

TP documentation in Luxembourg: what the Luxembourg tax authorities may expect

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Luxembourg has not implemented specific TP documentation legislation

In stark contrast to many jurisdictions, Luxembourg has not implemented specific TP documentation legislation. Against the trend of the growing importance of transfer pricing in Luxembourg, applicable TP documentation requirements may exclusively be based on the general provisions of the Luxembourg tax law.

This article purports to be the authoritative guide on TP documentation requirements in Luxembourg.

I. Introduction

Tax authorities around the world are increasingly aware that the transfer pricing of transactions between connected parties can affect their tax yield, all the more so amid the global recession and immediate aftershock.

An article published earlier this year evidenced this trend and, though Luxembourg has not implemented specific transfer pricing legislation, urged Luxembourg taxpayers to ensure that their controlled transactions satisfy the arm's length principle.¹

Transfer pricing documentation plays a pivotal role in safeguarding – or, at least, mitigating – adverse tax consequences in connection with transfer pricing inquiries triggered by tax authorities. Documentation requirements are indeed closely connected to the concept of hidden dividend distribution, in turn in most cases the ground for transfer pricing adjustments.

In Luxembourg, however, taxpayers need not theoretically prove the correctness of their transfer pricing through special documentation. However, documentation requirements may exist in some situations.

The OECD Transfer Pricing Guidelines may be of assistance as they intend to guide tax authorities in developing rules and/or procedures on documentation to be obtained from taxpayers. With much of Luxembourg tax law of German origin, German jurisprudence and related interpretations may also constitute a useful guideline.²

This article analyses both the review of transfer prices by the Luxembourg tax authorities and the co-operation duties of the taxpayer, in the frame of the tax assessment procedure (see II.), and provides practical recommendations for an optimum level of transfer pricing documentation (see III.).

II. Review of transfer pricing and the taxpayer's duty of co-operation

A. Opening comments

The transfer pricing of a Luxembourg company is generally reviewed by the tax authorities as part of the tax assessment procedure,³ but can also be reviewed in the frame of a tax audit spanning several fiscal years.⁴ The Luxembourg tax authorities usually assessed the income tax and net wealth tax due within a

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maximum of five years following the end of the year in which the corporate tax returns have been filed.⁵ Following the amendment of the Luxembourg General Tax Code (*Abgabenordnung*)⁶, the tax authorities are entitled to issue a tax assessment notice based on the tax return filed by Luxembourg companies for the acceleration of the assessment process.⁷ The tax authorities may, however, readjust the taxable basis thereafter within a five year time-frame.⁸

As a rule, the Luxembourg tax authorities are under a duty to investigate all the facts and circumstances of a tax case (*Untersuchungs- or Amtsermittlungsgrundsatz*).⁹ Conversely, the taxpayer is under a duty of co-operation with the tax authorities (*Mitwirkungspflicht*).¹⁰ Both principles go hand in hand and complement each other.¹¹

Should the tax authorities object to statements made in the tax returns, they should in principle ask the taxpayer to complete the tax returns or to provide supporting evidence; not least to accelerate the assessment procedure and to avoid eventual disputes.¹² Here, the taxpayer is obliged to co-operate (evidencing of facts, circumstances, and relevant information)¹³ (see II.B.).¹⁴

Meanwhile, tax authorities should not require the taxpayer to produce documents that are not in his actual possession or control or otherwise reasonably available.¹⁵ In cross-border transactional situations, however, the taxpayer has extended co-operation duties that should include the obligation to provide reasonably obtainable evidence (see II.C.).¹⁶

Should the co-operation of the taxpayer not suffice, the tax authorities may turn to third parties.¹⁷ The latter, however, by contrast to taxpayers themselves, may under certain circumstances lawfully deny the tax authorities access to requested information.

Should none of the above suffice, taxpayers should recognise that despite limitations on documentation requirements, tax authorities may estimate arm's length prices (in particular, where a Luxembourg company does not sufficiently evidence statements made in the corporate tax returns, or does not fulfil its bookkeeping obligations with due diligence) (see II.E.).¹⁸

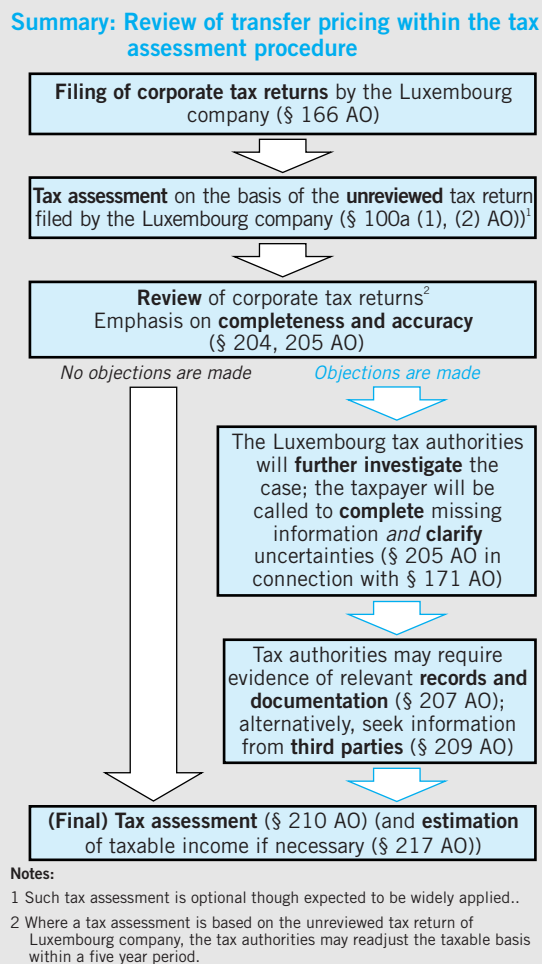
B. The taxpayer's duty of co-operation

Article 171 (1) AO is the basis for Luxembourg taxpayers' duty of co-operation with the tax authorities. Taxpayers are under a duty to evidence facts and relevant information, to the extent evidence is:

1. available,
2. reasonable for the taxpayer, and
3. relevant for clarification purposes.¹⁹

The obligations of Luxembourg companies relating to bookkeeping and the preparation of financial statements, provided by Luxembourg commercial law, are extended as obligations for tax purposes.²⁰ Importantly, however, no reference is made to transfer pricing documentation requirements.

To the extent such documentation fulfils the requirements of Section 162 AO, it will in principle have binding effect for Luxembourg tax purposes.²¹ It should be noted that financial statements, inventory records as well as relevant accounting records and business correspondence need be retained for 10



years.²² Where minimum standards or document retention requirements are not met, the accounting may be (partly) disregarded upon assessment of the taxable income.²³

Furthermore, in line with Section 169 AO, where values derive from estimations (rather than market values, nominal values or payment records), the latter need to be evidenced with facts.²⁴

C. Extended duties of co-operation in cross-border transactional situations

In cross-border transactional situations, Luxembourg taxpayers are under an extended duty of co-operation.²⁵ This measure finds its roots in the need for the Luxembourg tax authorities to respect the legal sovereignty of foreign jurisdictions involved.²⁶ Moreover, the taxpayer himself is often in a better position to obtain evidence from foreign jurisdictions.²⁷

Crucially, in these circumstances the taxpayer's duties of co-operation should rather be extended to providing evidence and clarification rather than mere information.²⁸

Whilst Luxembourg tax law restricts documentation requirements to financial accounting and bookkeeping, the tax authorities may require that documentation be organised in a certain manner.²⁹ The preparation of special transfer pricing documentation as such is, however, excluded from taxpayers' duties of co-operation. Rather, the taxpayer merely has to obtain and to provide already existing documents.³⁰

Where transfer pricing documents have been prepared, however, these should be produced before the Luxembourg tax authorities for the purposes of the investigation.³¹

Inability to obtain otherwise reasonably obtainable information should be no defence, thereby preventing taxpayers from escaping from their co-operation duties. Taxpayers should use all legal and actual means to obtain relevant evidence or information.³²

Taxpayers should endeavour to determine transfer prices for tax purposes in accordance with the arm's length principle, based upon information available at the time of the determination. Thus, the taxpayer may even be obliged to collect evidence at such time.³³

To confuse the extended co-operative duties with the reversal in the burden of proof would be wholly inaccurate. Rather, the Luxembourg tax authorities need to base their decision on all available evidence, thereby rendering taxpayers liable to full co-operation.

A Luxembourg company is under no duty to provide the tax authorities with calculation documents originating from its foreign parent company. What's more, in normal circumstances a Luxembourg subsidiary will generally not have access to such documentation.³⁴ Only a contractual clause could grant it the right to access such information; though examples thereof seldom exist between external third parties for obvious reasons.³⁵

The tax authorities must prove that a subsidiary has the right to obtain (or has exceptionally obtained) calculation documents (where such a right exists). Where the tax authorities cannot do so, the taxpayer cannot be blamed for violating his duty of co-operation. Where underlying facts cannot be clarified in spite of the taxpayer's co-operation, the onus is on the tax authorities to evidence a hidden dividend distribution.³⁶

Nevertheless, the Luxembourg tax authorities may require a Luxembourg *parent company* to provide calculation documents of a foreign subsidiary.³⁷

D. Burden of proof

The burden of proof that transfer prices do not comply with the arm's length principle generally lies on the Luxembourg tax authorities. It is up to the latter to verify whether transfer prices for goods and services transferred between group companies adhere to the arm's length criterion (i.e., no shift of advantages between affiliates). In particular in cross-border situations, the Luxembourg tax authorities will have to base themselves on information provided by the taxpayer.³⁸

Although Luxembourg tax law does not require specific transfer pricing documentation, taxpayers must demonstrate the motivations behind the conclusion of pricing arrangements³⁹ (that is, relevant facts including assets used, functions performed and risks assumed).⁴⁰

Importantly, the tax authorities must investigate compliance with the arm's length principle even where taxpayers do not fulfil their co-operation duties; all the more where the tax authorities suspect deceit. Here, the tax authorities must investigate as

far as is reasonably possible. The burden of proof remains, however, at the level of the tax authorities.⁴¹

Nevertheless, the tax authorities may take into account that the taxpayer is in breach of his duty of co-operation. It therefore cannot be excluded that non-compliance may adversely affect the result of the tax authorities' investigations.⁴²

Finally, as part of their duty to examine all underlying facts, the tax authorities are also entitled to (cross-border) administrative assistance. In this regard, most of Luxembourg's tax treaties contain a provision corresponding to Article 26 (Exchange of Information) of the OECD Model Tax Convention on Income and on Capital.

E. The estimation of transfer prices

As a means of last resort, tax authorities may estimate arm's length prices⁴³ for the determination of an appropriate result.⁴⁴ What is estimated is not the amount of tax due;⁴⁵ rather, the taxpayer's different income elements subsequently added together.⁴⁶

Such estimation is necessary where the tax authorities cannot proceed otherwise, regardless of the taxpayer's wrongdoings. The estimation of transfer prices may be required where:

- the taxpayer does not comply with his bookkeeping and financial statement obligations⁴⁷;
- bookkeeping standards are not met (as set out in Section 162 AO)⁴⁸;
- the taxpayer does not provide the necessary facts and circumstances relating to his tax position⁴⁹;
- the taxpayer does not file a statutory declaration (*eidestattliche Versicherung*) upon request of the tax authorities.⁵⁰

The estimation generally transpires from a breach in the taxpayer's duties of co-operation.⁵¹ However, where the Luxembourg tax authorities prove a breach in the arm's length principle, but the taxpayer fulfils his duties of co-operation, an estimation of taxable income may nonetheless be undertaken.

Evidence that transfer prices in intra-group transactions do not reflect transfer prices in comparable transactions (i.e. a pricing beyond the range of arm's length prices) should suffice for the purposes of evidencing a breach in the arm's length principle. Here, the Luxembourg tax authorities may look to public databases and data of comparable transactions experienced in other cases (under certain conditions).⁵² Overall, the burden of proof for the non-arm's length character of intra-group transactions should be relatively low.⁵³

If the tax authorities can prove that a transfer price is not within the range of arm's length prices, there exists a presumption that the transaction does not comply with the arm's length principle. Even where the burden of proof is on the tax authorities, the latter may still reasonably oblige the taxpayer to provide consistent arguments about its transfer pricing.⁵⁴ The taxpayer must take into consideration that the voluntary production of documents can significantly improve the persuasiveness of its approach to transfer pricing before the tax authorities.

Should the taxpayer be unable to justify the arm's length character of intra-group transactions, tax authorities may rely on the "hidden dividend distribu-

tion” concept to make necessary tax adjustments.⁵⁵ There is never one single arm’s length transfer price for a specific transaction; rather, a whole range of arm’s length prices. The cloudier the facts and circumstances of a given case are, the broader the scope of estimation for the tax authorities. The Luxembourg tax administration should generally apply the upper or lower end of a transfer pricing range, whichever is most beneficial to the taxpayer.⁵⁶

In some cases, the tax authorities may proceed to tax adjustments with reference to the “prudent business manager” test (*ordentlicher und gewissenhafter Geschäftsleiter*). This test is based on hypothetical assumptions relating to the behaviour of a prudent business manager and may allow the tax authorities to build up their own theories on third-party dealings without any reference to third party transactions.⁵⁷ Besides, a prudent business manager would generally not choose a price at the less beneficial range of arm’s length prices if it is not profitable.

In practice, the tax authorities may apply less favourable transfer prices where taxpayers do not fully co-operate and hamper the authorities’ investigations.⁵⁸

III. Documentation recommendations

A. Transfer pricing documentation requirements

Transfer pricing inevitably exerts pressure on taxpayers to strike a balance between a comfortable level of security, and the costs for the preparation of sound transfer pricing documentation. Complex tax consequences may ensue from insufficient documentation, involving uncertainty, an increase in taxable income, double taxation, and penalties. It is therefore crucial to properly analyse intra-group transactions and possible tax consequences.

For tax purposes, taxpayers should always stick to transfer prices that comply with the arm’s length principle on the basis of information reasonably available at the time of the determination. Thus, a taxpayer ordinarily should give consideration to whether its transfer pricing is appropriate for tax purposes before the pricing is established. Thereby, transfer prices should be determined with the same prudent business management principles that would govern the process of evaluating a business decision of similar complexity and importance

The importance of sound transfer pricing documentation in Luxembourg cannot be understated, regardless of the absence of a legal obligation to provide it. It is an excellent means of justifying the arm’s length character of intra-group transactions towards the tax authorities’, and a huge advantage during tax audits.

In fact, where the taxpayer does not produce adequate documentation, there may be a rebuttable presumption that transfer pricing was not considered, and that transactions were motivated by the shareholding relationship.⁵⁹ It remains, however, that the tax authorities bear the burden of proof.⁶⁰

Furthermore, Luxembourg companies in loss situations may raise suspicion on the part of the tax authorities⁶¹, all the more where such losses are incurred over long periods. Red flags for the Luxembourg tax authorities include *inter alia*

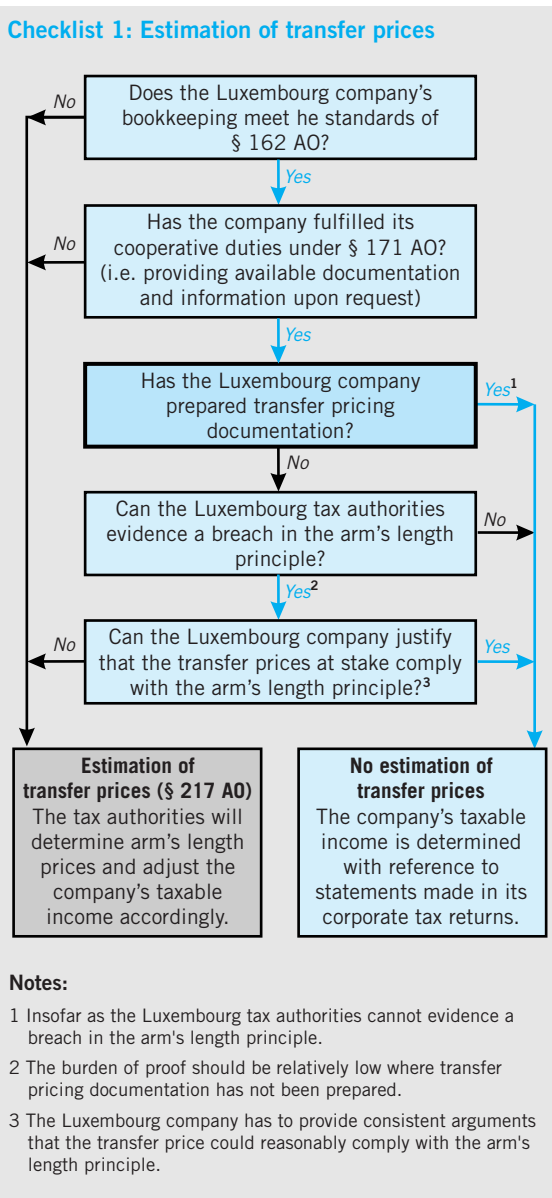
- long-lasting losses in the start-up phase; and
- absence of profit within a certain timeframe.⁶²

From a practical perspective, transfer prices may be reviewed several years after transactions take place. Thus, sound transfer pricing documentation is all the more important amid increasing difficulties in tracing back relevant facts and circumstances of intra-group transactions.

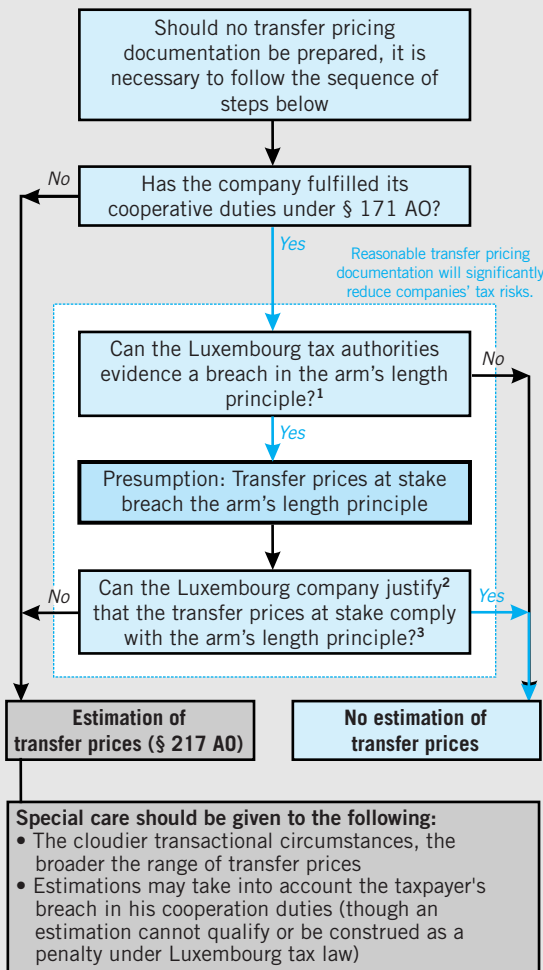
B. Reference to the OECD Transfer Pricing Guidelines

The OECD members (including Luxembourg) have unanimously approved the organisation’s Transfer Pricing Guidelines (“the Guidelines”). It can thereafter be argued that they express the Member State’s attitude towards transfer pricing issues.

While the Guidelines have binding effect on the Luxembourg tax authorities,⁶³ their importance is tempered twofold: firstly, they do not affect taxpayers’ rights and obligations; secondly, they have no binding effect on tax courts. Rather, they are *per se* mere guidelines and thereby rank below laws in the hierarchy of norms.



Checklist 2: The importance of transfer pricing documentation for tax purposes



Notes:

- 1 Tax authorities may look to public databases and data of comparable transactions experienced in other cases (under certain conditions).
- 2 The Luxembourg company has to provide consistent arguments that the transfer price could reasonably comply with the arm's length principle.
- 3 Transfer prices may be reviewed several years after transactions take place. Sound transfer pricing documentation is all the more important amid increasing difficulties in tracing back relevant facts and circumstances of intra group transactions

A separate chapter⁶⁴ of the Guidelines assists taxpayers in identifying useful transfer pricing documentation for evidencing the arm's length character of controlled transactions; but does not intend to impose a greater burden on taxpayers than is required by domestic rules⁶⁵ (all the more so in Luxembourg where the threshold for transfer pricing documentation requirements is relatively low).

The Guidelines also provide for adverse consequences where taxpayers do not fulfil their duties of co-operation, and go as far as shifting the burden of proof on to the taxpayer in certain circumstances.⁶⁶ In Luxembourg, however, the tax authorities bear the burden of proof regardless of taxpayers' wrongdoings.⁶⁷

Furthermore, the Guidelines do not restrict tax authorities' investigative powers. Rather, they require that the taxpayer should prepare or refer to written materials that could serve as documentation of the ef-

forts undertaken to comply with the arm's length principle (general information, factors taken into account, selected method, and so on). The standard for documentation requirement should accord with the prudent business management principles.⁶⁸

When requesting supporting transfer pricing documentation, tax authorities should balance the need for documentation against the cost and administrative burden to the taxpayer. Indeed, taxpayers should not be expected to incur disproportionately high costs and burdens to obtain documents from foreign associated enterprises or to engage in an exhaustive search for comparable data from uncontrolled transactions if the taxpayer reasonably believes either:

1. that no comparable data exists, or
2. that the cost of locating the comparable data would be disproportionately high relative to the amounts at stake.⁶⁹

The documentation/cost balance should, however, be interpreted broadly; it is generally accepted that the preparation of any transfer pricing documentation will involve additional costs.

Finally, the Guidelines suggest that tax authorities should not require taxpayers to provide unavailable documentation or evidence so as to avoid wholly unreasonable requests.⁷⁰

C. Practical documentation recommendations

In practice, companies should screen major inter-company transactions to:

1. identify issues that could raise suspicion on the part of the Luxembourg tax authorities, and
2. assess the magnitude of the tax risks.

It is thereafter up to companies to develop transfer pricing policies for risk mitigation purposes.

While Luxembourg does not have a specific set of transfer pricing rules, the arm's length principle must consistently be respected and arm's length prices be determined for tax purposes. It is essential to record and evidence relevant facts and circumstances, and thereby adhere to the "prudent business management" principle.

In cross-border transactional situations, foreign tax authorities may be more demanding than their domestic counterparts. The Luxembourg tax authorities may accept to make reference to a transfer pricing documentation prepared for a foreign country.

The Guidelines advise that – at the very least – the following be regularly documented:

- group structure (including group and organisational charts, information on the legal and operating structure);
- relevant transactions (including terms and conditions, assets used, functions performed, and risks assumed by the parties);
- relevant legal documentation (including agreements, price lists, and information deriving from financial controlling); and
- transfer pricing computations indicating compliance with the arm's length principle.⁷¹

While it may be argued that the Guidelines provide *de minimis* documentation requirements, it remains that the information relevant to an individual transfer pricing enquiry wholly depends on the facts and circumstances of the case. Thus, there exists no exhaus-

tive list of documents relevant for transfer pricing investigative purposes. Rather, Luxembourg tax advisers will assist companies in optimising transfer pricing documentation and avoiding adverse tax adjustments.

Regardless of the increasing importance of transfer pricing on a global scale and the significant documentation requirements that entail, the vantage points thereof cannot be overstated. Benefits resulting from properly monitored transfer pricing transcend the sphere of direct taxation and may extend to value chain management.

Finally, transfer pricing policies cannot be disregarded after implementation (though such practice is widespread). Valuable transfer pricing documentation should regularly be reviewed and updated; particularly upon business restructurings and where new transactions are envisaged.

IV. Conclusion

The current economic downturn may incite the Luxembourg tax authorities to undertake more stringent transfer pricing reviews. Additionally, the bulk of transfer pricing rules set to be implemented worldwide in the immediate aftermath of the recession is poised to elevate the importance of documentation requirements to a new level.

Though Luxembourg may remain for the time being one of the few West European countries that has not implemented special transfer pricing documentation rules, taxpayers should make all reasonable efforts at the time transfer prices are established to determine whether these are appropriate for tax purposes in accordance with the arm's length principle.

Luxembourg tax advisers are willing to speak to the issue and can assist in optimising bookkeeping practices and documentation requirements for the purposes of facilitating examinations and avoiding adverse tax adjustments.

Ultimately, and all the more amid the financial turmoil, the filing of an advance pricing agreement before the Luxembourg tax authorities remains a virtually unrivalled shield for security and flexibility in transfer pricing matters.

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NOTES

¹ See Philippe Neefs and Oliver R. Hoor: "Transfer pricing in Luxembourg", Tax Planning International Transfer Pricing, BNA International, Volume 10, Number 3 – March 2009, pages 7 – 17.

² Jean Olinger, *Etudes fiscales – Le droit fiscal* (Luxembourg: Editions Saint-Paul, 1994), p. 20; see Tribunal administratif, Decision No. 10553, 17.3.1999.

³ § 166 (1) Abgabenordnung.

⁴ § 162 (10) Abgabenordnung.

⁵ § 144 Abgabenordnung (the period is extended to ten years in case of tax fraud).

⁶ Article 19 of the Law of 19 December 2008.

⁷ § 100a (1), (2) Abgabenordnung.

⁸ § 100a (3) Abgabenordnung, it is worth mentioning that the tax office is not required to provide the taxpayer with a final assessment on his request. Therefore, under this procedure the taxpayer will have to wait five years to be certain that the amount of taxes fixed temporarily will indeed be the definitive amount.

⁹ § 204 (1) Abgabenordnung.

¹⁰ § 171 Abgabenordnung; Tribunal Administratif, Decision of 3.6.2009, No. 24935; Tribunal Administratif, Decision of 10.9.2008, No. 23544; BFH, Decision of 7.12.1955, V z 183/54 S, BStBl. III 1855, p. 75.

¹¹ BFH, Decision of 25.3.1955, III 81/54 U, BStBl. III 1955, p. 133; BFH, Decision of 7.12.1955, V z 183/54 S, BStBl. III 1955, p. 75; BFH, Decision of 7.4.1959, I 2/58 S, BStBl. III 1959, p. 233; BFH, Decision of 29.10.1959, IV 579/56 S, BStBl. III 1960, p. 26; BFH, Decision of 13.7.1962, VI 100/61 U, BStBl. III 1962, p. 428; BFH, Decision of 20.2.1979, VII R 16/78, BStBl. II 1979, p. 268.

¹² § 205 Abgabenordnung.

¹³ § 171 (1), (2) Abgabenordnung.

¹⁴ The taxpayer is not allowed to refuse its co-operation duties because the tax authorities are obliged to investigate and, at the same time, the tax authorities must not remain passive because the taxpayer has co-operation duties.

¹⁵ For example, legal documentation, statements of account, invoices.

¹⁶ Cour Administrative, Decision of 25.2.2009, No. 25436C.

¹⁷ § 175 Abgabenordnung.

¹⁸ § 217 Abgabenordnung.

¹⁹ Tribunal Administratif, Decision of 27.11.2006, No. 21034; Cour Administrative, Decision of 18.7.2008, No. 24642C; BFH, Decision of 19.12.1952, V z 66/53, BStBl III 1953, p. 63; BFH, Decision of 20.1.1959, I 155/57, BStBl III 1959, p. 222; BFH, Decision of 13.7.1962, VI 100/61 U, BStBl 1962, p. 428; BFH, Decision of 12.7.1974, III R 116/72 BStBl II 1975, p. 25; BFH, Decision of 16.4.1980, I R 75/78, BStBl II 1981, p. 492.

²⁰ § 160 (1) Abgabenordnung.

²¹ § 208 Abgabenordnung.

²² § 162 (8) Abgabenordnung.

²³ § 208 Abgabenordnung.

²⁴ RFH, Decision of 23.1.1935, RStBl 306; BFH, Decision of 13.7.1962, BStBl III 428.

²⁵ RFH, Decision of 16.4.1930, I A 370/29, RStBl 1930, p. 151; RFH, Decision of 18.10.1933, VI A 1683/32, RFHE 34, 286; RFH, Decision of 9.1.1934, I A 344/32, RFHE 36, 133; BFH, Decision of 7.4.1959, I 2/58 S, BStBl III 1959, p. 233; BFH, Decision of 21.1.1976, I R 234/73, BStBl II 1976, p. 513; BFH, Decision of 16.4.1980, I R 75/78, BStBl II 1981, p. 492; BFH, Decision of 14.5.1982, VI R 266/80, BStBl II 1982, p. 772.

²⁶ The Luxembourg tax authorities' sphere of influence ends at the border.

²⁷ BFH, Decision of 15.7.1986, VII R 145/85, BStBl. II 1986, p. 857; BFH, Decision of 20.3.1987, III R 172/82, BStBl. II 1987, p. 679; BFH, Decision of 19.6.1985, I R 109/82, BFH/NV 1986, p. 249; BFH, Decision of 15.2.1989, X R 16/86, BStBl. II 1989, p. 462.

²⁸ Cour Administrative, Decision of 25.2.2009, No. 25436C; RFH, Decision of 17.7.1934, V A 456/33, RStBl. 1935, p. 306; BFH, Decision of 7.4.1959, I 2/58 S, BStBl. III 1959, p. 233; BFH, Decision of 13.7.1962, VI 100/61 U, BStBl. III 1962, p. 428; BFH, Decision of 20.1.1978, VI R 193/74, BStBl II 1978, p. 338; BFH, Decision of 16.4.1980, I R 75/78, BStBl. II 1981, p. 492; BFH, Decision of 16.4.1980, I R 75/87, BStBl II 1981, p. 492; BFH, Decision of 10.7.1981, VI R 132/80, BStBl II 1982, p. 21; BFH, Decision of 19.6.1985, I R 109/82, BFH/NV 1986, p. 249.

²⁹ BFH, Decision of 17.10.2001, I R 103/00, BFH/NV 2002, 134.

³⁰ BFH, Decision of 10.5.2001, I S 3/01, BFHE 194, 360.

³¹ BFH, Decision of 17.10.2001, I R 103/00, BFH/NV 2002, p. 134.

³² BFH, Decision of 9.8.1991, III R 129/85, BStBl. II 1992, p. 55.

³³ BFH, Decision of 14.5.1982, VI R 266/80, BStBl II 1982, p. 772.

³⁴ BFH, Decision of 10.5.2001, I S 3/01, BFHE 194, 360.

³⁵ BFH, Decision of 10.5.2001, I S 3/01, BFHE 194, 360.

³⁶ Article 59 of the Law of 21 June 1999; BFH, Decision of 15.2.1989, X R 16/86, BStBl. II 1989, p. 462; BFH, Decision of 9.8.1991, III R 129/85, BStBl. II 1992, p. 55.

³⁷ A parent company is in the legal position to demand calculation documents from its subsidiary.

³⁸ RFH, Decision of 23.1.1935, RStBl 1935, p. 306; BFH, Decision of 13.7.1962, BStBl III 1962, p. 428.

³⁹ BFH, Decision of 26.8.1993, I B 25/93, BFH/NV 1994, p. 268.

⁴⁰ BFH, Decision of 12.7.1962, IV 124/58 U, BStBl III, p. 522.

⁴¹ BFH, Decision of 13.7.1962, VI 100/61 U, BStBl. III 1962, p. 428.

⁴² Tribunal Administratif, Decision of 10.9.2008, No. 23544; BFH, Decision of 15.2.1989, X R 16/86, BStBl. II 1989, p. 462; BFH, Decision of 9.8.1991, III R 129/85, BStBl. II 1992, p. 55; BFH, Decision of 9.8.1991, III R 129/85, BStBl II 1992, p. 55; BFH, Decision of 10.5.2001, I S 3/01, BFHE 194, 360; BFH, Decision of 17.10.2001, I R 103/00, BFH/NV 2002, 134

⁴³ § 217 (1) Abgabenordnung.

⁴⁴ Cour Administrative, Decision of 19.2.2009, No. 24907C; Cour Administrative, Decision of 29.10.2009, No. 25700C; BFH, Decision of 19.1.1993, VIII R 128/84, BStBl II 1993, p. 594.

⁴⁵ The estimation of the amount of the tax liability would be illegitimate.

⁴⁶ BFH, Decision of 26.1.1961, IV 314/58.

⁴⁷ § 217 (2) s. 2 Abgabenordnung, § 160 Abgabenordnung.

⁴⁸ § 217 (2) s. 2 Abgabenordnung; A bookkeeping does in particular not comply with the standard set out in § 162 Abgabenordnung if the accounting is incomplete or insufficient.

⁴⁹ § 217 (2) s. 1 Abgabenordnung in connection with § 171 Abgabenordnung.

⁵⁰ § 217 (2) s. 1 Abgabenordnung; the tax authorities do not regularly ask for such statutory declaration.

⁵¹ § 171 Abgabenordnung.

⁵² BFH, Decision of 17.10.2001, I R 103/00, BFH/NV 2002, 134.

⁵³ Tribunal Administratif, Decision of 27.11.2006, No. 21033; Tribunal Administratif, Decision of 31.12.2007, No. 22777; Tribunal Administratif, Decision of 9.6.2008, No. 23324; Tribunal Administratif, Decision of 10.9.2008, No. 23544; Cour Administrative, Decision of 12.2.2009, No. 24642C.

⁵⁴ The taxpayer has to provide consistent arguments underpinning the arm's length character of the transfer price representing at least a probable possibility; RFH, Decision of 21.12.1938, RStBl 1939, p. 307; BFH, Decision of 7.4.1959, I 2/58 S, BStBl III 1959, p. 233.

⁵⁵ § 217 (1) Abgabenordnung; it should be noted that the presumption that transfer prices do not comply with the arm's length principle (following the proof by the Luxembourg tax authorities) is a precondition for the estimation of transfer prices if Luxembourg companies comply with their co-operation duties.

⁵⁶ BFH, Decision of 17.10.2001, I R 103/00, BFH/NV 2002, 134.

⁵⁷ BFH, Decision of 17.10.2001, I R 103/00, BFH/NV 2002, 134.

⁵⁸ Tribunal Administratif, Decision of 10.9.2008, No. 23544; this does not aim at a penalisation of the taxpayer but rather at the avoidance of granting unjustified advantages to a taxpayer that does not fulfil his duties to co-operate.

⁵⁹ Cour Administrative, Decision of 12.2.2009, No. 24642C.

⁶⁰ Article 59 of the Law of 21 June 1999; BFH, Decision of 10.5.2001, I S 3/01, BFHE 194, 360; BFH, Decision of 17.10.2001, I R 103/00, BFH/NV 2002, 134

⁶¹ Here, the tax authorities may suspect that losses owe to unusually high charges or exceedingly low income.

⁶² BFH, Decision of 17.2.1993, I R 3/92, BStBl II 1993, p. 457.

⁶³ As Luxembourg is a member of the OECD and has approved the Guidelines, they basically have a self-binding effect on the Luxembourg tax authorities.

⁶⁴ Chapter V of the OECD Transfer Pricing Guidelines.

⁶⁵ Chapter V, Paragraph 5.2. of the OECD Transfer Pricing Guidelines.

⁶⁶ The Guidelines solely limit such practice to the extent tax authorities would make groundless or unverifiable assertions about transfer pricing; Chapter V, Paragraph 5.2. of the OECD Transfer Pricing Guidelines.

⁶⁷ The burden of proof for the non-arm's length character of intra-group transactions should, however, be relatively low; Tribunal Administratif, Decision of 27.11.2006, No. 21033; Tribunal Administratif, Decision of 31.12.2007, No. 22777; Tribunal Administratif, Decision of 9.6.2008, No. 23324; Tribunal Administratif, Decision of 10.9.2008, No. 23544; Cour Administrative, Decision of 12.2.2009, No. 24642C

⁶⁸ Whether documentation or evidence is required for other (i.e. non-tax) matters is wholly irrelevant; Chapter V, Paragraphs 5.3. and 5.4. of the OECD Transfer Pricing Guidelines.

⁶⁹ Chapter V, Paragraph 5.6. of the OECD Transfer Pricing Guidelines.

⁷⁰ Documents that are not reasonably available include, for example, information that cannot be legally obtained, or that is not actually available to the taxpayer because it is confidential to the taxpayer's competitors or because it is unpublished and cannot be obtained by normal enquiry or market data.

⁷¹ Chapter V, Paragraph 5.17. of the OECD Transfer Pricing Guidelines.