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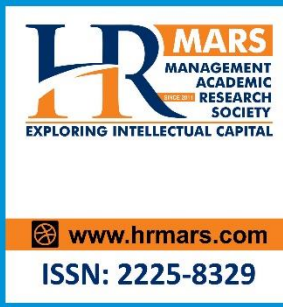
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## Restructuring and Transfer Pricing Multinational Companies - Between

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### Abstract

Under the current circumstances of globalised economic activities, the fiscal optimization techniques and methods are inevitably correlated with the fiscal regime of the transfer pricing that are a hot topic but also susceptible to raise contradictory opinions. Starting from these assumptions, this paper makes a selective analysis of the fiscal regulations in this field in Romania by focusing on decrypting controversial legislative aspects that are consequently interpretable. In compliance with the global trend, the Romanian legislation regarding the transfer pricing was modified in February 2008 with specific requirements regarding the contents of the file of the transfer pricing that the Romanian tax-payers that pay their tax on profit and do transactions with affiliated persons must prepare and have available in case of fiscal inspections. The purpose of the file including relevant documentation for the transfer pricing is to reflect how the prices have been established by the taxpayer during the transactions carried out with affiliated persons and to prove that they have been established in compliance with the fairness principle. The legislation regarding the transfer pricing in Romania is one of the most intricate in this region and it clearly mentions the express obligation of the taxpayers doing intra-group transactions to make and submit a file of the transfer pricing upon demand of the fiscal authorities.

**Keywords:** Transfer Pricing, Business Restructuring Taxpayer, Affiliated Persons, Fiscal Authority

### Introduction

As a result of the advanced and improved means of production and technologies, deepened social labor division, enlarged market, enhanced exchanges of commodities intermediated by money beyond the borders of the state, as well as expansion and diversification of transactions implying commercial effects and securities, individuals increasingly have political, economic or social relationships in one or several countries.

Depending on the context strategy-structure in which intra-company deliveries take place and on the fiscal restriction imposed, the transfer pricing policy is part of the financial policy of multinational companies. The positive effects of the transfer pricing are placed under question mark because of the fiscal policy enforced in the country of origin and in the host country since there is no international harmonization in this respect.

The financial institutions as well as other sectors of the global economy are strongly affected by the global economic crisis initiated in 2008; the stock exchange market are declining, investments are becoming significantly slower or even stop, loans granted by banks to economic agents become subject to discouraging restrictions, the consumers' level of trust is degrading, the unemployment is increasing, while several countries have reinforced their revenue repatriation policies. The feeble economic growth and the budget deficit of many countries triggered increased pressure of the fiscal authorities, namely ANAF (National Agency of Fiscal Administration) in Romania's case, to collect taxes, some of them continuously increasing (value added tax - VAT - increased in Romania from 19% to 24%), which increased the pressure to attract additional funds to the general consolidated budget.

Under these circumstances, in certain cases, the profitability of multinationals is not a problem but the cash deficit is a challenge. For foreign investors, profit repatriation is major under the current circumstances.

The concept of transfer pricing means the amounts paid by a company for a product, a service or loan acquired from a company belonging to the same group. One of the requirements is that the transfer pricing should be established according to the market value of that product, namely according to the price for which it would have been acquired from a company non-affiliated to the group. The transfer pricing can influence the profitability of the affiliated company, its cash flow, the performance indicators of that company, and the investments decisions of the group or business model. There are cases when these prices do not comply with the market value principle since intra-group establishing of prices is convenient to the companies that are members of that group to re-allocate profit or loss, according to their central policies while these re-allocations of profit have a direct impact upon the fiscal position in each country where the group operates through its branches.

Given these remarks above-mentioned, our purpose is to present in this article some aspects regarding the transfer pricing file requested from the taxpayers by the Romanian fiscal authorities and to re-analyze conventional business models starting from the assumption that any cash generation or saving is highly important.

### **Literature Review**

Three aspects shall be taken into account when taking the decision whether to choose intra-company market or foreign market for a multinational company:

- If there are alternatives to the domestic trade;
- The level of de-centralization of the multinational company;
- The need of the mother company to obtain detailed data about its branches, which affects the level of de-centralization of the latter.

Any multinational company shall be seen as a network made up of its branches which act within a system that is both internal and external to the company. Under these circumstances, the branches of a multinational company have relationships with other branches of the multinational company, with branches of other multinational companies, with local independent enterprises, and local authorities. The level of integration of the branch in the internal system of the company depends on the intra-company transaction which can be: cash flows, product flows and knowledge flows, and the higher shall be the more transactions with other branches shall take place. Thus, within a multinational company, "the branches with high integration shall be those that assemble components received in the internal system in a final product distributed outside the company and take over mature technologies from the internal system, and are oriented towards Research &

Development whose results shall be applied to the internal system of the company” (Voinea, 2003). Transfers of components and final and intermediary products take place among these branches, on an internal market of the multinational company, at prices established administratively, called transfer prices. Within a modern multinational company, marketing, Research & Development, Human Resources management, management and finance activities take place. These activities are interdependent and connected among themselves through product exchanges or intermediary services that contribute to achieving final products that are specific of the company. “given the sustainability of the relation and the mutual interest that coordinates this relation, this market allows, on the one hand, a cut of the transaction costs related to the permanent re-negotiation of the procurement relations and, on the other hand, a wealth-generating relational experience” (Nițu, 2003).

International trade is often dominated by changes among branches of a single enterprise. These changes should be in principle evaluated at the price that shall be the price achieved on the market among individual enterprises. “This price shall be called full competition price.” (Mazerolle, 2005). „As an extremely complex subsystem of the market economy, the price appears as a form of economic measurement, in monetary expression, of the value of the goods. It is the result of various dynamic and often contradictory factors: value of the goods; purchase power of the currency; relation demand-offer on the market; economic policies promoted by the countries across the world” (Nițu, 2003). The global price fluctuates, and changes according to the competition, depending on a whole range of economic and/or political factors that manifests themselves on static markets, usually called circumstantial factors, for which the major role is played by the evolution of the relation demand-offer. Beyond the relation demand-offer, practically the level, structure and dynamics of the global prices are the result of evolution of the: „economy, politics, finance and technology in geographic areas that have a significant weight in the global production, consumption and commercial trade; economic and circumstantial cycle of advanced countries; global inflation, exchange rate and loan conditions; trade policies promoted by regional economic groups; costs, depending on price trends, of the basic commodities; price policies enforced by multinational companies” (Platiș, 2002).

Several price categories are used in international exchanges, classified according to the nature of the transaction, the characteristics of the commodities, the policies promoted by the countries across the world, regional groups or certain groups of interest. Among them (Popa, 2008): „transaction prices, formed after direct negotiations among business partners, reflecting the trends of the market at a certain moment; tender prices, established according to the relation demand-offer of commodities sold on the respective markets, and these are the reference prices for similar products sold outside tenders or stock exchanges; transfer prices, for transfers among branches of a multinational company whose object is commodities sales, services, remuneration for licenses, income from real estate rental, and interests resulted from intra-company loans”. These prices are administratively established, depending on the economic and fiscal interests of the multinational company. The transfer prices shall be established according to the interests of the mother company and of the branches and are significantly different from the transaction prices for the same commodity and they influence, like transaction prices, the global prices for similar or corresponding commodities.

Several cases can be possible during the establishing of the transfer prices: the transfer price is tantamount to the price of full competition and the net consolidated profit is obtained by

complying with the principle of full competition; the transfer price is established according to the market, in other words, it is tantamount to the price of full competition but the principle of full competition is not complied with. If the multinational company intends to transfer the profit of the mother company to the branches in order to have lower taxes than in the country of origin, the transfer price shall be established so that the principle of full competition is violated and a fiscal fraud takes place in this case (*Mazerolle, 2005*). The internal financial system of the corporations gives the chance of taking advantage of imperfections resulted from the differences among national regulations of various countries. In order to avoid barriers and restrictions in transactions, corporations often make use of the fiscal arbitrage: reduction of the fiscal „burden” by transferring profit located in countries with high taxes in countries with low taxes (*Munteanu and Horobet, 2005*).

National legislations vary in terms of establishing and assessing the transfer prices which can generate the risk of double imposition for multinational companies, both the in country of origin and in the host country, and difficulties in checking the accuracy of taxable profit for the fiscal administration in the respective countries.

In order to emphasize the importance of the transfer prices in the EU, Alfons Weichenrieder (*Weichenrieder, 2007*) made a model to correlate profit taxes with profitability of the companies that are members of the same group. After analyzing the case of the corporations with foreign branches in Germany, the author found that a 10% increase in the profit tax in the country of origin triggers higher profitability of the branches (artificially generated through transfer pricing) with 0.5%.

International norms regarding the transfer prices, elaborated by the Organization for Cooperation and Economic Development (OECD), stipulates three requirements for a transaction to become subject of the regulations regarding the transfer price:

- To be a cross-border transaction (ex: between a Romanian person and a non-resident person);
- To take place between two affiliated entities;
- To have as object a commodity, a service or any item with economic value.

According to the provisions of the Romanian Fiscal Code (art.7) and its enforcement methodology, the affiliated persons, as well as the resident physical person and the non-resident physical person shall be defined as follows:

- *Affiliated persons* – a person is affiliated with another person if their relationship is defined by at least one of the following cases:

a) A physical person is affiliated with another physical person if they are spouses or relatives up to the 3<sup>rd</sup> degree. Among physical person, the prices for which tangible or intangible assets are transferred or services are provided shall be called transfer price;

b) A physical person is affiliated with a legal person if the physical person owns, either directly or indirectly, including the assets of the affiliated persons, at least 25% of the value of the shares or voting rights owned in the legal person or if the physical person practically controls the legal person;

c) A legal person is affiliated with another legal person is at least:

(i) the first legal person owns, either directly or indirectly, including assets of the affiliated persons, at least 25% of the value of the shares or voting rights owned in the other legal person or if first legal person controls the second legal person;

(ii) the second legal person owns, either directly or indirectly, including assets of the affiliated persons, at least 25% of the value of the shares or voting rights owned in the first legal person;



(iii) a third legal person owns, either directly or indirectly, including assets of the affiliated persons, at least 25% of the value of the shares or voting rights owned in the first and in the second legal persons.

- *Non-resident physical person* – any physical person that is not a resident physical person;

*Resident physical person* – any physical person that fulfils at least one of the following requirements:

a) Has its domicile in Romania;

b) The centre of its vital interests is in Romania;

c) Has been present in Romania for a period of time or several periods of time that exceed 183 days during a period of 12 consecutive months and ends in the respective calendar year;

d) Is a Romanian citizen working abroad, as a public servant or employee of the Romanian state in a foreign country.

As an exception from the provisions of letters a) - d), a foreign citizen who has a diplomatic or consular status in Romania, a foreign citizen who is an employee of an international or inter-governmental body registered in Romania, a foreign citizen who is a public servant or an employee of a foreign country in Romania and the members of their families shall not be considered as resident citizens.

In Romania, the contents of the „*transfer pricing file*” is stipulated by the Order of the Ministry of Economy and Finance (MEF) no 222/08.02.2008 (Romanian Official Gazette no 129/19.02.2008), in force starting with 19.02.2008. The Order of the Ministry of Economy and Finance no 222/2008 shall be completed with the Guidelines regarding the transfer pricing issued by the Organization for Cooperation and Economic Development, and the provisions of the OECD Guidelines regarding the transfer pricing for multinational entities and fiscal administration (Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, the most recent version, July 2010). Order no 222 of 8 February 2008 requires taxpayers that perform transactions with affiliated persons to make and submit the transfer prices file (art. 2 para. (1)), upon the request of the competent tax body and by the deadlines defined by the tax body.

The aim of the file including the relevant documents for the transfer prices is to reflect how the transfer prices have been established by the taxpayer in its transactions with the affiliated persons and to prove that the transfer prices have been established against a market price, according to the fairness principle. The methods accepted by the Fiscal Code that can be used by taxpayers to establish the transfer prices are the ones accepted by the OECD Guidelines regarding the transfer prices. Taxpayers shall use the most appropriate method out of the following:

- Price comparison method, by which the price is established by comparing it to the price agreed upon in a comparable transaction between non-affiliated companies, under comparable circumstances;

- Cost-plus method, by which the market price is established starting from the costs of commodities or services ensured by the transaction, increased with the corresponding profit margin;

- Re-sale price method, by which the re-sale price obtained by an associated re-saler from an independent buyer is decreased with a corresponding profit margin;

- Any other method stipulated in the OECD Guidelines.

In case of refusal or submission of an incomplete file (art. 3, para. (1)), the competent tax bodies, if the taxpayer performs transactions with affiliated persons without explaining the transfer

prices, shall estimate the transfer prices (art. 3, para. (2)). The method used by the tax bodies to do their own estimation is mentioned in Annex no 3 to this Order, namely:

- Identification of 3 examples of transactions similar with the ones that are the object of the estimation;
- the similar transactions, according to point 1, taking into account the lack of data as a result of non submission/incomplete transfer price file, shall be identified according to the general data regarding transactions that are to be the object of estimation, available to the competent tax body at the moment when the estimation is made;
- to establish the estimated value of the transaction, the average value of the values of the similar transactions identified according to point 1 shall be computed.

### **Research Methodology**

In order to reach our goal, we have used a fundamental research methodology consisting in reading of the literature in the field and reading of articles and studies regarding this topic. We have also studied the national regulations in the field: the Romanian Fiscal Code and its enforcement methodology, the Order of the Romanian Ministry of Economy and Finance no 222/08.02.2008, published in the Romanian Official Gazette no 129/19.02.2008, regarding the contents of the „transfer price file”, and the international recommendations of OECD - Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations and IRS (The Internal Revenue Service)-Pacific Association of Tax Administrators (PATA) Transfer Pricing Documentation Package. Our methods have been: analysis, synthesis, deduction and induction.

### **Results and Discussion**

The issue of transfer pricing is the main risk area of interest on the fiscal agenda of tax managers of the multinational groups. Through transfer prices, the group has the chance to transfer profit or loss to various jurisdictions according to the goal aimed at by the central management, with direct impact upon the fiscal position in each country in which the group operates through its branches. In other words, the transfer prices can be used as a tool to diminish taxable profit obtained in a fiscal jurisdiction and the tax on profit. At the same time, the transfer prices have an impact upon the cash flow, VAT, customs value of the commodities, investment decisions taken by the group or performance indicators of the respective company. The transfer prices lead to a conflict between fiscal authorities that wish to impose taxes upon the real profit obtained by local branches of the multinational groups and the group itself which is interested in optimizing the fiscal burden. When the transfer prices do not comply with the market value principle, the fiscal authorities are entitled to make adjustments, significant in most cases. The current economic situation and the wish to bring in money to the public budget have resulted into increased fiscal checks as an „aggressivity” of the tax authority in investigating the transfer prices. At present, in more than 80% of the investigated multinational companies that are resident in Romania and have been checked, the tax authorities checked their transfer prices as well. The legislation regarding the transfer prices in Romania is one of the most intricate in the region, and includes also the obligation of the taxpayers that perform intra-group transactions to make and submit a transfer prices file upon the request of the tax authorities. The costs incurred by this file are very high since there is no materiality threshold regarding the value of the intra-group transactions that must be documented and because of the

need to pay experts in transfer pricing (the number of experts in transfer pricing in Romania is very limited).

During the latest years, the opening of the South Eastern economies towards other economies and the increased political stability in this area encouraged the setting up of branches of European corporations in these countries. To the extent to which there is no transfer pricing legislation in these countries (table 1) and there are low taxes on profit, the risk to increase the imposition avoidance by using the mechanism of transfer pricing by European corporations increases as well. On the other hand, even some EU countries have no legislations regarding the transfer prices (Malta) or there is no obligation to make documentations regarding the transfer prices (Luxemburg).

Table 1. Aspects regarding the legislation on the transfer prices and the tax on profit in SEE

Country	National legislation complies with OECD principles	National legislation complies with „arm’s length” principle	National legislation implies documentation	Tax on profit in 2010 (%)
Azerbaijan	-	-	-	20
Bulgaria	x	x	-	10
Croatia	partial	x	-	20
Czech Republic	x	x	x	19
Estonia	x	x	x	21
Hungary	x	x	x	19
Kazakhstan	x	partial	For certain taxpayers	20
Latvia	x	x	-	15
Lithuania	x	x	x	15
Macedonia	partial	x	-	10
Poland	x	x	x	19
Romania	x	x	x	16
Russia	partial	partial	-	20
Slovenia	x	x	x	20
Slovakia	x	x	x	19
Ukraine	partial	x	-	25

Source: PriceWaterhouseCoopers, *Transfer Pricing Perspectives, 2010*.

In Romania, the order establishing the general contents of the „transfer prices file” tries to clarify an intricate field, difficult to approach by the taxpayer and by the competent tax bodies. The difficulty in analyzing the transfer prices is not a national problem but rather European and global. A deep accurate analysis imposes inclusion of some major elements:

- Total transparency regarding the way in which the group is organized;
- Total transparency of the cash flows within the group;
- A detailed presentation of the costs and the way in which internal costs are formed;



- A database including similar transactions in branches of the same company operating in various countries (i.e. transactions between Renault Romania and Renault France, compared to transactions between Renault France and Renault Turkey), as well as databases regarding similar transactions and the way in which prices are formed in the same country between taxpayers operating in the same industry but belonging to different corporations (i.e. transactions and the ways in which prices are formed between Renault Romania and Renault France, compared to the relation between Ford Romania - Ford Europe - Ford America).

ANAF approach (National Agency for Fiscal Administration) regarding the contents of the „transfer prices file” stipulated in the Order of the Ministry of Economy and Finance (MEF) no 222/08.02.2008 raises some aspects that require analysis:

- In our opinion, the attempt to (partially) transfer the obligation of the tax body to check the financial statements to the tax payer takes place;
- The „burden of proof” is partially transferred to the taxpayer who, with a file that should be as comprehensive as possible, shall persuade the tax body that its prices are justified;
- The taxpayer has however the right not to submit a transfer price file, which means lack of justification for the transfer prices;
- The tool imposed on the tax body – to identify 3 similar transactions and to compute the average – additional weight is given to the assessment method based on direct market comparisons.

The transfer of the check task to the taxpayer is manifest especially through the obligation to submit in the file, along with the price policy, a separate section of comparative analysis including information regarding external or internal comparable transactions (para. 1 para. (2)). In other words, taking the previous example, in order to submit a comprehensive file, Renault Romania should submit not only similar transactions done by Renault in other countries, but also similar transactions of the competition, let us say Ford Romania. Interesting to assess to what extent can be a taxpayer forced to submit similar transactions done by the competition. Should the taxpayer be aware of them? Should the taxpayer estimate these prices if it has no information about these transfer prices of the competition? What happens if the prices estimated for the competition are not the real ones? Is the taxpayer penalizable for this wrong estimation of the policies of the competition? Do we have to do with an approach by which the Romanian tax body attempts to transfer this obligation to the taxpayer, taking into account the difficulty to identify inaccuracies in the transfer prices of the affiliated persons?

Anyway, the obligation of the tax body, if the taxpayer refuses to submit or submits an incomplete file, to submit its own comparable information, ensures a balance regarding the „burden of proof” and the objectivity of the process. In case of the taxpayer’s own assessment, the tax body shall submit 3 similar transactions as an argument for the tax payer. In keeping with the principle of relevant market, these 3 transactions may become actually a valuable source of information regarding the competition policies for any taxpayer that is subject to a tax check.

Given the above-mentioned and taking into account that ANAF gains experience in revising the transfer price files (ANAF has a specialized department) it is the right moment for many companies to revise their strategies. Consequently, multinational companies scrutinize the alternative possibilities to render efficient the global business by restructuring production processes, distribution and price policies. Any restructuring of the business is accompanied by re-allocation of profit or loss among the companies of the group. Thus, the hot topic regarding adjustments of transfer prices during restructuring and post-restructuring, is the avoidance of VAT adjustment.

Restructuring of a business is defined as re-allocation by a company of the functions, assets and / or risks among its members located in various fiscal jurisdictions. In case of business restructuring, ANAF is trying to estimate if the restructuring generates transfer of assets that should be compensated and to assess such a transfer, with potential fiscal adjustments (tax on profit, VAT). In practice, in most business restructuring cases, intellectual property is the transfer most scrutinized by tax authorities and therefore, it is vital to have an appropriate documentation on the business restructuring since: intellectual property is a key element for the trade value of a group of companies; intellectual property significantly influences the fiscal burden of the group; migration of the intellectual property in best fiscal jurisdiction is an efficient tool to plan the business strategy of the group; migration of the intellectual property is usually analysed in detail by the tax authorities; in case of intellectual property migration, a strong documentation shall be prepared (for the periods: before restructuring, during the restructuring, after restructuring) to support the economic essence of the business model; intellectual property migration usually implies significant costs.

From operational perspective, according to OECD provisions, business restructuring means:

- Rationalisation of certain operations/processes by separating the functions (ex.: production, R&D, distribution) in different entities of the group;
- Transfer of intangible assets to one/several separate entities of the group;
- Specialisation of certain processes, accompanied by risk limitation in certain affiliated entities (ex: conversion from producers or distributors with intricate functions into producers with limited functions or commission-based distributor for other entities of the group that are parties in the agreements with customers).

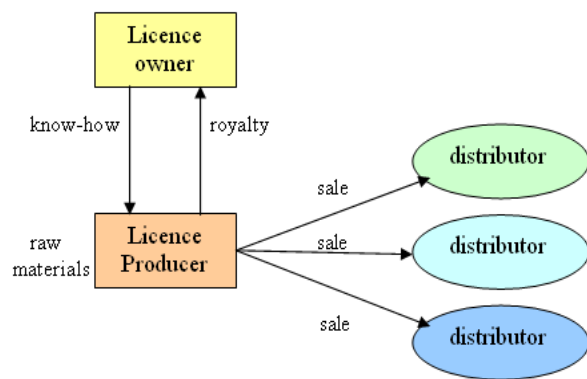
Consequently, business restructuring does not necessarily imply visible changes in the legal structure or even operational structure but brings about profit/loss re-allocation associated to the transferred functions/assets/risks. Examples of easily „visible” restructuring: reorganizations (mergers/acquisitions), relocations of production activities, setting up of new companies or mere fiscal registration (registered office or VAT), and examples of „invisible” restructuring: transfer of intellectual property rights among affiliated entities (implying reallocation of functions and risks), transfer of the business, „partial transfer of assets” (business).

The business models used by multinational companies can be:

- *Production models*: Producer with intricate functions; Producer with agreement; Processor with limited functions.
- *Sales models*: Distributor with intricate functions; Distributor with limited functions; Commission-based distributor or representative.
- *Intellectual property models*: Intellectual property dispersed across the group (shared licences and costs); Centralised intellectual property (a single company own the intellectual property).

Below, there are examples of possible business restructuring from the operation standpoint, namely specialisation of certain processes, accompanied by risk limitation in certain affiliated entities (ex: conversion from full rights producers into producers with limited functions or from distributors with intricate functions into commission-based distributors for other entities of the group that are parties in the agreements with customers).

Traditional model – full rights producer



Limited risk processor

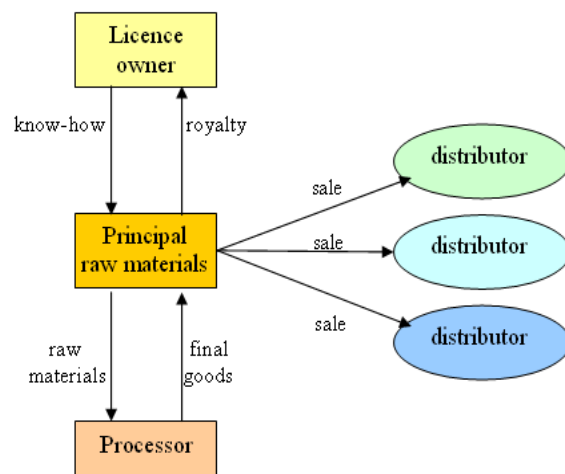
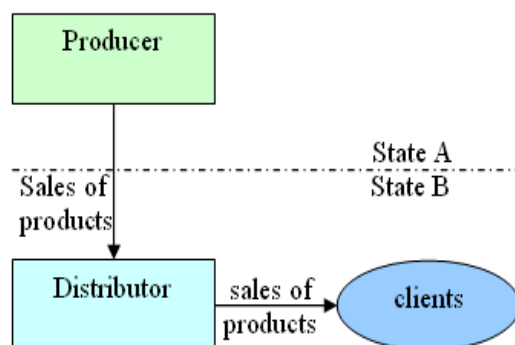


Figure 1. Conversion full rights producer → Limited risk processor

Distributor with intricate functions



Comission-based distributor

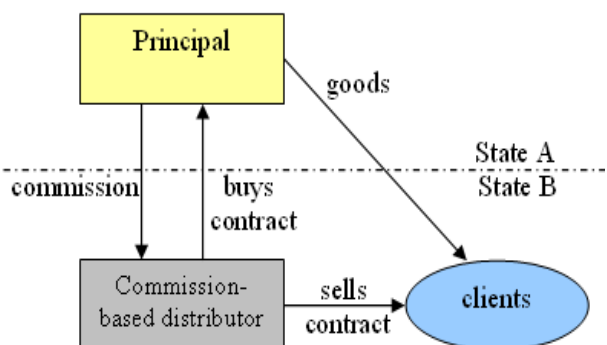


Figure 2. Conversion full rights distributor → Commission-based distributor

An aspect to analyse in the stages pre and post-business restructuring is the reallocation/ transfer of risks. Among the examples of risks: exchange risk, stock depreciation risk, stock excess risk, credit risk. Risk analysis is done by:

- Examining the contractual terms and conditions (contractual definition of risks);
- Examining the extent to which the parties comply with the contractual allocation of risks, control over decisions to take risks;
- Establishing the extent to which each transferred risk is or not significant from the economic perspective (if it has a significant associated potential of profit/loss);
- Identifying comparables or, if there are such comparables, establishing to what extent allocation could have taken place among independent entities;
- Identification of the consequences of risk allocation in terms of transfer of prices (if the principle of the market price is complied with), name the party that: bears the management costs or risk limitation (hedging, insurance); bears the costs that may appear as a result of risks (including

constituting appearing during regular checks requested according to the accounting of tax regulations); it is compensated by an increase of remuneration/revenue.

The adjustment of the transfer prices achieved after the audit of the tax authorities can generate the double imposition risk. For instance, double imposition through transfer prices appears when the tax administration of a member state unilaterally adjusts the price formed for a sale between companies of the same group and this adjustment is not compensated by a corresponding adjustment in the member state where the sale took place. Although the investigations done by the European Commission suggest that the number of litigations between tax authorities and corporations regarding the adjustments of the transfer prices is rather limited in the member states, the representatives of the business environment often complained that the costs triggered by those litigations are so high that the acceptance of the double imposition is less costly (*Ernst & Young, 1999*).

According to the OECD provisions regarding the transfer prices in the context of the restructuring, during the investigation of the transfer prices, the tax authority should establish if, under the circumstances of the market, the restructuring itself is remunerated. The principles to define the reply to the question if the restructuring itself is remunerated or not are the following:

- Identification of all transactions involved in the restructuring (functions, assets, risks) and their analysis before and after restructuring;
- Identification of options that the multinational company would have really had instead of restructuring;
- Analysis of re-allocation of the profit/loss potential as a result of restructuring and its compensation or non-compensation;
- Transfer of a value (asset, full/partial business);
- Remuneration of the restructured entity for the loss suffered as a result of restructuring.

In order to infer how post-restructuring transactions are remunerated, the following stages are recommended: selection of a method (one of those accepted by OECD), establishing the party to test and selection of the relevant financial indicator; application of the selected method: identification of potential comparables; analysis of the relation between remuneration/ compensation received upon restructuring and compensation received after restructuring.

Starting from the international approach according to which business restructuring usually implies relocation of profit towards other jurisdictions, more favourable from the fiscal perspective, a typical approach of the tax authorities in the state where profit is relocated could be summarized with the answers to three questions: How is restructuring done?; Where is restructuring done?; Who are the beneficiaries of restructuring?

Since the investigation of the transfer prices has become a usual practice during tax inspections, the existence of the transfer price file is a need within the new economic context and the restructuring shall comply with the principle of the market value applied to the transfer prices. The transfer price file shall include both an operational analysis and an economic analysis focused on the following aspects: market analysis, industry analysis and competition analysis; economic circumstances under which transactions between affiliated parties take place; documenting of the „reactions of the transactions” triggered by the current economic setback; documenting of the reasons to accept/remove comparable companies into /from the comparability study; including of regional comparables (Order no. 222/2008 of the Romanian Ministry of Economy and Finance stipulates that the comparability study should be done by selecting local comparables; if there are no

scuہ comaprables, the study can be extended to the EU and then to the global level); using financial data from several years to prove the changes in the business cycle.

### Conclusions

In the current economic context, multinational companies are compelled to revise their strategies. Consequently, multinational companies are increasingly looking at options to render more efficient the global business by restructuring the productions processes, distribution and their price policies. Any business restructuring is accompanied by re-allocation of profit and loss among the companies of the group. Thus, the hot topic is adjustment of the transfer prices during restructuring and post-restructuring, and avoidance of VAT adjustments, taking into account that the companies that do transactions with other companies of the group are more checked by tax authorities than before and these tax authorities become more and more demanding. This has become a fact in Romania where VAT refunding to the taxpayers imposes the requirement to submit the transfer price file. Under these circumstances, the companies must produce documents and submit to the tax authorities the transfer prices they have used for intra-group transactions, and especially for transactions with significant profit. In addition, these companies will have to adjust their transfer prices and policies for the near future and to re-analyse their price strategies to make them flexible under the current economic context. If the adjustments made by tax authorities yield an additional profit, this profit shall be taxed in addition to the 16% applicable to any income in Romania, including the profit. The additional amounts taxable shall not be deductible when the tax on profit is computed. These adjustments of the profit resulted from transaction between affiliated parties can be done by authorities within the limitation deadline, namely 5 years. In addition, there is a risk of double imposition if tax authorities in the country of residence of the other party do not perform a mirror adjustment of the contested amounts. The Romanian tax authorities became very strict about the publication of the Order no 222/2008 regarding the contents of the transfer price file and tend to contest the deductibility of the expenses if there are no documents provided, in compliance with the law. Problems appear also in case of commodities import when the customs authorities apply other method than the one of the company which may increase the customs value of the respective commodities as against the transfer price initially established. In this case, the importer shall pay additional customs taxes, interests and penalties.

Since investigating the transfer prices became a usual practice of the tax inspections, we recommend multinational companies to perform risk assessment related to their transfer prices during transactions with non-resident affiliated persons as well as with Romanian affiliated persons. The next steps should be to prepare the necessary documents to support their fiscal position and to harmonise their transfer price policy to their business model. The aim of the file including the relevant documents for the transfer price is to reflect how the transfer price have been established in transactions with affiliated persons and to prove that these transfer prices have been established against a market price, in compliance with the fairness principle.

### References

- Ernst & Young. (2008). *Global Transfer Pricing Survey 2007-2008: Global Transfer Pricing Trends, Practices and Analysis*.
- Gabroveau, S. (2009). *Brief considerations on the issue of transfer pricing*, The courier service tax, no. 2/2009.



- Matei, Gh., Pîrvu, D. (2011). *Transfer prices in the European Union*, Theoretical and Applied Economics, Volume XVIII (2011), No. 4(557), pp. 99-111.
- Mazerolle, F. (2005). *Les firmes multinationale*, Vuibr, Paris.
- Meier, O., Schier, G. (2006). *Entreprises multinationales*, Dunod, Paris.
- Munteanu C., Horobeț A. (2005). *Transnational finance*, All Beck Publishing House, Bucharest, p. 818.
- Nițu, A. R. (2003). *Transfer pricing*, Mirton Publishing House, Timișoara.
- OECD. (2010). *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*.
- Order of the Ministry of Economy and Finance of Romania (MEF) no 222/08.02.2008, published in the Romanian Official Gazette no 129/19.02.2008, regarding the contents of the „transfer price file”.
- Platiș, M. (2002). *Public sector economics*, Economic Publishing House, Bucharest.
- Popa, I. (2008). *Technique of foreign trade operations*, Economic Publishing House, Bucharest.
- PriceWaterhouseCoopers. (2010). *Transfer Pricing Perspectives*.
- Rotariu, I., Nițu, A. R. (2006). *Transfer prices used within multinational firms. A critical analysis of the relevant national regulations*, Annals of „Eftimie Murgu” University, Reșița.
- Voinea, L. (2003). *Transnational corporations and national economies*, IRLI, Bucharest.
- Weichenrieder, A. (2007). *Profit shifting in the EU: evidence from Germany*, CESifo Working Paper, nr. 2043, p. 21.