

# **Transfer Pricing Rules**

## **Consultation Document**

**Closing Date: 28 February 2022**



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## **1. Background**

The Maltese government is committed to implement specific transfer pricing rules in accordance with the current global standards related to the arm's length principle as part of Malta's Recovery and Resilience Plan that was agreed with the EU Commission in September 2021 and approved by ECOFIN in October 2021. Furthermore, the Commissioner for Revenue has received various representations from the private sector requesting certainty on transfer pricing, a subject that has become increasingly important in the global commercial world and an increasingly challenging and complex economic environment.

For this purpose, during 2021, an enabling provision (Article 51A) has been introduced into the Income Tax Act enabling the making of rules in relation to transfer pricing and Advance Pricing Agreements (APAs).

The Commissioner for Revenue, through this document, is seeking feedback in relation to a set of transfer pricing rules drafted with a view to implement legislation prescribing the requirement for the application of the arm's length principle for the pricing of transactions between associated enterprises falling within the scope of the rules. The requirement is a computational rule for the purposes of the Income Tax Acts and does not propose to impact the actual commercial arrangements between the parties. The prescribed methodology is based on the internationally recognised arm's length principle which essentially seeks to establish what the price would have been had the transactions been carried out under comparable conditions by independent parties. Moreover, through advance pricing agreements, the draft rules aim to provide a framework intended to grant certainty of outcomes to taxpayers in relation to cross-border transactions.

In particular, the Commissioner for Revenue invites all interested parties to:

- Provide general comments on the direction of the tax policy in the area of transfer pricing;
- Provide your views on all items in the draft rules, in particular those that are in brackets;
- Suggest any alternative approaches to those proposed in the draft transfer pricing rules;
- Provide comments on relevant issues that may not be addressed, or not sufficiently addressed, in the proposed rules.

## **2. Consultation Period**

The consultation period will end on 28 February 2022. Any submissions received after this date may not be considered.



### **3. Response:**

Please respond by email on:

ictu\_transferpricingconsultation.mfe@gov.mt

Alternatively, any participant may respond by post to:

Office of the Commissioner for Revenue,  
International and Corporate Tax Unit  
AM Business Centre,  
Labour Road,  
Zejtun, ZTN 2401  
(Transfer Pricing Rules- Public Consultation)

### **4. Post-Consultation**

The responses received as part of this consultation process will form part of the Commissioner for Revenue's considerations in the formulation of the final transfer pricing rules that shall be published by way of a legal notice during the last quarter of 2022.



## **Annex 1 – General description of the rules**

It is envisaged that the proposed transfer pricing rules (the rules) shall come into force with effect for financial years commencing on or after 1 January 2024.

The rules shall be applicable to cross-border arrangements entered into between associated enterprises as defined.

Bodies of persons will fall within the purport of associated enterprises when there is a direct or indirect control through a minimum holding of more than 50% of the voting rights or ordinary share capital or by virtue of any powers conferred by the articles of association or other document regulating the controlled body of persons. Bodies of persons subject to common control by virtue of the above-mentioned thresholds will also be within the scope of the rules.

Specific provisions relating to dealings and arrangements between a company (or other body of persons, where applicable) and its permanent establishment have been included.

Micro, small or medium-sized enterprises shall be excluded from scope. The rules shall also not apply where the aggregate arm's length value of all cross-border arrangements do not exceed a *de minimis* threshold that is yet to be determined.

The rules define the "arm's length amount" and provide for the determination of such amount on the basis of methodologies designated by the Commissioner for Revenue in guidelines yet to be published. It is envisaged that the OECD Transfer Pricing Guidelines will constitute an important source of reference in the application of the rules.

The income chargeable to tax of companies that fall within scope of the rules will be computed with reference to the arm's length amounts of incomes and expenditures. The rules provide for corresponding adjustments to be made in computing the chargeable income of other parties to the arrangement where such income falls within the scope of Maltese taxation.

Companies falling within scope must prepare and retain records for the purposes of determining whether, in relation to an arrangement, the total income of the company has been computed in accordance with the rules. Further details relating to such documentation will be included in guidelines.

The rules also provide a formal framework for the request and issue of Unilateral Transfer Pricing Rulings and APAs (bilateral and multilateral). These are intended to provide certainty in relation to the application of these rules to a transaction or a series of transactions.



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## Annex 2 – Draft Rules

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### TRANSFER PRICING RULES – S.L. 123.2XX OF THE LAWS OF MALTA

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1. (1) The title of these rules is the Transfer Pricing Rules.  
  
(2) These rules shall apply for basis years commencing on or after 1 January 2024 in relation to any arrangement entered into on or after that date and arrangements entered into before that date that are materially altered on or after that date.
  
2. (1) In these rules, unless the context otherwise requires:  
  
“advanced pricing agreement” means an agreement entered into between the Competent Authority and a relevant foreign competent authority under the provisions for a mutual agreement procedure found in –
  - (a) an arrangement referred to in article 76 of the Act;
  - (b) the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/463/EEC);

or

  - (c) any rules or regulations issued under the provisions of article 52B of the Act;

which agreement determines in advance of cross-border arrangements between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment in line with the arm’s length standard as developed through international tax standards.

“arrangement” means any transaction, agreement or dealing of any kind, including any modification to any existing transaction, agreement or dealing, where, at the relevant time, the parties thereto are associated enterprises.

“associated enterprises” means bodies of persons where:

  - (a) one of the bodies of persons controls the other body of persons whether as a result of the fact that it holds, directly or indirectly, a participation of more than fifty per cent (50%) in the voting rights, or the ordinary capital, of the other body of persons or by virtue of any powers conferred by the articles of association or other document regulating the other body of persons,



or

- (b) the same person (or persons) controls two or more bodies of persons whether as a result of the fact that it holds, directly or indirectly, a participation of more than fifty per cent (50%) in the voting rights, or the ordinary capital, of the two or more bodies of persons or by virtue of any powers conferred by the articles of association or other document regulating the two or more bodies of persons.

“company” has the meaning as set out in the definition of the term in article 2(1) of the Income Tax Act:

Provided that the term “company” shall not include any person, who is a micro, small or medium-sized enterprise.

“Competent Authority” means the Minister or his authorised representative. An authorised representative shall be the competent official that is identified as such and whose name and designation are published on the website of the Commissioner for Revenue.

“cross-border arrangement” means an arrangement between associated enterprises where any one of the following conditions is satisfied:

- (i) at least one party to the arrangement is not resident in Malta and at least one party to the arrangement is a company resident in Malta and the arrangement is relevant in ascertaining the total income of that company
- (ii) at least one party to the arrangement maintains a permanent establishment situated outside Malta to which the arrangement is effectively connected and at least one party to the arrangement is a company resident in Malta and the arrangement is relevant in ascertaining the total income of that company;
- (iii) at least one party to the arrangement is not resident in Malta and at least one other party, not being resident in Malta, is a company which maintains a permanent establishment situated in Malta to which the arrangement is effectively connected, or otherwise derives income or gains arising in Malta, and the arrangement is relevant in ascertaining the total income of that company.

“micro, small or medium-sized enterprise” means undertakings fulfilling the criteria laid down in Annex I of Commission Regulation (EU) No 651/2014, as in force at the relevant time.

“relevant material change” means –

- (i) a change of facts from those described in the request for the relevant unilateral transfer pricing ruling or advance pricing agreement, including any other communication connected thereto, and on which the substance of the unilateral



transfer pricing ruling or advance pricing agreement, or any other matter that is not trivial in connection thereto, was based:

Provided that such change has occurred after the date of the the request of the said unilateral transfer pricing ruling or advance pricing agreement;

- (ii) a change in the relevant legislation on which the substance of the unilateral transfer pricing ruling or advance pricing agreement, or any other matter that is not trivial in connection thereto, was based:

Provided that such change has occurred after the date of the said unilateral transfer pricing ruling or advance pricing agreement; or

- (iii) a decision of the directly interested party to withdraw the unilateral transfer pricing ruling.

“unilateral transfer pricing ruling” means a ruling issued by the Commissioner that determines, in advance of an arrangement, an appropriate set of criteria for the determination of the transfer pricing for that arrangement. The said criteria include the method used to arrive at the transfer pricing, comparables and appropriate adjustments thereto and critical assumptions as to future events.

“relevant time” means the earlier of (i) the date on which the arrangement becomes binding on the parties thereto or (ii) the date of commencement of the execution of the arrangement:

Provided that this definition shall be subject to such other methodology as may be determined by means of guidelines issued under article 96(2) of the Income Tax Act.

(2) Any terms not defined in sub-rule (1) of this rule shall, unless the context otherwise requires, have the meaning assigned to them in the Income Tax Act.

3. In ascertaining the total income of any company in accordance with the Income Tax Act:

- (a) where any amount incurred or due under any cross-border arrangement to which these rules apply differs from the arm’s length amount, it shall be deemed that the arm’s length amount was incurred or due instead of the actual amount incurred or due;

- (b) where any amount accrued or derived under any cross-border arrangement to which these rules apply differs from the arm’s length amount, it shall be deemed that the arm’s length amount was accrued or derived instead of the actual amount accrued or derived:

Provided that any adjustment made in terms of paragraph (a) or (b) of this rule shall apply





exclusively for the purpose of ascertaining the total income of one or more parties to the arrangement as the case may be and shall not affect any other person.

4. For the purposes of these rules the “arm’s length amount” in relation to an arrangement is the amount that independent parties would have agreed in relation to the arrangement had those independent parties entered into that arrangement.
5. The arm’s length amount shall be determined on the basis of such methodologies as shall be designated by the Commissioner in Guidelines issued in terms of article 96(2) of the Act.
6. A company, in relation to an arrangement to which these rules apply, shall prepare on a timely basis and retain at its registered office such records as may reasonably be required for the purposes of determining whether, in relation to the arrangement, the total income of the company has been ascertained in accordance with the provisions of these rules.
7. Where:
  - (a) the total income of a person is computed such that, instead of the actual amount incurred, due, accrued or derived under the terms of an arrangement, the arm’s length amount in relation to that arrangement were incurred, due, accrued or derived as the case may be, and
  - (b) any other party to the arrangement is subject to tax in Malta and the arrangement is relevant in ascertaining the total income of that person,

then, subject to this rule , the total income of the any person referred to in paragraph (b) shall be computed as if, instead of the actual amount incurred, due, accrued or derived under the terms of the arrangement, the arm’s length amount in relation to that arrangement were incurred, due, accrued or derived as the case may be.

8. Any adjustments made in furtherance of the requirements of these rules shall be relevant only for the purposes of the Income Tax Acts and shall have no consequences whatsoever under the Value Added Tax Act, the Duty on Documents and Transfers Act or any other law.
9. These rules shall not apply where the aggregate arm’s length value of all cross-border arrangements in the year preceding the year of assessment does not exceed [€---]

Provided that where the parties to a cross-border arrangements referred to in the paragraph above, make a request in writing to the Commissioner for the issuance of a determination stipulating that the provisions of these rules shall apply and the Commissioner issues such a determination, the provisions of these rules shall apply as may be determined.



10. (1) For the purpose of ascertaining the total income of any body of person not resident in Malta, where such body of person maintains a permanent establishment situated in Malta, these rules shall apply *mutatis mutandis* to the notional arrangements or dealings between the permanent establishment and the body of person.

(2) For the purpose of ascertaining any income derived by a company registered in Malta which is attributable to a permanent establishment situated outside Malta, these rules shall apply *mutatis mutandis* to the notional arrangements or dealings between the permanent establishment and the company registered in Malta.

Provided that for the purposes of this rule:

- i. the term “arrangement” shall be construed as including any dealings between the permanent establishment and the company;
- ii. the term “associated enterprises” shall be construed as including the relationship between a permanent establishment and the company;
- iii. a “permanent establishment” shall be treated as if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions;
- iv. the term “cross-border arrangement” shall be construed as including an arrangement, as defined in this rule, between a non-resident company and its permanent establishment situated in Malta and between a company registered in Malta and its permanent establishment situated outside Malta;

Provided further that this rule shall be construed, interpreted and applied to ensure, as far as practicable, consistency between the effect which is to be given to this rule, and the 2010 Report on the Attribution of Profits to Permanent Establishments approved on 22 June 2010 by the Committee on Fiscal Affairs and by the OECD Council on 22 July 2010, as supplemented, modified, revised or otherwise replaced, as may by notice be designated by the Minister responsible for Finance for the purposes of this rule.

### **Unilateral Transfer Pricing Rulings**

11. (1) The Commissioner may issue a unilateral transfer pricing ruling in order to provide certainty in relation to the application of these rules to a transaction or a series of transactions.

(2) A request for a unilateral transfer pricing ruling shall be made by a party to the transaction or series of transactions or his authorised representative (hereinafter in this regulation referred to as “directly interested party”). Such a request shall –

- (i) be made in writing;



- (ii) be made in relation to a specific transaction or a series of transactions;
  - (iii) include a reference to these regulations and, in the case of a request for an advance pricing agreement, the relevant provision concerning mutual agreement procedure;
  - (iv) disclose the identities of the directly interested parties and all other persons involved in the relevant transaction or the series of transactions including the direct and ultimate beneficial owners of such persons. Where any of such parties or persons are not in existence at the time of the request, the request shall indicate this fact, and the details shall be provided as soon such persons come into existence all the relevant details of the relevant transaction or series of transactions;
  - (v) any other details as determined by guidelines issued under the Income Tax Acts.
- (3) A request for a unilateral transfer pricing ruling may only be made in connection with the tax treatment of a transaction or a series of transactions commencing on or after the date that the request was made:

Provided that where the relevant transaction or series of transactions had already commenced on the date when the said request was made, the scope of the request may be extended as follows –

- (i) in the case of a series of transactions, to transactions forming part of such series that took place within the two previous accounting years;
  - (ii) in other cases, to transactions taking place in the year preceding the year of assessment in which the request was made.
- (4) A unilateral transfer pricing ruling may only be issued once all the necessary information, including all the identity details and any other relevant information requested by the Commissioner has been provided [and the applicable fees have been paid] by the directly interested party.
- (5) A unilateral transfer pricing ruling shall specify that it has been issued under the provisions of these regulations.
- (6) The Commissioner shall not unreasonably withhold the issuing of a unilateral transfer pricing ruling. The Commissioner may, however, decline to issue a unilateral transfer pricing ruling where the Income Tax Acts (including any rules, regulations and guidelines issued thereunder) clearly provide sufficient certainty with regard to the tax treatment of the relevant transaction or series of transactions. When the Commissioner declines to issue such a ruling on this basis, he shall issue a notice in writing that includes a reference to the provisions that provide such



certainty. The Commissioner may withhold the issuing of a unilateral transfer pricing ruling where the interested party is not up-to-date in relation to the obligations in relation to tax returns and tax payments at the time that such request is made.

(7) A non-refundable fee of [€---] shall be paid when making a request for a unilateral transfer pricing ruling.

(8) A unilateral transfer pricing ruling shall remain binding on the Commissioner for a period of five years from the date the tax ruling takes effect:

Provided that the Commissioner may, when issuing a unilateral transfer pricing ruling and after considering the circumstances of the request, stipulate that such ruling shall only remain binding for a shorter period, which period is indicated in the ruling itself:

Provided further that a unilateral transfer pricing ruling may also cover the period referred to in the proviso to sub-rule (3) where a request has been made to this effect by the directly interested party. The provisions of this proviso do not affect the operation of any provision relating to interests and penalties under the Income Tax Acts,

(9) A directly interested party shall notify the Commissioner of any relevant material change within fourteen days from the date of its occurrence or the date from when such party becomes aware thereof. Where such notification includes a request for a modification of the relevant unilateral transfer pricing ruling, such a request shall be considered to be a new request for a unilateral transfer pricing ruling.

(10) A unilateral transfer pricing ruling shall have no effect as from the date on which the Commissioner notifies the directly interested party that a relevant material change has taken place.

(11) A unilateral transfer pricing ruling shall be null and void where the notification referred to in sub-rule (9) has not been made or where the unilateral transfer pricing ruling issued by the Commissioner was based on a misrepresentation or the withholding of any relevant facts.

(12) (a) A directly interested party that has made a request under the provisions of sub-rule (2) may refer a matter relating to that request to the Administrative Review Tribunal established by article 5 of the Administrative Justice Act, hereinafter in these rules referred to as “the Tribunal”. Such reference may only be made in relation to matters that had been first raised in correspondence with the Commissioner within the parameters of this rule.

(b) A reference to the Tribunal as per paragraph (a) shall be made by means of an application which shall state clearly all the facts relevant to the matter and the manner in which, in the opinion of the applicant, that matter should be determined.



A copy of the correspondence with the Commissioner referred to in paragraph (a) shall form part of the reference to the Tribunal made by the directly interested party.

(c) The reference to the Tribunal as per paragraph (a) shall be made not later than [183 days] from the date that establishes any of the following instances –

- (i) where the Commissioner has issued the unilateral transfer pricing ruling or a refusal in terms of sub-rule (6), the date of such ruling or refusal, as the case may be;
- (ii) where the Commissioner has not issued the unilateral transfer pricing ruling or a refusal in terms of sub-rule (6), the date when a period of [183 days] have lapsed from the date that the Commissioner received the request for a unilateral transfer pricing ruling or such other longer period as agreed between the Commissioner and the directly interested party.

(d) Where a directly interested party institutes a reference to the Tribunal in accordance with this sub-rule, article 34 of the Income Tax Management Act shall apply *mutatis mutandis*.

(e) A decision by the Tribunal and by any subsequent Court of Appeal on a reference made under this sub-rule shall be binding on the Commissioner and the directly interested person with respect to the specific matter referred to it:

Provided that such decision shall be so binding only if the relevant facts have been correctly stated in the application or otherwise recorded in the records of the case and shall remain binding only as long as there has not been a relevant material change.

### **Renewal of Unilateral Transfer Pricing Ruling**

(13) A directly interested party may request a renewal of a unilateral transfer pricing ruling dealing with an ongoing arrangement under the same conditions as prescribed in this regulation where there has not been a relevant material change since the date of its issue. A request for such renewal shall be made in writing to the Commissioner during the six months preceding the expiry of the relevant unilateral transfer pricing ruling. [A non-refundable fee of [€--] shall be paid when making a request for a renewal of a unilateral transfer pricing ruling.] [Except for the provisions of sub-rule (7),] the provisions of this rule shall also apply to a request for a renewal of a unilateral transfer pricing ruling.

### **Advance Pricing Agreements**



12. (1) The Competent Authority may enter into an advance pricing agreement with the relevant foreign competent authority. An advance pricing agreement may be of a bilateral or multilateral nature.

(2) A request for an advance pricing agreement may only be made in connection with the tax treatment of a transaction or a series of transactions commencing on or after the date that the advance pricing agreement takes effect:

Provided that, where the transaction or series of transactions has already commenced on the date of the request, the scope of the request may be extended to such transactions that took place during the during the previous three basis years.

(3) The provisions of sub-rules (2), (4), (5) and (9) of Rule 11 shall apply mutatis mutandis to a request for an advance pricing agreement.

(4) A non-refundable fee of [€---] shall be paid when making a request for an Advanced Pricing Agreement.

(5) An advance pricing agreement may be entered into for a duration of a period not exceeding five years from the date the advance pricing agreement takes effect as determined during the relevant mutual agreement procedure.

(6) In addition to the period provided in sub-rule (5) an advance pricing agreement may also cover a period not exceeding three basis years preceding the date of the request for the advance pricing agreement where a request has been made to this effect by the directly interested party.

(7) A directly interested party shall notify the Competent Authority of any relevant material change within fourteen days from the date of its occurrence or the date from when such party becomes aware thereof.

(8) An advance pricing agreement shall have no effect as from the date on which the Competent Authority notifies the directly interested party that a relevant material change has taken place. The Competent Authority shall obtain the agreement of the other competent authorities involved before issuing such notification.

(9) An advance pricing agreement shall be null and void where the notification referred to in sub-rule (7) has not been made or where it is based on a misrepresentation or withholding of any relevant facts:

Provided that the provisions of this sub-rule shall only apply where there is agreement to this effect with the other foreign competent authorities involved.

(10) A directly interested party may request a renewal of an advance pricing agreement under the same conditions as prescribed in this regulation where there has not been a relevant material change since the date of its issue. A request for such renewal shall be



made in writing to the Competent Authority during the six months preceding the expiry of the relevant advance pricing agreement. The Competent Authority shall obtain the agreement of the other competent authorities involved before confirming such a renewal. A non-refundable fee of [€--] shall be paid when making a request for a renewal of an advance pricing agreement. Except for the provisions of sub-rule (4), the provisions of this rule shall also apply to a request for a renewal of an advance pricing agreement.