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The EU Joint Transfer Pricing Forum and the Code of Conduct on Transfer Pricing Documentation

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Executive Summary

The EU Joint Transfer Pricing Forum and the Code of Conduct on Transfer Pricing Documentation

1. Introduction

Multinational enterprises are subject to extensive transfer pricing documentation requirements. As each jurisdiction has specific requests, companies operating cross-border have to provide the tax authorities of each country with a different set of detailed information, which can be costly and time-consuming.

Such a burden is an undesirable obstacle to the effective functioning of the European common market. Aware of this problem, the European Commission proposed the adoption of a Code of Conduct on transfer pricing documentation, which provides for common standards and a partial centralization of transfer pricing documentation.

The Code of Conduct is not binding on the Member States, rather operating as soft law, with recommendations and solutions to the practical problems posed by transfer pricing practices.
My paper has analyzed the propositions of the Code of Conduct and the conclusions of the EU Joint Transfer Pricing Forum, considering whether the soft law approach will produce effective results as to the simplification of transfer pricing documentation requirements.

2. Content of the Paper

The first chapter of the paper discusses the problem of transfer pricing documentation requirements and the proposal developed by the EU Joint Transfer Pricing Forum. The chapter briefly describes the provisions of the Code of Conduct, and then comment on the advantages and disadvantages of having EU common guidelines as to documentation requirements.

The first chapter also comments on the legal status of the Code of Conduct, thus introducing the core matter of the paper: How effective is the Code of Conduct, considering its soft law status? Is the soft law approach adequate?

The second chapter analyze whether Member States have already adopted concrete measures for the implementation of the provisions of the Code of Conduct.

Reference is made to those cases where the provisions of the Code of Conduct conflict with a Member State's internal law, or where the internal law does not provide for documentation requirements.

In the case where the States are issuing new legislation to deal with documentation requirements, the paper analyzes whether these provisions already make reference to the guidance contained in the Code of Conduct.

The third chapter comments on the initiative of the Pacific Association of Tax Administrators (PATA), that established some common provisions on documentation requirements for companies that operate in Australia, Canada, Japan, New Zealand and the United States. A comparison is made between the approach adopted in PATA and the approach adopted in the Code of Conduct.

The fourth chapter evaluates the results of past experiences in which the soft law approach was adopted. Reference are made to the Arbitration Convention and the Code of Conduct for the effective implementation of the EU Arbitration Convention. Although not obliged to adopt the Code of Conduct, most Member States seem to welcome the initiative of the Joint Transfer Pricing Forum.

Finally, based on the past experience of EU in the field of soft law, and the progress made by the Member States in implementing the provisions of the Code of Conduct, I make some considerations on the effectiveness of the application of the Code of Conduct, discussing whether the approach adopted by EU is suitable from a policy perspective.

Overview of Main Findings

"Law" is traditionally a binding instrument, a direct order given by someone in a higher hierarchical level (the State) to people subject to their jurisdiction. If the latter do not obey, they are subject to penalties. The law is thus an impositive command.

Impositions tend to work better in those cases where there is a clear definition of authority. There is an authority (and only one) which has powers towards the people, thus imposing the rules. This clear definition of authority and jurisdiction is not present in the international scenario. When various States come together to achieve a common goal, the interaction among them can not be based on impositions, but rather on cooperation.

Rules can only be implemented on the basis of consensus. This is why article 94 of the EC Treaty requires unanimity. It is not possible to issue a Directive for the harmonization of national rules without the unanimous approval of the Council.

It is difficult to achieve unanimity in tax matters. Member States are not likely to agree on rules that will cause a reduction of their tax revenues. They are not prepared to give away their taxing rights in the name of harmonization.

This is where soft law comes into play. It allows member States to make progress on a certain topic even though there is no unanimity on the matter. Jurisdictions with a similar approach on a certain issue can adopt further steps to bring their legislation to a common ground. Disagreeing member states can keep their current system and learn from the experience of those countries going for harmonization. The solution is flexible enough to accommodate competing interests.

That makes soft law a convenient instrument for tax harmonization. Its flexibility allows member states to agree on general principles and conduct the implementation of guidelines in the manner that best suits its individual needs.

Flexibility is the main advantage of soft law. Member States will only be able to make progress in the field of taxation if they have the chance to adhere to the harmonized rules in their own pace, at their own manner. It is better to reach consistency on a long-term basis than not achieving consistency at all. It is better to have a consensus on basic principles than wait for unanimous approval on controversial issues.

Soft law increases the cooperation between Member States and favours an approximation between governments and the business community. Multinational enterprises should be invited to participate in the discussions of international tax issues. They will assist Member States to find a balance between the interest of tax administrations and the interest of taxpayers. The experience of the EU Joint Transfer Pricing Forum shows that governments and business community can work together to develop solutions for a better functioning of the internal market. Soft law expands dialogue and allows understanding between different players in the international scenario.

In light of the above, the Code of Conduct is likely to be introduced within a shorter period by those jurisdictions where the legislation has none or few provisions on documentation requirements, lacking clarification on important issues that have been regulated by the Code of Conduct.

Due to the above, soft law seems to be an adequate policy tool to promote harmonization in the tax field.

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1. Introduction

1.1. General considerations

In 2001, the European Commission conducted a study on tax obstacles to the consolidation of the internal market ("Company Taxation in the Internal Market" - SEC (01) 1681 of October 23, 2001). According to such study, the existence of different transfer pricing rules in each Member State was a major issue for multinational enterprises operating in the EU. The need to comply with different documentation requirements implied a huge tax burden, hindering the effective economic integration[1].

As an attempt to solve such problem, the European Commission decided to establish the EU Joint Transfer Pricing Forum ("Forum"). The Forum was created in June 2002, consisting of one representative from the tax administration of each EU Member State and ten representatives from the business sector[2].

The Forum should propose non-legislative measures to prevent double taxation, reduce compliance costs and harmonize transfer pricing rules within the EU, following the same framework of the OECD Transfer Pricing Guidelines[3].

The Forum worked for almost two years to develop a pan-European approach to documentation issues. Based on their work, the European Commission proposed the adoption of a Code of Conduct on transfer pricing documentation for associated enterprises ("Code of Conduct"). The Code of Conduct was issued on November 10, 2005, and suggests a standard set of documents that multinational enterprises should make available for the tax authorities within EU[4].

The Code of Conduct is not binding on the Member States, rather operating as soft law. This feature brings some doubts as to the effectiveness of its propositions. Will Member States really adopt the suggestions of the Forum? In order to answer this question, it is important to make reference to previous cases where the soft law approach was adopted, examining whether the political commitment made by Member States was held and implemented.

Also, it is important to analyze how jurisdictions outside EU deal with soft law, addressing whether such non-binding measures produced the expected results. Based on this assessment, the paper will discuss whether soft law is the right approach to promote tax harmonization.

1.2. Approaches to documentation requirements

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[1] Commission Staff Working Document. Report on the activities of the EU Joint Transfer Pricing Forum in the field of Documentation requirements – report prepared by the EU JTPF – (Brussels, 07.11.2005) Sec(2005) 543 final.
[2] Commission of the European Communities. Proposal for a Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the EU, International Transfer Pricing Journal, IBFD (January/February 2006), at 35.
[3] Document of the European Commission, see http://europa.eu.int/comm/taxation-customs/taxation/company_tax/docs/jtpf003_en.pdf.
[4] Stephan Schnorberger, Juliane Rosenkranz and Manel Garcia "Transfer Pricing Documentation: The EU Code of Conduct Compared with Member States Rule", Intertax volume 34 (June/July 2006) 305-313, at 305.

Companies that qualify as related parties are required by domestic and international law to apply the arm's length principle to their associated party transactions. In other words, these companies must document that intra-group transactions were performed in market conditions, and that no profit shifting took place. Documentation requirements vary per jurisdiction, though.
Some jurisdictions have quite clear rules on documentation, specifying which kind of evidence multinational enterprises should produce to support their transfer pricing policy. Others adopt a flexible approach, leaving to the taxpayers and the tax authorities certain discretion as to which documents should be presented in each practical case.
Documentation issues are closely related to the burden of proof. Documentation requirements are likely to be more strict when the burden of proof is on the tax authorities[5].

The OECD Transfer Pricing Guidelines tried to provide some guidance on the matter. According to the OECD, both the taxpayer and the tax administration "should endeavour to make a good faith showing that their determinations of transfer pricing are consistent with the arm's length principle regardless of where the burden of proof lies"[6].
Many elements should be taken into account by a Member State when establishing documentation requirements. The process of obtaining information can be quite burdensome for the taxpayers, both from a financial and administrative point of view. Therefore, when setting documentation requirements, a Member State should balance the need to get information for the tax authorities, and the compliance costs created for the companies. [7]

The amount and type of documentation required should be proportional to the circumstances of each case and the amounts at issue. Different compliance standards should apply for different sizes of business. It seems clear that a small company can not be required to produce the same amount of documents required from a big enterprise[8].

Another aspect to be taken into consideration is the need for legal certainty. The taxpayers should have a certain level of assurance in relation to the documents that they might be required to provide. Multinational enterprises should not be taken aback by onerous or extensive requests from the tax authorities. Documentation might have to be provided abroad, or might depend on information that is not easily available to the taxpayer. Thus, it seems important to have a pre-defined list of documents to be produced by the taxpayers for every intra-group transaction, as minimum level of information.

The OECD, however, poses some criticism to such approach. According to the Guidelines, States should avoid to set a fixed list of documents for transfer pricing purposes, because it would "tighten" too much the analysis of intra-group transactions. OECD believes that an exhaustive list of documents would not allow the tax administration to examine the particularities of each case, making the application of transfer pricing rules quite inflexible.

In order to remedy this situation, the OECD prepared an illustrative list of documents that should be provided by multinational enterprises (OECD Guidelines chapter V). When developing such a list, OECD tried to establish rules that are at the same time flexible and straight forward. The list is not exhaustive or compulsory, thus allowing the taxpayer to demonstrate its transfer pricing policy with any additional documents available. At the same time, it is simple and clear-cut, providing important advice as to which documents a multinational enterprise should produce in order to have a good level

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[5] Summary Record of the First Meeting of the EU Joint Transfer Pricing Forum- held in Brussels on 3 October 2002, (International Bureau of Fiscal Documentation March/April 2003), 75-80, at 76.
[6] Paragraph 5.2, chapter 5, OECD Transfer Pricing Guidelines
[7] Paragraph 5.6, chapter 5, OECD Transfer Pricing Guidelines
[8] See supra note 1, report on the activities of the EU Joint Transfer Pricing Forum, at page. 11.

of protection. When the listed documents are available, the enterprises have greater chances to support their transfer pricing policy.

The problem of a "flexible" approach is that the tax authorities are also granted a certain level of discretion. Besides, as the list would not be compulsory, each Member State can still impose additional requirements. This may constitute an issue in the context of EU law. is a trouble in the EU scenario. The existence of different documentation requirements within the EU can make domestic transactions less administratively burden than cross-border transactions, thus creating restrictions for enterprises that want to invest outside their country. This is in clear contradiction with the objectives of the internal market.
The Commission acknowledges the problem, but believes it is a reflection of the lack of harmonization in the field of direct taxation[9]. In other words, only the harmonization of the legislation of the Member States could pose a solution to the increasing compliance costs created by documentation requirements.
Faced with that, the EU Commission decided to establish the Forum and take further steps towards the creation of consolidated documentation requirements.

1.3. The Code of Conduct – Conclusions of the EU Joint Transfer Pricing Forum

The Code of Conduct summarizes the conclusions reached by the experts that took part in the EU Joint Transfer Pricing Forum. As mentioned, the main objective of this initiative was to standardise and centralize the documentation that multinational enterprises operating in the European Union should present to their tax authorities[10].
The Forum analyzed three possible approaches to documentation requirements: (i) "best practice", (ii) a set of "standardized documentation rules", and (iii) a "centralised documentation".

According to the best practice, different legislations and administrative rules dealing with documentation requirements would be analyzed to achieve, on the basis of consensus, the most suitable features that later on would be used from all the Member State. In short, the best practice approach is based on a collection of the most relevant provisions of each Member State on documentation requirements. This "collage" would work as an EU guideline on documentation requirements. This guideline would not be prescriptive, and would not require the Member States to actually harmonize their rules on documentation requirements. It would just be a set of principles followed across EU. Such a flexible approach would allow the Member States to reach a higher level of consistency and, at the same time, would grant the taxpayers more freedom to select supporting evidence for their intra-group transactions. However, there would still be room for uncertainty.

The second approach analysed by the Forum - the standardized documentation rules – is more prescriptive than the first. It would really require the Member States to agree on a harmonized set of binding rules. The taxpayer would still prepare separate documentation packages for each Member State, but these packages would basically consist of the same documents. The existence of a standard provision on documentation contributes to the reduction of compliance costs, besides increasing transparency and certainty in the transfer pricing audits. The negative point is that the taxpayers would not have flexibility in the selection and preparation of supporting evidence.

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[9] Commission of the European Communities " Proposal for a Code of Conduct on Transfer Pricing Documentation for associated Enterprises in the EU"(International Bureau of Fiscal Documentation January/February 2006), 35-43, at 35.
[10] See supra note 1, report on the activities of the EU Joint Transfer Pricing Forum, at page 36.

The last approach examined by the Forum – the centralized documentation – consists of the preparation of a basic set of information by one of the entities of the multinational enterprise (usually, the ultimate holding or the head of the group). This basic package would contain general data about the group, such as a description of the corporate structure, the business in which each entity is engaged, as well as the functions, risks and assets relating to their operations. This "blue print" of the group would contain the kind of data that the tax authorities of most jurisdictions would commonly request to the taxpayer during a transfer pricing audit.
The adoption of the centralised approach would thus allow all the entities of the same group to provide consistent information to the tax authorities of different Member States. Besides, there would be an increase in the quality of information provided to the tax administrations, considering that the centralized package would likely be prepared by individuals with more experience and better access to core information of the company.
It is important to stress that the existence of a centralized package of documentation would not prevent the tax authorities of the Member States to make specific requests to the entities operating locally. In this sense, the centralized approach does not create a harmonized approach to documentation requirements between the Member States, and does not allow a significant reduction of compliance costs, because the taxpayers would still have to care about additional requests in each jurisdiction.

Each of these three approaches has pros and cons. Considering that none of them would provide a perfect solution to the matter, the Forum developed a new approach called ‘‘EU Transfer Pricing Documentation" (EU TPD), which combines aspects of the standardized approach and of the centralized (integrated global) documentation approach.

The EU TPD establishes different sets of documentation: a master - file, containing common standardized information relevant for all EU group members (the "Masterfile") and several sets of standardized documentation each containing country specific information ("country-specific documentation").
The EU TPD approach means, therefore, that a multinational group of companies has a standardized and consistent set of documentation - the Masterfile supplemented by country-specific documentation at company level[11].
According to the Code of Conduct, the Masterfile should follow the economic reality of the business and provide information on the multinational group and its transfer pricing system that would be relevant and available to all EU Member States concerned. The Masterfile should contain the following items:

> (a) a general description of the business and business strategy, including changes in the business strategy compared to the previous tax year;
>
> (b) a general description of the multinational group's organisational, legal and operational structure (including an organisation chart, a list of group members and a description of the participation of the parent company in the subsidiaries);
>
> (c) the general identification of the associated enterprises engaged in controlled transactions involving enterprises in the EU;
>
> (d) a general description of the controlled transactions involving associated enterprises in the EU, i.e. a general description of:
> (i) flows of transactions (tangible and intangible assets, services, financial),

[11] See supra note 1, report on the activities of the EU Joint Transfer Pricing Forum, at page 22.

(ii) invoice flows, and
(iii) amounts of transaction flows;

(e) a general description of functions performed, risks assumed and a description of changes in functions and risks compared to the previous tax year, e.g. change from a fully fledged distributor to a commissionaire;

(f) the ownership of intangibles (patents, trademarks, brand names, know-how, etc.) and royalties paid or received;

(g) the group's inter-company transfer pricing policy or a description of the group's transfer pricing system that explains the arm's length nature of the company's transfer prices;

(h) a list of cost contribution agreements, Advance Pricing Agreements and rulings covering transfer pricing aspects as far as group members in the EU are affected; and

(i) an undertaking by each domestic taxpayer to provide supplementary information upon request and within a reasonable time frame in accordance with national rules.

Differently from the Masterfile, the country-specific documentation would only be available to those tax administrations with a legitimate interest in the appropriate tax treatment of the transactions covered by the documentation. As the structures of a MNE groups vary broadly from an organisational and operational point of view, A MNE should be free to move items from the country specific documentation to the Masterfile, maintaining however, the same level of detail as in the country specific documentation. This should allow a multinational group sufficient flexibility to accommodate specific circumstances. Any country specific information and documents that relate to a controlled transaction involving one or more Member States must be contained either in the country specific documentation of all the Member States concerned or in the common Masterfile.

As proposed in the Code of Conduct, the country-specific documentation should contain, in addition to the content of the Masterfile:

(a) a detailed description of the business and business strategy, including changes in the business strategy compared to the previous tax year;

(b) information, i.e. description and explanation, on country-specific controlled transactions, including:
(i) flows of transactions (tangible and intangible assets, services, financial),
(ii) invoice flows, and
(iii) amounts of transaction flows;

(c) a comparability analysis, i.e.:
(i) characteristics of property and services,
(ii) functional analysis (functions performed, assets used, risks assumed),
(iii) contractual terms,
(iv) economic circumstances, and
(v) specific business strategies;

(d) an explanation of the selection and application of the transfer pricing method(s), i.e. why a specific transfer pricing method was selected and how it was applied;

(e) relevant information on internal and/or external comparables if available; and

(f) a description of the implementation and application of the group's inter-company transfer pricing policy.

According to the Code of Conduct, a multinational enterprise should have the possibility of including items in the Masterfile instead of the country-specific documentation, keeping, however, the same level of detail as in the country-specific documentation. The country-specific documentation should be prepared in a language prescribed by the Member State concerned, even if the multinational enterprise has opted to keep the country-specific documentation in the Masterfile.

As commented in the resolution of the Council[12]:"The idea supporting the EU TPD is to create both a basic set of information for the assessment of the group's transfer prices and as a risk assessment tool (i) for taxpayers to identify transactions that may require more detailed explanations and documentation and (ii) for tax administration for case selection purposes and as a starting point for the examination of the company's transfer pricing".

The main advantage of this mixed model over the three initial approaches studied by the Forum is that the EU TPD allows standardization of the documentation requirements without being excessively prescriptive, still leaving certain flexibility for the taxpayer and contributing for the reduction of compliance costs.

Besides establishing the EU TPD approach, the Code of Conduct also propose documentation-related penalties and discusses the use of pan-European databases.[13] These are major innovations.

The Code of Conduct establishes that Member States should not impose penalties where the taxpayers have prepared their set of documents in accordance with the EU TPD, acting in good faith, in a reasonable manner and within a reasonable time.

As to the use of pan-european databases, the Code of Conduct goes further than the OECD Transfer Pricing Guidelines, adopting a broader approach in the definition of market.

When describing the comparability criteria, the OECD mentions the importance of analyzing the economic circumstances under which the taxpayers and the comparable entities operate. According to the OECD Guidelines, comparability requires that "the markets in which the independent and associated enterprises operate are comparable. As a first step, it is essential to identify the relevant market or markets(…) Economic circumstances that may be relevant to determining market comparability include the geographic location (…)."[14]

Following the OECD approach, most tax administrations require their taxpayers to evidence its transfer pricing practices based on local comparables. When using external comparables, the tax administrations themselves usually disregard data of companies that do not operate in the same jurisdiction, although they perform similar functions within the single market.

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[12] Resolution of the Council and of the Representatives of the Governments of the Member states, meeting within the Council, on a Code of Conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD), 1-19, at 8.
[13] Andrew Hickman, "European Union Transfer Pricing Documentation ('EU TPD') – BSFG or JAA?". *Transfer Pricing International BNA*, November 2005.
[14] OECD Transfer Pricing Guidelines, chapter 1, paragraph 1.30.

Thus, a company operating in Italy would only be allowed to support its transfer prices with data from other independent Italian enterprises. The need to search for a different set of comparables in each jurisdiction result in a great burden both for taxpayers and the tax authorities[15].

The Code of Conduct is much more flexible in this regard, establishing that "comparables found in pan-European databases should not be rejected automatically"[16] and that taxpayers may not be penalised by using non-domestic comparables.

1.4. Pros and Cons of the EU TPD

1.4.1. Valuable contributions of the EU TPD

The provisions of the EU TPD are a great contribution for the reduction of compliance costs related to documentation requirements, besides helping the taxpayer to keep track of its intra-group transactions, and assess exposure to tax audits.

The creation of standard sets of documents facilitates the production, management and maintenance of supporting evidence, also establishing a common background for the discussions between taxpayers and the tax authorities.

The fact that information can be partially centralized in one of the entities of the multinational enterprise avoids duplication and increases the quality of the data.

Misunderstandings are avoided, as the information is likely to be produced by individuals with a better understanding of the global transfer pricing policy of the group. The centralization also contributes to gain experience in the preparation of supporting documents, and build some kind of "know-how" in this matter.

From the perspective of the functioning of the single market, the EU TPD helps to reduce an important barrier between the jurisdictions – the barrier of information. The EU TPD assures the tax administrations of the Member States access to the same data, thus eliminating contradictions or misunderstandings in the interpretation of facts or transactions. Mutual agreement procedures tend to be reduced and facilitated.

The use of a common source of information brings consistency to the comparability analysis and reduces the risk that tax authorities apply transfer pricing methods in an incoherent manner. Transparency and a higher degree of certainty were added by the EU TPD.

The Report of the EU Joint Transfer Pricing Forum[17] lists additional advantages of the EU TPD approach, such as:

(a) Advantages for the taxpayer

(i) avoidance of documentation related penalties when the taxpayer complies with the EU TPD, acting in good faith an in a timely manner;
(ii) less probability of being audited,
(iii) shorter tax audits; and

[15] Hickman, supra note 13.
[16] Annex to the Code of Conduct, paragraph 25.
[17] See supra note 1, report on the activities of the EU Joint Transfer Pricing Forum, at page 23.

(iv) reduced risk of double taxation.

(b) Advantages for the tax authorities

(i) possibility of better assessing transfer prices and safeguarding the tax base, due to an increase in the quality of the data;
(ii) better insight into the EU transfer pricing policy of multinational enterprises;
(iii) increase in the effectiveness of risk assessment, and
(iv) reduced administrative costs.

1.4.2. Disadvantages of having EU common guidelines as to documentation requirements

Although the report on the Activities of the Forum stresses the advantages of the EU TPD, practitioners pose serious criticism on some aspects of the proposal. As highlighted in literature[18], "the master file and foreseen increase in information exchange amongst Member State will give tax authorities a view beyond their borders".

Multinational groups therefore have to be consistent in the presentation of facts and the used transfer pricing methods throughout the European Union. For example the EU TPD suggests that taxpayers should also include a list of APAs and rulings as far as group members in the European Union are affected. Some APAs/rulings may in practice contradict with position taken in other countries, which may expose multinational groups to reassessments and penalties.

Another disadvantage pointed out by the authors is the discretion of the tax authorities to establish whether the multinational groups have complied with the EU TPD approach in a reasonable manner and time for the purpose of documentation-related penalties.

Uncertainty is present in the EU TPD also in relation to the use of Pan-European comparables. In fact, companies operating in certain jurisdictions may need to be remunerated in accordance with country specific margins also if they have the same risk, functions and assets.
It is also to be stressed that, depending on the domestic law requirements for transfer pricing documentation, the EU TPD approach may be significantly more burdensome than the current rules.

According to the Code of Conduct, multinationals should be committed to the EU TP documentation approach once it is selected to be used. They can not arbitrarily opt in and out of the EU TP documentation approach.

The most significant disadvantage of the EU TDP approach is, though, that it leaves to the member states the decision on how to implement the EU TPD documentation at national level without any control by the forum or another organization within the EU.

1.5. Status of the Code of Conduct

The Code of Conduct has the status of soft law.

[18] Clive Jie A Joen and Martin Weenink, "E.U. Commission Issues Proposal for Code Of Conduct On Trasfer Pricing Documentation", BNAI Tax Planning International European Union Focus (November 2005),1-6, at 3.

According to the dictionary[19], the term soft law refers to "quasi-legal instruments which do not have any binding force, or whose binding force is somewhat 'weaker' than the binding force of traditional law, often referred to as 'hard law' (…)

In the context of international law, the term 'soft law' usually refers to agreements reached between parties (usually states) which do not amount to international law in the strictest sense. Soft law consists of non-treaty obligations which are therefore non-enforceable (…)The term 'soft law' in the international law context also includes certain types of resolutions of international organizations (e.g. resolutions of the UN General Assembly).

The term 'soft law' is also often used to describe various kinds of quasi-legal instruments of the European Communities: 'codes of conduct', 'guidelines', 'communications' etc. In the area of law of the European Communities, soft law instruments are often used to indicate how the European Commission intends to use its powers and perform its tasks within its area of competence.

Soft law can be used as a synonym for non-binding rules. The designation, however, contradicts the meaning of the expression. Law, by definition, is mandatory. Therefore, an instrument without binding power should never be named law.
According to literature[20], the concept of soft law has three core elements: (i) it is concerned with 'rules of conduct' or 'commitments'; (ii) these rules or commitments are laid down in instruments which have no legally binding force as such, although not being devoid of all legal effect; and (iii) they aim at or may lead to some practical effect or impact on behaviour.

Based on these elements, soft law could be defined as "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain - indirect - legal effects, and that are aimed at and may produce practical effects" [21].
Different kinds of instruments fall within the category "soft law". The aforementioned Author, proposes a classification of these instruments into three different categories, according to their function and objectives.

The first category, named "*preparatory and informative instruments"*, comprises Green Papers, White Papers, action programmes and informative communications. These instruments are adopted with a view to prepare further Community law and policy and/or providing information on Community action. According to the Author, the European Parliament has used these instruments as alternatives to legislation. However, it may be questioned whether they actually constitute soft law at all, as they do not establish any rules of conduct themselves. As such, they can only be regarded as fulfilling a *pre-law* function.

The second category comprises "*interpretative and decisional instruments*", aimed at providing guidance as to the interpretation and application of existing Community law. The interpretative instruments restate or summarise the interpretation that should be given to Community law provisions, also on the basis of the case law of the ECJ. As such, they can be considered to fulfil a *post-law* function, being adopted subsequent to already existing Community law with a view to supplementing and supporting it.

The third category would comprise "*steering instruments"*, which establish or give further effect to

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[19] http://en.wikipedia.org
[20] Linda Senden, "Soft law, Self Regulation and Co-Regulation in European Law: Where do they meet", Electronic Journal of Comparative Law, vol.9.1(January 2005), 1-26, chapter 4.
[21] Senden, supra note 20, chapter 4.

Community policies. “Sometimes this is done in a rather political and declaratory way - in declarations and conclusions - but often also with a view to establishing closer cooperation or even harmonisation between the Member States in a non-binding way, as occurs in particular in recommendations, resolutions and codes of conduct.”[22] Steering instruments are commonly adopted as alternatives to legislation, and could be considered as having a “para-law function”.

The EU Code of Conduct on Transfer Pricing Documentation can be considered a “steering instrument”, since it is a proposal aimed at harmonizing documentation requirements between the Member States in a non-binding manner.
In fact, Member States are free to decide whether the provisions of the Code of Conduct will be implemented in their jurisdiction, and how. The EU TPD may be introduced in the domestic scenario by means of new or amending law. It can also take the form of administrative guidelines compatible with the Code. Member States are free to decide the best approach, and also to establish requirements that are less or more detailed than those proposed in the EU TPD[23].

There is no pattern. Each State can decide on the form that is most suitable to accommodate differences among the business sectors and the sizes of the companies operating in the country[24].
The point that comes into discussion is why the European Council decided to release the Code of Conduct in the form of a steering instrument, instead of issuing a Directive.

A Directive requires unanimous agreement from the Member States[25]. As pointed by Robert Verrue, Director-General of the Commission’s taxation Directorate: “When it comes to taxes, unanimity remains the rule in the European Union and in negotiations with third countries. Experience shows that some member states are very reluctant even to consider co-operation, even when they would gain from it”[26]. Therefore, it seems easier to reach consensus through a non-binding instrument.

The EU is increasingly applying soft law to conduct an approximation between the national laws. Soft law is flexible and allows the Member States to decide on the best way to introduce community principles in their legal system. By allowing Member States to decide on the form, the European Union drives international discussions to the core of the rules.

In this framework, the Code of Conduct encourages Member States to agree on broad objectives, and issue internal legislation aligned with the stated principles. Based on their experience, they can evaluate the best practices and work together towards common goals[27].

The soft law approach is also welcomed by some business sectors. For them, complying with soft law can be less expensive than adapting to statutory EU provisions. In fact, as soft law can be introduced by each Member State in the form that best suits its legal system and economic background, it is

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[22] Senden, supra note 20, chapter 4.
[23] Stephan Schnorberger, Juliane Rosenkranz and Manel Garcia “Transfer Pricing Documentation: The EU Code of Conduct Compared with Member States Rule”, Intertax volume 34 (June/July 2006) 305-313, at 306.
[24] See supra note 9, Commission of the European Communities, at page 37.
[25] Article 94 (100) of the EC treaty establishes that: “The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.”
[26] Robert Verrue, as quoted by Nicholas Bridgland, “The EU Code of Conduct to Eliminate Harmful or Potentially Harmful Business Tax Regimes”, 28 BNA International’s Tax & Legal Newsletter (January 2006), 1-7, at 2.
[27] See Hickman, supra note 13.

expected to require less changes than community provisions that do not take into account specific features of each jurisdiction. Also, depending on the characteristics of each Member State, the soft law approach would allow a quicker implementation of the provisions discussed at international level.

2. Implementation of the provisions of the Code of Conduct

2.1. State of play of the implementation of the Code of Conduct

As mentioned, the EU Commission left to the Member States the decision of whether and how to implement the Code of Conduct in their internal legislation. Although the Code is quite recent (it was presented in November 2005), it is possible to assess its short-term effectiveness by analysing which Member States have already adopted measures towards the introduction of the EU TPD in the internal law.

In the case where Member States have already issued legislation to adopt the EU TPD, this paper will examine whether the measures introduced in the internal law embrace all the contents of the Code, and whether measures more or less restrictive than the ones suggested by the EU Commission have been adopted.

As to the jurisdictions where no legislation has been issued until now, it is important to analyze whether the governments are already discussing manners to implement the documentation requirements established by the Code, and whether these measures would conflict with the documentation rules already existing in the national systems.

As examined, the EU TPD could be significantly more burdensome than the documentation requirements existing in the national legislation. It is also important to examine the position of Member States which current legislation does not provide for any documentation requirements, evaluating whether the approach suggested by the Code of Conduct could be implemented without other major changes in their current transfer pricing policy.

According to a study conducted by a consultancy firm, presented to the Asia Pacific Transfer Pricing Forum in March 2006[28], the actual state of the implementation of the Code of Conduct, is the following:

Member States that have publicly indicated adopting the code	**Member States that have not implement the code**	**Member States that have not implement the code but are oriented to adopt**
Czech Republic (Code recognised by authorities as administrative guidance)	Austria Cyprus	**Belgium** (Informal discussions with authorities suggest intentions to adopt Code)
Denmark (Authorities have indicated accepting Code)	Greece Hungary Ireland	**Estonia** (TP regulations currently under revision)
France (Authorities have indicated that	Latria	**Finland** (Government proposal on TP

[28] Slide presented by Ernest & Young to the Asia Pacific Transfer Pricing Forum (March 2006), at n.29.

EUJTPF recommendations will form reference point; may issue administrative guidance)	Lithuania Malta Poland Portugal	documentation – referring Code expected)
Spain (Draft act on tax fraud prevention – 30 December 2005 – specifically mentions intent to align legislation with Code)	Slovenia Slovakia Switzerland	**Germany** (Authorities will accept documentation prepared under the Code – though Code not legally binding)
Sweden (Proposed documentation requirements – February 2006 – reference Code)	United Kingdom	**Italy** (Code currently under consideration)
		Netherlands (Parliamentary Finance Committee to discuss Code imminently)

Due to its status of soft law, the Code of Conduct does not bind Member States to adopt specific documentation requirements. It does not intend to promptly implement new obligations nor increase the documentation requirements already existing in the Member States' internal law.

However, based on the political commitment assumed by its leaders, some Member States have already adopted measures towards the adoption of the EU TPD. These States are moved by the common goal of harmonizing their transfer pricing documentation requirements for a better functioning of the internal market. The Czech Republic, Denmark and Spain were the first jurisdictions to take into consideration the proposals of the Code of Conduct when issuing new transfer pricing legislation. Below is an analysis of the legislation of these three countries, highlighting the points in which the new legislation fully follows the approach of the EU TPD and where those Member States have reserved their right not to follow the suggestions of the Code of Conduct and introduce more specific provisions to deal with the matter.

2.2. Member States that have issued legislation to implement the EU TPD

2.2.1. The EU Code of Conduct versus Danish documentation rules

Denmark's first rule on documentation requirements was article 3b(4) of the Tax Control Act. According to such article, the taxpayers should prepare and keep written documentation to evidence the prices and conditions of its controlled transactions. The written documentation should be suitable for assessing whether the prices and conditions follow the arm's length principle, i.e, whether they correspond to what independent parties would have agreed under the same circumstances.

This general provision of the Tax Control Act was supplemented by the "Transfer Pricing Documentation Guidance", a regulation which contained a list of suggestions as to the contents of transfer pricing documentation.[29]

[29] Arne Mollin Ottosen and Michael Norremark, "New Transfer Pricing Documentation Regulation", International Transfer Pricing Journal (May/June 2006), IBFD, 162-165, at 162.

Denmark's documentation requirements only applied to intra-group transactions carried out with foreign enterprises. Domestic transactions were out of the scope of the transfer pricing control. The fact that international transactions were subject to stricter compliance rules, and additional administrative burden, could be seem as contrary to the EC Treaty, which forbids any kind of discrimination between national or foreign enterprises.
In order to reduce the risks of a future challenge under EU law, Denmark decided to issue new rules on transfer pricing, embracing also transactions carried out in the domestic scenario.
On 24 January 2006, the Danish tax authorities issued a statutory order on "the documentation of the determination of prices in controlled transactions" ("the Order")[30] followed by new guidance on the interpretation of documentation requirements ("the Guide")

The new rules replace the old legislation, establishing stricter documentation requirements that apply both to domestic and international intra-group transactions. It is important to stress that the new legislation was not specifically designed to introduce the EU TPD approach in the internal legislation. In fact, it was targeted to eliminate other distortions in the functioning of the internal market, but the Danish government thought that the change was a good opportunity to bring its internal legislation to line with the EU Code of Conduct[31].

Besides changing the scope of transfer pricing control, the new legislation also created new penalties for non-compliance with the documentation requirements, and authorized the tax authorities to request the taxpayers for a benchmark study as part of their documentation.

A survey carried out in October 2003 showed that, out of 212 companies, 21% had no TP supporting documentation, 27% had defective documentation, whereas 51% had documentation that was not obviously defective[32]. Such statistics show that compliance was a great problem in Denmark. The new legislation tries to change this scenario, imposing new penalties on the companies that do not fulfil the requirements of the Order.

According to the Order, penalties apply if non-compliance is intentional or due to gross negligence. This means that penalties apply if no documentation is available or if documentation is not sufficient in terms of amount and scope. Failure to comply with the documentation requirements is sanctioned with a penalty of up to 200 percent of the cost saved by not preparing the documentation. If the taxpayer subsequently prepares and submits the documentation, the penalties is reduced of 50 percent. A penalty of 10% is issued for any adjustment. Furthermore, the taxpayer's taxable income may be determined on an estimated basis if documentation is not prepared[33].

The Code of Conduct establishes that Member States should not impose penalties where the taxpayers have prepared their set of documents in accordance with the EU TPD, acting in good faith, in a reasonable manner and within a reasonable time. However, the Code of Conduct allows the tax authorities to impose penalties in the case the taxpayer does not provide additional information or document upon specific request. In this respect, the application of penalties in Denmark is in line with the Code of Conduct. However, it is necessary to see in practice how the tax authorities will apply the provision, interpreting whether the lack of information is due to good faith of the taxpayer. This evaluation of the intention of the taxpayer can be quite subjective, and might have an influence on the manner that the penalties are applied. Depending on the position adopted by the tax authorities, the

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[30] See Ottosen and Norremark, supra note 29.
[31] Jens Wittendorff, "New Transfer Pricing Rules Enacted", International Transfer Pricing Journal (September/October 2005), IBFD, 244-245, at 244.
[32] Peter Andersen, "New legislation tightens Danish Regime", TPI Transfer Pricing (June 2005).
[33] See Andersen, supra note 32.

penalties might be applied in a manner that is not consistent with the purpose of the Code of Conduct, even if the legislation itself is theoretically in line with the provisions of the Code.

As to the benchmark study, the new Order authorizes the tax authorities to request a benchmark as part of a taxpayer's transfer pricing documentation. The benchmark does not have to be prepared in advance. Though, the taxpayers should be prepared to present a benchmark in the case there is a specific request from the tax authorities. Danish taxpayers will be given a minimum period of 60 days to prepare the benchmark and deliver it to the tax authorities.

The requirement of a benchmark study is generally in line with the provisions of the Code of Conduct. The Code of Conduct establishes that the country specific documentation should contain a comparative analysis, an explanation of the selection and application of the method chosen, and relevant information about internal or external comparables, if available. The benchmark study is aimed to provide information about internal and external comparables. In this sense, the Danish legislation complies with the Code of Conduct.
There are also important provisions to be highlighted. The Danish Order exempts small and medium sized enterprises (SMEs) from preparing documentation requirements. This exemption does not apply to intercompany transactions with companies and permanent establishment in countries outside the EU that have not signed an income tax treaty with Denmark and other parties in tax havens. Small and medium sized companies are defined as companies which employ less than 250 persons and have a total assets of less than DKK 125 million (EUR 17 million) or net sales of less than DKK 250 million (EURO 33.6 million).

The Code of Conduct encourages Member States to establish different documentation requirements depending on the size of the enterprise. The purpose is to reduce the administrative burden for both the taxpayers and the tax administration. The Danish provision is in line with the provisions of the Code of Conduct. The only difference is that the Code of Conduct does not provide any precise threshold for the reduction of the "amount or complexity of documentation"[34] for small and medium sized enterprises. The definition of small and medium sized enterprises is to be made by each Member State. It is part of the flexible approach adopted by the Code of Conduct.

Also with a view to reduce costs and stimulate compliance, the Code of Conduct encourages Member States not to require translations of all the documents listed in the master file or country specific documentation. Following the recommendations of the Code of Conduct, the Order issued by the Danish tax authorities adopt a flexible approach, allowing the companies to present documentation in 4 different languages: Danish, Norwegian, Swedish or English.

In respect of submission of the documentation, the Code of Conduct establishes that documents should not be presented together with the tax returns. A taxpayer is only required to present documentation in the course of a tax audit or when requested by the tax authorities. The Danish provisions are in line with this principle, as they only require submission of the documents upon request of the tax authorities. Under the Danish law, the taxpayers should present documentation within a period of 60 days after the request of the tax authorities.

Broadly speaking, the contents of the Danish Order are also quite similar to the Code of Conduct. Under Section 4 of the Order, transfer pricing documentation must contain, among others:

a) an overview of the group and its commercial activities
b) a description of the controlled transactions

[34] EU Code of Conduct, no. 5.

c) a comparability analysis
d) an overall account of the implementation of the pricing principles
e) a list of any written agreement regarding the controlled transaction

However, Danish tax authorities are free to require further documentation whenever they feel it necessary to guarantee the tax control.

It is important to stress the Order makes express reference to the Code of Conduct, authorizing a taxpayer to follow the approach established by the EU when preparing documentation.

According to the Order, the taxpayers have the possibility to prepare the documentation as prescribed by the Code of Conduct. In this case, the documentation shall contain either in the Master file or in the country-specific documentation the descriptions and analyses specified in sections 4-8 of the Order (i.e. an overview of the group and its commercial activities, a description of the controlled transactions, a comparability analysis, an overall account of the implementation of the pricing principles, a list of any written agreement regarding the controlled transaction). Thus, in principle, a taxpayer opting for the EU approach has also to comply with the specific documentation requirements established in the Order.

As mentioned, there is no substantial difference between the documents mentioned in the Code of Conduct and the documents mentioned in the Order. So, a taxpayer opting for the EU approach is not necessarily left in a more burdensome position when compared to a taxpayer that only opted for the internal legislation.

In some aspects, the Danish legislation is more specific than the EU TPD. This is because the Code of Conduct assumes the existence of national documentation requirements, which are usually more detailed and more targeted than the general EU rules.

The situation can be summarized as follows:

Danish rules vs. EU TPD	Similarities	Differences
Application of penalties	Penalties only apply if non-compliance is intentional or due to gross negligence. According to the Code of Conduct, no penalties apply if the taxpayer has prepared documentation in accordance with the EU TPD, acting in good faith, in a reasonable manner and within a reasonable time.	
Benchmark study	Tax authorities can request a benchmark as part of a taxpayer's transfer pricing documentation. The Code of Conduct establishes that the country specific documentation should contain relevant information about internal or external comparables.	
Small and medium sized enterprises	Small and medium sized enterprises are exempt from preparing documentation.	Under Danish rules, small and medium sized companies are defined.

		The Code of Conduct does not define small and medium sized enterprises
Language	It is not necessary to present all documents in the national language. The companies can present documentation in 4 different languages: Danish, Norwegian, Swedish or English.	
Submission of documentation	A taxpayer is only required to present documentation in the course of a tax audit or when requested by the tax authorities	

2.2.2. The EU Code of Conduct versus Czech documentation rules

Czech Republic issued its transfer pricing legislation in 1992. The rules broadly followed the OECD guidelines, but did not provide on documentation requirements. The legislation just established that the taxpayers should be able to evidence the arm's length character of intra-group transactions presenting sound and clear documentation.

The lack of structured or detailed regulations on documentation requirements was probably due to Czech Republic's legal system which imposes the burden of proof on the taxpayer. When the burden of proof is on the taxpayers, the tax authorities are less worried about compliance issues, as it is on the interest of the taxpayer to gather and organize documentation to substantiate its transfer pricing policy. The lack of regulation on the matter left the taxpayers in a defenceless position, though. In the course of a tax audit, the taxpayer was never sure whether its documents would be accepted by the tax authorities and whether they would be considered sufficient proof that the transaction of arm's length.

Another problem of the Czech legislation was the lack of provisions on Advanced Pricing Agreements ("APAs"). The taxpayers did not have the possibility to enter into previous negotiations with the tax authorities with a view to explain its transfer pricing policy and agree on the applicable methodology.

Faced with the increasing complexity of intra-group transactions, the Czech tax authorities have recently issued a number of formal measures to improve transfer pricing control and audit procedures. Two of the most important rules are the Directive D-292, governing the APA process, and the Directive D-293, which specifies the scope of transfer pricing documentation requirements.

The Directive D-293 contains a notification from the Ministry of Finance specifying the documents to be submitted by a taxpayer either in the course of an APA process or during regular tax audits. The note of the Ministry makes express reference to the EU Code of Conduct, broadly following the recommendations established by the EU Joint Transfer Pricing Forum.

According to the Directive D-293, the taxpayers are not required to file documentation together with their income tax returns. However, documentation should be presented in the course of a tax audit, upon the request of the tax authorities, in the application for an APA or upon the beginning of a mutual agreement procedure under one of the tax treaties entered into by the Czech Republic. The orientation, thus, follows the approach of the Code of Conduct.

As to the contents, the Directive D-293 implemented only part of the documentation listed in the Code of Conduct. The set of documents established in the internal legislation is less detailed and less burdensome than the one contained in the Code of Conduct.

Under the internal law[35], Czech taxpayers are requested to present documentation on five different topics:

a) information on the group of companies,
b) information concerning the taxpayer;
c) description of the business relationship between the related parties;
d) information on other circumstances that may influence the business transaction; and
e) information on the applicable transfer pricing method.

The information on the group of companies corresponds to the Code of Conduct's master file. It should contain:

a) a description of the group's business activities, its ownership and organisational structure, and distribution of business functions within the group;
b) detailed information on related parties involved in the transaction, including information on their financial performance; and
c) overview of the group's transfer pricing system and information on existing cost-sharing agreements.

Besides, the taxpayer should commit to provide the tax authorities with any additional information and evidence, as requested.

Although this first group of documents contains the main requirements established in the Masterfile, some provisions of the EU document were not implemented in the internal law. For instance, Czech internal legislation does not require the taxpayer to present invoice flows for intra-group transactions, nor to present a description of the changes in the functions and risks of the members of the group.

The second group of documents established by the internal law regards the company and includes:

a) detailed information of the taxpayer business activities and strategies;
b) information on the taxpayers' ownership and organisation structure; and
c) information on the taxpayer's past financial performance.

The third group of documents mentioned by the Directive D-293 concerns the business relationship between the parties and requires:

a) description of the business relationship, e.g., description of the commodities or services being traded;
b) economic and business conditions governing the transaction;
c) description of all relevant agreements concluded between the parties involved; and
d) volume of transactions and all risks associated therewith.

The fourth group of documents regards other circumstances that might have an influence on the business transactions between the related parties, such as:

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[35] Information on Czech internal law based on: Tigran Mkrtchyan, "Transfer Pricing: Recent Developments in the Czech Republic", 06 *International Tax Planning Review BNA*, 16-17, at 16.

a) marketing strategy of the company;
b) specific economic conditions on the market;
c) legal peculiarities of the market.

The fifth group of documents concerns the applicable transfer pricing method and lists:

a) description of the method used to determine transfer prices;
b) explanation as to why the specific method was used; and
c) information on internal or external comparable transactions, and
d) a comparative analysis consistent with paragraphs 1.15 – 1.35 of the OECD transfer pricing guidelines.

The second, third, fourth and fifth groups of documents established in the Czech law correspond to the EU TPD country specific documentation requirements. However, the Czech law makes reference to an item that was not clear included in the EU TPD country specific documentation: the description of legal peculiarities of the market where the company operates. This item is aimed at determining whether the taxpayer operates in a regulated market or is subject to legal restrictions that may interfere in the pricing of the transactions.

Although the new regulation issued by the Czech government is in line with the Code of Conduct, such provision does not seem to have been issued with the specific purpose of complying with the EU TPD. It is important to note that the Czech Republic has implemented various measures in the transfer pricing area over the past few years, and that the Directive on transfer pricing documentation was issued together with the rules on APA. By introducing APAs, the Government had to establish rules on the documents to be presented by a taxpayer wishing to enter into advanced agreements with the tax authorities. It seems that the need to rule on APAs was a good opportunity to issue more extensive regulations on the transfer pricing area, also establishing documentation requirements that would apply to audit procedures as a whole. Thus, when analyzed as a whole, the Directive D-293 seems to be part of a broader reform in the Czech transfer pricing system, rather then a specific provision targeted at EU harmonization.

Nonetheless, the new provisions were highly positive for Czech taxpayers, as now they have guidance on which documents to present to the tax authorities in order to evidence their arm's length prices.

The situation can be summarized as follows[36]:

Czech rules vs. EU TPD	Similarities	Differences
Documentation requirements	The taxpayer should commit to provide the tax authorities with any additional information and evidence.	The set of documents established in the internal legislation is less detailed and less burdensome than the one contained in the Code of Conduct. Czech internal legislation does not require the taxpayer to present invoice flows for intra-group

[36] There is no information available on language, small and medium sized enterprises, application of penalties and benchmark study.

		transactions, nor to present a description of the changes in the functions and risks of the members of the group. The internal legislation requires a description of legal peculiarities of the market where the company operates.
Submission of documentation	A taxpayer is only required to present documentation in the course of a tax audit or when requested by the tax authorities.	

2.2.3. The EU Code of Conduct versus Spanish documentation rules

On March 2006, the Spanish government approved a draft bill on transfer pricing documentation requirements. The new legislation brings major modifications in the Spanish transfer pricing regulations, affecting, among others, the burden of proof.

The Spanish transfer pricing rules are generally in line with the OECD Guidelines. The evaluation of transfer prices is based on the arm's length principle, and it is on the tax authorities the obligation to demonstrate that certain intra-group were not performed under market conditions[37].

The tax systems which impose the burden of proof on the tax authorities are generally expected to establish detailed documentation requirements. This is not the case of Spain, though. Until now, Spain had very few provisions on documentation, embracing only research and development, cost sharing agreements and management cost agreements between related parties. Even in these cases, the documentation to be presented was quite simple, comprising only a written agreement with the description of the services or projects and the allocation criteria between the participants[38].

The Draft Bill approved by the Spanish Government extends the documentation requirements to all the transactions between related parties, generally following the Code of Conduct. In fact, the preamble of the proposed rules make express reference to the Code. However, no reference is made to the concept of master file.

Considering that the draft bill embraces the main recommendations of the EU Joint Transfer Pricing Forum, the lack of express reference to the Masterfile should not be seem as a problem. The Spanish tax authorities are expected to accept the Masterfile and the Spanish country specific documentation as valid evidence of arm's length prices[39].

It is important to stress that the Draft bill is not yet law. The provisions of the bill should be implemented in new regulations which are expected to pass and become effective on 2007. At the moment, the legislative bill is just at a preliminary stage, and may be subject to modifications until the

[37] Chris Wix, "Introducing Transfer Pricing Documentation Rules in Spain", 14 *Tax Management Transfer Pricing Report* 18, 781-783, at 781.
[38] Stephan Schnorberger, Juliane Rosenkranz and Manel Garcia, "Transfer Pricing Documentation: The EU Code of Conduct Compared with Member States Rules", 34 Intertax 6/7 (June/July 2006), 305-313, at 312.
[39] Ignacio Longarte and Chris Wix, "Transfer Pricing in Spain – Interaction with EU Documentation", *TPI Transfer Pricing*, BNA International, 312-313, at 312.

day of final approval. Although not definitive, the bill is a good indication of the provisions that should be implemented in the Spanish system.

The main expected innovation is a change in the burden of proof. In order to stimulate compliance and facilitate the tax audits, the burden of proof would be transferred to the taxpayers. Once clear documentation requirements are established, the taxpayers would be obliged to present the mandatory documentation to evidence the arm's length character of the transactions. In the case the documentation is not presented, the tax authorities would be allowed to assess the transfer prices of the taxpayer based on other methods, and would be able to apply specific penalties.

The new legislation will exempt taxpayers with small or non-relevant transactions from the documentation requirements. A threshold will be established in order to avoid a high compliance cost for those taxpayers with low turnover or that perform non-core transactions with related parties. As mentioned, this is a recommendation of the Code of Conduct, according to which documentation requirements should not create excessive burden, and should be consistent with the size of the operations carried out by the enterprise.

It is not clear yet whether the taxpayer would be requested to submit supporting documentation together with the tax return. However, considering that the draft bill makes express reference to the Code, it is expected that Spanish taxpayers will not be requested to file documentation together with the tax returns, but only at the beginning of a tax audit[40].

The draft bill does not contain a list of the documents that a taxpayer will be requested to present to the tax authorities to evidence its transfer pricing system. Thus, until now, it is not possible to ascertain whether the documentation requirements imposed by the Spanish legislation will be tighter or more detailed than the ones established in the Code of Conduct. The list of documents will be decided by the Spanish tax authorities at a later stage. Nonetheless, it is expected to be quite similar to the one mentioned in the Code of Conduct.

It is possible to get a first impression of the documents that the Spanish tax authorities might request in the future by looking at section 20 of the Corporate Income Tax Regulations, that lists the supporting documentation to be presented with an APA request[41]. The APA documentation already comprises:

a) a detailed description of the transactions analyzed from the legal, technical, economic and financial standpoint,
b) a detailed description and a justification of the valuation method selected,
c) the valuation range derived from the valuation method selected,
d) the identification of relevant comparables related to companies operating in the same geographical markets if reasonably available to the taxpayer,
e) the profit split resulting from the valuation method selected,
f) any information on similar APAs agreed or in process in other jurisdictions regarding any of the parties and similar transactions, and
g) a delimitation of those transactions between the related entities excluded from the proposal.

The contents are broadly similar to the documentation established by the EU Code of Conduct, although not as detailed. One of the items not required by the current APA legislation is the chart with

[40] See Stephan Schnorberger, Juliane Rosenkranz and Manel Garcia, supra note 38.
[41] See Stephan Schnorberger, Juliane Rosenkranz and Manel Garcia, supra note 38.

the invoice flows between related parties. It is still unsure, however, whether the missing points will be included in the list to be prepared by the Spanish authorities.

The Spanish tax authorities have demonstrated an increasing interest in the control of intra-group management charges. In fact, most of the transfer pricing assessments issued by the Spanish authorities in the last few years concern the rendering of management services between related entities. The draft bill approved in Spain makes express reference to the documentation of services, stating that "the deduction for expenses in relation to services between related parties is dependent on the services producing or being able to produce a benefit or utility to the recipient". The definitive legislation on documentation requirements is expected to include a specific item on the demonstration of the actual performance and benefits provided by intra-group services[42]. There is no similar provision in the Code of Conduct, thus showing that the Spanish tax authorities will likely implement in the internal legislation specific requirements to deal with issues that are particularly relevant for the country.

One point that is not yet clear concerns the language of the documentation prepared by the taxpayers. The Code of Conduct establishes that the local tax authorities should not require extensive translations, thus reducing the compliance burden. The Spanish law is expected to follow this recommendation, establishing that translations of the Masterfile should be made upon request.

In fact, Spanish taxpayers will have to make a commitment to produce any additional transfer pricing documentation at the request of the tax authorities. Such an undertaking is in line with the provisions of the Code of Conduct.

The current draft bill does not clarify whether Spanish taxpayers will be able to use pan-European comparables to evidence the arm's length price of its transactions. There is no consensus among the Spanish tax authorities on the acceptability of out-of-country comparables. The office responsible for APA negotiations adopts a more lenient approach to the matter, while the office responsible for regular tax audits have a strong preference for local comparables. Considering that the new law on documentation requirements will be highly inspired in the Code of Conduct, the Spanish tax authorities are expected to be more flexible in the examination of comparables, accepting international data as proof of arm's length prices[43].

When preparing the Code of Conduct, the EU Joint Transfer Pricing Forum verified that pan-European comparables produce economic results consistent with the ones produced by domestic comparables. They based their conclusions on a benchmark study that used the Transactional Net Margin Method to assess transfer prices based both on pan-European and domestic comparables. Thus, from the perspective of the EU Joint Transfer Pricing Forum, Member States should allow the taxpayers to evidence the arm's length character of their transactions by reference to a TNMM analysis with pan-European comparables.

The problem is that Spanish legislation did not provide for the use of TNMM. The Spanish tax authorities have clear preference for traditional methods. In order to bring internal legislation into line with the Code of Conduct, the draft bill recently approved acknowledges the TNMM as an acceptable valuation method where other traditional methods are not reliable.

The recognition of TNMM as a valid methodology also has an impact on the imposition of penalties

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[42] See Ignacio Longarte and Chris Wix, supra note 39.
[43] See Stephan Schnorberger, Juliane Rosenkranz and Manel Garcia, supra note 38.

The new draft bill creates specific transfer pricing and document-related penalties. The penalties, however, should not be imposed when the taxpayer is acting in good faith and in a timely manner, following the recommendation of the Code of Conduct. Thus, when preparing a benchmark using the TNMM or pan-European comparables, a taxpayer should not be subject to documentation related penalties. It is important to check whether these features will be incorporated in the Spanish final legislation, though.

The situation can be summarized as follows:

Spanish rules vs. EU TPD	Similarities	Differences
Documentation requirements		The legislation is expected to include a specific item on the demonstration of the actual performance and benefits provided by intra-group services. There is no similar provision in the Code of Conduct.
Benchmark study	The Spanish tax authorities are expected to follow the Code of Conduct in the examination of comparables, accepting out-of-country comparables.	
Small and medium sized enterprises	Small and medium sized enterprises will be exempt from preparing documentation.	
Language	The Spanish law is expected to be as flexible as the Code. Translations of the Masterfile would be made upon request.	
Submission of documentation	It is expected that Spanish taxpayers will be required to present documentation in the course of a tax audit or when requested by the tax authorities	
Application of penalties	Following the recommendation of the Code of Conduct, penalties should not be imposed when the taxpayer is acting in good faith and in a timely manner.	

2.3. Member States that already had documentation requirements – compatibility with the Code of Conduct

2.3.1. The Code of Conduct versus German documentation rules

Some Member States already have substantial rules on documentation requirements, such as Germany. In these cases, it is important to evaluate the extent to which the existing legislation is compatible with the Code of Conduct or requires further adjustments to the EU approach.

Until 2003, Germany had no specific rules on transfer pricing documentation requirements. The taxpayer had to observe the same guidelines applicable to all kinds of transactions. However, after a

decision handed down by the Federal Tax Court, the German tax authorities felt it was time to establish specific documentation rules for intra-group transactions.

In the decision of 17 October 2001, the Federal Tax Court held that the German Tax Code did not provide a legal basis for the obligation to prepare specific transfer pricing documentation. Thus, "if a German subsidiary fails to provide information on how prices for transactions with a foreign related company are calculated, the German tax authorities are only allowed to regard the prices as influenced by the shareholder relationship, but they may not assume that the agreed prices are not at arm's length; to prove that such prices are not at arm's length, the tax authorities need to provide additional evidence."[44]

In Germany, the burden of proof is on the tax authorities. Thus, they should gather substantial information about the taxpayer's activities and its transfer pricing policy to demonstrate that an adjustment should be made. In order to strengthen the position of the tax authorities and facilitate the auditing procedure, the Government decided to amend the existing legislation and create strict documentation duties supplemented by heavy sanctions.

First, it should be stressed that documentation requirements do not apply to small and medium-sized business, thus considered those companies which do not report more than € 5,000,000.00 in consideration for supplies (paid or received) and not more than € 500,000.00 in consideration for services (paid or received). Such companies, however, have a duty to cooperate with the tax authorities in the case of a specific request.[45] This provision is already in line with the Code of Conduct, which advises the Member States to adapt documentation requirements to the size of taxpayers.

German taxpayers are not requested to submit documentation together with their tax returns. However, they should be prepared to attend specific requests from the tax authorities and show the documents at the beginning of a tax audit. Contemporaneous documentation should be presented for special transactions. Compared with the Code of Conduct, the provisions of the German legislation look stricter, as the Code of Conduct does not require taxpayers to produce contemporaneous documentation.

Under section 90(3), sentence 5, of the General Tax Code, German taxpayers have the duty to record the contents of cross-border transactions with related parties, evidencing the economic and legal basis of arm's length prices. Those transactions should be documented with[46]:

a) a description of the relationship between the taxpayer and the related party, including a chart with the corporate organizational structure of the group as well as a description of the business activities conducted by the taxpayer;
b) details of the transactions carried out by the related party and intercompany agreements underlying them;
c) a description of the taxpayer's intangible assets that are involved in intra-group transactions,
d) an analysis of the functions, risks and assets related to the business of the taxpayer and its related party,

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[44] Peter H. Dehnen and Silke Bacht, "New Developments regarding Transfer Pricing Documentation in Germany", *IBFD Bulletin* (May 2005), 185-190, at 186.
[45] Stephan Schnorberger, Juliane Rosenkranz and Manel Garcia, "Transfer Pricing Documentation: The EU Code of Conduct Compared with Member States Rules", 34 Intertax 6/7 (June/July 2006), 305-313, at 307.
[46] See Peter H. Dehnen and Silke Bacht, supra note 44.

e) a description of the transfer pricing method used by the taxpayer, with an explanation on the selection and use of the method, accompanied by any comparability analysis performed by the company. The comparability analysis should address any financial data from independent enterprises used by the taxpayer and should point out any adjustments made to those financial statements.

There are also documentation requirements for extraordinary business transactions. Extraordinary business transactions comprise:

a) asset transfers in the scope of restructuring;
b) significant changes in function and risks within the company; and
c) business transactions in connection with a change in the business strategy of the group which has a decisive impact on the transfer pricing determination and the conclusion and amendment of long-term contracts of particular relevance, which have a substantial impact on the amount of income generated from the business relationships with related parties[47].

In these cases, the taxpayer should present:

a) information regarding any change in the business strategies or price adjustments;
b) information on cost sharing agreements,
c) information on APAs and other advanced rulings,
d) if the taxpayer's controlled transactions resulted in losses during a three-year period, records and information explaining the reason for the losses and future plans to make those transactions profitable[48].

Broadly speaking, the documents listed in the German legislation are quite similar to those included in the Code of Conduct. One item included in the Code of Conduct that is not specifically mentioned in the German legislation is the invoice flows of controlled transactions. One can not say, though, that the Code of Conduct is more burdensome than the German legislation. On the contrary, the German legislation puts much more emphasis on the cooperation duties of the taxpayers and establishes heavy penalties in the case the documentation is deemed incomplete or unusable.

Under the Code of Conduct, a taxpayer that fails to provide information on comparables is not subject to penalty provided that the information for the comparability analysis was not reasonably available for the taxpayer. Under the German rules, the lack of information on comparability may be interpreted as a violation of the taxpayer's documentation duty and even cause other transfer pricing documents to be disregarded by the tax authorities.[49] In this sense, the Code of Conduct is much softer than the internal legislation, as it forbids the imposition of penalties where the taxpayer has failed to present documentation in good faith.

As regards penalties, it is important to stress that Germany does not have specific document-related penalties. In fact, document-related penalties are combined with the penalties for income adjustment. According to sections 328 and 329 of the General Tax Code, the taxpayer is subject to a penalty varying from 5% to 10% in the case of an income adjustment where documentation has not been

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[47] Decree Law on Documentation in the Sense of Section 90, approved on October 17, 2003, translation by Deloitte & Touche, Dusseldorf, in 14 *Tax Management Transfer Pricing* 10 (September 14, 2005), 65-68, at 66.
[48] See Peter H. Dehnen and Silke Bacht, supra note 44.
[49] See Stephan Schnorberger, Juliane Rosenkranz and Manel Garcia, supra note 45.

submitted, has been deemed unusable or not contemporaneous. Late payment penalties also vary according to whether the taxpayer has submitted documentation that was not complete.

As mentioned, the Code of Conduct forbids the imposition of document-related penalties where the taxpayer has complied with the EU approach in good faith and within reasonable time. However, document related penalties are connected to income adjustment penalties under German law. Thus, one should analyze whether the German administration would be forbidden to apply the full combination of penalties in the case where the taxpayer does not comply with specific requirements of the German law but follows the EU approach.

The Code of Conduct expressly states that taxpayers should not be subject to penalties when using pan-European databases. The German legislation has no express provision allowing or disallowing the use of pan-European or other international comparables. However, the German law requires comparable data to be at least partly comparable to the tested party data. Some tax auditors might understand that the comparability standard requires a taxpayer to provide comparability information on national transactions. Comparability information on out-of-country transactions would only be accepted if the taxpayer is able to demonstrate that the arm's length range produced by foreign comparables are at least partly similar with the range produced by domestic comparables. This point is in conflict with the Code of Conduct, which makes a strong recommendation on the use of pan-European comparables, without imposing conditions[50].

Another important feature of the German legislation is that it requires a taxpayer to provide the tax authorities with documents pertaining to foreign parties of the group. According to the German Transfer Pricing Regulations, a taxpayer should be able to present foreign documents to evidence, among others:

a) the cost base and allocation criteria adopted in cost allocation and cost sharing agreements,
b) services costs in cost plus service charges,
c) royalty revenues,
d) third party prices of the reseller, where the resale price method is applied; and
e) total consolidated profit and allocation criteria where the profit split method is used[51].

The Code of Conduct also requires taxpayers to provide a Member State with information on the activities developed by other members of the group and documents on intra-group transactions. In fact, the master file contains information on the functions, risks, assets and intangibles applicable to all group companies. The information contained in the master file is more extensive than the information required under German legislation. By accessing the master file, the German tax authorities would have a deeper knowledge of the business of the group, going beyond the information originally required in the internal legislation. On one hand, there is an increase in the transparency of intra-group transactions. On the other hand, German taxpayers are more exposed than before.

As to the language, the German legislation requires a taxpayer to prepare documentation in German, but the tax authorities may accept documentation in other language at the taxpayer's request. The Code of Conduct recommends Member States not to request excessive translations. In this sense, the German tax authorities may be more willing to accept documentation in other language.

The situation can be summarized as follows:

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[50] See Stephan Schnorberger, Juliane Rosenkranz and Manel Garcia, supra note 45.
[51] See Stephan Schnorberger, Juliane Rosenkranz and Manel Garcia, supra note 45.

German rules vs. EU TPD	Similarities	Differences
Application of penalties		There are no specific document-related penalties. Document related penalties are combined with the penalties for income adjustment.
Benchmark study		German legislation impose conditions for the use of pan – European comparables. The Code of Conduct makes a strong recommendation on the use of pan-European comparables, without imposing conditions.
Small and medium sized enterprises	Small and medium sized enterprises are exempt from preparing documentation.	Under German rules, small and medium sized companies are defined. The Code of Conduct does not provide a definition.
Language	Flexibility as established by the Code of Conduct. The German legislation requires a taxpayer to prepare documentation in German, but the tax authorities may accept documentation in other language at the taxpayer's request.	
Submission of documentation	German taxpayers are not requested to submit documentation together with their tax returns.	Contemporaneous documentation should be presented for special transactions. The Code of Conduct does not require taxpayers to produce contemporaneous documentation.
Documentation requirements	The documents listed in the German legislation are quite similar to those included in the Code of Conduct.	German legislation does not specifically mention the invoice flows of controlled transactions, an item incorporated in the Code of Conduct.

2.3.2. The Code of Conduct versus Dutch documentation rules

The framework of Dutch transfer pricing legislation is article 8b of the Corporate Income Tax Act. According to article 8b of the Corporate Income Tax Act, intra-group transactions should be carried out on arm's length. The arm's length conditions of controlled transactions should be demonstrated in accordance with the provisions of chapter I of the OECD Guidelines[52]. There is no rule listing the documents to be presented to local tax authorities for the demonstration of transfer prices.

The Dutch legislation is quite vague, leaving to the taxpayers the task of selecting the documents that better evidence the arm's length character of their transactions. The fact that advanced rulings are

[52] Monique van Herksen and Folkert Idsinga, "How Dutch pratice fits with European transfer pricing code", *International Tax Review* (April 2006), 47-50, at 58. According to the authors, the legislative history of article 8b of the Corporate Income Tax Act makes it clear that a taxpayer should refer to articles 1.15 to 1.40 of the OECD Guidelines when documenting the arm's length conditions of controlled transactions.

common practice in the Netherlands is probably one of the reasons why the tax authorities take a flexible approach to documentation, rather referring to general documentation principles instead of establishing strict rules on the matter.

Chapter I of the OECD Guidelines provides a background for the application of the arm's length principle, laying down the items that should be covered in a comparative analysis. By making reference to Chapter I of the OECD Guidelines, the Dutch legislation emphasizes the importance of preparing a sound comparative study taking into account the functions, assets and risks applicable to controlled and independent transactions.

According to the OECD Guidelines, the factors to be taken into consideration in a comparative analysis are:

a) the characteristics of the property or services negotiated;
b) the allocation of functions, risks and assets among the group companies taking part in the transaction,
c) the contractual terms guiding the relationship between the parties,
d) the economic circumstances of the transactions, including an analysis of the markets where the companies operate and their business strategies,
e) the substance of the transaction entered into between the parties.

The documentation requirements set by the Code of Conduct are much broader than the general provisions of the OECD Guidelines. The masterfile and the country-specific documentation should contain more than a functional analysis of the controlled transaction and its comparables. The Code of Conduct requests the taxpayers to include in the Masterfile the invoice flows of the transaction, a description on the ownership of intangibles and royalties received, a list of cost contribution agreements, APAs and rulings affecting all EU companies of the group, as well as written undertaking under which the taxpayer shall provide additional documentation upon the request of the tax authorities.

The main difference between the approach adopted by the OECD Guidelines and the one prescribed in the Code of Conduct is that, under the OECD Guidelines taxpayers are only required to present information on the Dutch company itself and the related party directly involved in a controlled transaction. Conversely, the Masterfile requires the taxpayer to provide information on a EU-wide basis, analyzing the functions, risks and assets of all group companies inside Europe.

In this perspective, the Code of Conduct can be more burdensome than the existing documentation requirements.

There are a number of points where the Dutch legislation is in line with the Code of Conduct, though.

The Dutch legislation does not require a taxpayer to file documentation together with the tax return. Documentation is usually presented in the course of a tax audit, during the negotiation of advanced rulings or APA procedures. Notwithstanding, the Dutch tax authorities have clear preference for contemporaneous documentation, which is not required under the Code of Conduct.

The Dutch legislation does not clarify whether a taxpayer can use out-of-country data to substantiate transfer prices. Experience shows that the Dutch tax authorities are willing to accept Pan-European comparables, provided that the market where the foreign comparables operate is similar to the

taxpayer's market[53]. The Dutch approach is in line with the Code of Conduct, according to which a taxpayer should not be subject to penalties when performing its comparative analysis based on Pan-European comparables.

Besides preparing a comparative study, Dutch taxpayers should explain why they selected a transfer pricing method and how it was applied to controlled transactions. The same requirement is established by the Code of Conduct under the country specific documentation.

It is important to stress that Netherlands does not have specific transfer pricing penalties. If the Dutch tax authorities believe that a taxpayer has used incorrect transfer prices with a malicious intent, an administrative penalty may be imposed. There are no document-related penalties either. If a taxpayer fails to present a functional analysis and the comparative study, there may be a shift in the burden of proof from the tax authorities to the taxpayers[54]. Such a system is not conflicting with the Code of Conduct, which forbids the application of document-related penalties where the taxpayer has complied with the EU approach, acted in good-faith and in a timely manner.

The Dutch Government has not yet confirmed whether the provisions of the Code of Conduct will be incorporated in the internal law and whether the masterfile will be accepted as the standard transfer pricing documentation for intra-group transactions. Considering that the Dutch legislation provides very few on documentation requirements, the adoption of the EU approach would not be detrimental to the Dutch tax administration. Although more burdensome for the taxpayer, the EU approach can bring more certainty to the documentation of transfer prices, as it makes clear which kind of evidence should be presented in order to demonstrate arm's length conditions. The existence of a fixed structure and layout for documentation could reduce disputes between the taxpayers and the tax authorities, as well as facilitate transfer pricing audits[55].

The situation can be summarized as follows:

Dutch rules vs. EU TPD	Similarities	Differences
Documentation requirements		Under the Dutch rules, taxpayers are only required to present information on the Dutch company itself and the related party directly involved in a controlled transaction. The Masterfile requires the taxpayer to provide information on a EU-wide basis, analyzing the functions, risks and assets of all group companies inside Europe.
Submission of documentation	A taxpayer is only required to present documentation in the course of a tax audit or when requested by the tax authorities.	Dutch tax authorities have clear preference for contemporaneous documentation. The Code of Conduct does not require taxpayers to produce contemporaneous documentation.
Application of penalties		There are no document-related penalties. If a taxpayer fails to

[53] Monique van Herksen and Mark Bonekamp, "European Transfer Pricing Law and Developments – Netherlands", 14 Tax Management Transfer Pricing 10 (September 14, 2005), 17-20, at 18
[54] See Monique van Herksen and Mark Bonekamp, supra note 53.
[55] See Monique van Herksen and Folkert Idsinga, supra note 52.

		present a functional analysis and the comparative study, there may be a shift in the burden of proof from the tax authorities to the taxpayers.
Benchmark study	The comparative analysis is based on Pan-European comparables.	

2.4. Member States without documentation requirements and where the Code has not been implemented

Some European States which internal legislation does not provide on transfer pricing documentation requirements have not yet confirmed whether they intend to issue legislation to adopt the Code of Conduct.

Most of these States have a general provision on their tax legislation establishing that a taxpayer should be able to evidence its transactions based on sound and clear documentation. No specific rules are addressed to intra-group transactions or transfer pricing analysis. There is only a general duty to provide information to the tax authorities. Upon a tax audit, the taxpayers should be prepared to demonstrate that the figures reported in their income tax returns correspond to their actual transactions. Austria, Finland, Ireland, Italy, Luxembourg and the Slovak Republic are among those Member States.

In Austria, the burden of proof is with the party that claims for a certain treatment under the tax legislation. Thus, when the taxpayer claims a certain deduction, it should demonstrate that the underlying expenses are true and necessary for the company. Differently, when the tax authorities intend to make an income adjustment and increase the tax liability, they have the burden of proof.[56] In light of this general provisions, Austrian taxpayers are requested to document intra-group transactions, either to keep a deduction for certain expenses or demonstrate that the remuneration received from a related party should not be adjusted. However, there is no guidance on which documents should be presented, being upon the taxpayer the task of selecting relevant data.

Finnish taxpayers are advised by the tax authorities to collect and organize relevant information for demonstrating the evaluation of transfer prices, even though there are no statutory or administrative provisions on the matter. It is on the interest of the taxpayers to show the arm's length character of their transactions, as they have the burden of proof.

The situation in Ireland is similar. Although there are no internal transfer pricing rules, the Irish tax authorities may have an interest on the global pricing policies of the group, reason why local taxpayers are advised to collect supporting data.

In Italy, the Presidential Decree No. 600, dated September 29, 1973, authorizes local tax authorities to request documentation on intra-group transactions. There is no specific rule listing the documents that should be presented upon a tax audit, but experience shows that the tax authorities usually request documentation in accordance with the OECD Guidelines[57]. The burden of proof lies with the tax authorities.

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[56] Imke Gerdes, "European Transfer Pricing Law and Developments – Austria", 14 Tax Management Transfer Pricing 10 (September 14, 2005), 4-6, at 5.
[57] Giuliana Polacco and Sergio Sottocasa, "European Transfer Pricing Law and Developments – Italy", 14 Tax Management Transfer Pricing 10 (September 14, 2005), 16-17, at 16.

Luxembourg does not have specific transfer pricing regulations, but follows the OECD guidelines when evaluating the results of controlled transactions. Even though no documentation requirements are prescribed, the local tax authorities expect taxpayers to present documentation in accordance with the OECD Guidelines.

In the Slovak Republic, taxpayers are also expected to present documentation evidencing their transfer prices. They might be formally required to do so upon the beginning of a tax audit.

This brief analysis shows that, even where documentation requirements do not exist, the taxpayers might be requested to present information on intra-group transactions. Due to the lack of internal provisions on the matter, the tax administrations of Italy and Luxembourg refer to the OECD Guidelines when examining transfer prices and requesting documentation. Jurisdictions lacking internal legislation seem to be receptive to international standards and practices. That creates a favourable scenario for the implementation of the Code of Conduct.

It is undeniable that the Code of Conduct would increase the compliance burden for the taxpayers of those Member States. Still, transparency and certainty would be added to the tax audits, with possible positive results for multinational enterprises.

3. The Experience of PATA

3.1 The Pata Documentation Package

The Code of Conduct is not the first multilateral initiative to harmonise transfer pricing documentation requirements. The Pacific Association of Tax Administrators ("PATA") Transfer Pricing Package has been in existence since March 12, 2003. It allows multinational enterprises to prepare a uniform set of documentation regarding transactions between associated enterprises resident in Australia, Canada, Japan and the United States.

Multinational enterprises are free to decide whether they will present documentation in accordance with PATA. The use of PATA documentation package is of a voluntary nature, just like the use of the European Code of Conduct.

As mentioned in the introduction to the PATA agreement, the PATA documentation package does not impose any legal requirements greater than those imposed under the internal law of the Member States[58]. A company adopting the provisions of PATA will also be deemed as satisfying each Member State's documentation requirements, provided that three operating principles are complied with: reasonable efforts, contemporaneous documentation and timely production.

The taxpayer adopting the PATA documentation package should put reasonable efforts to determine arm's length prices in accordance with the OECD Guidelines. The taxpayer is expected to provide a detailed analysis of controlled transactions, searching for comparables, and selecting the appropriate transfer pricing methods to its intra-group transactions.

The application of the arm's length principle should be substantiated by contemporaneous documentation, provided at the request of the tax authorities. Documentation is considered

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[58] Michael S. Lebovitz, Monique van Herksen, Robert S. Kirschenbaum and Margreet G. Nijhof, "Achieving Transfer Pricing Com-Pata-Bility", *Journal of International Taxation* (September 2003),14-19.

contemporaneous if it is existing or brought into existence no later than the due date of the taxpayer's income tax return.

By requiring contemporaneous documentation, the PATA agreement deviates from the provisions of the OECD Guidelines. Although based on the general principles set on chapter V of the OECD Guidelines, the Member States introduced a new requirement with respect to contemporaneous documentation. This is also a main difference between PATA and the Code of Conduct.

The companies adopting the PATA documentation package should produce documents on ten different aspects[59]:

a) Organizational Structure, which includes identification of the participants and a description of the worldwide group structure;

b) Nature of the business, industry and market conditions, which includes an outline of the multinational enterprise's industries and business lines, analysis of relevant economic factors, information on assets, functions and risks, allocation of intangibles, copies of annual reports and financial statements for the current year and the five previous periods;

c) Controlled transactions, including identification and description of controlled transactions (including the value, currency and terms of the transactions), identification of the internal data relating to the transactions, and copies of the relevant intercompany agreements;

d) Assumptions, strategies, policies, including information on business strategies and assumptions and information regarding factors that influenced the setting of prices or pricing policies that are used by the multinational enterprise;

e) Cost contribution arrangements, which includes a copy of the agreement formalizing the arrangement, a description of the scope of the activities, the details regarding use of the arrangement by the participants (including the financial terms of the use), the details of the buy-in/buy-out payments, a description of the method used to determine each participant's share of the contributions, identification of each participant's expected benefits, and procedures governing balancing payments;

f) Comparability, functional and risk analysis, including a description of the comparable transactions, identifications and documentation of material factors that could be used in comparable selection and adjustments, supporting methodologies used, aggregation analysis, and the establishment of ranges of outcomes;

g) Selection of the transfer pricing method, including a description of the method selected, as well as description of the data and methods considered;

h) Application of the transfer pricing method, including documentation of assumptions and judgments, and documentation of all calculations made;

i) Background documents, defined as any documents that provide back-up or support for the transfer pricing analysis; and

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[59] John Hobster, Crystal Thibeault, Rahul Tomar, and Deloris R.Wrigth, "Practical Implications of the PATA Documentation Package", *International Transfer Pricing Journal* (May/June 2003), 83-89.

j) index to documents, i.e. a general index of documents and a description of the multinational-s record-keeping system.

Besides, the taxpayer is request to provide additional information upon the request of the tax authorities.

Broadly speaking, the requirements established by the PATA Package are similar to those contained in the Code of Conduct. However, the PATA agreement is more structured and straight-forward. It brings an exhaustive list of 48 documents to be presented by multinational enterprises. Some items are also much more detailed, like the provisions on cost contribution arrangements. Under the Code of Conduct's Masterfile, the taxpayer is only requested to present a list of cost contribution arrangements. Under the PATA documentation package, a taxpayer should present copies of the agreements, description of the activities, details on the amount of contributions, expected benefits, balancing payments, buy-in and buy-out transactions.

The PATA documentation package requires a taxpayer to present copies of annual reports and financial statements for the current year and the five previous periods. There is no such rule on the Code of Conduct.

The Code of Conduct seems to be much more clear on comparability issues, though. The Code of Conduct clearly states that the national tax administrations should accept benchmarks using out-of-country comparables. PATA has no provisions in this regard. It is not clear whether a company opting for the PATA documentation package is able to use foreign comparables when performing a comparability analysis. It is up to each PATA's Member State to determine whether out-of-country comparables are accepted[60].

The PATA documentation package seems to be more burdensome than the member State's domestic documentation rules. Australia, Canada and the United States had previous transfer pricing documentation requirements, but their rules were less detailed, providing only general guidance on the matter. The Canadian legislation, for instance, specified six items that should be evidenced by multinational enterprises, but did not bring an exhaustive list of documents. The Japanese legislation contained a general provision authorizing the local tax authorities to request documents upon a transfer pricing audit, but did not establish specific documentation requirements or related penalties.

The main disadvantage of the PATA documentation package is that it applies equally to all sizes and kinds of enterprises. There is no provision establishing an exemption or *de minimis* rules for small and medium-sized companies. The agreement states that the tax authorities should see whether the request for a certain document is reasonable for a give taxpayer, but no protection is assured to small and medium-sized business[61]. Those taxpayers, usually looking for simpler manners to do business and reduce compliance costs, would benefit from not choosing the PATA approach[62].

When compared to PATA, the Code of Conduct puts stronger emphasis on the need to create special rules for small companies or small business.

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[60] See Michael S. Lebovitz, Monique van Herksen, Robert S. Kirschenbaum and Margreet G. Nijhof, supra note 58.
[61] See John Hobster, Crystal Thibeault, Rahul Tomar, and Deloris R.Wrigth, supra note 59.
[62] Philip Anderson, "PATA Transfer Pricing Documentation Package", IBFD Asia Pacific Tax Bulletin (July 2003), 199-203.

The main benefit of PATA is that it protects the taxpayers against document-related penalties where they have complied with the PATA documentation package and followed the guiding principles of the agreement (reasonable efforts, contemporaneous documentation and timely presentation). However, the fact that a taxpayer has complied with the PATA documentation package does not preclude a Member State from making transfer pricing adjustments, and assessing any interest due on those adjustments. The PATA documentation Package works in the same manner of the Code of Conduct.

According to the Package, the following penalties would be avoided:

a) For Australia, penalties under section 225 of the Income Tax Assessment Act 1936 and section 284 of the Taxation Administration Act 1953;
b) For Canada, penalties under subsection 247(3) of the Income Tax Act; and
c) For U.S., accuracy related penalties under I.R.C. § 6662 for underpayments of tax attributable to substantial valuation misstatements under I.R.C. §§ 6662(e)(1)(B)(i), and gross valuation statements under I.R.C. § 6662(h)(2)(A).

Japan is not mentioned on the agreement because the Japanese legislation does have transfer pricing documentation requirements nor related penalties.

Australia does not have document-related penalties either, but documentation has an influence on the extent to which transfer pricing adjustment penalties are imposed. Thus, Australian taxpayers complying with PATA may only get a reduction in the general penalty imposed on transfer pricing adjustments.

Only US and Canadian taxpayers would truly benefit from the penalty exemptions, being more likely to adopt the PATA documentation package, despite more burdensome and detailed than the current national provisions.

3.2. Implementation of PATA

3.2.1. Status of PATA

None of the Member States taking part in PATA has issued specific legislation with regard to the PATA Documentation Package. This is probably because their internal legislation is already inspired in the principles guiding the PATA documentation package (the OECD Guidelines), there being no need to issue additional rules on the matter.

As mentioned, Canada, Australia and US already had legislation establishing transfer pricing documentation requirements. The Japanese legislation did not impose documentation duties on the taxpayer, despite having a general provision authorizing the tax authorities to request evidence. Administrative Circulars listed the documents that the Japanese tax authorities should take into consideration when analyzing whether intercompany dealings were carried out on arm's length. However, no penalties were imposed if the taxpayer did not provide the documentation established on the list.

In general, the internal provisions of the Member States are much simpler than the provisions of PATA. Only the US legislation brings substantial documentation requirements. Still, the US requirements are less specific than those established in the PATA documentation package. Given the above, implementing the PATA documentation package in the internal legislation could lead to

an increase in the compliance burden, affecting both taxpayers and the Member States' tax authorities.

The adoption of the PATA documentation package should be really voluntary. All Member States have issued communications saying that the PATA countries have a common understanding on documentation, and that multinational enterprises are free to adopt the PATA approach. A taxpayer complying with PATA will surely comply with the documentation requirements of each Member State, as the PATA list is much broader than the internal documentation requirements.

Below is a brief analysis of the documentation rules in each Member State, highlighting whether the principles contained in the PATA documentation package already underline their internal practice, and whether the countries' internal legislation resemble the PATA provisions.

3.2.1.1. Australia

On 12 March 2003, the Australian Commissioner of Taxation issued a press release announcing that Australia had agreed to the PATA Documentation Package[63]. The document did not provide details on the interaction between PATA and the internal legislation, except that a taxpayer is deemed to comply with internal documentation requirements when following the PATA approach.

The website of the Australian Taxation Office has a section explaining what is PATA and which documents are included in the PATA documentation package. In the beginning of the Section, however, the tax authorities make a reservation: "This document is not a Tax Office publication. It was prepared by the members of the Pacific Association of Tax Administrators (PATA). PATA is an inter-country affiliation between Australia, USA, Canada and Japan"[64]. Such a statement shows very clear that, although Australian taxpayers have the possibility of using the PATA approach, the requirements of PATA are not deemed part of Australian's legislation or administrative guidelines.

The current Australian legislation has a number of similarities with the PATA approach.

Pursuant to Section 262A of the Income Tax Assessment Act of 1936, taxpayers should produce records of the process of setting transfer prices and calculating the appropriate taxable income. When allocating indirect costs between controlled transactions and other independent transactions, taxpayers should also retain documents explaining the allocation basis used.

Australian taxpayers are required to provide information on intercompany transactions through Schedule 25A of the income tax return. "Schedule 25A asks whether the taxpayer has contemporaneous documentation to support their transactions. Taxpayers may indicate in Schedule 25A that no documentation is maintained, but the consequence of such an admission will most likely ensure that the taxpayer will receive a letter from the ATO inquiring why no documentation is in place"[65].
Specific documentation requirements are set out in two Tax Rulings: TR98/11 and TR94/14.

According to the TR98/11, there are four reasons for a taxpayer keeping contemporaneous documentation:

a) because there is an statutory obligation to keep records;

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[63] IBFD Transfer Pricing Database - country survey - Australia
[64] http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/30275.htm
[65] See IBFD Transfer Pricing Database, supra note 63.

b) the burden of proof rests with taxpayers in the event of dispute;
c) it reduces the risk of tax audits and adjustments; and
d) it has an impact on the imposition of penalties.

Such provisions are in line with the provisions of PATA, considering that the PATA documentation package also requires a taxpayer to provide contemporaneous documentation.

Australian taxpayers should demonstrate a reasonable arguable position when defending their transfer pricing policy. According to local practitioners, "having contemporaneously prepared documentation helps multinationals in two ways. First, it helps the taxpayer to establish that it has a RAP [reasonable arguable position], which could reduce the primary penalty by half. (…) Second, if the taxpayer has fully documented the process of selecting and applying an arm's length method at the time the transaction was negotiated or, at the very latest, the time the relevant income tax return was prepared, then any transfer pricing penalties will be lowered[66]."

This link between documentation compliance and reduction of penalties is also in line with the spirit of the PATA documentation package.

The list of documents established in TR98/11 and TR94/14[67] include, among others:

a) the multinational's relevant transfer pricing policies;
b) the company's profits on the products at issue;
c) a description of relevant market information;
d) the profit contributions of each party to the intercom any transaction;
e) an analysis of the functions, assets, skills, and the degree and nature of risks involved for the various parties; and
f) an explanation of the method used for intercompany prices and its application.

Australia also has extensive documentation requirements with regard to cost contribution arrangements. All these aspects have been regulated in the PATA Documentation Package.

One difference between the PATA approach and the Australian legislation is the treatment afforded to medium and small business. The Australian tax authorities have developed a simplified approach to the transfer pricing review process for small to medium businesses, aiming to minimize costs for these businesses. The PATA agreement did not provide special rules for those taxpayers.

The Australian simplified approach applies to businesses with an annual turnover of less than 100 million Australian dollars, unless they are part of a multinational group that is listed on any stock exchange, or part of a private group with any international subsidiary or other offshore related party that has the resources to deal with global transfer pricing issues. Under the simplified approach, the taxpayers are only required to prepare a functional analysis and provide evidence of how they set transfer prices. They should undertake a basic benchmarking study using publicly available data from the Australian tax authorities or the Australian Bureau of Statistics to broadly show that the outcome of the business reflects arm's length pricing[68].

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[66] See John Hobster, Crystral Thibeault, Rahul Tomar and Deloris R. Wright, supra note 59.
[67] See John Hobster, Crystral Thibeault, Rahul Tomar and Deloris R. Wright, supra note 59.
[68] See IBFD Transfer Pricing Database, country survey – Canada.

Those provisions make it clear that small and medium business would have an increase in their administrative and compliance burden by adopting the PATA approach. Only large companies could envisage some benefit in the PATA documentation Package.

3.2.1.2. Canada

On March 12, 2003, the Canadian tax authorities published a press release announcing the conclusion of the PATA documentation package. The announcement, which was included in the website of the Canadian Customs and Revenue Agency[69], states that:

"The PATA Documentation package is intended to reduce taxpayer burden and provide certainty that a penalty will not be imposed. Use of this PATA documentation package is completely voluntary and, if the principles are satisfied, will protect the taxpayer from transfer pricing documentation penalties that might otherwise apply in each of the four jurisdictions."[70]

It also clarifies that:

"By providing taxpayers with the option of applying this uniform documentation package, the PATA members intend to assist taxpayers to efficiently prepare and maintain useful transfer pricing documentation, and timely produce such documentation upon request to PATA member tax administrations while precluding any related transfer pricing penalties"[71].

The PATA documentation package and the Canadian rules have a number of similarities.

Both the PATA package and the Canadian rules contain a request for contemporaneous documentation.

Under section 247 of the Canadian Income Tax Act, when filing the tax return, the taxpayer should have available documents and records of:

a) the property or services to which the transaction relates,
b) the terms and conditions of the transaction,
c) the identity of the participants in the transaction and their relationship to each other at the time the transaction was entered into,
d) the functions performed, the property used and the risks assumed,
e) the data and methods considered and the analysis performed to determine the transfer prices, and
f) the assumptions, strategies and policies, if any, that influenced the determination of the transfer prices[72].

All the listed above are included in the PATA documentation package.

Canadian taxpayers should make "reasonable efforts" to determine and use arm's length prices. There is no definitive interpretation of "reasonable efforts". It should be analyzed on a case-by-case basis.

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[69] http://www.cra-arc.gc.ca/newsroom/releases/2003/mar/pata-e.html.
[70] statement reproduced by the IBFD Transfer Pricing Database, supra note 68.
[71] statement reproduced by the IBFD Transfer Pricing Database, supra note 68.
[72] See IBFD Transfer Pricing Database, supra note 66. See also John Hobster, Crystal Thibeault, Rahul Tomar and Deloris R. Wright, supra note 59.

According to the Canadian tax authorities, the assessment of whether "reasonable efforts" have been adopted will take into account whether the taxpayer has demonstrated:

"a) the general organization and description of the business;
b) the selection of a particular transfer pricing methodology, including an explanation of why the selected method is more appropriate than any higher-ranking methods;
c) the projection of the expected benefits as they relate to the valuation of the intangible;
d) the scope of the search and criteria used to select comparables;
e) an analysis of the factors determining comparability, including a review of the differences and attempts made to make adjustments; and
f) the assumptions, strategies, and policies as they relate to the tangible property, intangible property, and services being transferred." [73]

The term "reasonable efforts" is also used in the PATA Documentation Package. It is unclear whether the term should be interpreted in line with the Canadian internal provisions.

Under the Canadian rules, a penalty of 10% applies when the taxpayer has not made "reasonable efforts" to assess arm's length prices. The lack of contemporaneous documentation usually results in the application of the penalty.

According to the PATA agreement, taxpayers may be exempt from document-related penalties when complying with the documentation package and its principles. In principle, Canadian taxpayers complying with PATA should not be subject to the 10% penalty. However, considering that the Canadian tax authorities make a factual analysis of the cases, and that the penalty provisions take into account a range of factors that goes beyond documentation, a taxpayer may still be subject to fine when complying with the PATA package.

Under the Canadian rules, the taxpayers may employ a cost-benefit analysis when deciding which documentation should be produced. Such measure is designed to reduce the compliance burden for small and medium-sized business. The PATA Documentation package is less clear in this regard, just requesting the tax authorities to be reasonable when requesting documentation[74]. Once again, small and medium sized companies may find it easier to comply with internal documentation requirements then adopting the PATA approach.

3.2.1.3. Japan

On October 26, 2004, the Japanese National Tax Agency ("NTA") released a report explaining their latest measures and tax policies. The Report confirms the release of the PATA documentation package and invites the taxpayer's to visit the NTA website for further information:

"A meeting of the tax authorities of four key Pacific Rim countries (Japan, Canada, the United States, and Australia), PATA was established in 1980 with the aim of fostering the exchange of views on common tax issues. To facilitate transfer pricing examinations by PATA members, PATA released principles in March 2003 under which taxpayers can create uniform transfer pricing documentation for their international transactions (PATA Documentation Package) so that one set of documentation

[73] See IBFD Transfer Pricing Database, supra note 68.
[74] See John Hobster, Crystal Thibeault, Rahul Tomar and Deloris R. Wright, supra note 59.

can meet their respective transfer pricing documentation provisions. The PATA Documentation Package can be viewed in Japanese and English on the NTA website"[75]

No specific legislation implementing the PATA approach has been issued. Japanese taxpayers are free to decide whether they will comply with the PATA documentation package or not.

Complying with PATA will certainly be more burdensome for Japanese taxpayers. One should remind that Japan has ruled very few on documentation, always approaching the matter from a general perspective. No document-related penalties are imposed on multinational enterprises. Therefore, no potential benefits can be envisaged by the use of PATA. The only advantage of PATA when compared to the Japanese legislation is that it brings more certainty to local taxpayers, providing structure guidance for organizing transfer pricing documentation.

Under section 66-4(7) of the Special Taxation Measures Law, the tax authorities can request a taxpayer to present any documentation that might be relevant for assessing transfer prices[76].

Until 2001, the regulations did not clarify exactly what types of documents might be requested during a transfer pricing examination. The Administrative Guidelines released in June 2001 were the first regulation to issue a list of transfer pricing documents. The list comprises:

"a) documents describing the capital relationships and business activities of the taxpayer and its related parties (this would include documents describing the flow of transactions among the related parties, annual reports or securities filings, materials describing the principal products and markets sold by the taxpayer and its related parties, and documents regarding the financial performance and special characteristics of the business in each business year);
b) documents that the taxpayer used to compute its arm's length price (including documents describing the details of and selection process used for the comparable transactions used by the taxpayer, description of the reasons behind the selection of the taxpayer's transfer pricing methodology, and documents describing any adjustments made to the comparable transactions for differences with the taxpayer's transaction);
c) documents describing the content of the foreign related transaction (including relevant contracts, descriptions of the profit/loss situation of the taxpayer and its related parties with respect to the foreign related transactions, any market analyses conducted in regard to the inventory in the foreign related transactions, descriptions of the content of the inventory in the foreign related transactions, and descriptions of the business strategies, functions, risks, and intangible assets of the taxpayer and its related parties); and
d) other necessary documents (such as accounting manuals of the taxpayer, descriptions of any transfer pricing examinations or advance pricing agreements of the foreign related parties, documents prepared by the foreign related parties under the transfer pricing documentation requirements of foreign countries, and other documents deemed to be necessary)."[77]

This list can not be seem as imposing a documentation duty on the taxpayers. In fact, if a Japanese company fails to provide any of the documents established on the list, no penalties will apply. However, the company will certainly be in a weaker position when supporting the arm's length character of its transactions. In practice, the lack of documentation can result in a reversed burden of proof, as the Japanese tax authorities are allowed to analyze the controlled transactions according to

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[75] National Tax Agency of Japan, 2004 Report, reproduced by Tax Analysts (October 27, 2004), 2004 WTD 210-8.
[76] See John Hobster, Crystal Thibeault, Rahul Tomar and Deloris R. Wright, supra note 59.
[77] IBFD Transfer Pricing Database - country survey - Japan

its own methods and available data. The Japanese tax authorities are famous for using secret comparables in the determination of transfer prices. Thus, by failing to provide the requested documentation, a taxpayer is exposed to transfer pricing adjustments based on NTA's internal data.

The PATA documentation package does not contain specific provisions on the selection and use of comparables. However, a taxpayer that has complied with the PATA documentation package and attended the specific requests of local tax authorities is more likely to be protected against adjustments based on secret comparables.
On the other hand, Japanese taxpayers may be more exposed, as the amount of information revealed under the PATA approach exceeds the one established by the internal rules.

3.2.1.4. United States

On March 12, 2003, the US Government also issued a press release informing about the conclusion of the PATA documentation Package ("Press Release IR-2003-32"). The announcement was published in the website[78] of the Internal Revenue Service, together with an explanation about the PATA Documentation Package and a specific link on the Transfer Pricing Section. The IRS makes it clear that, by complying with the PATA Documentation Package, the taxpayer also comply with the US internal requirements being exempt from penalties.

The US taxpayers seem to be the ones most benefited by the adoption of PATA. The US documentation requirements are quite similar to those established by the PATA documentation package, so US taxpayers would not have additional burden by adopting the PATA approach. In fact, the PATA documentation Package seems to provide further explanations on the US internal requirements, offering a more-structured guide to transfer pricing compliance.

Under Section 6001 of the Internal Revenue Code, US taxpayers should keep permanent books of accounts or records to establish the accuracy of their income tax return. This requirement includes records relevant to determine the correct transfer prices[79].

Section 6662 of the Internal Revenue Code sets the transfer pricing documentation requirements, dividing documentation in two broad categories: principal documents and background documents.[80]

The category "principal documents" refers to the transfer pricing analysis itself, and include:

a) an overview of the taxpayers' business, including an analysis of the economic and legal factors that affect the pricing of its property or services;

b) a description of the taxpayers' organizational structure, covering all related parties engaged in transactions subject to transfer pricing control, including transactions with foreign affiliates that directly or indirectly affect the pricing of property or services in the United States;

c) any documentation explicitly required by the transfer pricing regulations, such as the documentation requirements for qualified cost sharing agreements;

d) a description of the method selected and an explanation of why that method was selected;

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[78] http://www.irs.gov/newsroom/article/0,,id=108024,00.html
[79] IBFD Transfer Pricing Database - country survey - United States
[80] See John Hobster, Crystal Thibeault, Rahul Tomar and Deloris R. Wright, supra note 59.

e) a description of the alternative methods that were considered and an explanation of why they were not selected (such requirement is in line with the US best method rule, that requires a taxpayer to check the availability and adequacy of more than one method);

f) a description of the controlled transactions (including the terms of sale) and any internal data used to analyse those transactions (such as amount of income, costs, assets and their allocation);

g) a description of the comparables that were used, how comparability was evaluated, and adjustments made;

h) an explanation of the economic analysis and projections relied upon in developing the method;

i) a description or summary of any relevant data that the taxpayer obtains, showing that the method was applied in a reasonable manner; and

j) a general index of the principal and background documents and a description of the record-keeping system used for cataloguing and assessing such documents[81].

The category "background documents" comprises the assumptions, conclusions and positions adopted by the taxpayer when performing the transfer pricing analysis and gathering documentation. It might include, for example, pricing documents, foreign regulations affecting the controlled companies abroad, etc.

All the items mentioned by the US Regulations are covered by the PATA documentation Package. It is not clear, however, whether a taxpayer opting for the PATA approach would still be obliged to explain why other transfer pricing methods have not been adopted. Such requirement, which is included in the US list of principal documents, is not comprised in the PATA list. The PATA documentation package simply states that the taxpayer should make a comparative analysis, identifying the method selected, as well as a description of the data and methods considered. The US legislation seems to impose a stricter requirement in this aspect.

Besides the documents contained on the list, the US tax authorities may require the taxpayer to provide additional information on the controlled transactions. They may also summon third-parties to provide data that might be relevant in the ascertainment of the taxpayer's tax liability. The request of additional documentation to the taxpayer is in line with the PATA documentation package. Nothing is mentioned with respect to third-party summons, though.

Under the US law, a taxpayer will be deemed to meet the documentation requirements when it has selected one of the transfer pricing methods established by the US Regulations and has:

a) used the selected method in a reasonable manner,
b) presented documentation which was in existence at the time the tax return was filed, making it clear that the application of the transfer pricing method was made in a reasonable manner; and
c) provided such documentation to the Internal Revenue Service within 30 days of a request[82].

The three conditions established by the US legislation resemble the three compliance principles established by PATA: reasonable efforts to establish arm's length prices, contemporaneous documentation and timely presentation.

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[81] See John Hobster, Crystal Thibeault, Rahul Tomar and Deloris R. Wright, supra note 59.
[82] See IBFD Transfer Pricing Database, supra note 79.

By complying with the three conditions established by the internal law, the taxpayer may avoid the imposition of penalties. The same is established under the PATA documentation package.

The US legislation establishes a fine of 20% or 40% of the transfer pricing adjustment. The penalty does not apply where the taxpayer has made reasonable efforts to apply an appropriate transfer pricing method and has presented the required documentation. By complying with the PATA documentation package, a taxpayer may avoid the imposition of the 20% or 40% penalty, provided that it has applied the selected transfer pricing method in a reasonable manner. The situation, thus, is similar to the one in Canada.

3.3. Lessons from PATA

PATA's Member States decided not to issue legislation on the documentation package. However, they have informed the taxpayers about the possibility of adopting the harmonized documentation package and avoiding penalties.

A closer analysis of these Member States' legislation shows that the requirements of the documentation package can be more burdensome than the current ones, and that the penalty exemptions do not grant 100% protection to the taxpayers. Still, the PATA documentation package offers straight-forward guidance for those taxpayers willing to improve their tax risk-management by increasing compliance.

The PATA Documentation Package is an agreement setting forth uniform documentation requirements for jurisdictions that are part of different markets. The Code of Conduct has higher goals. The creation of standard documentation requirements is just a step to achieve a better functioning of the internal market. The creation of an internal market like the EU requires more effort and cooperation among Member States. This additional effort implies introducing the harmonized rules in their internal legislations, so that all Member States have similar provisions. That is the way things should work in a single market.

Another point to be taken into consideration is that the PATA Documentation Package only involves four States. The Code of Conduct is applicable to 25 States. It is easier to find an agreement when few players are involved. This is why the PATA Documentation Package is much more detailed than the Code of Conduct. The PATA Documentation Package established a list of 46 specific documents that should be presented by the taxpayers. The guidelines in the Code of Conduct are much more general. The approach adopted in the Code of Conduct is more flexible. It is not possible to establish strict rules when so many States are involved. It is impossible to harmonize so many legal systems without taking into consideration the particularities of each jurisdiction, leaving some space for customization.

In spite of their different goals, the PATA Documentation Package and the Code of Conduct share the same principles. The fact that the Report prepared by the EU Joint Transfer Pricing Forum expressly mentions the PATA experience leads to the understanding that the EU initiative to harmonize documentation requirements was inspired by PATA.

4. Previous experience in Soft Law – The Code of Conduct on the EU Arbitration Convention

4.1. The EU Arbitration Convention

The EU Arbitration Convention was promulgated on July 23 1990 (90/436/EEC). The purpose was to create a procedure to resolve cases of international double taxation arising from transfer pricing adjustments[83].

The Arbitration Convention needed to be ratified by all the member states to become effective. As the procedures were very slow, the convention only came into effect on January 1 1995. "While there was no immediate rush of taxpayers seeking to access the convention, taxpayers and governments alike began to think about how they might use it, in practice. There proved to be many areas of uncertainty, most of which remained unaddressed until the recent adoption of the code of conduct" [84].

The first problem was whether new Member States were subject to the Arbitration Convention. When Austria, Finland and Sweden joined the EU in 1995, the Convention had to be supplemented by a new document, subject to parliamentary approval by all the Member States. This process was only finally completed in 2004[85].

The second issue concerns the period of the Convention, supposed to be valid for an initial period of five years. In order to extend it for additional periods, the Member States would have to sign supplementary documents and submit it to internal approval. In order to avoid additional burden and delays, the European Commission issued a protocol automatically extending the life of the convention beyond December 31 1999. According to the Protocol, the Convention would be extended for additional periods of five years, unless opposed by a Member State. Although signed in 1999, the Protocol only became effective in November 2004, as the ratification process took too long[86].

Aware of the problems related to the practical implementation of the Arbitration Convention, the European Commission required the EU Joint Transfer Pricing Forum to look for solutions to enhance the concrete application of the Arbitration Convention. The solutions, once again, had to be pragmatic, straight-forward, but non-legislative[87].

4.2 Code of Conduct for the effective implementation of the EU Arbitration Convention

On 23 April 2004, the European Commission released a report on the work developed by the EU Joint Transfer Pricing Forum, which proposed the adoption of a Code of Conduct for the effective implementation of the EU Arbitration Convention (90/436/EEC of 23 July 1990) (COM(2004) 297 final of 23 April 2004)[88].

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[83] S.B. Huibregtse and R.H.M.J. Offermanns, "What is the future of the EU Arbitration Convention?", *International Transfer Pricing Journal*, March-April 2004, 76-87, at 1.
[84] Chris Rolfe, "New rules for transfer pricing disputes in Europe", *International Tax Review*, February 2005, 15-17, at 15.
[85] See Chris Rolfe, supra note 84.
[86] See Chris Rolfe, supra note 84.
[87] Luc de Hert, "A new impetus for the arbitration convention?", *International Transfer Pricing Journal* (March/April 2006), 50-55, at 51
[88]http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/arbitration_convention/index_en.htm

The Code of Conduct applies in those cases where a Member State adjusts the taxable income of a multinational enterprise due to the application of transfer pricing rules. The Code of Conduct clarifies issues that are crucial to the application of the Convention, thus ensuring a more effective and uniform interpretation of all the Member States. The Code of Conduct provided for:

a) the starting point of the three-year period which is the deadline for a company suffering double taxation to present its case to the relevant Member State's tax administration;
b) the starting point of the two-year period during which Member States' tax administrations must attempt to reach an agreement that eliminates the double taxation that is the subject of the complaint;
c) the arrangements to be followed during this mutual agreement procedure (the practical operation of the procedure, transparency and taxpayer participation); and
d) the practical procedure to be followed if there is no mutual agreement between the tax authorities within two years (i.e. the establishment and functioning of the advisory commission that must then arbitrate in the case)[89].

One of the most important provisions of the Code of Conduct is the recommendation to Member States on the suspension of tax collection during cross-border dispute resolution procedures. Thus, the tax administrations would be forbidden to collect tax with respect to the issued litigated under the arbitration convention until the procedure comes to an end. The purpose is to protect taxpayers from double taxation while the problem is still pending.

The Code of Conduct also advises Member States to apply the rules established therein to the mechanisms of dispute settlement provided for in the international tax treaties entered into among them.

Like the EU TPD, the Code of Conduct on the Arbitration Convention is not-binding on the Member States. It is a political commitment that does not affect the Member States' rights and obligations or the respective spheres of competence of the Member States and the Community.

Although not obliged to adopt the Code of Conduct, most Member States seem to welcome the initiative of the Joint Transfer Pricing Forum. The work developed by the group clarified key issues for the application of the Convention. The question that remains is whether Member States will be more willing to adopt the arbitration procedure after the release of the Code.

The Code of Conduct on Arbitration Convention is quite recent. It was released in 2004. Maybe it is still too early to assess whether the work of the EU Joint Transfer Pricing Forum has increased the use of the arbitration procedure.

The Code of Conduct invites Member States to report to the Commission on the practical functioning of the proposals every two years. Based on the evaluation of the Member States, the Commission may propose a review of the provisions of the Code.

According to the website of the European Commission, the EU Joint Transfer Pricing Forum has been discussing the practical results achieved in the implementation of the Code of Conduct on Arbitration

[89] See supra note 88.

Convention. According to a draft document prepared by the Forum[90], the actual situation of the Code is the following:

Member States	Implementation through a legislative instrument / legal reference	Implementation through administrative practice / administrative reference	Possibility to suspend tax collection / legal reference
Austria		Yes	Yes
Belgium	Information not available	Information not available	Information not available
Cyprus	Information not available	Information not available	Information not available
Czech Republic		No In preparation	Exceptionally
Denmark		Yes Administrative decision (SKM 2005.2.TSS)	Yes
Estonia		No In preparation	Yes Taxation Act § 128(2) 5 and § 146 (3)
Finland		Yes	No
France		Yes	Yes Livre des procedures fiscales Art. L189A
Germany		Yes	Yes
Greece	Information not available	Information not available	Information not available
Hungary	No An Act of Parliament amending / modifying the Tax Procedure Act is in preparation	No Guidance of the Ministry of Finance is in preparation	No An Act of Parliament amending / modifying the Tax Procedure Act is in preparation
Italy		Yes	Yes Law nr.99 of 22 March 2003
Ireland		Yes	Yes
Latvia	Information not available	Information not available	Information not available
Lithuania		No In preparation	Yes
Luxembourg		Yes	Yes
Malta	Yes Legal notice		Yes Art. 41 of the Income Tax Management Act
Netherlands	Yes Decree		Yes
Poland	Information not available	Information not available	Information not available
Portugal		Yes	Yes
Slovak Republic		No In preparation	Information not available

[90] "State of play of the implementation of the Code of Conduct on the Arbitration Convention (doc. JTPF/006/BACK/2006)". The document is still a draft and, as such, has not been made available to the public.

Member States	Implementation through a legislative instrument / legal reference	Implementation through administrative practice / administrative reference	Possibility to suspend tax collection / legal reference
Slovenia	Information not available	Information not available	Information not available
Spain	No In preparation	No In preparation	Yes
Sweden		Yes	Yes
United Kingdom		Yes	Yes

On June 6, 2006, the European Commission released a document regarding the future work of the EU Joint Transfer Pricing Forum. The EU Commission is considering an extension of the Forum, which would be responsible for monitoring the implementation of the two Codes of Conduct (the Code of Conduct on Transfer Pricing Documentation and the Code of Conduct on the Arbitration Convention).

According to the document, "taking into consideration that both Codes of Conduct invite Member States to report to the Commission on their implementation and the practical problems faced with their implementation, this topic is of course of major importance and must be considered as a continuous task of the JTPF. Furthermore, the Forum has an important role to play in checking how the suggestions and best practices developed by the Forum are being implemented across the EU."[91] The Commission acknowledges that "the project may represent a work load that is ambitious considering the length of any possible new mandate"[92]. Still, a follow-up of the implementation of the Codes of Conduct has to be done.

5. Conclusion

The European Commission has been increasingly using soft law to achieve common grounds on intricate tax matters. The EU Code of Conduct to eliminate harmful or potentially harmful tax competition, the Conduct of Business rules and the Code of Conduct on Arbitration Convention are important initiatives that took the form of soft law. Non-EU countries looking for cooperation have also made a choice for soft law (one example is the PATA recommendations on TP documentation).

Soft law does not have to be included in the internal legislation of a Member State to become effective. The fact that a certain State has not made reference to soft law provisions in their internal legislation can not be interpreted as a refusal to follow the international approach. The PATA Documentation package is a good example of that. None of the PATA Member States has issued legislation to incorporate the documentation package in their legal systems. However, all of them have informed taxpayers about their harmonization provisions and the possibility of adopting the international " guidelines" on transfer pricing documentation developed by the PATA members. It is still unclear whether taxpayers will be motivated to use the PATA documentation package, as the requirements established in the package are generally more burdensome than those established in the internal law. Failure to comply with PATA should thus not be credited to its status of soft law. Maybe the contents of the rule is not appealing enough to attract taxpayers.

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[91] European Commission, JTPF/021/2006/EN (June 6, 2006), published by Tax Analysts, Worldwide Tax Daily 2006 WTD 144-8

[92] See European Commission, supra note 90.

The opposite might be true for the Code of Conduct on Arbitration Convention. Despite all the problems occurred in the release of the Convention, Member States and multinational enterprises seem to have reacted very positively to the provisions of the Code. From now on, they have clear grounds to solve cross-border transfer pricing disputes.
The future of the Code of Conduct on Transfer Pricing Documentation requirements is still unsure. Most Member States seem to welcome the initiative. Spain, Denmark, Sweden, Czech Republic, France and Belgium have already adopted measures to implement the provisions of the Code.

The Code of Conduct is likely to be introduced within a shorter period by those jurisdictions where the legislation has none or few provisions on documentation requirements, lacking clarification on important issues that have been regulated by the Code of Conduct.

Implementing the Code of Conduct may also be a suitable manner to correct previous problems and eliminate “inconsistencies” of the system. This is the case of Denmark. The old Danish documentation rules only applied to cross border transactions. Domestic operations were not subject to documentation requirements. This inconsistency could be contended discrimination. In order to solve the problem, Denmark issued new rules, following the provisions of the Code and extending documentation requirements to local transactions.

Countries with previous rules on documentation requirements may find it more difficult to implement the Code. They have to change a system to which both taxpayers and the tax authorities are used. If the documentation requirements are contained in the statutory law, they will have to involve the legislative branch, which will take the relevant proceedings to change the legislation. This is something that might take time. A country with no documentation requirements would have more freedom in this regard. They could simply instruct the tax authorities to issue a Circular implementing the EU TPD. As mentioned, the Code does not require a specific form. It might be implemented in the way that is more suitable to each Member State.

Flexibility is the main advantage of soft law. Member States will only be able to make progress in the field of taxation if they have the chance to adhere to the harmonized rules in their own pace, at their own manner. It is better to reach consistency on a long-term basis than not achieving consistency at all. It is better to have a consensus on basic principles than wait for unanimous approval on controversial issues.

Soft law increases the cooperation between Member States and favours an approximation between governments and the business community. Multinational enterprises should be invited to participate in the discussions of international tax issues. They will assist Member States to find a balance between the interest of tax administrations and the interest of taxpayers. The experience of the EU Joint Transfer Pricing Forum shows that governments and business community can work together to develop solutions for a better functioning of the internal market. Soft law expands dialogue and allows understanding between different players in the international scenario.

In light of the above, soft law seems to be an adequate policy tool to promote harmonization in the tax field.

Annotated bibliography on "The EU Joint Transfer Pricing Forum and the Code of Conduct on Transfer Pricing Documentation"

Andersen Peter, "New legislation tightens Danish Regime", in TPI Transfer Pricing (June 2005).
On 27 October 2004, the Minister of Taxation published draft legislation that would tighten transfer pricing rules. The draft legislation is interesting in an EU context, as it may set the standard for a wave of transfer pricing changes in other EU Member States. In this substantial article the Danish legislation relevant to transfer pricing is discussed.

Anderson Philip, "PATA Transfer Pricing Documentation Package", IBFD Asia Pacific Tax Bulletin (July 2003), p.199-203.
The author, after a brief description of the Pacific Association of Tax Administrator's (Pata) and the aim of the documentation "package", analyzes the penalty provisions that, through compliance with the package, the taxpayer can avoid or reduce.

Commission of the European Communities, " Proposal for a Code of Conduct on Transfer Pricing Documentation for associated Enterprises in the EU",International Bureau of Fiscal Documentation (January/February 2006), p.35-43.
This is a communication from the Commission to the Council, the European Parliament and the European Economic and Social Commitee on the work of the EU Joint Transfer Pricing Forum on transfer pricing documentation for associated enterprises in the EU. The aim of this communication is to report on the work done by the EU Joint Transfer Pricing Forum.

Dehnen Peter H. and Bacht Silke, "New Developments regarding Transfer Pricing Documentation in Germany", in *IBFD Bulletin* (May 2005), p.185-190.
This article presents a comprehensive analysis of the legislation and administrative instructions concerning documentation requirements in Germany.

Ernest & Young, Asia Pacific Transfer Pricing Forum (March 2006), at n.29.
This study conducted by Ernest & Young and presented to the Asia Pacific Transfer Pricing Forum in March 2006 shows the actual state of the implementation of the Code of Conduct.

Gerdes Imke , "European Transfer Pricing Law and Developments – Austria", 14 Tax Management Transfer Pricing 10 (September 14, 2005), p.4-6.
In this article the author presents an overview of the transfer pricing rules in Austria.

van Herksen Monique and Bonekamp Mark, "European Transfer Pricing Law and Developments – Netherlands", 14 Tax Management Transfer Pricing 10 (September 14, 2005), p.17-20.
The authors describe the transfer pricing rules in the Netherlands. Some countries, such as the Netherlands, have not or have only a limited requirement for documentation upon request, relying more on the OECD Transfer Pricing Guidelines, which are helpful, but not necessarily fully instructive to local law.

van Herksen Monique and Idsinga Folkert, "How Dutch pratice fits with European transfer pricing code", in *International Tax Review* (April 2006), p.47-50.
Here, the authors undertake a thorough analysis of the Code of Conduct. They compare the Code of Conduct with documentation requirements in Germany and Netherlands to reach the conclusion that the Code of Conduct may be more burdensome than current documentation rules but on the other hand for some countries, such as Germany, the Code may present a more streamlined approach than what domestic law requires. The authors believe that the Code of Conduct is more an opportunity than a burden for the taxpayers.

de Hert Luc , "A new impetus for the arbitration convention?", in *International Transfer Pricing Journal* (March/April 2006), p. 50-55.

This article presents a detailed view into the possibilities and impossibilities of the application of the EC Arbitration Convention. The Convention was already adopted (but not yet effective) in 1990 and the first effective five-year period ran until 31 December 1999. At the end of 2003, the EU Joint Transfer Pricing Forum adopted a proposal for a Code of Conduct for the effective implementation of the EC Arbitration Convention. This proposal was taken up by the European Commission and on 7 December 2004 the ECOFIN Council adopted it. The author gives a description of what will be changed, an analysis of the issues which have not been solved, and finally deals with the implementation problems regarding the re-entry into force of the EC Arbitration Convention.

Hickman Andrew, "European Union Transfer Pricing Documentation ('EU TPD') – BSFG or JAA?", in *Transfer Pricing International BNA*, November 2005.
This article deals with the Code of Conduct and analyzes the main points of the E.U. TPD. After expounding the documentation requirements, the author makes an analysis of the new provisions.

Hobster John , Thibeault Crystal , Tomar Rahul , and Wrigth Deloris R, "Practical Implications of the PATA Documentation Package", *International Transfer Pricing Journal* (May/June 2003), p.83-89.
This article reviews the release of the Pata Documentation Package. It describes the package and compares it with the documentation requirements in individual countries and suggest practical advice for taxpayers operating in Canada, Japan, Australia and United States.

Huibregtse S.B. and Offermanns R.H.M.J., "What is the future of the EU Arbitration Convention?", *International Transfer Pricing Journal*, March-April 2004, p.76-87.
The authors address the future of the EU Arbitration Convention. They provide a brief explanation of the objectives and legal status of the Convention, and then focus on the issue of whether multinationals rely on the Convention. Some new initiatives and ideas regarding how to effectively achieve arbitration of transfer pricing disputes are highlighted.

Jie A Joen C. and Weenink Martin, "E.U. Commission Issues Proposal for Code Of Conduct On Trasfer Pricing Documentation", TPI Transfer Pricing (December 2005).
In this contribution the authors discuss the introduction and the status of the Code of Conduct. The article describes the documentation requirements contained in the Code of Conduct , highlighting the advantages and disadvantages of the EU TPD for MNE groups.

Lebovitz Michael S., van Herksen Monique, Kirschenbaum Robert S. and Nijhof Margreet G., "Achieving Transfer Pricing Com-Pata-Bility", *Journal of International Taxation* (September 2003), p.14-19.
This article examines the Pata agreement and compares the provisions contained in the OECD Guidelines with the documentation requirements established in the Pata Documentation Package. The authors present some of their own observations on future topics and issues that are or may become relevant in this area.

Longarte I. and Wix Chris, "Transfer Pricing in Spain – Interaction with EU Documentation", in *TPI Transfer Pricing*, BNA International, p.312-313.
The two authors explain the discussion draft of the Tax Fraud Prevention Act published by the Spanish Government on December 30, 2005. The draft proposes major reforms to the domestic transfer pricing rules. Next, they compare the Masterfile with the specific documentation in Spain.

Mkrtchyan Tigran, "Transfer Pricing: Recent Developments in the Czech Republic", in *International Tax Planning Review BNA*, p.16-17.
In this article the author presents an overview of the recent developments in the Czech Republic regarding transfer pricing documentation requirements. After a detailed description of the new rules, the author makes clear that documentation requirements listed in the Annex and the E.U. Code of Conduct are comparable to a large extent.

Ottosen A. Mollin and Norremark Michael, "New Transfer Pricing Documentation Regulation", in International Transfer Pricing Journal (May/June 2006), IBFD, p.162-165.
The authors present a very clear and readable overview of the changes regarding documentation requirements for intra-group transactions in Denmark. This article discusses the developments of the EU TPD requirements and concludes with the authors' commentary on several of the proposed changes.

Polacco Giuliana and Sottocasa Sergio, "European Transfer Pricing Law and Developments – Italy", 14 Tax Management Transfer Pricing 10 (September 14, 2005), p.16-17.
In this article the author presents an overview of the transfer pricing laws in Italy.

Rolfe Chris, "New rules for transfer pricing disputes in Europe", *International Tax Review*, February 2005, p.15-17.
The author makes a general overview on the Arbitration Convention and explains what the EU's code of conduct will mean in practice for transfer pricing disputes.

Schnorberger S., Rosenkranz J. and Garcia Manel, "Transfer Pricing Documentation: The EU Code of Conduct Compared with Member States Rule", in Intertax, volume 34 (June/July 2006), p.305-313.
In this article the authors explain the general concept and stated objectives of the EU proposal for a documentation Code of Conduct. The authors address the legal status of the Code of Conduct and compare the EU TPD requirements with the German and Spanish documentation rules .

Senden Linda, "Soft law, Self Regulation and Co-Regulation in European Law: Where do they meet", in Electronic Journal of Comparative Law, vol.9.1(January 2005), p.1-26.
This article is aimed at providing a general insight into the meaning which the concept of soft law has within the context of the EU; it discusses the legal framework for the use thereof and touches upon some possible effects in terms of legitimacy.

Summary Record of the First Meeting of the EU Joint Transfer Pricing Forum- held in Brussels on 3 October 2002, (International Bureau of Fiscal Documentation March/April 2003), p.75-80.
This record provides for an overview of the first meeting of the EU Joint Transfer Pricing Forum held in Brussels on 3 October 2002. It is aimed at providing a general analysis of different documentation requirements within the EU.

Verrue Robert, as quoted by Nicholas Bridgland, "The EU Code of Conduct to Eliminate Harmful or Potentially Harmful Business Tax Regimes", 28 BNA International's Tax & Legal Newsletter (January 2006).
This article presents a comprehensive analysis of the E.U. Code of Conduct to eliminate harmful tax competition taking into consideration the non-legislative nature and the effectiveness of the Code.

Wittendorff Jens , "New Transfer Pricing Rules Enacted", in International Transfer Pricing Journal (September/October 2005), IBFD, p.244-245.
In this practice-oriented contribution, the author analyzes the new provisions of Danish transfer pricing rules, highlighting the reason behind the expansion of the transfer pricing legislation.

Wix Chris, "Introducing Transfer Pricing Documentation Rules in Spain", in *Tax Management Transfer Pricing Report* 18, p.781-783.
The author describes the current legislation in Spain, highlighting that the specific details of the transfer pricing rules will be strongly influenced by the Organization for Economic Cooperation and Development transfer pricing guidelines and by the Code of Conduct on transfer pricing documentation.