pricing methodologies generally accepted in establishing the arm’s length interest rates on intercompany loans.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?
No specific guidance exists in this respect. Generally, a notional cash pooling arrangement is assimilated to a deposit and, therefore, the same conditions expressed above should be valid.

**Intercompany guarantees**

What is your tax authority’s approach towards recognising guarantees?
There are no specific provisions in this respect. Based on experience, guarantees, whether explicit or implicit, may be subject to transfer pricing adjustments as they should be evaluated according to the arm’s length principle.
How is a guarantee fee characterised?
No specific guidance in this respect exists and the general transfer pricing rules apply.

What transfer pricing methodologies are preferred generically accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>x</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>x</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>✓</td>
</tr>
</tbody>
</table>

Are foreign comparables accepted?
Foreign comparables are accepted to the extent the market is sufficiently comparable.

**Documentation**

**Documentation requirements**
There are no specific documentation requirements. The general principle is that the burden of proof lies with the Italian tax authorities; however, the taxpayer is expected to demonstrate the fairness of its intercompany transactions in the event of an assessment by the tax authorities.

The taxpayer can file a notice with the tax administration confirming the possession of the required transfer pricing documentation simultaneously with the filing of their annual tax return according to the Decision of the Commissioner of the Italian Revenue Agency No. 2010/137654 dated 29 September 2010. The transfer pricing documentation provides protection from the statutory penalty that is applicable in case of transfer pricing adjustments.

The documentation standards are consistent with the EUTPD (i.e. local file and master file if certain conditions are met).

There are no specific documentation requirements for intercompany loans/ guarantees in addition to the regular documentation requirements; however, the guidance indicates that each intercompany transaction should be separately indicated and documented.

**When does documentation need to be available?**
Italian tax authorities can require any person to provide them with information or to produce documents by way of a written notice.

**What is the deadline for submitting the documentation?**
Upon written request, the documents need to be provided within 10 days.

**In which language should the documentation be prepared?**
The documentation has to be prepared in Italian. It is possible to enclose attachments prepared in English. The Masterfile could be prepared in English in the event that a sub-holding makes use of faculty to submit Masterfile prepared by a non-resident entity.
Advance certainty

Are APAs/ATRs available?
Yes, Article 8 of law decree no.269 30 September 2003 (converted with amendments into Law no.326 of 24 November 2003 and implemented with Regulation of the Director of the Revenue Agency of 23 July 2004) introduced in Italy the so called ‘International Standard Ruling’. The International Standard Ruling is comparable to a unilateral APA in that it constitutes an agreement which binds the taxpayer and the Italian tax administration.

Where does the request for the APA/ATR need to be filed?
The application for a ruling must be sent by registered letter with return receipt on unstamped paper in an unwrapped envelope to the International Ruling Office – International Division – Central Directorate for Tax Assessment of the Revenue Agency, which is organised into two branches based in Rome and Milan:

Rome branch of the Office is competent for applications submitted by entities having their fiscal domicile in the regions of Tuscany, Umbria, Marche, Lazio, Abruzzo, Molise, Campania, Puglia, Calabria, Basilicata, Sicily and Sardinia; and

Milan branch of the Office is competent for the for applications submitted by entities having their fiscal domicile in the regions of Lombardia, Piemonte, Valle d’Aosta, Trentino Alto Adige, Friuli-Venezia Giulia, Veneto, Liguria and Emilia-Romagna.

What information is typically required?
The application must include, on pain of inadmissibility:

• Name of the enterprise;
• Registered office or fiscal domicile;
• Taxpayer identification number;
• VAT registration;
• If the case, the national addressee for the procedure, is different from the enterprise, to whom communications relating to the procedure itself are to be sent;
• Resident enterprises must accompany applications by documents giving evidence that they are in possession of the subjective requirements, while non-residents must indicate the presence of a permanent establishment in Italy in order to be eligible for the procedure;
• Goods and/or services which are the object of the cross border transactions between related parties, as well as the non-resident companies with which said transactions are carried out; and
• Criteria and methods used to determine the arm’s length value of the relevant transactions and the reasons why they are considered consistent with the law.

Term of the APA
The International Standard Ruling agreement remains in force for three years starting from the tax period in which it is signed.


**Luxembourg**

**Transfer pricing rules and regulations**

Rules by means of legislation

- **Article 56 Luxembourg Income Tax Law (L.I.R.):** Arm’s length principle. No specific transfer pricing rules on intercompany loans, guarantees and cash pools.
- **Article 164 L.I.R.:** Hidden dividend distribution.

Rules by means of regulations (decrees, manuals, position papers, etc.)

- **Circulars, L.I.R 164/2 dated 28 January 2011 and L.I.R. 164/2 bis dated 08 April 2011 (Circulars):** Issued by the Luxembourg tax authorities covering Luxembourg companies carrying out intra-group on-lending activities. There are no other specific rules for remaining transactions.

**Specific rules PE context**

No specific rules with regard to PE’s. Luxembourg tax authorities follow the OECD PE Report in the respect.

**Thin capitalisation**

Rules by means of legislation and regulations

No specific legislation and regulations but common practice accepted by the Luxembourg tax authorities.

A Debt-to-Equity ratio of 85:15 is generally acceptable in Luxembourg.

**What is the effect of the rules on the deduction of interest?**

Excess of interest is re-qualified as a non-deductible hidden dividend distribution; subject to a withholding tax of 15% (reduction-exception may apply). Furthermore, hidden capital contribution is not deductible for net wealth tax purposes.

**Intercompany loans**

**How is the arm’s length nature of an intercompany loan evaluated?**

Intercompany loans are evaluated in line with OECD transfer pricing principles. There is no detailed guidance available from the Luxembourg tax authorities.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>×</td>
</tr>
</tbody>
</table>

Bank quotes may be accepted as an indication if terms and conditions of intercompany loan and bank loan are comparable, and provided that the bank quote is a binding offer.
What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td></td>
</tr>
<tr>
<td>Public data source</td>
<td>√</td>
</tr>
</tbody>
</table>

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

There has been no guidance from the Luxembourg tax authorities, but in practice implicit or explicit guarantees may be accounted for.

Are foreign comparables accepted?
Foreign comparables are accepted to the extent the foreign market is sufficiently comparable.

Cash pool
How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?

There is no specific guidance from the Luxembourg tax authorities. The statutory rule on transfer pricing in Article 56 LITL, as well as the guidelines provided by the OECD Guidelines, should be applied for borrowings/deposits.

Intercompany guarantees
What is your tax authority’s approach towards recognising guarantees?
The term guarantee is widely defined. The Luxembourg tax authorities in general accept implicit and explicit guarantees in the assessment of the level of risks borne in a transaction. It is yet to be tested whether the Luxembourg tax authorities would consider guarantees, and especially implicit ones, as shareholder services. To date the risk that the Luxembourg tax authorities would consider a fee for explicit guarantees is remote; except in relation to the Circulars for which it is stated that the guarantor should charge a fee that should at least correspond to the cost of the guarantee.

How is a guarantee fee characterised?
See above. There are valid arguments that guarantees are seen as shareholder services and no remuneration should be received; however, no clear guidance from the Luxembourg tax authorities is available; except in relation to the Circulars (see above).

To what extent are implicit guarantees recognised?
Implicit guarantees may be recognised by Luxembourg tax authorities when assessing the risk of an intercompany lending transaction.
**Documentation**

**Documentation requirements**
Besides specific documentation requirement for intercompany on-lending transactions covered by the scope of the aforementioned Circulars, there are no specific documentation requirements for other transactions; however, on request of the Luxembourg tax authorities, taxpayers need to justify prices set in controlled transactions.

**When does documentation need to be available?**
At the request of the tax authorities.

**What is the deadline for submitting the documentation?**
There is no strict deadline.

**In which language should the documentation be prepared?**
Luxembourgish, French or German as official languages. English is generally accepted by the Luxembourg tax authorities in most of the cases.

**Advance certainty**

**Are APAs/ATRs available?**
No general guidance on APA practice has been published, but APA’s can be obtained with the Luxembourg tax authorities.

**Where does the request for the APA/ATR need to be filed?**
With the competent direct tax office.

**What information is typically required?**
Transfer pricing documentation in line with the OECD Guidelines.

**Term of the APA**
There is no clear guidance provided by the Luxembourg tax authorities. However, as a result of the recently issued Circulars with regard to intercompany on-lending transactions, APAs for these transactions can be obtained for a period of five years with an option for extension for another five years.
Netherlands, The

Transfer pricing rules and regulations

Rules by means of legislation

• **Article 8b of the Dutch Corporate Income Tax Act**: Codification of the arm’s length principle and documentation requirements for inter-company transactions.

• **Article 8c of the Dutch Corporate Income Tax Act**: Real risks requirement for Dutch companies involved in intermediary financing and/or licensing activities within the group.

Regulations (decrees, manuals, position papers, etc.)


• Advance Pricing Agreement Decrees IFZ2001/292M and IFZ2004/124M.

• Advance Tax Ruling Decree IFZ2001/293M and IFZ 2004/125M.

• Decrees on Intermediary Financing and Licensing Companies and providing Advance Certainty on their applied transfer prices: IFZ2001/294M, IFZ2004/126M and IFZ2004/127M.

• Decree on interpretation Article 7 OECD Model Convention IFZ2010/457M.

Please note that the above Decrees provide the formal position of the Dutch government and do not legally bind the taxpayer.

Rules by means of case law (most relevant ones)

• **Supreme Court, 9 May 2008, No. 43 849**: The Supreme Court ruled on a case where a loan had been issued by a company to its parent company and where subsequently the lender was faced with a default on the loan. The Court ruled that if and to the extent a supply of funds occurs on terms and under conditions such that a third party would not have assumed the debtor’s risk, it must be concluded that the supplier of funds had accepted the debtor’s risk with the intent to serve the interests of its shareholder and that the write off on the loan is not acceptable. The Court did not explicitly deal with the question on how the interest on the loan should be dealt with.

• **Supreme Court, 25 November 2011, No. 08/05323**: Following the 9 May 2008 case above, the Supreme Court further ruled that:
  • In principle, if a loan is qualified under civil law as a loan, it is considered also a loan for fiscal purposes; except for the following 3 situations as set out in BBN 1988/217.
  • If a loan between affiliated entities is considered a loan for fiscal purposes, any imperfections need to be solved in first instance by determining an arm’s length interest rate;
  • However, if in determining such an arm’s length interest rate, the interest rate would become so high that the loan is considered to have a profit-sharing nature, the debtor risk is considered to be such that the creditor has accepted this risk in the capacity as shareholder. Such loan is considered by the Supreme Court to be a non-arm’s length loan. This means that a write off on such a loan will not be deductible. In that respect, a loan that was at first considered to be provided on an arm’s length basis can be considered non-arm’s length at a later point in time;
  • There can be no split of a loan into an arm’s length and a non-arm’s length part;
• The interest rate for a non-arm’s length loan should be determined at the interest rate that an affiliated entity would have to pay for a third-party loan granted under similar conditions and with the actual intra-group creditor company acting as a guarantor.

Specific rules PE context
The Dutch tax authorities generally follow the guidance provided by the OECD in its Report on the attribution of profit to Permanent Establishments and the revised Article 7 of the OECD Model Convention and the Commentary thereto. However, some specificities to the above mentioned OECD guidance (e.g. on the approaches for capital allocation) are considered by the Dutch government. In that respect, specific Dutch guidance is provided in a Decree on the allocation of profit (and capital) to permanent establishments, Decree IFZ 2010/457M of 15 January 2011. The Decree provides the formal position of the Dutch government and does not legally bind the taxpayer.

Thin capitalisation
Rules by means of legislation and regulations
• (New)_Article 13l of the Dutch Corporate Income Tax Act: On 20 November 2012, the Second Chamber of Parliament approved certain Bills amending Dutch tax law. Among other things, the approved Bills include the abolition of Article 10d; which stipulated the thin capitalisation regulation.\(^{40}\) The thin capitalisation rules have been abolished effectively for the fiscal year commencing on or after 1 January 2013. At the same time, a (new) restriction of interest deduction on loans (and costs associated to such) taken up for investments in participations, qualifying for the participation exemption has been enacted (Article 13l Corporate Income Tax Act).

The non-deductibility applies to the participation interest that is considered ‘excessive’; the deduction of that interest is regarded as improper use of the Dutch Corporate Income Tax Act. The excessive participation interest is the interest that can be allocated to the participation debt. The participation debt is determined by a mechanical, mathematical rule according to which the taxpayer is assumed to have financed its participations with equity first, a taxpayer friendly approach. Qualifying expansion investments are excluded from the participation debt formula.\(^{41}\)

\(^{40}\) In the Bosal Case (ECJ September 18, 2003, C-168/01), the European Court of Justice decided that the Dutch participation exemption rules were in conflict with European law because of the discriminatory distinction these rules made between interest expenses relating to domestic participations (deductible) and the interest expenses relating to foreign participations (non-deductible). In reaction to this court ruling, interest expenses relating to foreign participations became deductible too as of January 1, 2004. Per the same date general thin capitalisation rules were introduced.

As on or after 1 January 2013, the new Article 13l of the Dutch CITAct will put an end to perceived adverse consequences of the rules mentioned above by restricting deduction of participation interest. For reference only, Article 10d Corporate Income Tax Act stipulated that the Debt-to-Equity ratio is 3:1. A higher ratio could be applied upon request, if the group to which the Dutch company belongs had a higher worldwide Debt-to-Equity ratio (group ratio). The amount of non-deductible interest based on this rule is maximised to interest paid directly or indirectly to affiliates minus the interest received from affiliated companies. The deduction of interest paid on genuine third party loans was therefore in principle not limited by the rules. There was a threshold of EUR 500,000 for loans exceeding the 3:1 ratio. Thus, if the 3:1 ratio was exceeded by less than EUR 500,000, the rules were not applicable. This threshold will not apply when the group ratio is used.

\(^{41}\) Participations within a period of 12 months before or after an investment that is considered as an investment to increase operational activities of the group the taxpayer belongs to, are not taken into account in determining the interest on the surplus of participation debt. The taxpayer has to make it plausible that there is in fact an investment in order to increase operational activities. Participations taken up in a book year before or starting on 1 January 2006 can be excluded for 90% in determining excessive participation interest expenses, without further proof by the taxpayer. This term is based on the legal obligation to keep the administration for at least 7 years. These two facilities (i.e. consideration of investments to increase operational activities and the possibility to apply the 90% rule), are only applicable in situations where there are no undesirable effects such as double dip situations, hybrid financing and tax driven interest deduction.
The new Article 13l Corporate Income Tax Act applies to financial years beginning on or after 1 January 2013. A transitional rule has been introduced for participation investments made in financial years prior to or beginning on 1 January 2006. Instead of applying the expansion investment test, the taxpayer may choose to take into account only 10% of the cost price of these investments when calculating the excessive participation interest and the participation debt. The transitional rule is not open for investments that were aimed at interest deduction in the Netherlands, or result in deduction of the interest twice (double dips). In this respect, reference is made to the circumstances under which expansion investments are denied.

Back-to-back inter-company funding (and related interest expenses and costs) in the context of active group financing activities are not taken into account in determining the excessive participation interest expenses and costs.

What is the effect of the rules on the deduction of interest?
These so-called excessive participation interest expenses are non-deductible to the extent these expenses are deemed to relate to the financing of participations and to the extent this excessive participation interest exceeds a threshold of EUR 750,000.

Are there additional rules on the deductibility of interest (e.g. safe harbours)?
Besides the above Article 13l Corporate Income Tax Act, there are only some additional rules regarding the non-deductibility of interest. Those rules relate to some cases of inter-company financing, for instance, dividend payments, capital contributions, internal reorganisations and external acquisitions (codified in Article 10a of the Dutch Corporate Income Tax Act). Furthermore, as mentioned above, there is a special regime in the Netherlands for affiliated entities engaged in intermediary financing and licensing activities codified in Article 8c of the Dutch Corporate Income Tax Act.

Intercompany loans

How is the arm’s length nature of an intercompany loan evaluated?
Until recently the Dutch tax authorities took the position that if the debtor would not have been able to enter into the loan in a third party situation, the intercompany loan could be re-characterised into shareholder equity on the basis of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. This should be reviewed from a two-sided perspective. However, the Supreme Court case of 25 November 2011 seems to suggest that the position taken by the Dutch tax authorities is not entirely correct (further analysis on the interest rate needs to be performed first). As per currently – January 2013 – it is yet unclear what the interpretation and position of the Dutch tax authorities is with respect to re-qualifying loans into equity/dividend distribution or assessing loans as being non-arm’s length on the basis of the arm’s length principle.

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?
The terms and conditions of the loan should be at arm’s length. The Dutch tax authorities in particular pay attention to the economic rationale for both the debtor and the creditor. If this is not the case, the relevant terms and conditions may be amended which could result in disallowing a loss or interest deduction due to the not at arm’s length terms and conditions or making an adjustment in the pricing of the loan.

42 Though they are still subject to the arm’s length principle and Dutch transfer pricing rules and regulations.
In addition, the Dutch tax authorities have a relatively strong focus on the combination of financing activities, and whether the activities overall makes sense and have an economic rationale for the company at hand.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>×</td>
</tr>
</tbody>
</table>

Internal and external CUPs are preferable taking into account the creditworthiness of the borrowing entity and the terms and conditions of the transaction. Bank quotes are typically not accepted since 1) they do not represent a ‘consumed transaction’ and 2) for various commercial reasons the bank may quote a rate as desired by their client, but not representing a binding offer. Bank quotes which have gone through the internal credit committee and which do represent a binding offer may have a much stronger value.

**What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
</tbody>
</table>

The best practice approach is to use a credit scoring tool or to map the borrowing entity’s financial ratios against S&P/Moody’s financial ratios. Taking the parent credit rating as the basis and notch up/down based on the borrowing entity’s profile may be appropriate as well, depending on the borrowing entity’s financial profile and the type of business within the group. This may especially be the case for borrower’s based in the Netherlands, since generally the creditworthiness is relatively strong, and hence the interest rate will be relatively low.

**How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?**

There is no formal guidance from the Dutch tax authorities whether the arm’s length principle requires the borrower’s relationship with its parent to be disregarded (i.e. the standalone approach) or to be regarded as having an impact on the interest rate (i.e. passive association/implicit support approach). However, based on informal discussion with the Dutch tax authorities, it becomes very clear that passive association needs to be taken into account in substantiating the arm’s length interest rate.

**Are foreign comparables accepted?**

Foreign comparables are accepted to the extent the market is sufficiently comparable.
**Cash pool**

**How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?**

The terms and conditions of the deposits and borrowings should be at arm’s length (i.e. have economic rationale) for both the debtor and the creditor. If this is not the case, the relevant terms and conditions may be amended which could result in disallowing a loss due to the not at arm’s length terms and conditions or making an adjustment in the pricing of deposits and borrowings. Outstanding deposits and borrowings in the cash pool for a long period may be re-characterised into long term loans.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?**

Borrowing and deposit rates should be established based on the specific facts and circumstances of the transaction (creditworthiness, terms and conditions etc.). The transfer pricing methodologies generally accepted in establishing the arm’s length interest rates on intercompany loans apply here as well.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?**

In case of a notional cash pool the remuneration for the cash pool header is typically considered a service fee (assuming the leader is not incurring any financial risk). In case of a target balancing cash pool, the remuneration is typically considered the difference between interest income and interest expenses (and other related financial expenses), however also subject to the Cash Pool Leader assuming financial risk. Cash pool activities where the financial risks for the Cash Pool Leader are restricted to a maximum of Euro 2 million, in line with Article 8c Corporate Income Tax Act, are also observed. An arm’s length remuneration for such Cash Pool Leaders is then determined taking into account this maximum risk of Euro 2 million.

There are minimum substance requirements in the Netherlands for the CPL, both in terms of economic substance and operational substance. Not complying may result in the interest income and interest expenses not being recognised in the Dutch tax base (e.g. on the basis of Article 8c of the Dutch Corporate Income Tax Act) and the tax treaty network not being applicable (mainly relevant for target balancing cash pools).

**Intercompany guarantees**

**What is your tax authority’s approach towards recognising guarantees?**

Guarantees that cannot be invoked such as comfort letters, letters of intent and keep well agreements are typically considered to be shareholder motivated. No guarantee fee is due. Explicit credit guarantees provided by a group company for the benefit of another group company are generally considered a service for which a fee is payable. However, if the beneficiary would not have been able to enter into the guaranteed transaction on a stand-alone basis (in comparison to a guarantee which is provided to better the terms and conditions of the transaction), the guarantee is considered to be provided due to shareholder reasons. As such, the guarantee will not result in guarantee fees payable nor deductible losses. Following the Court Case of 25 November 2011 it is not fully clear to what extent this applies to the full amount of the guaranteed transaction or only to the amount in excess of what could have been obtained on a standalone basis.
How is a guarantee fee characterised?
A guarantee fee seems to be treated as a financial transaction for Dutch tax purposes. However, since the Netherlands does not have a withholding tax on interest nor on service fees, this question does not really have a practical relevance for Dutch tax purposes.

To what extent are implicit guarantees recognised?
The implicit guarantee is recognised by the Dutch tax authorities. It is necessary to either document or substantiate why the credit rating of the parent is not impacting that of the subsidiary or ‘alternatively’ to what extent the standalone credit rating of a subsidiary is indeed affected by that of the parent, and how this impacts the value of the explicit guarantee provided by that same parent.

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
There is no formal guidance from the Dutch tax authorities whether the arm’s length principle requires the beneficiary’s relationship with its parent to be disregarded (i.e. the standalone approach) or to be regarded as having an impact on the guarantee fee (i.e. passive association/implicit support approach). However, based on informal discussion with the Dutch tax authorities, passive association could be required to be taken into account in substantiating the arm’s length guarantee fee.

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
The terms and conditions of the guarantee should be at arm’s length. If this is not the case, the relevant terms and conditions may be amended which could result in disallowing a loss due to the not at arm’s length terms and conditions or making an adjustment in the pricing of the guarantee.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>√</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>√</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>×</td>
</tr>
<tr>
<td>CUP approach</td>
<td>√</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>×</td>
</tr>
</tbody>
</table>

In the past, PwC has used the benefit approach, cost of capital approach and a combination of the two. CDS spreads have been used as a secondary method but caution should be used. The cost of capital approach should not be used to price the guarantee as such, but reflects what – from the guarantor perspective – should be the minimum compensation it should receive for the guarantee.

Are foreign comparables accepted?
Foreign comparables are accepted to the extent the market is sufficiently comparable.
**Documentation**

**Documentation requirements**
Yes, documentation must be kept in the taxpayer’s administration.

There are no specific documentation requirements for intercompany financial transactions; however, in our experience it is recommended to maintain a core ‘loan pricing policy’, robust (loan) agreements, substantiation of the pricing applied on a transaction basis, board minutes to support that a transaction has been evaluated and assessed from the economic rationale of both a lender and a borrower perspective.

When a strict interpretation of the rule means that the documentation needs to be available at the moment of the transaction. But it is generally within 4 – 12 weeks (depending on the complexity of the transaction) as per the request of the Dutch tax authorities.

**What is the deadline for submitting the documentation?**
See above.

In which language should the documentation be prepared?
Not specified, but generally prepared in either English or Dutch.

**Advance certainty**

**Are APAs/ATRs available?**
Yes, but to date not for the arm's length nature of a financial transaction or the pricing thereof due to the fact that the Dutch tax authorities are still reviewing/considering their position on financial transactions. Nevertheless, the Dutch tax authorities are always open to at least have upfront discussions on these matters and potentially provide ‘informal’ guidance/certainty on the approach taken.

ATR’s can be obtained on the tax treatment of hybrid loans and APA’s can be obtained on an arm’s length remuneration for affiliated entities engaged in intermediary financing and licensing transactions.

**Where does the request for the APA/ATR need to be filed?**
With the tax inspector or the APA/ATR team of the Dutch tax authorities.

**What information is typically required?**
- Details on the transaction;
- Details on the entities/PE's involved;
- Relevant jurisdictions;
- Details on the worldwide group structure;
- Functions, assets and risks analysis;
- Financial information;
- Proposed methodology, including comparables analysis ;
- Critical assumptions for the proposal and implications of changes to critical assumptions;
- Accounting years involved; and
- Industry analysis.

**Term of the APA**
Typically five years, but no set term requirement.
### Poland

**Transfer pricing rules and regulations**

**Rules by means of legislation**

- **Article 9a of the Polish Corporate Income Tax Law (Dz. U. 00.54.654) (CIT Law):** Regulations regarding transfer pricing documentation.
- **Article 11 of the CIT Law:** General transfer pricing regulations.
- **Article 25 of the Polish Personal Income Tax Law (Dz. U. 00.14.176):** General transfer pricing regulations for individuals.
- **Article 20a – 20r of the Tax Ordinance (Dz. U. 97.137.926):** Sets the procedure for the APA procedure.
- **Article 12.1, point 2 of the CIT Law:** Regulations regarding taxation of free of charge benefits.
- **Article 32 of the VAT Law (DZ. U. 05.54.535):** TP VAT regulations regarding limitation of the right to reduce the amount of tax due in case of non arm’s length intercompany transactions.

**Rules by means of regulations (decrees, manuals, position papers, etc.)**

- **Decree of the Minister of Finance of 10 September 2009:** Concerning the method of and approach to establishing taxable income of taxpayers by way of estimating prices in transactions undertaken by these taxpayers (Dz. U. z 2009 r. Nr 160, poz. 1268) ‘Decree’; in particular Article 21 of the Decree: guidelines regarding dealing with financial transactions (including loans and guarantees).

**Rules by means of case law (most relevant ones)**

In several rulings the Supreme Administrative Court (SAC) confirmed that the guarantees should be granted for a fee and that a guarantee granted free of charge raises a free of charge benefit for the debtor and such additional income should be subject to income tax.

The SAC also confirmed that arm’s length level of interest in intercompany loans should be set at the lowest interest rate that the taxpayer would have to pay to an independent entity for the loan granted for comparable period and under comparable terms and conditions.

**Specific rules PE context**

Transfer pricing regulations apply to PE’s accordingly.

### Thin capitalisation

**Rules by means of legislation and regulations**

- **Article 16, point 60 of the CIT Law:** Regulations regarding thin capitalisation.

  Thin capitalisation rules generally apply to loans from a direct shareholder or a lending company which has the same direct shareholder as the tested entity. The Debt-to-Equity ratio is 3:1, set on the day of payment of interests. For the purposes of these rules, equity is defined narrowly as share capital paid-up.

  For thin capitalisation purposes, the term ‘loan’ includes bonds and deposits.
What is the effect of the rules on the deduction of interest?
Interest incurred in relation to the percentage of the debt above the 3:1 ratio is not tax deductible.

Intercompany loans
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>√</td>
</tr>
</tbody>
</table>

As per Polish transfer pricing regulations, the arm’s length interest rate is defined as the lowest interest rate that the taxpayer would have to pay to an independent entity for the loan granted for a comparable period and under comparable terms and conditions. To this end, there is no official guidance of how to demonstrate this. Where auditing the intercompany financing, the tax authorities tend to refer to internal CUPs available at the company. Offerings of bank(s) (in particular the bank[s] that the company uses as its primary provider[s] of financial services) are also sometimes used. Though, the tax authorities appreciate that such data have indicative character, as they do not reflect actual transactions.

Taking the above into account, internal and external CUP information is preferable, taking into account the creditworthiness of the borrowing entity and the terms and conditions of the transaction.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?
The tax authorities have not developed a common practice in this area. The law does not require specifically obtaining a credit rating for the purposes of setting the interest. In practice:

- If the interest is set based on the external CUPs/benchmarking analysis, it is highly recommended at least for significant transactions to base the interest on the credit rating, even if it is not issued by a rating agency but only estimated. Otherwise, it is not feasible to identify proper comparables and to apply the CUP method in an appropriate way;
- If the interest is set based on another point of reference (e.g. internal comparables), credit rating may not be necessary to set the transfer pricing; and
- Where the transaction value is not significant, taxpayers tend to refer to general data on the market (e.g. average rates applied by the banks, offerings of financial institutions) to limit effort associated with documenting the transaction.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?
In the case of intercompany loans, it may be an argument for lower interest rate; implicit support will improve creditworthiness of the borrowing entity.
Are foreign comparables accepted?
In general, foreign comparables are accepted to the extent the market is sufficiently comparable.

**Cash pool**

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?
The terms and conditions of the deposits and borrowings should be at arm’s length for both the debtor and the creditor. In general the conditions are evaluated similarly to the evaluation of the arm’s length character of loans. Similar to loans, the specific conditions must be taken into account.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?
The transfer pricing methodologies generally accepted in this respect are the same as the transfer pricing methodologies generally accepted in establishing the arm’s length interest rates on intercompany loans.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?
In general, in case of a notional cash pool, a service fee is considered as remuneration for the CPL. In case of a target balancing cash pool, usually the remuneration is set as a difference between interest income and interest expenses (and other related financial expenses).

**Intercompany guarantees**

What is your tax authority’s approach towards recognising guarantees?
The Minister of Finance and SAC confirmed that intercompany guarantees should be granted for a fee and that a guarantee granted free of charge raises a free of charge benefit for the debtor and such additional income should be subject to income tax. This is under the condition that a given transaction/agreement has a legal character of a ‘guarantee’ (i.e. unconditional obligation of a guarantor) and not a form of silent guarantee, letter of intent, etc.

How is a guarantee fee characterised?
In general, a guarantee fee is characterised as a service fee.

To what extent are implicit guarantees recognised?
Probably it would not be regarded as an item that should be subject to guarantee fees. However, this should be reviewed on a case by case basis.

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
There is no legislation or experience on this matter.

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
The arm’s length level of a guarantee fee is the lowest guarantee fee that the taxpayer would have to pay to independent entity for the guarantee granted for comparable
period and under comparable terms and conditions. In most cases the tax authorities try to find a CUP.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>✓</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>×</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>✓</td>
</tr>
</tbody>
</table>

In most cases the CUP approach is used. A comparable offer may be identified or the remuneration may be set as a difference between unsecured and secured loans.

**Are foreign comparables accepted?**

Foreign comparables are accepted to the extent the market is sufficiently comparable.

**Documentation**

**Documentation requirements**

Article 9a of the CIT Law imposes on a taxpayer the documenting obligations of:

- Transactions conducted with its related entities in the meaning of Art. 11 of the CIT Law; and
- Transactions conducted with entities from the tax havens.

The transfer pricing documentation should comprise of the following elements:

- A description of the functions performed by the entities engaged in the transaction (including assets utilised and the risks assumed);
- A determination of all costs that are expected to be incurred in relation to the transaction as well as the form of, and the date when amounts are due to be paid;
- The method and manner of calculating profits and the determination of the price applied in the transaction;
- A description of the business strategy and other activities undertaken under this strategy; where the strategy adopted by the entity impacts the transaction’s value;
- Where other factors were taken into account in determining the value of the transaction, an indication of these factors; and
- In the case of contracts to perform intangible activities (including services), a determination of benefits that the entity obliged to prepare the documentation expects to derive from these activities.

The obligation to prepare the transfer pricing documentation includes transactions, in which the amount actually paid in a given tax year or resulting from the agreement exceeds:

- EUR 100,000; if the transaction value does not at the same time exceeds 20% of share capital;
- EUR 30,000; with respect to provision of services or intangible assets;
- EUR 50,000; in all other cases; or
- EUR 20,000; with respect to the transactions with entities from the tax havens.
There are no specific documentation requirements for intercompany loans and/or guarantees.

**When does documentation need to be available?**
There are no specific regulations on the time when the documentation should be prepared. If requested, it must be made available to the tax authorities within seven days from receiving the written request.

**What is the deadline for submitting the documentation?**
The documentation must be submitted within seven days from receiving a written request from the tax authorities.

**In which language should the documentation be prepared?**
The documentation needs to be prepared in Polish.

**Advance certainty**

**Are APAs/ATRs available?**
From 1 January 2006, a taxpayer may conclude an APA with the Minister of Finance to confirm the appropriateness of the taxpayer’s transfer pricing policy. From 1 January 2007, APAs also cover the attribution of profit to PEs. APAs can be obtained for financial transactions as well.

**Where does the request for the APA/ATR need to be filed?**
The relevant authority is the Minister of Finance.

**What information is typically required?**
- Proposed transfer pricing method;
- Description of method:
  - Principles for calculating transfer price.
  - Forecasts underlying transfer price.
  - Benchmarking study underlying transfer price.
- Factors which affect transfer pricing method, including:
  - Subject, nature and value of the transaction, including:
    i. functional analysis;
    ii. description of transaction-related costs; and
    iii. description of economic strategy and its impact on the transfer price.
  - Industry analysis including transactions of unrelated parties in the industry used for calculating the transfer price;
  - Organisational & capital structure of the applicant, as well as parties to the APA related transaction; and
  - Accounting principles of the parties to the transaction.
- Important documents related to the transaction including agreements, etc., indicating intentions of the parties;
- Proposed period of the APA; and
- List of related parties with whom the transaction is to be concluded, including their consent to submit all requested documents and explanations.

**Term of the APA**
Five years, possible extension following the five years’ period.
Portugal

Transfer pricing rules and regulations

Rules by means of legislation

- Article 63 of the Portuguese Corporate Income Tax (CIT) Code: Provides detailed transfer pricing rules in Portuguese tax law.
- Article 138 of the CIT Code: Sets the procedure for entering into an APA.

Rules by means of regulations (decrees, manuals, position papers, etc.)

- The Decree number 1446-C/2001, dated 21 December 2001: Regulate, amongst others, the application of the transfer pricing methods, the type, nature and contents of the documentation and the procedures applicable to (corresponding) adjustments.
- Decree number 620-A/2008, dated 16 July 2008: Establishes specific regulations regarding the implementation (procedures and obligations) of the APA regime in Portugal.

Rules by means of case law (most relevant ones)

There have been few court cases on transfer pricing issues under the previous legislation. The older case law is mainly related to cost contribution arrangements (CCA). The lack of legal provisions and administrative guidelines regarding transfer pricing has given rise to discretionary and contradictory court decisions, some of which do not seem to be in accordance with the OECD Guidelines. More recent case law shows the importance of a well-prepared factual and functional analysis to support arm’s length dealings with associated enterprises.

Specific rules PE context

There are no specific rules for a PE in Portugal. However, interest on loans between a PE and its home office may not be deductible if a loan from the home office is not (ultimately) a third party loan, with exception of funding of banks.

Portugal follows the OECD PE Report on allocation of profits to PE’s of banks.

Limitation of the deductibility of financial costs

Rules by means of legislation

- State Budget for 2013

Net financial costs are only deductible up to the higher of the following limits: 3 million Euros or 30% of the earnings obtained before depreciations, net financing expenses and taxes (EBITDA).

Nevertheless, a transitional period is foreseen, under which such limitation shall be gradually increased. The deductible percentage shall amount to 70% in 2013, 60% in 2014, 50% in 2015, 40% in 2016 and the 30% limit will only apply from 2017 onwards.

Financial costs, which are not considered as tax deductible, as a result of the application of such limitations may be carried forward for a period of 5 fiscal years, as long as such limits are always complied with. Furthermore, when the amount of financial costs considered as tax deductible is lower than the 30% limit, the unused
amount can be carried forward for the following five fiscal years, until the total amount is fully deducted.

This financial costs capping rule entirely replaces the former thin capitalisation rules, (Article 67 of the CIT Code). What is the effect of the rules on the deduction of interest?

Any disallowed interest is not re-qualified as a dividend for withholding tax purposes. This means that withholding tax should be levied on the full amount of the interest, including the interest related to the part of the loan that exceeds the limits mentioned above.

**Intercompany loans**

How is the arm’s length nature of an intercompany loan evaluated?

In Portugal, the evaluation of the arm’s length nature of an intercompany loan includes the following factors:

- The question of the economic substance. i.e. whether the loan would have been made in absence of the relationship;
- The amount which the loan would have been in the absence of the relationship; and
- The interest rate and the other terms which would have been agreed in the absence of the relationship.

The tax deduction of any interest over and above the arm’s length amount will be disallowed for tax purposes, and tax adjustments should apply.

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?

Portuguese legislation specifically mentions that, in the presence of special relationship, it shall be stipulated, accepted and observed, the terms and conditions substantially identical to the conditions that would be stipulated, accepted and observed between independent entities in comparable transactions.

Additionally, Portuguese legislation does not include specific guidance to financial transactions, nonetheless it may be concluded from our experience that an economic analysis should not be limited to the pricing evaluation, but also to the analysis of the terms and conditions, namely, the currency of the loan (and which entity held the currency risk), the amount, duration and the economic substance of the transaction.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>√</td>
</tr>
</tbody>
</table>

Internal and external CUP information is preferable taking into account the creditworthiness of the borrowing entity and the terms and conditions of the transaction.
What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>x</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
<tr>
<td>Specific economic reasons</td>
<td>√</td>
</tr>
</tbody>
</table>

Credit rating assessments performed by an independent entity would be particularly advisable.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

The arm’s length interest rate should be established always considering the terms and conditions that would be stipulated, accepted and observed between independent entities in comparable transactions.

Are foreign comparables accepted?

Portuguese tax authorities seem to prefer local comparables, although foreign comparables are also accepted, to the extent that the market is sufficiently comparable.

**Cash pool**

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?

The terms and conditions of the deposits and borrowings should be at arm’s length for both the debtor and the creditor. The pricing of any ‘non arm’s length’ aspect of a cash pooling arrangement may be adjusted if it creates an advantage to the Portuguese taxpayer (i.e. imputation of interest income or disallowance of interest expense). Long term balances in the cash pool may be re-characterised into long term loans.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?

The transfer pricing methodologies generally accepted in this respect are the same as the transfer pricing methodologies generally accepted in establishing the arm’s length interest rates on intercompany loans.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?

The transfer pricing methodologies generally accepted in this respect are the same as the transfer pricing methodologies generally accepted in establishing the arm’s length interest rates on intercompany loans.
Europe

Intercompany guarantees

What is your tax authority’s approach towards recognising guarantees?
Guarantees are recognised by the Portuguese tax authorities, and may generically be identified as collateral or personal guarantees. Additionally, guarantees may be based on comfort letters, keep well agreements, letters of credits and explicit credit guarantees.

How is a guarantee fee characterised?
The Portuguese legislation does not provide any guidance concerning guarantee fees; however, from previous experience it may be characterised as interest or financial costs.

To what extent are implicit guarantees recognised?
The Portuguese legislation does not specifically mention the necessary requirements to recognise implicit guarantees. Nonetheless, the Portuguese tax authorities may challenge a situation in which a fee is charged to an entity that benefits from an implicit guarantee (in the form of a service fee, interest, etc.).

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
Based on our experience, the arm’s length guarantee fee should be established on a separate entity basis (i.e. borrower and its subsidiaries) and no account should be taken on any guarantees, explicit or implicit, from associated entities.

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
The terms and conditions of guarantees should be at arm's length, and tax adjustments should apply if it is not the case. However, at this moment, without proper experience it is not possible to indicate any specific conclusions regarding the Portuguese tax authorities’ approach in the evaluation of the arm’s length of an intercompany guarantee.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>✓</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>x</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>x</td>
</tr>
</tbody>
</table>

There is no specific guidance from the Portuguese tax authorities in the process of pricing a guarantee, although, from our experience, the CUP approach is the preferential approach.
Are foreign comparables accepted?
With no certainty, foreign comparables may be accepted by Portuguese tax authorities, depending on the level of comparability.

Documentation
Documentation requirements
Based on the Decree 1446-C/2001, taxpayers are required to keep a transfer pricing documentation file, which is expected to include the following information:

- The terms and conditions agreed, accepted and observed in the open market in relation to the controlled transactions; and
- The selection and application of the method or methods most appropriate for benchmarking transfer prices through the use of arm's length comparables.

The transfer pricing documentation file should include, among others, the following information and documentation (if and when applicable):

- A description of any special relations that exist with any entities with which commercial, financial or other transactions are carried out;
- A record of the corporate relationship by which the special relationship arose, including any documents that demonstrate a subordination or dependency relationship as mentioned above;
- A description of the activities carried out during the controlled transactions, a detailed list of amounts recorded by the taxpayer over the past three years and, where appropriate, the financial statements of the associated enterprises;
- A detailed description of the goods, rights or services involved in controlled transactions and of the terms and conditions agreed if such information is not disclosed in the respective agreements;
- A description of the activities performed, the assets used and the risks assumed, both by the taxpayer and the associated enterprises involved in the controlled transactions;
- Technical studies on essential areas of the business, namely investment, financing, research and development, marketing, restructuring and reorganisation of activities, as well as forecasts and budgets connected with the global business and business by division or product;
- Guidelines regarding the transfer pricing policy of the firm, containing instructions on the methods to be applied, procedures for gathering information (particularly on internal and external comparables), analysis of the comparability of transactions, cost accounting policies and profit margins obtained;
- Contracts and other legal instruments concluded with both associated enterprises and third parties, together with any other document that may govern, or explain, the terms, conditions and prices under those transactions;
- An explanation of the method or methods applied to determine arm's length prices for each controlled transaction and the rationale for the selection;
- Information regarding comparable data used (the grounds for selection, research records and sensitivity, and statistical analyses should all be documented);
- An overview of business strategies and policies, particularly regarding commercial and operational risks that might have a bearing on the determination of transfer prices or the allocation of profits or losses for the transactions; and
- Any other information, data or documents considered relevant for determining an arm's length price, the comparability of transactions or the adjustments made.
Portugal

There are no specific documentation requirements for intercompany loans or guarantees.

**When does documentation need to be available?**
Transfer pricing documentation is required at the time of transaction, as well as at the moment of the filing of corporate income tax return. Companies should keep documentation for ten years.

**What is the deadline for submitting the documentation?**
Contemporaneous documentation should be in place by the 15th day of the seventh month after the fiscal year-end, which for a typical Portuguese taxpayer is 31 December, thus, documentation should be prepared by 15 July.

Upon request of the tax authorities, documents need to be provided in a 10 days' period (the statute of limitations is four years).

**In which language should the documentation be prepared?**
Portuguese Tax Authorities may require a translation of the documentation into Portuguese. Nonetheless, upon request, the taxpayer can be dismissed from translating if contents are understood in the original language.

**Advance certainty**

**Are APAs/ATRs available?**
The Decree 1446-C/2001 stipulated that after relevant experience would have been gained regarding the application of the new transfer pricing rules, the Portuguese tax system would be in a position to adopt the OECD’s recommendations in the area of APAs, which is now set in the following legislation:

- Decree number 620-A/2008, dated 16 July 2008 establishes specific regulations regarding the implementation (procedures and obligations) of the APA regime in Portugal; and
- Article 138 of the CIT Code – Sets the procedure for entering into an APA.

**Where does the request for the APA/ATR need to be filed?**
The request for the APA must be sent for the attention of the General-Director of the Portuguese Tax Authorities (Direcção de Serviços de Inspeção Tributária dos Serviços Centrais), up to 180 days prior to the beginning of the first fiscal year covered by the agreement.

Additionally, for bilateral or multilateral APA, a duplicate copy must be sent to the competent authority for mutual agreement procedures (Direcção de Serviços das Relações Internacionais), which, under the double taxation treaties, should notify the competent tax authorities of the other jurisdiction.
What information is typically required?

- Description of the business model of the taxpayer and a description of any special relations that exist with any entities with which commercial, financial or other transactions are carried out;
- Overview of the taxpayer business strategy and its position in the supply chain;
- Description of the activities performed, the assets used and the risks assumed, both by the taxpayer and the associated enterprise involved in the controlled transaction to be covered by the APA;
- Explanation of the method or methods applied to determine arm’s length prices for the controlled transaction and the rationale for the selection;
- Information regarding the Database used to identify the comparable data used, identification of the arm’s length price the comparability of transactions, or the adjustments made;
- Term of the APA; and
- Any other information, data or documents considered relevant for when requesting the APA.

Term of the APA
The APA is valid for a maximum of three years with the possibility for renewal. No formal rollback.
Romania

Transfer pricing rules and regulations

Rules by means of legislation

- **Title I and II of the Fiscal Code**: Provides incorporation of transfer pricing in the Romanian Law.
- **Government Decision No. 44/2004**: Provides methodological norms to the Fiscal Code.
- **Government Ordinance No. 92/2003**: Provides the incorporation of the individual advance tax ruling and the advance pricing arrangement in the Romanian Law and sets the penalties for not complying with the TP regulations.
- **Government Decision No. 529/2007**: Sets the application procedure which refers to both issuance and monitoring of APA.
- **Order No. 222/2008**: Provides the requirements of a transfer pricing file.

Rules by means of regulations (decrees, manuals, position papers, etc.)

Although Romania is not an OECD member, the Romanian transfer pricing legislation expressly stipulates that the Romanian tax authorities should also consider the OECD Guidelines when applying transfer pricing rules/methods. Therefore, the related manuals and position papers of OECD in respect to transfer pricing may be applicable when analysing transfer pricing issues.

Rules by means of case law (most relevant ones)

Transfer pricing is still in an incipient phase as regards jurisprudence. PwC observes that tax audits are increasing significantly, and this may constitute the premise for future jurisprudence. Financial transactions have just started to be investigated and so far PwC has not witnessed any case law regarding this area.

Specific rules PE context

In case of a Romanian branch/PE of an overseas company, income arising directly or indirectly through or from the branch/PE is taxable under Title II, Article 13, (b) of the Fiscal Code. Transfer pricing rules are applicable for the transactions made between a PE and its home office.

Thin capitalisation

Rules by means of legislation and regulations

The thin capitalisation rules are stated under the provisions of Title II, Article 23 of the Fiscal Code and under the methodological norms of the Fiscal Code.

The Romanian legislation provides specific interest deductibility rules such as ‘thin capitalisation’ which is applicable for loans taken from entities other than banks, non-banking financial institutions and other entities that grant loans as under the law.

The thin capitalisation rule states that the interest expenses and the net foreign exchange differences related to loans with a maturity of over one year (including short term loans which are subsequently prolonged) are non-deductible if the Debt-to-Equity ratio is higher than three or the equity of the company is negative. The Debt-to-Equity ratio is computed by taking into account the opening and ending balances of the net assets and the long term borrowings (maturity over one year).
What is the effect of the rules on the deduction of interest?
As mentioned above, the interest expenses and the net foreign exchange differences related to loans which do not meet the thin capitalisation criteria are non-deductible for corporate income tax purposes. However, such interest expenses and foreign exchange differences can be carried forward to subsequent years, for an indefinite period, until the Debt-to-Equity condition is met, the moment when they become fully deductible.

Are there additional rules on the deductibility of interest/guarantee fees (e.g. safe harbours)?
There is an additional interest deductibility limit rule which states that the deductibility of interest expenses is capped at an annual rate, which is currently set at 5.25% for the loans denominated in RON and 6% for the loans denominated in foreign currency, irrespective of the maturity of the loan. Please note that this limit is set annually for the foreign currency loans while it is pegged to the quarterly reference interest rate of the National Bank of Romania for the local currency loans. The interest expenses exceeding such limits are non-deductible and cannot be carried forward to subsequent fiscal years.

Intercompany loans

How is the arm’s length nature of an intercompany loan evaluated?
Currently there is no experience from the Romanian tax authorities with particular regard to financial transactions. Thus, one has to follow the Romanian transfer pricing rules which state that the market price for loans granted between related parties consists of the interest that would have been agreed on between independent legal entities for similar transactions in comparable circumstances, including the commission for administering the loan.

In light of the thin capitalisation rules, a correlation can be made between the transfer pricing and the interest deductibility limit rule which states that the deductibility of interest expenses is capped at an annual rate (see above). Thus, in practice, as long as taxpayers contracted related party loans for which the interest rate does not exceed the threshold mentioned above, no challenges are generally expected from the Romanian tax authorities (because the law expressly mentions that interest expenses exceeding the specified threshold are tax non-deductible). Nonetheless, please note that there is no explicit link between these rules in the domestic legislation.

Also, in case the amount paid by a company for goods or services furnished by a participant in the company exceeds the market price for such goods or services, then the difference is to be treated as a dividend.

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?
When assessing the arm’s length of the specific terms and conditions related to an intercompany loan, the Romanian law specifically states that the following elements should be taken into consideration:

- The amount and the term of the loan;
- The nature and the purpose of the loan;
- The guarantees involved;
- The currency of the loan;
• Exchange rate risks and additional costs incurred from hedging the exchange rate risk; and
• Any other elements that may influence the lending conditions.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>×</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>×</td>
</tr>
</tbody>
</table>

The CUP method is the most used method when documenting loan transactions. When internal comparables are not available, other comparables are used from external databases, such as the statistical data published by the National Bank of Romania and Bloomberg database. Note that tax authorities have just started to investigate financial transactions and PwC is not aware of their approach with these types of transactions.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>×</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
</tbody>
</table>

In practice, the credit rating of the borrower on a standalone basis is assessed without taking into account the credit rating of the parent. In order to determine the creditworthiness of the borrower, the Moody’s Bank Financial Strength Ratings model may be used before performing the interest rate analysis in an external database. It further must be ensured that the terms and conditions associated with the transaction also reflect the arm’s length principle.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?
There is no specific practice in respect of the effect of passive association on substantiating the arm’s length interest rate.

Are foreign comparables accepted?
Yes, but only if local comparables are not available. Note that according to the domestic legislation, the foreign comparables should be taken into account in the following sequence: national, European Union, international.

Cash pool

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?
The interest rate on deposits or borrowings should be set at arm’s length for both the debtor and the creditor. The interest rate on deposits is typically benchmarked...
against comparable deposit interest rates. As regards the interest rate on borrowings, the transfer pricing approach should not differ from the approach for evaluating the specific terms and conditions for intercompany loans provided above.

**As regards the long term positions in a cash pool, these should be seen as a long term deposit or loan.**

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?

The approach taken should not differ from the approach for evaluating the specific terms and conditions for intercompany loans/deposits. The CUP method is typically preferred but when interest data on similar transactions is not available, the tax authorities may also accept statistical data on interest rates published by the National Bank of Romania.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?**

The remuneration of a CPL is generally treated as a service fee. Therefore, in principle there should be no difference between a zero-balancing cash pool and a notional cash pool in respect of the remuneration paid to the CPL. However, depending on how the product is effectively implemented, certain differences may arise and in such cases it should be analysed if the remuneration is a service fee or has an interest rate nature (less common in practice).

**Intercompany guarantees**

**What is your tax authority’s approach towards recognising guarantees?**

There are no specific provisions in the Romanian Fiscal Code dealing with guarantee fees, the conditions in which they can be charged and their tax treatment. The deductibility of guarantee fees is to be assessed based on the general deductibility rules.

Although there is no specific definition in our domestic fiscal legislation regarding the term ‘guarantee’, under the methodological norms of the Romanian Fiscal Code, the guarantees involved in a loan agreement should be taken into consideration when assessing the arm’s length of the specific terms and conditions.

**How is a guarantee fee characterised?**

There is no specific practice in Romania in respect of guarantees, however, from the international literature and case law, it appears that the guarantee payments may be seen either as a service or as interest. In the latter case, the guarantee is seen as having a financing nature.

**To what extent are implicit guarantees recognised?**

There are no rules in respect of recognition of implicit guarantees.

**How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?**

There are no rules in respect of recognition of passive association/implicit support when guarantees are assessed.
How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
There is no experience or guidance from the tax authorities on evaluating the specific terms and conditions of guarantees. Also, the transfer pricing legislation in Romania covers the arm’s length nature of pricing as well as any terms and conditions related to the transactions.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>x</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>x</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>x</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>✓</td>
</tr>
</tbody>
</table>

The most common method used by PwC for substantiating guarantee fees is the CUP method. As a secondary method, the CDS spreads can also be used.

Are foreign comparables accepted?
Yes, but only if local comparables are not available. Note that according to the domestic legislation, the foreign comparables should be taken into account in the following sequence: national, European Union, international.

Documentation
Documentation requirements
In line with the requirements of Order 222/2008 on the content of the transfer pricing documentation file (the Order), taxpayers engaged in related party transactions are required to prepare and present the TP documentation file. The Order includes information on preparing the transfer pricing information file as well as on requesting and presenting the file to the tax authorities.

No specific requirements for intercompany loans/guarantees are mentioned by the Order. However, specific details in respect of loans are provided in the methodological norms to the Fiscal Code whereby, at point 38, it is stated that the market price for loans granted between related parties consists of the interest that would have been agreed on between independent legal entities for similar transactions in comparable circumstances, including the commission for administering the loan. For the elements that should be taken into consideration when assessing the interest rate, please refer to the intercompany loans section above.

When does documentation need to be available?
The deadline for presenting the transfer pricing documentation to the tax authorities can be set for up to three months from the date when the request was issued, during a tax audit. Upon request of the taxpayer, the deadline can be extended with a period equal to the initial period.

What is the deadline for submitting the documentation?
Please refer to our comments above.
In which language should the documentation be prepared?
The transfer pricing documentation should be prepared in Romanian. Any documents in foreign languages must be accompanied by their Romanian version validated by certified translators.

Advance certainty
Are APAs/ATRs available?
The following types of APA options are available in Romania: unilateral, bilateral and multilateral. Taxpayers can apply for these options for any type of transactions undertaken with their related parties, including loans, guarantees and cash pools. To the best of our knowledge, no APAs for loans, guarantees or cash pools have been submitted or issued in Romania.

Where does the request for the APA/ATR need to be filed?
The APA request should be submitted to the National Agency for Tax Administration. Note that prior to submitting a request for issuance or amendment of an agreement and the documentation, taxpayers can request in writing to the National Agency for Tax Administration a preliminary discussion to establish the future facts with a view to entering into or amending an agreement.

What information is typically required?
The request for the preliminary discussion must include information on the identification data of the taxpayer and of its legal representative, as well as sufficient information on the topic of the discussion.

As regards the documentation for issuance of an agreement it must include at least the following information:

- The organisational, legal and operational structure of the group, including shareholding, history and financial data;
- A general description of the group business, business strategy, including changes in the business strategy as compared to the preceding fiscal year;
- Description of the implementation of the transfer pricing methodology within the group, if any;
- Overview of the related-party transactions: flows of transaction, invoice flows, amount of transaction flows;
- A general description of the functions and risks undertaken by related parties, including changes as compared to the preceding year;
- Presentation of ownership of intangibles within the group (patent, name, know-how, etc.) and royalties paid or cashed;
- Detailed presentation of the transactions, products, deals or agreements to be covered by the agreement;
- Comparability analysis: specifics of the goods or services, functional analysis (functions/roles, risks, fixed assets used, etc.), contractual terms, economic circumstances, specific business strategies;
- Presentation of information on comparable domestic or foreign transactions;
- Critical assumptions liable to affect the transfer price of the transaction or the validity of the agreement;
- Related parties and their permanent establishments involved in such transactions or agreements;
Romania

- Foreign authorities which were requested to participate in the issuance of the agreement, for bilateral or multilateral agreements;
- A description of the proposed transfer pricing methodology, and its selection criteria respectively;
- The period to be covered by the agreement;
- Description of other conditions regarded as relevant for the taxpayer;
- Sworn statement confirming that the information in the request and documentation is accurate; and
- Sworn statement of the taxpayer confirming that there is no fiscal, administrative or judiciary procedure in progress in the submitted case on which the issuance of an agreement is sought.

**Term of the APA**

The APA is valid for a period of a maximum of five years; however, the period may be extended for certain long-term contracts (e.g. royalty agreements).
Spain

Transfer pricing rules and regulations

Rules by means of legislation

- **Articles 16 and 17 of the Spanish Corporate Income Tax Law (CITL):** Provides incorporation of transfer pricing in Spain’s tax law.

Rules by means of regulations (decrees, manuals, position papers, etc.)

- **Articles 16 to 21 of the Spanish CITL:** Determination of arm’s length value and documentation requirements.
- **Article 22 to 29 of the CITL:** APAs.

Rules by means of case law (most relevant ones)

Regarding the current legislation, the Spanish tax authorities and the jurisprudence issued by the tribunals have widely used the OECD Guidelines to apply or interpret the Spanish transfer pricing rules and regulations. In particular, the TEAC (i.e. Tribunal Económico Administrativo Central) and the Spanish High Court of Appeal (Audiencia Nacional) are making an extensive and intensive use of the OECD Guidelines.

In particular, in terms of intercompany financing instruments, the Spanish High Court of Appeal recently issued an important decision in which it re-characterised as equity a profit participation loan (PPL) granted by a holding company to its Spanish subsidiary and denied the deduction of interest expenses related to the loan. In this regard, applying the principle of substance over form, the court found that the loan did not actually have debt features and was, in reality, a shareholder contribution (equity). The court’s arguments for re-characterising the PPL as equity were as follows: (i) the loan agreement did not set a maturity date and was to be terminated by mutual agreement; (ii) it was expressly stipulated that the loan could be converted into the borrower’s shares; (iii) the amount of interest paid (linked to the Euribor) was limited to the company’s profits; iv) the loan specified that the lender must continue to be the borrower’s shareholder.

This indicates that a combination of indefinite duration, convertibility, and interest payments contingent on the existence of profit may result in the requalification of a loan into equity. This is a pioneer decision in Spanish case law and this approach follows the general lines of international tax standards on the subject.

Specific rules PE context

Regarding loans/guarantees, PEs in Spain would be submitted to the Non Residents Income Taxation Law (RDL 5/2004).

Thin capitalisation

Rules by means of legislation and regulations

- **Article 20 of the Spanish CITL:** Thin capitalisation rules.

------------------

43 Thin capitalisation rules are abolished from the 1st January 2012.
What is the effect of the rules on the deduction of interest?
Royal Decree-Law 12/2012 of 30 March, which introduces various tax and administrative measures designed to reduce the public deficit, and Royal Decree-Law 20/2012 of 13 July, which introduces various measures to guarantee budgetary stability and boost competitiveness, have made significant temporarily undefined changes to the CITL which affect the tax deductibility of financial expenses.

These measures include the creation of a new section in Article 14 of the CITL, according to which the following will not be deductible:

“Financial expenses accruing in the tax period deriving from debts with entities of the Group according to the criteria laid down in Article 42 of the Commercial Code, regardless of place of residence and the obligation to formulate consolidated annual accounts, used for the acquisition, from other entities of the group, of the shares or own funds of any type of entity or for the making of contributions to the capital or own funds of other entities of the group, unless the taxpayer demonstrates there are valid economic reasons for the carrying out of the said operations”.

Thus the new Article 14.1.h of the CITL excludes the deductibility of financial expenses within a business group resulting from the acquisition from other entities of the group of the shares or own funds of any type of entity unless there are shown to be valid economic reasons for the carrying out of these operations.

Additionally, the wording of Article 20 of the CITL has been amended to include a general limitation on the deduction of net financial expenses to 30% of the operating profit of the financial year. Net financial expenses up to one million Euros are always deductible. In cases of entities subject to tax consolidation, the limit is to apply to the tax group.

Net financial expenses refers to the excess of financial expenses over income deriving from the assignment to third parties of own capital accruing in the tax period in question, excluding the non-deductible expenses referred to in Article 14.1. h) of the CITL.

This rule, which replaces the rules on the thin capitalisation ratio with related entities, affects all types of financial expenses, whether with external entities or entities of the group, and abandons the re-classification under the previous regulation of the amount over the limit as dividend.

Intercompany loans
How is the arm’s length nature of an intercompany loan evaluated?
Spain’s legislation concerning transfer pricing does not establish specific rules regarding the evaluation of the arm’s length nature of intercompany loans.

However, based on our experience, the arm’s length character of an intercompany financial transaction will be assessed by considering:

• The economic rationale of the transaction (i.e. repayment capacity and need for funds);
• The leverage level of the borrower (i.e. reasonableness of the debt to equity ratio); and
• The interest rate levels applied.
How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?

In order to analyse the arm’s length nature for intercompany loans, terms and conditions of the transaction are considered. In this regard, such elements are taken into account when performing a benchmark analysis and identifying comparables.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>√ (corroborative approach)</td>
</tr>
</tbody>
</table>

Internal and external CUP information is preferable taking into account the creditworthiness of the borrowing entity and the terms and conditions of the transaction.

In case of existence of bank quotes, these are generally included as corroborative approach for sustaining arm’s length interest rate. Therefore a robust analysis will further require the application of an additional transfer pricing method (i.e. CUP).

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>√</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratio’s to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
</tbody>
</table>

The best practice approach is to use a credit scoring tool or to map the borrowing entity’s financial ratios against S&P/Moody’s financial ratios. Taking the parent credit rating is the basis and notch up/down based on the borrowing entity’s profile may be appropriate as well as a corroborative analysis.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?

The arm’s length interest rate should be established on a ‘separate entity’ basis (i.e. borrower and its subsidiaries).

Both the Tax Office and the Spanish courts understand that if the borrowing entity obtains funds from financial institutions through direct or indirect guarantees provided by non-resident related entities, the operation falls within the scope of the borrowing rules.

Are foreign comparables accepted?

Foreign comparables are accepted to the extent the market is sufficiently comparable.
**Cash pool**

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?

Spain’s legislation concerning transfer pricing does not establish specific rules regarding the evaluation of the arm’s length nature of a cash pool. The terms and conditions of the deposits and borrowings should be at arm’s length for both the debtor and the creditor.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?

Borrowing and deposit rates should be established based on the specific facts and circumstances of the transaction (creditworthiness, terms and conditions, etc). The transfer pricing methodologies generally accepted in this respect are the same as the transfer pricing methodologies generally accepted for any other kind of financial transaction (i.e. internal CUP, external CUP).

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?

There are no specific methodologies preferred in substantiating the arm’s length remuneration for the CPL. In practical terms, CPL remuneration analysis generally focuses on evaluating functional and risk profile of the CPL. Remuneration schemes generally follows a service fee approach or fee based on the spread resulting from arm’s length interest rate paid and received.

**Intercompany guarantees**

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?

Spain’s legislation concerning transfer pricing does not establish specific rules regarding the evaluation of the arm’s length nature of an intercompany guarantee. Intuitively in practical terms, the arm’s length evaluation would follow the CUP approach.

What TP Methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>x</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>x</td>
</tr>
<tr>
<td>Accounting approach</td>
<td></td>
</tr>
<tr>
<td>CUP approach</td>
<td>√</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>x</td>
</tr>
</tbody>
</table>

There is no practical experience on this issue. Intuitively in practical terms, the arm’s length evaluation would follow the CUP approach. Credit default swaps may be used as a secondary method.

Are foreign comparables accepted?

Yes, to the extent the market is sufficiently comparable.
**Documentation**

**Documentation requirements**

In line with the EUTPD, the Corporate Income Tax Regulations identifies two levels of documentation: (i) group-level documentation; and (ii) documentation specific to the local taxpayer.

The specific group-level documentation is the following.

- A general description of the group's organisational, legal, and operative structure, as well as any relevant changes in the structures;
- Identification of the different entities that, as part of the group, undertake controlled transactions which affect the taxpayer;
- A general description of the nature, amounts and flows of the controlled transactions between entities of the group when these affect the taxpayer;
- A general description of functions performed and risks assumed by the different entities of the group when these affect in a direct or indirect way the transactions undertaken by the taxpayer, including changes compared to the previous tax year;
- Ownership of patents, trademarks, brand names and other intangible assets within the group which affect the taxpayer and its controlled transactions, as well as the considerations paid for rights to their use;
- A description of the group's transfer pricing policy which includes the method or methods used in order to determine the prices adopted by the group, and that justifies the arm's length nature of the group's transfer prices;
- A list of CCAs and service agreements between entities of the group, when they affect the taxpayer; and
- The group's annual report.

The specific local documentation is the following.

- Name and surname or corporate name or complete denomination, legal address and tax identification number of the taxpayer and of the persons or entities with which the transaction is undertaken; as well as a detailed description of the transaction's nature, characteristics and amount;
- Comparability analysis according to the requirements set down in the regulation (that outlines the circumstances that must be considered in assessing comparability);
- An explanation about the selection and application of the valuation method, and the value or range of values derived from its application, including relevant information on internal and/or external comparables, if available;
- Cost allocation criteria used where services have been provided to more than one related party, the corresponding agreements and agreements in line with the new regulations on cost sharing (following the specific contents that the agreements must contain in order for the costs to be deductible); and
- Any other information that the taxpayer has used in order to determine the valuation of its controlled transactions as well as the para-social pacts subscribed with other partners.

The burden of the proof that transfer pricing is at arm's length falls on the taxpayer.

With regard to the first year in which the documentation obligations must be applied, the documentation obligations must be deemed to apply to transactions performed on or after 19 February 2009.
Spain

There are no specific documentation requirements for intercompany loans/guarantees. Therefore general documentation requirements described above applies.

**When does documentation need to be available?**
Article 16.2 of the Corporate Income Tax Law establishes as a general rule that related persons or entities must keep available the transfer pricing documentation for the tax authorities from the end of the voluntary return or assessment period in question. Companies present their Corporate Income Tax self-assessment within the 25 calendar days after the six months after the conclusion of the tax period.

**What is the deadline for submitting the documentation?**
Although transfer pricing documentation shall be available for the tax authorities from the end of the voluntary return or assessment period, its submission is subject to the requirement by the tax authorities.

In the course of a tax inspection, the requirements to appear at the offices of the tax authorities not performed in the presence of the taxpayer must enable a minimum period of 10 days, counted from the day following the notification of the requirement.

**In which language should the documentation be prepared?**
Corporate Income Tax Law does not specify anything about the language in which the transfer pricing documentation should be prepared. Based on experience, tax authorities accept transfer pricing documentation prepared in English. However, tax authorities have occasionally requested its total or partial translation into Spanish. If that is the case this is presumed not to trigger formal transfer pricing penalties.

**Advance certainty**

**Are APAs/ATRs available?**
Spanish law provides taxpayers with a statutory right to negotiate APAs. The general regulations are contained in paragraph seven of Article 16, and Royal Decree 1793/2008 regulates in detail the procedure for processing and deciding on APAs between related persons or entities, whether of a unilateral nature with the Spanish tax authorities, or bilateral or multilateral, involving other tax authorities.

Article 16.7 of the Corporate Income Tax Law mentions that the procedure applying to APAs is contained in the Corporate Income Tax Regulations. The APA filing procedure is specified in Articles 22 through Article 29 of Chapter VI of Title I of the CTR, which came into force on 19 November 2008. Unilateral, bilateral and multilateral APAs are available in Spain.

**Where does the request for the APA/ATR need to be filed?**
The tax inspection department of the Spanish national tax agency (AEAT) is the administrative body in charge of dealing with APA requests. The procedure for applying for an APA is a two-step process. Step one is a pre-filing waiting period of one month, after which the taxpayer is informed of the basic elements of the procedure and its possible effects. Step two is the actual filing and subsequent negotiation. Negotiation might take approximately six to eight months in the case of unilateral APAs.
What information is typically required?
Prior APA request shall include the following elements:

- Identification of the parties;
- Description of the transfer pricing transactions proposed to be covered by the APA; and
- Basic elements from the valuation proposal pretended.

A formal APA request shall include the valuation proposal based on market value with a description of the proposed method and an analysis justifying that the way it is applied respects the arm's length principle. The application shall also include documentation requirements as described above.

Term of the APA
The final resolution is effective for the period of time decided in the agreement, but cannot exceed four years. Additionally, it can be determined that the APA affects the operations of the year in which the APA is agreed as well as the operations of the prior year, as long as the tax return has not been filled.

Furthermore, providing that no significant changes in the underlying conditions of the APA occur, a taxpayer may request an APA renewal.
**Sweden**

**Transfer pricing rules and regulations**

**Rules by means of legislation**


**Rules by means of regulations (decrees, manuals, position papers, etc.)**

The Swedish Tax Authorities (STA) continuously publish guidelines for transfer pricing including guidance for financial transactions.

**Rules by means of case law (most relevant ones)**

- **Diligentia case:** The group replaced an external financial structure with internal loans. The internal loans carried a considerably higher interest rate and the STA claimed that the interest rate applied was not in accordance with the arm's length principle, among other considerations, due to the amount of insight and control between the parties. This view was shared by the Supreme Administrative Court and has led to the STA initiating several similar cases where the interest rate applied has not been considered to be at arm's length due to the insight and control between the two affiliated parties. No guidance has been given regarding how to adjust for these criteria which has resulted in an unsecure environment for companies with intra-group loans and other financial transactions. It is uncertain if the Supreme Administrative Court actually intended that insight and control due to ownership always was a factor to consider as argued by the STA or that the Supreme Administrative Court only used this argument as a tool to adjust the interest rate of the unsecured loan into that of a secured loan given that in the Diligentia case the borrower had unpledged assets which under normal circumstances could have been used as security for the loan to obtain a significant lower interest rate for the borrower and the owner, as also being the lender, had an indirect control over these assets regardless of the assets being pledged as collateral for the loan or not. The interpretation of the Diligentia case made by the STA has recently been overturned by the administrative court of appeal, but has as of yet not been re-tries by the Supreme Administrative Court.

- **Mobil Oil case:** In this case it was established that the arm’s length principle cannot be used to challenge a taxpayer on the grounds of thin capitalisation.

**Specific rules PE context**

There are no specific rules for PEs.

**Thin capitalisation**

**Rules by means of legislation and regulations**

There are no rules dealing specifically with thin capitalisation and no set permissible Debt-to-Equity ratios; however, the thin capitalisation issue has been under scrutiny; new legislation has been discussed and is likely to be introduced during 2013.
Intercompany loans

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?

The STA guidelines state that certain terms should be taken into account when establishing whether a transaction is at arm’s length. Reference is made to the currency of the loan, the amount and duration of the loan and the degree of risk involved when establishing the pricing.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>×</td>
</tr>
</tbody>
</table>

The STA guidelines for financial transactions state that the applied remuneration level or interest rate should be in accordance with the arm’s length principle. For intra-group loans issues such as contractual terms, currency, duration, security, seniority and the creditworthiness of the lender should be taken into consideration.

Internal and external CUP information is preferable taking into account the creditworthiness of the borrowing entity and the terms and conditions of the transaction under review. However, the tax agency currently argues that ownership insight and control adjustment is necessary for any comparable to be accepted. How such an adjustment is to be done is currently highly uncertain and its necessity is currently being appealed throughout the Tax Courts.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>√</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>√</td>
</tr>
</tbody>
</table>

The best practice approach is to use a credit scoring tools provided by S&P or Moody’s; however, its applicability is uncertain as the STA argues that a full credit rating is necessary taking into account not only quantitative but also qualitative data. However, in court cases both credit scoring methods and the CAPM method has been accepted as indications of a reasonable correct arm’s length interest rate.
How is passive association/implicit support taking into account in substantiating the arm’s length interest rate?

Based on transfer pricing regulations and STA guidelines, the arm’s length interest rate should be established on a ‘separate entity’ basis (i.e. borrower and its subsidiaries); however, as mentioned above the STA and in case law references indicating that ownership insight and control should be adjusted for. As part of the STA arguments for such adjustments it has been mentioned that OECD acknowledge that the “separate entity” basis does not need to be adhered in all instances and for example passive association/implicit support can be said to be allowed to adjust for based on OECD Guidelines 7:13. Based on our knowledge, the STA has so far not applied or argued for any adjustments for passive association/implicit support.

Are foreign comparables accepted?

Foreign comparables are accepted to the extent the market is sufficiently comparable and adjustments can be made if they can improve the comparability.

CASH POOL

How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?

The terms and conditions of the deposits and borrowings should be at arm’s length for both the debtor and the creditor. Long term balances with the cash pool could be re-characterised into long term loans.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?

The transfer pricing methodology preferred for determining interest rate on borrowings/deposits is the CUP method. Both external and internal CUPs are commonly used for cash pools. However, the specific facts of the transactions under review should be taken into consideration.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?

In case of a zero balance cash pool the remuneration for the cash pool header is generally considered a service fee based on a TNMM approach. This set-up however requires cross guarantees to be in place ensuring no credit risk remaining at the CPL. In case of a target balancing cash pool, the remuneration is typically considered the difference between interest income and interest expenses (and other related financial expenses).

INTERCOMPANY GUARANTEES

What is your tax authority’s approach towards recognising guarantees?

It is stated in guidelines provided by the STA that guarantees are a service for which a fee should be charged. However, such arguments have successfully been challenged in case law. Due to this the STA has specified numerous situations where no guarantee fee is necessary. Letters of Comfort and Letters of Intent might be viewed as guarantees depending on the circumstances. Based on the current case law, payments of guarantee fees from Swedish entities would generally not be deductible if not supported with actual benefit for beneficiary or cost to guarantor.
How is a guarantee fee characterised?
A guarantee fee is seen as service fee.

To what extent are implicit guarantees recognised?
There are no regulations or guidance given by the STA. So far we are not aware of any circumstance where the STA has taken the view that an implicit guarantee should have been recognised and adjusted for.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>✓</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>x</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>✓</td>
</tr>
</tbody>
</table>

In general, any methodology which could substantiate with sufficient likelihood that the price applied is reasonable would most likely be accepted by the STA. Generally, the STA has based their arguments for payment of guarantee fees on subjective approximations without substantiating the actual value with any method.

Are foreign comparables accepted?
Foreign comparables are accepted to the extent the market is sufficiently comparable and adjustments can be made if they can improve the comparability.

**Documentation**

**Documentation requirements**
All intra-group transactions over certain levels should be covered by transfer pricing documentation. If the gross amount of financial transactions, services and royalties paid by/to a Swedish entity from a foreign related party exceeds approximately five million SEK (around 550 KEUR) then benchmark support is also necessary for each individual payment.

There are no specific documentation requirements for financial transactions.

**When does documentation need to be available?**
30 days within request by the STA.

**In which language should the documentation be prepared?**
The documentation may be prepared in Swedish, Danish, Norwegian or English.

**Advance certainty**

**Are APAs/ATRs available?**
As of 2010, APAs are available in Sweden. Any corporation which is (or is expected to become) liable to taxation, in accordance with Swedish taxation regulations and which is subject to the provisions of a tax treaty, can apply for an APA. APAs are only available in bilateral form for countries with exchange of information clauses in the double taxation agreements with Sweden.
Where does the request for the APA/ATR need to be filed?
The request is to be filed at the STA. The STA charges an administrative fee which is based on the type of application for each country involved in the relevant transaction of 150,000 SEK.

What information is typically required?
The application shall be made in writing and shall contain all information deemed necessary to enable the STA to make a fair decision as to the appropriateness of the taxpayer’s suggested transfer pricing set-up. Some of the basic information required is a functional analysis, an economic analysis and a comparables search, which supports the selection of a transfer pricing methodology. The minimal requirement is at least a similar level of information as required under the documentation rules.

The taxpayer may, prior to an application, request a pre-filing meeting with the STA to discuss the conditions of a potential APA and what information should be included in the application. Such a meeting is highly advisable.

Term of the APA
The APA is based on a mutual understanding between the countries involved for a predetermined period of three to five years.
Switzerland

Transfer pricing rules and regulations

Rules by means of legislation
Switzerland has not released any specific transfer pricing regulations. Inter-company transactions between related entities need to be determined according to third-party prices under the Federal Law on Direct Federal Tax Article 58 and the Federal Law on the Harmonisation of the Cantonal and Communal Taxes Article 24 which both define the calculation of a taxpayer's taxable net profit. Importantly, Articles 58 and 24 deny a tax deduction for expenditure that is not commercially justifiable, and this provides the basis for an adjustment to profits for non-arm’s-length returns.

Rules by means of regulations (decrees, manuals, position papers, etc.)
In addition, there are a number of administrative directives (including circulars and circular letters), which implicitly or explicitly refer to the determination of inter-company transfer prices. The circular letter of 4 March 1997 from the Federal Tax Administration regarding the “1995 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (including 1996 Addendum)” encourages cantons to apply the OECD Transfer Pricing Guidelines in the determination of transfer prices for multinational companies but does not specifically address the usage of transfer pricing methods with respect to loans, guarantees or cash pools.

Rules by means of case law (most relevant ones)
Several cases on transfer pricing have been brought before the Swiss courts, especially concerning the interpretation of ‘costs which are not commercially justifiable’ (e.g. non-arm’s-length transactions of management services, license fees or excessive interest rates on loans made between related parties), the use of company assets by the shareholder on privileged terms, and the restructuring of sister companies by means of non-arm’s-length transactions.

Specific rules PE context
In Swiss federal and cantonal laws, the definition of a PE is the same; that a PE constitutes a permanent place of business in which the business of the headquarters is wholly or partially carried out. This unilateral definition follows, in general, the OECD Model Tax Convention definition. The profit of a Swiss PE of a foreign head office is subject to limited taxation in the same way a company with legal domicile in Switzerland would be taxed. Consequently, the PE is also granted the same tax privileges (holding, mixed and domicile status, participation relief) as a resident company, in the case of it fulfilling the same criteria to obtain such privileges.

Thin capitalisation

Rules by means of legislation and regulations
At the federal level, an instruction was released in June 1997 including safe harbour debt-to-equity ratios which are determined based on the fair market value of a company's assets. According to circular letter no. 6, the Federal Tax Administration believes that the amount of available borrowings should be determined depending on the category of assets as follows:
### Switzerland

**Asset Class**

<table>
<thead>
<tr>
<th>Asset Class</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liquid assets</td>
<td>100%</td>
</tr>
<tr>
<td>Receivables on supplies and services</td>
<td>85%</td>
</tr>
<tr>
<td>Other receivables</td>
<td>85%</td>
</tr>
<tr>
<td>Stock</td>
<td>85%</td>
</tr>
<tr>
<td>Other circulating assets</td>
<td>85%</td>
</tr>
<tr>
<td>Foreign bonds in foreign currency</td>
<td>80%</td>
</tr>
<tr>
<td>Swiss and foreign quoted shares</td>
<td>60%</td>
</tr>
<tr>
<td>Other shares and investments in limited liability companies</td>
<td>50%</td>
</tr>
<tr>
<td>Participations</td>
<td>70%</td>
</tr>
<tr>
<td>Installations, machines, tools, etc.</td>
<td>50%</td>
</tr>
<tr>
<td>Operating real estate</td>
<td>70%</td>
</tr>
<tr>
<td>Villas, parts of real estate, vacation houses and constructible land</td>
<td>70%</td>
</tr>
<tr>
<td>Other real estate</td>
<td>80%</td>
</tr>
<tr>
<td>Cost of constitution or increase of capital and organisation</td>
<td>0%</td>
</tr>
<tr>
<td>Other intangible assets</td>
<td>70%</td>
</tr>
</tbody>
</table>

Regarding finance companies, the safe harbour ratio is 6:7 of the total assets.

**What is the effect of the rules on the deduction of interest?**

The tax authorities may request any information that is relevant for properly assessing a company’s profits. If the taxpayer does not comply, fines may be imposed and the burden of proof moves from the tax authorities to the taxpayer.

A tax adjustment can be imposed by the Swiss Tax Authorities. In practice, the conduct of the taxpayer during the investigation can significantly affect the size of any adjustment, i.e. cooperation is more likely to lead to a satisfactory resolution.

If the taxpayer disagrees with an assessment, he or she is entitled to make a formal appeal to the tax authorities. If the appeal is partly or entirely dismissed, then the taxpayer has the right to appeal to the Cantonal Tribunal and ultimately to the Swiss Federal Supreme Court.

**Are there additional rules on the deductibility of interest/guarantee fees (e.g. safe harbours)?**

Some flexibility is available in the application of these rules, particularly where they interact with the instructions on permissible interest rates. Thus where the combination of a modest interest rate with excessive indebtedness results in an interest charge that is at arm’s length, given the amount of debt that would normally be permissible, it is unlikely that any adjustments would be made to the actual interest paid. Obviously, an excessive interest rate on a high amount of debt would not be acceptable.

**Inter-company loans**

**How is the arm’s length nature of an inter-company loan evaluated?**

Switzerland maintains guidance concerning permitted tax-deductible interest rates on loans. The Federal Tax Administration annually issues instructions (in a circular letter) on the safe harbour maximum and minimum interest rates as set by reference to the prevailing interest rates in the Swiss market. Interest rates for a loan in Swiss
Francs depend on the qualification of the underlying loan. In the circular letter (21 February 2012) the Federal Tax Administration published the safe harbour interest rates applicable to shareholders and inter-company loans denominated in Swiss Francs applicable for 2012.

<table>
<thead>
<tr>
<th>Description</th>
<th>Interest rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>For loans denominated in Swiss Francs made to shareholders and affiliated parties, the interest rates that a Swiss resident shall receive are as follows:</td>
<td></td>
</tr>
<tr>
<td>• Loans financed through equity</td>
<td>1.5%</td>
</tr>
<tr>
<td>• Loans financed through debt: the actual interest incurred plus 0.5% on amounts up to CHF 10m, or plus 0.25% on amounts exceeding CHF 10m (in all cases at least 1.5%)</td>
<td>Margin: 0.25% – 0.5% (total at least 1.5%)</td>
</tr>
</tbody>
</table>

For loans denominated in Swiss Francs received from shareholders and affiliated parties, the interest rates payable are as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Interest rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>• by a Swiss trading or production company for an operational loan</td>
<td>3.75%</td>
</tr>
<tr>
<td>• Swiss holding or asset administration company for an operational loan</td>
<td>3.25%</td>
</tr>
<tr>
<td>• Real estate loans: depending on loan type and level of debt financing</td>
<td>1.5% – 2.75%</td>
</tr>
</tbody>
</table>

If a loan is in foreign currency, the relevant market interest rate applies for Swiss resident borrowers, which is effectively an application of arm’s length principle. Below are details on the safe harbour interest rates applicable for 2012 (circular letter published on 22 February 2012):

<table>
<thead>
<tr>
<th>Country</th>
<th>Currency</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>AUD</td>
<td>5.0%</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>BGN</td>
<td>4.75%</td>
</tr>
<tr>
<td>Canada</td>
<td>CAD</td>
<td>2.25%</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>CZK</td>
<td>2.5%</td>
</tr>
<tr>
<td>Denmark</td>
<td>DKK</td>
<td>2.5%</td>
</tr>
<tr>
<td>European Union</td>
<td>EUR</td>
<td>2.5%</td>
</tr>
<tr>
<td>Great Britain</td>
<td>GBP</td>
<td>2.5%</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>USD</td>
<td>2.5%</td>
</tr>
<tr>
<td>Hungary</td>
<td>HUF</td>
<td>7.75%</td>
</tr>
<tr>
<td>Japan</td>
<td>JPY</td>
<td>1.5%</td>
</tr>
<tr>
<td>New Zealand</td>
<td>NZD</td>
<td>4.5%</td>
</tr>
<tr>
<td>Norway</td>
<td>NOK</td>
<td>3.75%</td>
</tr>
<tr>
<td>Poland</td>
<td>PLN</td>
<td>5.5%</td>
</tr>
<tr>
<td>Romania</td>
<td>RON</td>
<td>6.0%</td>
</tr>
<tr>
<td>Russia</td>
<td>RUB</td>
<td>8.5%</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>SAR</td>
<td>2.75%</td>
</tr>
<tr>
<td>Singapore</td>
<td>SGD</td>
<td>2.0%</td>
</tr>
<tr>
<td>South Africa</td>
<td>ZAR</td>
<td>7.75%</td>
</tr>
<tr>
<td>South Africa</td>
<td>ZAR</td>
<td>7.75%</td>
</tr>
<tr>
<td>South Korea</td>
<td>KRW</td>
<td>4.25%</td>
</tr>
<tr>
<td>Sweden</td>
<td>SEK</td>
<td>3.0%</td>
</tr>
<tr>
<td>Thailand</td>
<td>THB</td>
<td>4.0%</td>
</tr>
<tr>
<td>Turkey</td>
<td>TRY</td>
<td>9.75%</td>
</tr>
<tr>
<td>USA</td>
<td>USD</td>
<td>2.0%</td>
</tr>
</tbody>
</table>
For loans made to affiliated parties, the minimum interest rates that a Swiss resident shall receive are as follows:

- **Loans financed through equity**: loans to affiliated parties shall however at least carry the safe harbour interest rate for loans denominated in Swiss Francs, i.e. 1.5%
- **Loans financed through debt**: actual borrowing costs plus 0.5%, however, at least the safe harbour rates listed above

In practice, there is an interdependence of permissible interest rates and the permissible amount of debt in the context of thin capitalisation. If companies deviate from the safe harbour rates, it is strongly advised that they maintain documentation to support the arm’s length nature of the rates applied, as there have been an increasing number of audits in this area.

**How is the arm’s length nature of the specific terms and conditions of an inter-company loan evaluated?**

There is no specific guidance on how the arm’s length nature of specific terms and conditions of an intercompany loan should be evaluated.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>✓</td>
</tr>
<tr>
<td>External CUP</td>
<td>✓</td>
</tr>
<tr>
<td>Bank quotes (binding)</td>
<td>✓</td>
</tr>
<tr>
<td>Other</td>
<td>✓</td>
</tr>
</tbody>
</table>

In general, the burden of proof within Switzerland lies with the taxpayer regarding the justification of tax deductible expenses (the burden of proof lies with the tax authorities regarding adjustments which increase taxable income).

However, it is recommended to obtain an advanced ruling with the Swiss Tax Authorities where the tax authorities give generally binding information on taxation of a future transaction, if the following conditions are met: the future transaction (or facts) must be described in detail (including names of taxpayers involved) and true; the tax authorities providing for the ruling must be competent; the information of the tax authorities must not be obviously wrong; the taxpayer takes measures which cannot be cancelled easily and the legal situation does not change.

**What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>✓</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>✓</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>✓</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>✓</td>
</tr>
<tr>
<td>Other</td>
<td>✓</td>
</tr>
</tbody>
</table>
The credit rating may be obtained through binding banking offers or is estimated by assessing the probability of default of a given borrower on a standalone basis. The standalone credit rating determines the credit worthiness of a borrower as if it was an independent entity and was to obtain borrowings from the market (on an arm's length basis). However, it is recommended to obtain an advanced ruling with the Swiss Tax Authorities.

How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?
Although there is no formal position on this matter, the estimated credit rating of the borrowing entity which is established on a standalone basis might be adjusted in order to account for the implicit guarantee if this is challenged by the Tax Authorities. However, this depends on each individual case.

Are foreign comparables accepted?
In practice yes, but depending on the case and provided the key terms, such as currency and base rate, are sufficiently comparable or can be adjusted for comparability.

Cash pool
How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?
The arm's length principle applies to the interest and deposit rates charged within intercompany cash pools. The terms and conditions of the borrowings need to be at arm's length for both the cash pool leader and the cash pool participants. Long term balances with the cash pool could be re-characterised into long term loans.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?
Borrowing and deposit rates should be established based on the specific facts and circumstances of the cash pool and corresponding intercompany transaction. The transfer pricing methodology applied in this respect is the CUP method, similar as to the transfer pricing methodologies generally applied in establishing the arm's length interest rates on intercompany loans.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the cash pool leader?
The safe harbour rules for loans to related parties as provided by the Tax Authorities can be applied. For funds up to CHF 10m, the safe harbour margin for the cash pool leader is 0.5%; for funds exceeding CHF 10m, the applicable margin is 0.25%.

In general, a taxpayer should choose the most appropriate transfer pricing method in order to determine the arm’s length remuneration for the cash pool leader. The transfer pricing method chosen should depend on the functions performed and risks assumed by the cash pool leader (for example, routine administrative functions and limited risks at the level of the cash pool leader vs. the cash pool leader bearing the foreign exchange risk and taking on additional functions in relation to investment decisions). Hence, the transfer pricing method applied in practice ranges from the cost plus method on a TNMM basis to the profit split method. In cases where the cash pool leader
performs major investment decisions in addition to its activities as a cash pool leader, the determination of the remuneration via alternative methods might be appropriate.

**Inter-company guarantees**

**What is your tax authority’s approach towards recognising guarantees?**

In general, there is no common practice in relation to intercompany credit ratings and rating approaches in Switzerland. The different cantonal tax administrations may have a different approach. As a standard rule, all cantonal tax administrations follow OECD Guidelines and the separate entity approach. Therefore, a standalone rating for each of the group companies involved should be acceptable. However, we have experienced different discussions where a subsidiary has asked for a better rating due to the fact that the company is part of a group. In addition, there is a trend to ask for guarantee fees where a Swiss HoldCo grants guarantees to group companies irrespective of the rating of the companies involved.

**How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?**

There is no specific guidance or formal position on implicit guarantees; however, the credit rating should generally be established on a standalone basis.

**How is the arm’s length nature of the specific terms and conditions of an inter-company guarantee evaluated?**

In general, the guarantee fee payment shall correspond to the arm’s length principle and be proportionate to the risks assumed by the parent company. In practice and depending on the case, the safe harbour regulations for inter-company loans might be applied if a parent company provides guarantees (i.e. for funds up to CHF 10m, the safe harbour margin applicable for the guarantor is 0.5%; for funds exceeding CHF 10m, the applicable margin is 0.25%).

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>✓</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>✓</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>✓</td>
</tr>
<tr>
<td>Other</td>
<td>✓</td>
</tr>
</tbody>
</table>

There is no formal guidance to support or challenge the use of the benefit approach, cost of capital approach, accounting approach, CUP approach or credit default swap approach. The CUP approach or the benefit approach are used most commonly in practice. However, it is recommended to obtain an advanced ruling with the Swiss Tax Authorities.

**Are foreign comparables accepted?**

Foreign comparables are generally accepted to the extent that the market is sufficiently comparable.
**Documentation**

**Documentation requirements**
There are no specific transfer pricing documentation requirements in Switzerland. However, documents necessary to support a taxpayer’s transfer pricing should be provided upon request from the tax authorities in an audit in order to provide protection against the use of ‘taxation by estimation’.

In more detail, the burden of proof is shared between the tax payer and the tax authority. This effectively means that the taxpayer is required to prove to the tax authorities that the price it has paid for the goods, services and intangibles it has received from a related party is at arm’s length. But also, the Swiss tax authorities have to prove when making adjustments that the compensation for any services rendered by the taxpayer or any intangible or intangibles transferred to a related party does not reach an arm’s length level. In any case, although not legally required, the Swiss taxpayers should maintain appropriate documentation to justify all income and expenses resulting from related party transactions.

There are no specific requirements for intercompany loans/guarantees/cash pools.

**What is the deadline for submitting the documentation?**
There is no formal deadline.

**In which language should the documentation be prepared?**
The documentation can usually be provided in one of the official languages that are most commonly used (German, France, Italian) or English.

**Advance certainty**

**Are APAs available?**
There are no formal procedures for agreeing pricing policies in advance with the tax authorities in Switzerland. The advance pricing agreements (APAs) procedure is therefore informal in its nature. APAs are available to all industries (unilateral and bilateral).

**Where does the request for the APA need to be filed?**
The APA process in Switzerland is rather informal. A close relationship between the taxpayer, the advisors and the Swiss Federal Tax Administration is often required to secure a smooth process. The request for the APA must be submitted directly to the Swiss Federal Tax Administration.

**What information is typically required?**
One prerequisite for the Swiss Federal Tax Administration to accept an APA request and to enter into negotiations is a full disclosure of information which is relevant to resolve the APA application. In this context, a transfer pricing study is the central document relevant to the negotiations.

**Term of the APA**
The existing APAs in Switzerland typically cover a period of three to five years. Depending on the industry and the complexity of the case, agreement on shorter or longer APA periods are possible. The longest current APA has a term of 10 years.
Turkey

Transfer pricing rules and regulations

Rules by means of legislation

- **Article 13 of Turkish Corporate Tax Law (‘CTL’):** Turkish transfer pricing law is part of the Turkish CTL effective as of 1 January 2007. Transfer pricing regulations under Article 13 of CTL follow the arm’s-length principle as provided in the OECD Guidelines and are applicable to all financial, economic, commercial transactions and employment relations between associated parties.

Rules by means of regulations (decrees, manuals, position papers, etc.)

- **General Communiqué No.1 (November 2007):** Deals with disguised income distribution via transfer pricing.
- **Communiqué No:2 (April 2008):** A supplementary document to the first communiqué.

There are no specific rules and regulations for intercompany loans/guarantees/cash pools under Turkish transfer pricing legislation.

Thin capitalisation

Rules by means of legislation and regulations

- **Article 12 of CTL numbered 5220**
- **Section 12 of the Communique No:1 of CTL**

According to Turkish thin capitalisation regulations, if the ratio of the borrowings from shareholders or from persons related to the shareholders exceeds three times the shareholders’ equity of the borrowing company at any time within the relevant year, the exceeding portion of the borrowings will be considered thin capital.

Except for loans received from credit institutions that provide loans only to related companies, half of the loans received from related banks and similar financial institutions are taken into account for thin capitalisation calculations. In other words, the loan received only from these institutions will not be considered as thin capital until the amount of the borrowing exceeds six times the shareholders’ equity. The equity capital is the equity of the corporation at the beginning of the fiscal year. The equity capital represents the total amount of the shareholders’ equity.

What is the effect of the rules on the deduction of interest?

In the scope of the CTL, the interest paid or accrued and similar payments on the portion of the loan which is deemed as thin capital are re-classified at the end of the relevant fiscal year as hidden profit distribution (deemed dividend) and subject to dividend taxation rules. That is, the interest, foreign exchange losses and other similar expenses calculated over the portion of the loans that are considered as thin capital are treated as non-deductible for corporate income tax purposes and subject to 20% corporate tax. Additionally, for the company that uses thin capital, there will be an additional tax assessment with penalty for the interest and similar payments for withholding tax over dividend distribution. The rate of withholding for non-resident corporations is 15%. This rate may reduce based on certain conditions for certain double tax treaties.
Are there additional rules on the deductibility of interest/guarantee fees (e.g. safe harbours)?

Under Turkish tax legislation, the main principle with respect to the deductibility of expenses is that the expenses related to the generation of commercial income and maintaining commercial activities should in principle be treated as deductible expense for income and corporate tax purposes as long as they are actually related with its business.

The general principle for tax deductibility is that the payment should be a necessary business expense and it should be properly documented in accordance with the relevant provisions of the Turkish transfer pricing regulations and those in the local tax procedural law.

**Intercompany loans**

**How is the arm’s length nature of an intercompany loan evaluated?**

There is no specific rule for evaluating the arm’s length nature of intercompany loans. It is evaluated in accordance with the OECD Guidelines and all factors of a transaction should be taken into account when establishing whether it has been established in accordance with the arm’s length principle, including:

- The question whether the loan would have been made at all in the absence of the relationship;
- The amount which the loan would have been in the absence of the relationship; and
- The rate of interest and other terms which would have been agreed in the absence of the relationship.

**How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?**

In principle, for the determination of arm’s length interest rate the terms and conditions (e.g. the currency of the loan, the amount and duration of the loan and the degree of risk involved when establishing the pricing) should be taken into account in order to be able to make comparability analysis.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>√</td>
</tr>
</tbody>
</table>

In the CUP method, if the internal comparables are sufficient to reach an arm’s-length price, there is no need to find an external comparable. If there is no internal comparable, external comparables should be used after making a comparability analysis and the required amendments. Bank quotes are accepted provided that they are arm’s length.

What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity?
There is no standard developed or sophisticated approach in practice currently and the legislation is silent on what to use. Companies do not make such detailed analyses, rather generally bank quotes and other borrowings are taken into account regardless of its comparability. Since there is no standard approach, the preferred method changes depending on merits of each case.

**How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?**
Given that the Turkish transfer pricing practice is relatively new and in development, the approach of authorities has not been tested yet. Hence it may not be possible to provide insight on this point.

**Are foreign comparables accepted?**
It has not yet been tested whether or not foreign comparables are accepted specifically for intercompany loans. There are several other cases where foreign comparables have been used for determination of arm’s length transfer prices by the tax authorities or by the taxpayer. However there is no standard approach on whether foreign comparables are accepted. In one case, the authority accepted foreign comparable but the court rules out that foreign comparable cannot be accepted whereas in one case the taxpayer accepted foreign comparables but authority rejected the utilisation of foreign comparable.

**Cash pool**
**How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?**
This is a developing practice in Turkey and PwC has not seen cases where terms and conditions are evaluated in detail. In principle the terms and conditions of the deposits and borrowings should be evaluated in order to be able to make comparability analysis.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?**
The transfer pricing legislation is silent on the methodologies accepted in this respect and there is no standard approach in practice as well. We think that bank deposit interest rates are generally taken into account when determining the arm’s length interest rates on borrowings and deposits

**Intercompany guarantees**
**What is your tax authority’s approach towards recognising guarantees?**
There is no specific rule under Turkish legislation and it has been not yet been tested by the Turkish tax authorities.

**How is a guarantee fee characterised?**
There are different views among practitioners on whether guarantee fees should be characterised as commercial income (i.e. fees) or interest. The tax authority’s view is that a guarantee fee should be regarded as interest. However PwC’s view is that such a fee should be characterised as commercial income.
To what extent are implicit guarantees recognised?
Under legislation, there is no specific explanation or rule. In practice, so far, we have not seen that implicit guarantees are being recognised. There is no guidance in terms of private letter rulings or court cases.

How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?
There is no specific rule under local legislation and it has been not yet been tested by the Turkish tax authorities.

How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?
This is a developing practice in Turkey and we have not seen cases where terms and conditions are evaluated in detail. In principle the terms and conditions of an intercompany guarantee should be evaluated in order to be able to make a comparability analysis.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?
There is no standard developed and sophisticated approach in practice currently and the legislation does not provide guidance. Companies do not make such detailed analysis; rather bank quotes and other borrowings are taken into account regardless of their comparability. Furthermore it has not yet been tested by the authority whether or not these approaches are accepted, and since there is no standard approach the preferred method changes depending on merits of each case.

Are foreign comparables accepted?
It has not yet been tested whether or not foreign comparables are accepted for intercompany guarantees. There are several other cases where foreign comparables have been used for determination of arm’s length transfer prices. However there is no standard approach on whether foreign comparables are accepted.

Documentation

Documentation requirements
The legislation requires documentation as part of the transfer pricing rules wherein Turkish taxpayers should keep documented evidence within the company in case of any request by the tax authorities. The documentation must represent how the arm’s length price has been determined, and the methodology that has been selected and applied through the use of any fiscal records and calculations, and charts available at the taxpayer.

• The transfer pricing regulations in Turkey have three basic documentation requirements:
• Electronic corporate tax return form about transfer pricing, controlled foreign company and thin capitalisation;
• Annual transfer pricing report; and
• Transfer pricing documentation for taxpayers during the application of an APA.

There are no specific documentation requirements for intercompany loans/guarantees under Turkish transfer pricing rules; however, taxpayers should be able to prove the arm’s length nature of intra-group transactions.
When does documentation need to be available?
The preparation deadline for the annual transfer pricing report is the corporate tax return submission on the 25th day of the fourth month following the end of the fiscal year.

What is the deadline for submitting the documentation?
The submission deadline for the transfer pricing form is the corporate tax return submission (i.e. as attachment to the corporate tax return) on the 25th day of the fourth month following the end of the fiscal year; for the annual transfer pricing report it is 15 days upon request.

In which language should the documentation be prepared?
Transfer pricing documentation should be prepared in Turkish.

Advance certainty
Are APAs/ATRs available?
Yes, as part of the Turkish transfer pricing legislation, the APA procedure has been introduced for corporate taxpayers who desire to obtain some certainty with respect to their transfer pricing issues.

Where does the request for the APA/ATR need to be filed?
The APA application should be made to the relevant tax office for the corporate taxpayer. The corporate taxpayers that are registered to the Major Tax Payers tax office may apply for an APA beginning from 1 January 2008. APA applications are possible for taxpayers that are registered to other tax offices as of 1 January 2009. Moreover, after 1 January 2009, taxpayers that operate in free trade zones in Turkey may apply for APAs with respect to transactions with related parties in Turkey.

What information is typically required?
• Names, identity numbers, addresses, telephone numbers of the taxpayers or representatives of the taxpayers; information about the subject of activity of the taxpayer; summary information on the structure, shareholder structure, sector, economic and legal history of the corporation, information about definition of the related parties and ownership relations of them;
• All the information that includes the functions and the risks of the company;
• Financial statements, sample tax returns, sample foreign transactions agreements of the related parties for last three years;
• Information about different accounting standards and methods that are used by related parties and comparable studies, if any;
• Clarifications, supporting analysis and other studies (comparability analysis, comparable company information, if any; market data, court decisions, scientific researches) on suggested transfer pricing method and conditions for choosing this method;
• Financial data of the taxpayer and documents for last three years related to these data supporting the suggested transfer pricing method;
• If there is more than one comparable data, the method used to determine the arm’s length price range;
• Economic assumptions (profit predictions, currency information, interest rates, etc.) that can affect the financial structure of the taxpayer; and
• Other documents used to determine the arm’s length price.

The administration can demand additional information and documents, if necessary.
Term of the APA
It is stated in the legislation that agreements concluded with the Turkish tax authorities in this respect will be valid for a three year period, maximum.
**United Kingdom**

*Transfer pricing rules and regulations*

**Rules by means of legislation**

- **Part 4 of Taxation (International and Other Provisions) Act 2010:** Provides incorporation of transfer pricing in UK tax law.
- **Part 5 of Taxation (International and Other Provisions) Act 2010:** Sets the procedure for entering into an APA.

**Rules by means of regulations (decrees, manuals, position papers, etc.)**

- **HMRC's International Manual:** Contains guidance on transfer pricing, cross-border financing and thin capitalisation legislation, etc.

**Rules by means of case law (most relevant ones)**

- **DSG Retail and others v HMRC (TC00001) (2009).** The DSG group captive reinsurer insured extended warranties for DSG’s UK customers. The dispute concerned the level of sales commissions and profits received by DSG. The Tax Tribunal rejected DSG’s contentions that the transfer pricing legislation did not apply to particular series of transactions. Furthermore, the Tax Tribunal rejected potentially comparable contracts that DSG had used to benchmark sales commissions. The overall conclusion was that profits should have been distributed on a profit split basis according to the bargaining power of each party involved. The case is important in understanding HMRC’s future approach to transfer pricing.

**Specific rules PE context**

- **ICTA 88, Sections 11 and 11AA and Schedule A1:** Deals with UK branch/PEs of an overseas company; income arising directly or indirectly through or from the branch is taxable hereunder.

*Thin capitalisation*

**Rules by means of legislation and regulations**

- **Part 4 of Taxation (International and Other Provisions) Act 2010:** Includes provisions that incorporate financial transactions.

The (transfer pricing) legislation is principles based and focuses on the ‘could’ and ‘would’ arguments. The arm’s length nature of each transaction should be assessed on a case by case basis. Borrowing capacity should be established on a ‘separate entity’ basis (i.e. borrower and its subsidiaries) and no account should be taken of any guarantees, explicit or implicit, from connected companies.

The arm’s length borrowing capacity should ideally be determined based on comparables; key financial ratios should be used to assess the arm’s length nature of the transaction (e.g. interest cover & gearing/leverage ratios). HMRC guidance does include various comments relating to the impact of several factors and how they may impact the borrowing capacity of an entity, for example, industry (Private Equity is specifically mentioned), asset backed lending, business strategy, etc.
What is the effect of the rules on the deduction of interest?
A tax deduction relating to the interest expense associated with debt which is over and above the arm’s length borrowing capacity will be disallowed for corporate tax purposes. Disallowed interest is categorised as interest for tax purposes with consequences for the withholding tax regime.

Are there additional rules on the deductibility of interest (e.g. safe harbours)?
Debt Cap rules are set out in Part 7 of Taxation (International and Other Provisions) Act 2010. The Debt Cap rules seek to limit the UK tax deduction for finance expense to the worldwide group’s third party finance expense. The UK element of this comparison is basically calculated by aggregating the net finance expense shown in the tax computations of each UK group member that is in a net finance expense position (excluding the de minimis ones) and deducting from that any net finance income (again, per tax computations) of other UK group members. This is compared to the gross finance expense shown in the group’s worldwide consolidated accounts which, since intra-group transactions are eliminated upon consolidation, is the amount of finance expense paid to third parties.

Intercompany loans
How is the arm’s length nature of an intercompany loan evaluated?
UK rules require that account be taken of all factors of a transaction when establishing whether it has been established in accordance with the arm’s length principle, including:

• The question whether the loan would have been made at all in the absence of the relationship;
• The amount which the loan would have been in the absence of the relationship; and
• The rate of interest and other terms which would have been agreed in the absence of the relationship.

The deduction of any interest over and above the arm’s length amount will be disallowed for UK corporate income tax purposes.

How is the arm’s length nature of the specific terms and conditions of an intercompany loan evaluated?
UK rules specifically mention that ‘terms’ should be taken into account when establishing whether a transaction is arm’s length. HMRC guidance specifically makes reference to the currency of the loan, the amount and duration of the loan and the degree of risk involved when establishing the pricing. However, the transfer pricing analysis should not be limited to these factors.

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal CUP</td>
<td>√</td>
</tr>
<tr>
<td>External CUP</td>
<td>√</td>
</tr>
<tr>
<td>Bank quotes</td>
<td>x</td>
</tr>
</tbody>
</table>
Internal and external CUP information is preferable taking into account the creditworthiness of the borrowing entity and the terms and conditions of the transaction.

**What approaches are preferred/generally accepted with respect to establishing the creditworthiness of the borrowing entity, if no formal credit rating is available?**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Notch up/down from parent credit rating</td>
<td>×</td>
</tr>
<tr>
<td>Map S&amp;P/Moody’s ratios to borrower’s ratios</td>
<td>✓</td>
</tr>
<tr>
<td>Use credit scoring tool</td>
<td>✓</td>
</tr>
</tbody>
</table>

The best practice approach is to use a credit scoring tool or to map the borrowing entity’s financial ratios against S&P/Moody’s financial ratios. Taking the parent credit rating is the basis, and notch up/down based on the borrowing entity's profile may be appropriate as well, depending on borrowing entity’s financial profile.

**How is passive association/implicit support taken into account in substantiating the arm’s length interest rate?**

Based on HMRC guidance, the arm’s length interest rate should be established on a ‘separate entity’ basis (i.e. borrower and its subsidiaries) and no account should be taken of any guarantees, explicit or implicit, from connected companies.

**Are foreign comparables accepted?**

Foreign comparables are acceptable to the extent the market is sufficiently comparable.

**Cash pool**

**How is the arm’s length nature of the specific terms and conditions of borrowings/deposits within a cash pool evaluated?**

The terms and conditions of the deposits and borrowings should be at arm’s length for both the debtor and the creditor. The pricing of any ‘non arm’s length’ aspect of a cash pooling arrangement may be adjusted if it creates an advantage to the UK tax payer (i.e. imputation of interest income or disallowance of interest expense). Long term balances with the cash pool may be re-characterised into long term loans.

**What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length interest rate on borrowings/deposits within a cash pool?**

Borrowing and deposit rates should be established based on the specific facts and circumstances of the transaction (creditworthiness, terms and conditions, etc.). The transfer pricing methodologies generally accepted in this respect are the same as the ones generally accepted in establishing the arm’s length interest rates on intercompany loans.
What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length remuneration for the CPL?

In case of a notional cash pool the remuneration for the cash pool header is typically considered a service fee. In case of a target balancing cash pool, the remuneration is typically considered the difference between interest income and interest expenses (and other related financial expenses).

**Intercompany guarantees**

**What is your tax authority’s approach towards recognising guarantees?**

The term ‘guarantee’ is defined very widely and includes a reference to:

- A surety; or
- Any other relationship, arrangements, connection or understanding (whether formal or informal) such that the person making the loan to the issuing company has a reasonable expectation that in the event of default by the issuing company, the person (the lender) will still be paid by, or out of the assets of, one or more companies.

Guarantees, whether explicit or implicit, may be subject to transfer-pricing adjustments, since they constitute a business facility and/or a provision extended to another party, and one which should carry an arm’s length price. The key test is whether a third party would pay for the guarantee/assurance provided.

**How is a guarantee fee characterised?**

At arm’s length, a company will not take on the extra cost of a guarantee unless that guarantee makes the overall cost of finance cheaper than it would be on a standalone basis. If the cost of the guarantee itself is greater than the saving it brings, it will be disallowed to the extent that it causes the total finance costs relating to the guaranteed debt to exceed the standalone arm’s length price.

**To what extent are implicit guarantees recognised?**

Although the tax authorities state in the guidance that implicit guarantees may be subject to transfer pricing adjustments, it also states that the imputation of a transfer pricing adjustment in such circumstances is unlikely based on the ‘passive association’ language contained in the guidelines. The guidance in this area is not definitive. If it can be clearly demonstrated that the involvement of a related party has affected the cost of borrowing for the related party, it may be possible to impute a fee.

**How is passive association/implicit support taken into account in substantiating the arm’s length guarantee fee?**

Based on HMRC guidance, the arm’s length guarantee fee should be established on a ‘separate entity’ basis (i.e. borrower and its subsidiaries) and no account should be taken of any guarantees, explicit or implicit, from connected companies.

**How is the arm’s length nature of the specific terms and conditions of an intercompany guarantee evaluated?**

The terms and conditions of the guarantee should be at arm’s length. If this is not the case, the relevant terms and conditions may be amended which could result in disallowing a loss due to the not at arm’s length terms and conditions or making an adjustment in the pricing of the guarantee.
United Kingdom

What transfer pricing methodologies are preferred/generally accepted in substantiating the arm’s length guarantee fee?

<table>
<thead>
<tr>
<th>Approach</th>
<th>Accepted/Not accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit approach</td>
<td>✓</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>✓</td>
</tr>
<tr>
<td>Accounting approach</td>
<td>×</td>
</tr>
<tr>
<td>CUP approach</td>
<td>✓</td>
</tr>
<tr>
<td>Credit default swaps</td>
<td>×</td>
</tr>
</tbody>
</table>

HMRC’s guidance states that all relevant factors should be considered when pricing a guarantee:

- The obligations of the guarantor;
- Its ability to fulfil them;
- An analysis of the improvement to the borrower’s creditworthiness; and
- Consideration as to whether the guarantee brings the borrower something beyond the implicit parental or group support provided by passive association with fellow group members.

In the past, PwC has used the benefit approach, cost of capital approach and a combination of the two. CDS spreads have been used as a secondary method but caution should be used.

Are foreign comparables accepted?
Foreign comparables are accepted to the extent the market is sufficiently comparable.

**Documentation**

**Documentation requirements**
There are no specific documentation requirements. However the burden of proof that transfer prices are at arm’s length falls on the taxpayer.

**When does documentation need to be available?**
HMRC can require any person to provide them with information or to produce documents by way of a written notice.

**What is the deadline for submitting the documentation?**
Upon written request, documents need to be provided in a reasonable time (one to three months).

**In which language should the documentation be prepared?**
There are no specific documentation requirements, but requested documentation needs to be prepared in either English.
**Advance certainty**

**Are APAs/ATRs available?**
Yes, UK business may request APAs regarding transactions that are subject to Part 4 of Taxation (International and Other Provisions) Act 2010, including financial transactions (covered by an Advance Thin Capitalisation Agreement –ATCA). The APA procedure is established in Part 5 of Taxation (International and Other Provisions) Act 2010 and HMRC’s interpretation is of these rules are provided in a Statement of Practice 3/99.

**Where does the request for the APA/ATR need to be filed?**
General PwC practice would be to contact the competent authority within HMRC directly.

**What information is typically required?**
- Identification of the parties and their historic financial data;
- Description of the transfer pricing issues proposed to be covered by the APA, a functions, assets and risks analysis, and projected financial data in relation to the issues at hand;
- Details on the worldwide group structure, ownership and business operations of the group to which the taxpayer belongs;
- Description of the records that will be maintained to support proposed methodology, including comparables analysis (in case of APA);
- A description of current tax inquiries or competent authority claims relevant to the issues covered in the APA;
- Chargeable periods to be covered by the APA;
- Critical assumptions for the proposal and implications of changes to critical assumptions; and
- The formal request for entering into the APA.

**Term of the APA**
Typically five years, but there is no set term requirement.
Glossary
## Glossary

<table>
<thead>
<tr>
<th>Accounting approach</th>
<th>Guarantee fee pricing method: No guarantee fee is recognised. A guarantee fee is only recognised in case of default of the guarantee/beneficiary.</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFR</td>
<td>Applicable Federal Rate</td>
</tr>
<tr>
<td>AOA</td>
<td>Authorised OECD Approach</td>
</tr>
<tr>
<td>APA</td>
<td>Advance Pricing Agreement</td>
</tr>
<tr>
<td>ATCA</td>
<td>Advance Thin Capitalisation Agreement</td>
</tr>
<tr>
<td>ATO</td>
<td>Australian Tax Authorities</td>
</tr>
<tr>
<td>ATR</td>
<td>Advance Tax Ruling</td>
</tr>
<tr>
<td>Benefit approach</td>
<td>Guarantee fee pricing method: With this approach the benefits achieved as a result of the guarantee is split between the guarantor and the guarantee/beneficiary.</td>
</tr>
<tr>
<td>CDS</td>
<td>Credit Default Swap</td>
</tr>
<tr>
<td>CFA</td>
<td>Controlled Foreign Affiliates</td>
</tr>
<tr>
<td>Cost of capital approach</td>
<td>Guarantee fee pricing method: With this approach, the guarantor is remunerated with a fee by the guarantee/beneficiary on the basis of a return on its capital required to support the risk of a potential claim on the basis of the guarantee.</td>
</tr>
<tr>
<td>CPL</td>
<td>Cash pool leader</td>
</tr>
<tr>
<td>CPM</td>
<td>Cost Plus Method</td>
</tr>
<tr>
<td>CRA</td>
<td>Canada Revenue Agency</td>
</tr>
<tr>
<td>CUP</td>
<td>Comparable Uncontrolled Price</td>
</tr>
<tr>
<td>DTT</td>
<td>Double Tax Treaty</td>
</tr>
<tr>
<td>EBIT</td>
<td>Earnings Before Interest and Taxes</td>
</tr>
<tr>
<td>EBITDA</td>
<td>Earnings Before Interest and Taxes, Depreciation and Amortisation</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>EUTPD</td>
<td>EU Transfer Pricing Documentation</td>
</tr>
<tr>
<td>Fin48</td>
<td>Official interpretation of United States accounting rules that requires businesses to analyse and disclose income tax risks</td>
</tr>
<tr>
<td>GAAP</td>
<td>Generally Accepted Accounting Principles</td>
</tr>
<tr>
<td>GECC</td>
<td>General Electric Capital Canada, Inc.</td>
</tr>
<tr>
<td>GECUS</td>
<td>General Electric Capital Corporation</td>
</tr>
<tr>
<td>HMRC</td>
<td>HM Revenue &amp; Customs</td>
</tr>
<tr>
<td>IRS</td>
<td>Internal Revenue Services</td>
</tr>
<tr>
<td>KSA</td>
<td>Saudi Arabia</td>
</tr>
<tr>
<td>LIBOR</td>
<td>London Interbank Rate</td>
</tr>
<tr>
<td>MAP</td>
<td>Mutual Agreement Procedure</td>
</tr>
<tr>
<td>MNE</td>
<td>Multinational Enterprise</td>
</tr>
<tr>
<td>Moody’s</td>
<td>Moody’s Investors Service, Inc., Moody’s Analytics, Inc. and/or their affiliates.</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
</tr>
<tr>
<td>OECD Guidelines</td>
<td>2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations</td>
</tr>
<tr>
<td>OECD PE Report</td>
<td>OECD report on Attribution of Profits to Permanent Establishments</td>
</tr>
</tbody>
</table>
Guarantee fee pricing method: the guarantee fee is quantified by approximating the guarantor’s potential risk of loss as a result of pledging the guarantee. Under this approach, two variables are estimated to calculate the guarantee fee: (i) the assets at risk, and (ii) the risk of the loss factor.

S&P
Standard & Poor's Financial Services LLC, a subsidiary of The McGraw

TOC
Tax Court of Canada

TNMM
Transactional Net Margin Method

WHT
Withholding tax
Contacts
Contacts list

Global Financial Services Transfer Pricing leader
Aamer Rafiq
+44 20 7212 8830
aamer.rafiq@uk.pwc.com

Americas
Argentina
Jose Maria Segura
+5411 4850 6720
jose.maria.segura@ar.pwc.com

Brazil
Cristina Medeiros
+55 11 3674 2249
cristina.medeiros@br.pwc.com
Alvaro Taiar
+55 11 3674 3833
alvaro.taiar@br.pwc.com
Ivo Rocha
+55 11 3674 2400
ivo.rocha@br.pwc.com

Canada
Jeff Rogers
+1 416 815 5271
jeff.rogers@ca.pwc.com
Emma Purdy
+1 416 941 8433
emma.j.purdy@ca.pwc.com

Colombia
Carlos Mario Lafaurie Escorce
+571 6340555 404
carlos_mario.lafaurie@co.pwc.com
Jorge Ricardo Suárez Rozo
+571 6340555 357
ricardo.suarez@co.pwc.com
Francisco Javier Gonzáles Ceballos
+571 6340555 331
francisco.l.gonzales@co.pwc.com

Mexico
Fred Barrett
+52 555 263 6069
fred.barrett@mx.pwc.com
Ivan Diaz-Barreiro
+52 555 263 6607
ivan.diaz-barreiro@mx.pwc.com
Edgar Ahrens
+52 555 263 8562
edgar.ahrens@mx.pwc.com
Augusto Cesar Montoya
+52 555 263 5822
augusto.montoya@mx.pwc.com

Peru
Rudolf Roder
+511 211 6500 ext 8005
rudolf.roder@pe.pwc.com
Bryan Cottle
+51 1 211 6500 ext 8084
bryan.x.cottle@pe.pwc.com
United States
Adam M. Katz
+1 646 471 3215
adam.katz@us.pwc.com

Arthur Mendoza
+1 415 498 6244
arthur.mendoza@us.pwc.com

Frank Douglass
+1 646 471 2730
frank.m.douglass@us.pwc.com

Junko Yamato
+1 646 471 6944
junko.yamato@us.pwc.com

Krishnan Chandrasekhar
+1 312 298 2567
Krishnan.Chandrasekhar@us.pwc.com

Mac Calva
+1 646 471 2368
mac.calva@us.pwc.com

Uruguay
Daniel García
+598 2 916 0463
garcia.daniel@uy.pwc.com

Javier Cots
+598 2 916 0463
javier.cots@uy.pwc.com

Venezuela
Elys Aray
+58 241 825 2361
elys.aray@ve.pwc.com

Alberto Mendez
+58 212 700 6344
alberto.j.mendez@ve.pwc.com
Contacts

**Asia Pacific**

**Australia**
Nick Houseman  
+61 2 8266 4647  
nick.p.houseman@au.pwc.com

Danielle Donovan  
+61 7 3257 8102  
danielle.donovan@au.pwc.com

**China, People’s Republic of**
Phillip Mak  
+852 2289 3503  
phillip.mak@hk.pwc.com

David McDonald  
+852 2289 3707  
david.mcdonald@hk.pwc.com

**Hong Kong**
Phillip Mak  
+852 2289 3503  
phillip.mak@hk.pwc.com

David McDonald  
+852 2289 3707  
david.mcdonald@hk.pwc.com

**India**
Dhaivat Anjaria  
+91 22 6689 1333  
dhaivat.anjaria@in.pwc.com

**Indonesia**
Ay Tjhing Phan  
+62 21 5289 0658  
ay.tjhing.phan@id.pwc.com

**Japan**
Ryann Thomas  
+81 3 5251 2356  
ryann.thomas@jp.pwc.com

Naoki Hayakawa  
+813 5251 6714  
aoki.hayakawa@jp.pwc.com

**Korea, Republic of**
Han-Jun Chon  
+822 3781 3489  
hjchon@samil.com

**Malaysia**
Anushia Joan Soosaipillai  
+60 3 2173 1419  
anushia.joan.soosaipillai@my.pwc.com

**Middle East**
Mohamed Serokh  
+971 4 304 3956  
mohamed.serokh@ae.pwc.com

**New Zealand**
Erin Venter  
+64 9 355 8862  
erin.l.venter@nz.pwc.com

**Singapore**
Paul Lau  
+65 6236 3733  
paul.st.lau@sg.pwc.com

Carrie Lim  
+65 6236 3650  
carrie.cl.lim@sg.pwc.com

**Taiwan**
Richard Watanabe  
+886 2 2729 6704  
richard.watanabe@tw.pwc.com
Europe
Austria
Herbert Greinecker
+43 1 501 88 3300
herbert.greinecker@at.pwc.com

Doris Bramo-Hackel
+43 1 501 88 3232
doris.bramo-hackel@at.pwc.com

Marianna Dosza
+43 1 501 88 3239
marianna.dozsa@at.pwc.com

Belgium
David Ledure
+32 2 710 7326
david.ledure@pwc.be

Denmark
Jørgen Juul Andersen
+45 39 45 94 34
jju@pwc.dk

Anne Mette Nyborg
+45 3945 3346
abo@pwc.dk

Rasmus Steiness
+45 3945 3816
rst@pwc.dk

Finland
Sari Takalo
+358 9 2280 1262
sari.takalo@fi.pwc.com

France
Pierre Escaut
+33 1 56 57 42 95
pierre.escaut@fr.landwellglobal.com

Gilles Vincent du Laurier
+33 1 56 57 46 80
gilles.vincent.du.laurier@fr.landwellglobal.com

Germany
Jobst Wilmanns
+49 69 9585 5835
jobst.wilmanns@de.pwc.com

Greece
Antonis Desipris
+30 210 68 74 016
antonis.desipris@gr.pwc.com

Hungary
Zaid Sethi
+36 1 461 9289
zaid.sethi@hu.pwc.com

Aniko Refi
+36 1 461 9826
aniko.refi@hu.pwc.com

Iceland
Jón Ingi Ingibergsson
+354 550 5342
jon.i.ingibergsson@is.pwc.com

Ireland
Barbara Dooley
+353 1 792 7911
barbara.dooley@ie.pwc.com

Italy
Alessandro Caridi
+39 02 9160 5003
alessandro.caridi@it.pwc.com

Luxembourg
Begga Sigurdardottir
+352 49 48 48 3194
begga.sigurdardottir@lu.pwc.com

Netherlands, The
Michel van der Breggen
+31 88 792 75 23
michel.van.der.breggen@nl.pwc.com
Poland
Piotr Wiewiorka
+48 22 523 4645
piotr.wiewiorka@pl.pwc.com

Portugal
Jaime Esteves
+ 351 21 359 9212
jaime.esteves@pt.pwc.com
Leendert Verschoor
+351 21 359 9642
leendert.verschoor@pt.pwc.com

Romania
Ionut Simion
+40 21 225 3702
ionut.simion@ro.pwc.com
Mihaela Popescu
+40 21 225 3429
mihaela.popescu@ro.pwc.com
Olivia Chitic
+40 21 225 3408
olivia.chitic@ro.pwc.com

Spain
Michael Walter
+34 91 568 4464
michael.w.walter@es.landwellglobal.com
Javier Gonzalez Carcedo
+34 91 568 4542
javier.gonzalez.carcedo@es.landwellglobal.com
Alexis Insausti
+34 91 568 4407
alexis.insausti@es.pwc.com

Sweden
Pär Magnus Wiséen
+46 10 2133295
paer.magnus.wiseen@se.pwc.com

Switzerland
Stephanie Pantelidaki
+41 58 792 462
stephanie.pantelidaki@ch.pwc.com
Karl-Heinz Winder
+41 58 792 42 47
karl-heinz.winder@ch.pwc.com

Turkey
Baris Yalcin
+90 212 326 6536
Baris.Yalcin@tr.pwc.com

United Kingdom
Aamer Rafiq
+44 20 7212 8830
aamer.rafiq@uk.pwc.com
Victoria Horrocks
+44 20 7804 7084
victoria.j.horrocks@uk.pwc.com
Stephen Morgan
+44 161 245 2387
stephen.morgan@uk.pwc.com
Loic Webb-Martin
+44 20 7213 5451
loic.webb-martin@pwc.uk.com
Kevin Smith
+44 20 7804 5834
smith.kevin@uk.pwc.com
Daniel Alter
+44 20 7212 3818
daniel.alter@uk.pwc.com
Wout Moelands
+44 20 7213 8168
wout.y.moelands@uk.pwc.com
What do dozens of countries around the world have in common? For starters, they all have vast and complex transfer pricing regulations related to inter-company financial transactions and loans. But that's where the similarity ends. Because every country's individual rules vary – a lot – tax professionals need to know and understand each applicable rule. Gathering such information is a daunting task, to be sure, but PwC's *Navigating the complexity – findings from a financial transactions transfer pricing global survey* helps simplify the process.

This book compiles global survey findings about the transfer pricing environment of over 40 countries, giving tax professionals a convenient reference to a complex subject matter. From arm's length interest rates and guarantee fees, to cash pool and thin capitalisation rules, this global study guides tax professionals so they can successfully navigate these complex laws and assure stakeholder compliance.