The author considers the new Greek APA regime and new transfer pricing legislation. Remarks are also offered on the newly introduced provisions.

1. Introduction

In January 2013, the Greek Parliament adopted Law 4110/2013\(^1\) which brought substantial changes to the Greek transfer pricing landscape. The changes, contained in article 11 of Law 4110/2013, include an enhanced obligation for multinationals to maintain transfer pricing documentation and also provide for specific rules on thin capitalization. In order to facilitate transfer pricing audits and enhance taxpayer compliance, the new transfer pricing legislation is complemented by an advance pricing agreement (APA) regime. This represents the first time that an APA regime has been introduced in Greek legislation.\(^2\)

The body of transfer pricing rules is now to be found in the block of article 39 of the Income Tax Code,\(^3\) as those provisions stand after the amendments effected by Law 4110/2013. Article 39A gives the definition of connected enterprises; it also contains the thin capitalization rules and specifies the tax consequences of the application of the arm’s length principle. Article 39A sets forth the transfer pricing documentation rules that taxpayers must comply with and the penalties connected with non-compliance or late compliance. Article 39B indicates the cases in which prices are considered to be undocumented and the consequences thereof. Finally, article 39C introduces the new APA regime.

This article will consider the new APA regime, before discussing in general the new transfer pricing legislation. The analysis will conclude with some remarks on the newly introduced provisions.

2. The New APA Regime

Article 39A, which introduces for the first time the possibility for taxpayers and the tax administration to enter into an APA, was added to the ITC by article 10(4) of Law 4110/2013. APAs are possible in the majority of EU Member States, and Greece had already undertaken an ECOFIN-level commitment to introduce an APA regime. The new regime will be available to taxpayers for accounting periods beginning on or after 1 January 2014.\(^4\)

2.1. General remarks

The newly introduced APA provisions are drafted according to the "Guidelines for Advance Pricing Agreements (APAs) in the European Union"\(^5\) provided in the Annex to the 2007 Communication on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on the Guidelines for Advance Pricing Agreements within the EU.\(^6\) Several advantages, for both taxpayers and the tax administration, of adopting and maintaining an APA regime are put forward in the explanatory report that accompanied the draft legislation when it was submitted to the parliament. Such advantages, present especially in cross-border situations, include the creation and maintenance of a stable tax regime for taxpayers; enhancing tax certainty; the minimization of costly, lengthy and complex cross-border tax audits; the avoidance of double taxation; and the reduced compliance costs that APAs offer.

An APA, as provided under both the OECD\(^7\) and the EU\(^8\) guidelines, usually takes the form of a formal agreement between the taxpayer and the tax administration. This method is problematic in the case of Greece, as the Greek Constitution does not permit the conclusion of any kind of contract or agreement on tax matters, between taxpayers and the state.\(^9\) In order to overcome this limitation and make the APA regime operational, the legislature opted for a different approach: the taxpayer has the right to file

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\(^{2}\) Certain earlier attempts were partial, regulating only the consideration paid for royalties or management fees paid abroad; in practice, they proved to be unsuccessful and were abolished without ever having been really implemented.


\(^{4}\) Article 39A(1) of the ITC is valid as from 1 January 2014, according to article 11(19) of Law 4110/2013.

\(^{5}\) The source of the Greek APA provisions is mentioned expressly in the official explanatory document accompanying the bill that was submitted to the parliament before its discussion and adoption by the members of parliament providing for the justification of the proposed legislation.


\(^{7}\) See e.g. Chapter IV of the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines), in particular Part F on Advance Pricing Arrangements, paragraph 4.141 (acknowledging that in some countries there may be a lack of legal basis that would allow tax administrations to enter into such arrangements).

\(^{8}\) See EU Guidelines on APAs, footnote 6, especially paragraph 20(d) of the Annex, (providing for the conclusion of a formal agreement at the final stage of the APA process).

\(^{9}\) This prohibition is inferred from the principle of legality of taxation contained in article 78 of the Constitution.
an application with the tax administration, accompanied by a relevant documentation file, requesting a pre-authorization of the transfer pricing methodology that the particular taxpayer will use in its future transactions with its affiliated enterprises. The pre-authorization of the transfer pricing methodology by the tax administration takes the form of an administrative act that has the same binding effect, and escapes the constitutional problems that would arise if a contract were to be required to be signed between the taxpayer and the tax administration.

The legislation adopted sets the principles and the broad outline of the APA regime. Under paragraph 9 of article 39Γ, the Minister of Finance is authorized to issue a ministerial decision by which the practical issues of the APA regime will be expanded upon and detailed. The following issues will be covered by the ministerial decision:

- the procedure for the pre-authorization of the transfer pricing methodology;
- the procedure for the revision, cancellation or renewal of the decision granting the pre-authorization;
- the required content of the application for the pre-authorization and of the application for renewal;
- the fees that will be imposed;
- the procedure for coordination and cooperation with the tax authorities of other involved states; and
- the form and content of the decisions of the authority entrusted with the competence to grant the pre-authorization of the transfer pricing methodology.

As the required ministerial decision that will make the APA regime operational has not yet been issued at the time this article was finalized, the analysis here will be limited to the provisions of the legislation itself.

2.2. Taxpayers covered

The APA regime is available to taxpayers that fall within the scope of application of the transfer pricing rules. Under article 39Γ(1), enterprises eligible for the APA regime are those resident enterprises that are covered by article 39(1) of the ITC, were the principle for the correction of profits between associated enterprises is found.

Article 39(1) of the ITC provides that when transactions take place between associated enterprises and those transactions are concluded under different financial terms than those that would have been agreed between two independent enterprises or between the associated enterprises and third parties, the profits (or losses) of the resident enterprise may be corrected in order to reflect the profits (or losses) that would correspond to it, had the said transactions taken place at arm’s length. The legislation makes special reference to dealings between a head office and its branch; the APA regime is available, under the same conditions that apply for companies, also for:

- a permanent establishment of a non-resident company in Greece, for its dealings with its head office located outside Greece and for the transactions of this permanent establishment with other enterprises that are associated with the foreign head office; and
- a company’s head office in Greece, for its dealings with its branches in other countries.

The reference to article 39(1) implies that an APA is available only when special financial terms are agreed between associated enterprises that can be identified as a deviation from the arm’s length principle. Indeed, it would be redundant to apply for a pre-authorization of the pricing method, if the method followed by an enterprise were applicable in the same way for both transactions with associated enterprises and transactions with third parties. If, however, a domestic enterprise, being part of a multinational group of companies, is dealing only with other associated enterprises and it has no transactions with third parties, it may be advisable for this domestic enterprise to file for a pre-authorization, as it may not always be possible to have a clear view of what an arm’s length price is in this particular case.

The definition of associated enterprises is found in article 39(2) of the ITC. Under this provision, the concept of “associated enterprises” includes all enterprises that have a relationship of direct or indirect substantial management or financial control or dependence, such as:

- when an enterprise participates in the management, control or capital of another enterprise;
- when the same persons participate in the management, control or capital of two or more enterprises; or
- when third enterprises possess the above-mentioned rights of control or influence over one of the associated enterprises.

2.3. Filing an application

An eligible taxpayer may file an application for a pre-authorization of its transfer pricing methodology. The use of the APA option rests entirely with the taxpayer. The application must be specific, in the sense that it covers specific future transactions of the eligible taxpayer with associated enterprises.

The term “future transactions” is not clarified in the legislation. It must be accepted, however, that it should refer to transactions which have not yet taken place at the time of filing the application, nor at the time that the pre-authorization is given. Indeed, this may be inferred from article 39Γ(3), where it is mentioned that a decision granting a pre-authorization of the transfer pricing methodology may not cover accounting periods that have already been closed at the time the application was filed. Accordingly, it appears that the crucial time for judging whether the

10. There is no provision or any other reference to costs in the text of the law itself, apart from this part, regarding the authorization granted to the Minister of Finance to set the amount of fees in the ministerial decision to be issued.

11. The rules apply to all associated enterprises, domestic and foreign, but apply to dealings between head office and permanent establishment only when there is a cross-border element. This differentiation seems to be compatible with the EU law. For a discussion of the compatibility of this provision with EU law, see section 3.2.1.

12. This definition is now under revision, according to draft legislation proposed by the government on 10 June 2013. On the concept of “associated enterprises” used for the purposes of transfer pricing legislation, see the analysis at section 3.2.
transactions for which an enterprise seeks to gain approval are "future transactions", is the accounting period in which they take place: the earlier eligible transactions will be those that will take place during the accounting period in which the application for pre-authorization is filed.

The application is submitted to the Secretariat General of Tax Audits and Tax Collection with the Ministry of Finance. Although the pre-authorization and in general the APA regime is aimed at reducing the incidence of tax audits, a small sample will indeed be subject to a tax audit. Under article 39F(1) of the ITC, a special committee will be established, by a ministerial decision which will be issued in due time, that will be entrusted with the task to re-audit 5% of the cases in which pre-authorization of the transfer pricing methodology has been granted.13

This audit appears to be a special tax audit, targeted only of the approved APAs, aimed at making sure that the APA programme works properly by verifying that the pre-authorization is granted on proper grounds. It does not seem to replace the general tax audit provisions that apply to all enterprises, under which the compliance of an enterprise with the APA conditions will be examined.14 In any case, the scope of this kind of audit must be detailed in the ministerial decision that will be issued, especially in connection with the other types of audit that apply concurrently.

2.4. Content of the pre-authorization decision

The object of the pre-authorization decision is the transfer pricing methodology. The pre-authorization is granted for the total of the appropriate criteria that are used for the determination of the transfer prices during a certain period. Such criteria include:
- the methodology used;
- the comparables and their appropriate adjustments; and
- the critical assumptions as to future events.

On the other hand, the pre-authorization decision may not provide for:
- a specific transfer price between associated enterprises; or
- a pre-determined net profit or gross margin for the controlled transactions with associated enterprises.

The pre-authorization may also extend to cover any other special issue concerning the pricing of transactions between associated enterprises.

It appears that the decision of the tax administration granting a pre-authorization may not be partial or selective. In other words, the criteria submitted by the applicant enterprise will be either accepted as a whole or rejected as a whole. In case of approval, there seems to be no room left for the tax administration to use any discretionary power and issue a decision that would modify the content of the application submitted by the taxpayer. Still, the tax administration has the power to unilaterally review, revoke or even annul the decision granting the pre-authorization, under certain conditions.15 On the other hand, the taxpayer also has the right to request a review of the decision under certain circumstances.16

The decision granting the pre-authorization is communicated to the enterprise that filed the application. There is no specific time limit in which the decision must be issued by the competent Secretariat General of Tax Audits and Tax Collection of the Ministry of Finance. This, however, may create a series of problems. First, it must be clarified what happens with decisions that do not grant the requested pre-authorization. Although this is not expressly mentioned in the law, legal certainty requires that such negative decisions also be communicated to the taxpayer within a certain time from the filing of the application. Such decisions rejecting the application should also contain an appropriate justification for rejecting the application. In addition, it must be clarified what is the position of the applicant company in the case of a late rejection of its application, at a time when a substantial body of transactions will have already been carried out.

Also, it is not clear from the legislation whether the applicant enterprise has the right to dispute a decision that rejects its application,17 especially if the basis for the rejection is not some formality but rather a disagreement of substance as regards the transfer pricing methodology used by the enterprise. In general, as with all ministerial decisions, the decision granting or refusing the pre-authorization is an administrative act that is subject to judicial control. Therefore, although not expressly mentioned, it must be accepted that the taxpayer has the right to dispute a decision rejecting its application.

In any case, setting a certain time limit for the tax administration to reply is crucial, as it affects the right of the taxpayer to appeal. As a general rule, when a taxpayer has filed an application with the tax administration and the tax administration has not replied within three months, this is deemed to be a silent rejection of the taxpayer’s application and the time limit for appeal to the administrative court begins tolling. There is a risk, in cases where the procedure for issuing the relevant decisions takes a long time, in particular if it takes longer than three months after

13. At the time this article was finalized, the relevant ministerial decision has not yet been issued.
14. The provision of article 39F(4) of the ITC provides that the tax audit of an enterprise, where a decision granting a pre-authorization has been issued, is limited, as far as transfer pricing issues are concerned, to verifying that the criteria and assumptions provided for in the pre-authorization decision are still valid and that the enterprise complies with the decision.

15. See section 2.6.
16. See section 2.6.1.
17. Under the assumption that the tax administration does not have any discretionary power regarding the approval of the transfer pricing methodology submitted by the taxpayer, it seems rather difficult that a taxpayer would dispute the decision granting a pre-authorization. In any case, however, a late approval remains problematic, as it prolongs the uncertainty in which the taxpayer is found until a decision is taken (an effect that is mitigated by the fact that the period from filing the application until the time the decision is issued can be covered in retrospect, by the decision granting the pre-authorization). One major concern is what happens when the company is audited in the meantime when the application has been filed but a decision has not yet been issued: issues such as which tax audit body is competent for this issue, and whether the general tax audit body will have to wait for the Secretariat General of Tax Audits and Tax Collection to issue the decision, remain open.
the filing of an application, that this could be considered a silent rejection, such that taxpayers will have to appeal in order not to lose their right to appeal.

It is advisable that there be specific provisions on this issue, in order to avoid unnecessary recourse to the courts while simultaneously protecting the taxpayer’s right to appeal. This could be achieved, for example, by stating clearly whether a delay by the tax administration of more than three months after the filing of an application to furnish a decision, is to be considered a silent rejection. Alternatively, it could be clarified that the taxpayer’s right to appeal against a (negative) decision will not be affected and the time limit for appeal will not begin tolling until such a decision is formally communicated to the taxpayer in writing.

Under the law, the initial period of validity of any decision granting pre-authorization for a transfer pricing methodology may not exceed two years, and it may not extend back to accounting periods that have already concluded at the time of the filing of the application. The decision granting pre-authorization may be renewed, without any change in its conditions, for a maximum of two more terms of two years each. The renewal is granted after an application by the interested enterprise which must be filed before the initial two-year term ends and under the condition that the assumptions and facts taken into account for the initial decision have not been substantially altered.

The pre-authorization decision, once issued, is valid and covers only the transactions of the applicant company. It does not create any rights or obligations for other taxpayers apart from the applicant company. However, this is not the case for other states that may have an interest in the transactions of their taxpayers, when dealing with a Greek affiliate covered by the pre-authorization decision.

The Greek APA regime is, by definition, applicable only between an enterprise and the Greek state. However, the rights of the other state, i.e. the state in which an associated enterprise is located, are not affected. If the other state disagrees, the mutual agreement procedure provided for under the applicable income tax treaties or in the EU Arbitration Convention will have to be used, in order for the other state to be able to effectively voice its disagreement. If the two states reach an agreement through the mutual agreement procedure, the decision granting the pre-authorization in Greece will be amended accordingly.

The enterprise has a particular obligation to maintain the documentation related to the pre-authorization decision. This amendment, giving effect to the decision reached through the mutual agreement procedure between states, is implemented domestically by a unilateral decision of the Greek tax administration, in which the taxpayer does not participate. The amended decision will be effective from the time it is communicated to the taxpayer. Problems may arise in case the taxpayer does not agree with the amended decision, which would reflect the agreement reached by the tax administrations after the mutual agreement procedure is concluded.

Normally, under mutual agreement procedure provisions, in order for an agreement reached by the tax administration to be effective, the consent of the taxpayer is required. Although this is not stated in the law, it should be accepted that if a mutual agreement procedure that concerns a Greek pre-authorization agreement is set in motion, the taxpayer should be able to effectively participate in the MAP and in any case it must be presented with the option to accept or reject the solution reached by the tax administrations through the MAP. In such a case, any unilateral amendment following a MAP will have been in fact approved by the taxpayer as well, and therefore it will be less likely to be disputed before the national courts.

2.5. Effects of the pre-authorization decision

Once a decision that pre-authorizes the transfer pricing methodology is issued, compliance of the enterprise with the decision is crucial. The effects of the pre-authorization decision are that the transfer prices agreed between the associated enterprises following the authorized transfer pricing methodology are considered to be at arm’s length and therefore the profits (or losses) of the associated enterprises are not subject to any unilateral upward (or downward) adjustment by the tax administration.

The enterprise has the obligation to keep the required documentation that supports the pre-authorized transfer pricing methodology, and to facilitate the audits for compliance with the terms and conditions of the pre-authorization decision (APA documentation). The APA documentation is kept with the transfer pricing documentation files that the enterprise is obliged to maintain. As mentioned, when a pre-authorization decision is issued, the tax audit of the transactions with associated enterprises is limited to only the verification that the conditions set in the decision are followed by the enterprise and that the critical assumptions on which the decision was based have not changed.

The enterprise has a particular obligation to maintain the documentation related to the pre-authorization decision during the whole time that it has the obligation to maintain the transfer pricing documentation file of article 39A, namely until the end of the statute of limitations for the tax administration to levy taxes or for as long as a case is litigated and pending before the courts. This obligation is in addition to other obligations that are provided for by the existing legislation to keep and maintain fiscal records.

2.6. Revision, revocation and annulment of the pre-authorization decision

The decision granting a pre-authorization may be revised, revoked or cancelled in certain circumstances and under certain conditions.
2.6.1. Revision

The decision granting the pre-authorization may be revised and amended at any time during its period of validity. The revision may be effected either following an application of the enterprise or unilaterally, by the competent authority, in the following circumstances:

- if the critical assumptions on which the pre-authorization decision was based prove to be in error, without responsibility of the applicant enterprise;
- if the critical assumptions or conditions have changed substantially so as to render compliance with the pre-authorization decision impossible, without responsibility of the applicant enterprise; and
- if the mutual agreement procedure under an applicable income tax treaty or the EU Arbitration Convention is applied for the same taxpayer and the same transactions that are covered by the pre-authorization decision.

2.6.2. Revocation

The pre-authorization decision may be revoked unilaterally by the competent authority at any time during its period of validity:

- if it proves to be that the critical assumptions or other issues on which the decision granting the pre-authorization was based, were inaccurate; or
- if it proves to be that the applicant enterprise did not comply with substantial terms and conditions or obligations set in the decision granting the pre-authorization.

This revocation has retroactive effect. If the pre-authorization decision is revoked, the decision is deemed to be null and void from the time it was first issued; that means that it is regarded as if it had never produced any effect, and the enterprise is subject to penalties. In this case, as the retroactive revocation of the decision granting the pre-authorization will most probably create tax obligations for the affected enterprise for past years, it is advisable that it be clarified that such revocation does not lead to retroactive taxation that is prohibited by the Constitution.

2.6.3. Annulment

The decision granting a pre-authorization may be annulled by the competent authority at any time during its validity period:

- if it proves to be that the critical assumptions or conditions on which the decision was based have changed substantially;
- if it proves to be that the applicant enterprise did not comply with substantive conditions or obligations provided for in the pre-authorization decision; or
- if the applicable tax legislation is substantially amended.

If the pre-authorization decision may be revised under article 39Γ(5) of the ITC, the tax administration is not permitted to annul the decision.

If, however, the decision is annulled, it ceases to exist from the time that is specified in the annulment decision itself. Although the wording of the provision leaves the possibility open for the annulment decision to determine that the annulment has effects in the past, it is advisable, in order to avoid the imposition of any tax obligations retroactively and possibly contrary to the Constitution (which prohibits retroactive taxation), that the annulment decision can have effects only from the time it is issued, and not for the past.

2.7. Overall assessment of the new APA regime

The new APA regime in Greece is still in its infancy. The legislation adopted in January 2013 outlines in broad strokes the framework in which the new regime will develop, but there are still many details to be determined and many issues that need to be clarified in order to make the APA regime really effective and useful for both taxpayers and the tax administration.

The fact that in adopting this legislation the guidelines of the OECD and of the European Union were used as a model, creates legal certainty as far as the interpretation and application of the relevant rules is concerned, even if the domestic rules are not very clear or detailed. Many issues are expected to be clarified when the ministerial decisions provided for in the legislation are eventually issued.

3. The Amended Transfer Pricing Rules

The transfer pricing rules are found in articles 39, 39A and 39B of the ITC. The main characteristics of these rules will be outlined below.

25. Art. 39Γ(5) ITC.
26. Art. 39Γ(6) ITC.
27. In such a case, the penalties provided in article 4(5) of Law 2523/1997 are imposed. The penalty is set at 1/1000 of the aggregate gross revenue of the enterprise, which may not be less than EUR 1,000 nor more than EUR 10,000.
28. Article 78 of the Constitution permits only limited retroactivity of tax legislation, not exceeding one year back, before the tax legislation is adopted.
29. Art. 39Γ(7) ITC.
30. Art. 78 Constitution. See similar concerns above in section 2.6.2.
3.1. General remarks

The new legislation attempts to simplify and modernize Greek transfer pricing legislation. The new rules have retroactive effect, in the sense that although introduced in 2013 they cover transactions taking place in accounting periods beginning on or after 1 January 2012.31 The new transfer pricing legislation replaces the old, fractioned, transfer pricing regime that was split between the Ministry of Development and the Ministry of Finance.

Until the adoption of Law 4110/2013, two parallel transfer pricing regimes were applied, separately but cumulatively. The first, implemented by Law 3728/2008,32 was monitored by the Ministry of Development, whereas the second, implemented by article 39 of the ITC, as amended by Law 3775/2009,33 was monitored by the Ministry of Finance. Obviously, the existence of two parallel regimes that provided for more or less the same obligations (with slight differences between them that only made things more complicated) but which served different purposes (market issues on the one hand, tax issues on the other) created chaos for all interested parties.

The simultaneous application of two transfer pricing regimes created an extensive compliance burden on taxpayers and an extensive administrative burden on certain agencies at the Ministry of Development that were not prepared or adequately staffed to deal with delicate or complicated transfer pricing issues. At the same time, this situation had very little to offer to the tax administration. The more elaborate rules were those monitored by the Ministry of Development; as the Ministry of Finance had no competence over that legislation, the tax administration was not able to effectively use the findings of the audits conducted by the Ministry of Development for tax purposes.

After the adoption of Law 4110/2013, only the Ministry of Finance has competence over transfer pricing issues34 and article 26 of Law 3728/2008 of the Ministry of Development is abolished.35 All transfer pricing documentation requirements are now provided for in the ITC. As mentioned, the new rules apply for the documentation of transactions that took place during accounting periods beginning on or after 1 January 2012 and will be reported in 2013.

For transactions that took place during accounting periods beginning on 1 January 2010 and on 1 January 2011 (when the old, dual, system was in place), the documentation file that was prepared under article 26 of Law 3728/2008 that used to be monitored by the Ministry of Development will still be valid for purposes of the ITC transfer pricing provisions. The competence to audit these “old” transfer pricing documentation files is henceforth transferred to the Ministry of Finance and the competent tax authorities.

3.2. Principles, scope of application, definitions

3.2.1. Arm’s length principle

Following the work of the OECD on transfer pricing, the Greek legislature has adopted the arm’s length principle as the appropriate principle in order to determine the transfer prices in transactions between associated enterprises and in dealings between a Greek permanent establishment and its foreign head office (including the associated enterprises of its foreign head office) and dealings between a Greek head office and its foreign permanent establishments.

The way the provision is drafted, it requires that a cross-border element be present only in the case of a permanent establishment (the permanent establishment is located in Greece and the head office is located in another country, or vice versa). There is no such cross-border requirement in the case of associated enterprises. Such a differentiation between the treatment of associated enterprises on the one hand and the treatment of a permanent establishment in relation to its head office on the other hand, as far as transfer pricing compliance requirements are concerned, seems to be compatible with EU law. As can be inferred from the judgment of the European Court of Justice in the SGI case, domestic legislation under which a resident company is not subject to transfer pricing rules for its dealings with domestic permanent establishments, but is subject to such transfer pricing rules for its cross-border dealings with its permanent establishments in other states, is compatible with EU law, as it pursues the legitimate objective of preventing the artificial (non-arm’s length) transfer of profits from Greece to a foreign jurisdiction.36

If the transactions or dealings are found not to observe the arm’s length principle, the profits (or losses) of the domestic enterprises are adjusted, in order to include the profits that the domestic enterprise would have made if the transfer prices were agreed at arm’s length.

3.2.2. Covered transactions

The arm’s length principle under article 39 of the ITC and the transfer pricing documentation requirements under article 39A of the ITC apply not only to transactions concerning the sale of goods or the provision of services, but they also cover:

- the transfer of parts or participation percentages in civil law societies or joint ventures;37
- the transfer of shares of non-listed companies;38
- loan agreements.39

37. Art. 13(1)(a) §§(5) ITC, as amended by art. 11(6) Law 4110/2013.
38. Art. 13(2) ITC, as amended by art. 11(7) Law 4110/2013.
39. Art. 25(3) ITC, as amended by art. 11(8) Law 4110/2013.
3.2.3. Adjustment of profits

The adjustment of the profits (or losses) affected as a result of the application of the arm’s length principle does not affect the validity of the accounting books that the domestic enterprise is required to maintain under domestic tax legislation. This means that the results derived according to the accounting books of the enterprise are not disputed as a result of the application of the transfer pricing rules. However, the increased gross profits, as determined after adjustments due to the application of transfer pricing legislation, are taken into account for the determination of the tax obligations of the enterprise, arising from tax legislation other than income taxation.42

3.2.4. Associated enterprises

The term “associated enterprises” for transfer pricing legislation purposes is defined in the ITC.43 The definition adopted is very broad, as the concept of “associated enterprises” includes all enterprises having any relationship of direct or indirect substantial management or financial control or dependence, and in particular:

- when an enterprise participates in the management, control or capital of another enterprise;
- when the same persons participate in the management, control or capital of the two enterprises; or
- when third enterprises possess on any one of the associated enterprises the above-mentioned rights of control or influence.

It appears that the aim of the legislature is to cover a wide range of cases where not only control or dependence is present, but even cases where mere influence is exerted on an enterprise, even if there is no participation of the influencing company in the management or capital of the influenced company. The broad wording however could lead to many interpretation problems. It could also lead to imposing a disproportionate administrative burden on both enterprises and tax auditors, especially in cases of minor importance.

In order to clarify and delimit the scope of application of transfer pricing legislation, an amendment of the definition was recently proposed by the government. The proposed legislation provides that the term “associated enterprises” for transfer pricing purposes shall include in particular (i) direct and indirect participations of at least 33%; (ii) any other company that is linked to a company participating for at least 33% in any of the associated enterprises; and (iii) companies linked to any person having a relationship of direct or indirect substantial management control or dependence or cases where a person exerts or is capable of exerting definitive influence upon an enterprise or when both persons are subject to the control or dependence or definitive influence of a third person.44

As the wording adopted deviates from the wording found in article 9 of the OECD Model Tax Convention and article 4 of the EU Arbitration Convention, there may be some mismatches in the determination of the scope of application of the domestic legislation when it applies in a tax treaty context or in an EU context, which will be resolved in favour of the tax treaty or EU Arbitration Convention definition. The domestic definition will be applicable only in the case of non-EU associated enterprises that are established in a state with which Greece has not a concluded a tax treaty.

3.2.5. Application of the OECD Transfer Pricing Guidelines

Despite the differences in the personal scope of application, the aim of the Greek legislature to follow the OECD principles is stated very clearly in the law. In particular, it is expressly mentioned that in transfer pricing audits, for which the Tax Office for Large Taxpayers is competent, the tax administration is bound by the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines), as amended from time to time.

The Greek legislation has opted for the dynamic interpretation of the OECD Guidelines, as the version that is to be taken into account in any given audit is the updated version which is valid at that time.45 At this point a clarification needs to be made: when applying the dynamic interpretation, it must be taken into account that tax matters and tax obligations are judged under the legislation in force at the time the tax obligation was borne; this cannot be changed by a subsequent change in the law. Accordingly, the updated version of the OECD Guidelines that must be used by the tax administration in the case of a transfer pricing audit must be the version that was in force at the time the tax obligation was born.

3.2.6. Transfer pricing audits

As regards tax audits by the Tax Office for Large Taxpayers, the details and procedures of these audits, besides the reference to the OECD Guidelines which is included in the law, are to be determined by a ministerial decision that is to be issued within an exclusive deadline of one month after the publication of Law 4110/2013 in the Official Gazette.46 As Law 4110/2013 was published in the Official Gazette on 23 January 2013, the prescribed ministerial decision ought to have been issued by 23 February 2013. However, at the time this article was finalized, such ministerial decision had not been issued. As the deadline for issuing the ministerial decision was specified to be an exclusive one, there

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40. Art. 28, para. 3\textit{c} ITC, as amended by art. 11(9) Law 4110/2013.
41. Art. 31, para 1\textit{e}) ITC, as amended by art. 11(11) Law 4110/2013.
42. Art. 39(4) ITC.
43. Art. 39(2) ITC.
44. See article 64(3)α of the draft legislation submitted to the Parliament by the Ministry of Finance on 10 June 2013 which adds a new indent to article 39(2) of the ITC (the draft legislation has not yet been adopted by the Parliament at the time this article was finalized).
45. Art. 39(5) ITC.
46. Id.
were questions raised as to whether a decision that would be issued after the legal provision granting the authorisation to the Minister of Finance has expired, will be issued under a lawful authorization or not. In order to avoid any legal implications, the government has proposed an amendment to the existing legislation seeking to eliminate the requirement of the one-month time limit.  

3.3. Thin capitalization rules

Special rules on thin capitalization are included in article 39(3) of the ITC. Under these rules, if the ratio of the total amount of loans from associated enterprises in relation to the net equity of the company exceeds a ratio of 3:1 on average in a given accounting period, the interest corresponding to the amount of loans exceeding the 3:1 ratio is not deductible. The term “interest” in this case includes interest on bond loans that are paid to associated enterprises. The aggregate amount of loans received by associated enterprises includes the bond loans that have been issued to them, as well as the loans that have been received by third parties but for which an associated enterprise has provided a guarantee of any form or kind. The thin capitalization rules do not apply to enterprises active in the financial sector.  

As the thin capitalization rules apply equally and under the same conditions for both domestic and cross-border situations, there seem to be no major concerns regarding the application of this part of the legislation. As a general comment, the consequence of triggering the application of thin capitalization rules is the non-deductibility of the amount of interest corresponding to the amount of loans exceeding the safe harbour; the legislation does not provide for a recharacterization of the interest income as a dividend. Last but not least, some problems may be created by the fact that the provision does not allow the company a reasonable possibility to prove that the excess above the 3:1 ratio is due to valid commercial reasons, so as to be able to avoid the adverse consequences of non-deductibility of interest expense.

3.4. Documentation

3.4.1. Taxpayers covered; thresholds

Domestic enterprises that are associated with other enterprises, as the term “associated enterprises” is defined and applies for transfer pricing legislation purposes in article 39(2) of the ITC, have the obligation to keep a documentation file for the pricing of their controlled intra-group transactions. The same applies by analogy for dealings between a permanent establishment in Greece and its head office (including associated enterprises of its head office abroad) or dealings between a head office in Greece and its permanent establishment abroad.

There are certain exceptions to the documentation obligation:

- non-resident trading companies that are established in Greece under Law 89/1967 are exempt from the obligation to document their intra-group transactions;
- transactions with one or more associated enterprises of less than EUR 100,000 in total are also exempt, provided that the aggregate gross revenue of all the members of the group in the relevant accounting period does not exceed EUR 5 million; and
- if the aggregate gross revenue of all the members of the group in the relevant accounting period exceeds EUR 5 million, the exemption threshold is set at EUR 200,000; that is transactions with one or more associated enterprises of less than EUR 200,000 in total are exempt from the documentation obligation.

3.4.2. Required documentation

The transfer pricing documentation file consists of:

- a master file, which is common for all the members of the group and contains standardized information on all the companies and the branches that form part of the group; and
- a country-specific file, the Greek documentation file, which complements the master file and contains additional information regarding the Greek members of the group, the permanent establishments of non-resident companies that are located in Greece and the permanent establishments located outside Greece in the case of a Greek enterprise.

The documentation file is compiled before the publication of the tax compliance report (tax certificate) and in any case within 50 days after the end of a financial year. The documentation file is accompanied by a summary information table, which is submitted electronically to the Secretariat General of Information Systems of the Ministry of Finance by the same deadline (i.e. not later than 50 days after the end of the financial year). For financial year 2012, the documentation file was initially to be prepared and the summary information table submitted by 10 May 2013. In order to facilitate the first application of this legislation, for both the enterprises and the tax administration, the government has proposed an extension of the time limit for the preparation of the documentation file and for the submission of the summary information to 10 July 2013.

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47. See article 64(3) of the draft legislation submitted to the Parliament by the Ministry of Finance on 10 June 2013 (the draft legislation has not yet been adopted by the Parliament at the time this article was finalized).
48. There is an enumeration in the legislation of the companies excluded from the scope of application of thin capitalization rules: leasing companies, factoring companies, companies that provide credit, special purpose companies provided for by special legislation and banking institutions.
49. Art. 39A(1) ITC.
50. Although not mentioned expressly in the legislation, the structure follows the provisions of the EU Transfer Pricing Documentation. See Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD), 2006/C 176/01, EU Law IBFED.
51. The tax certificate is provided for in article 82(5) of the ITC.
52. Art. 39A(5) ITC.
54. See article 64(3) of the draft legislation submitted to the Parliament by the Ministry of Finance on 10 June 2013, amending article 11(17) Law 4110/2013 (the draft legislation has not yet been adopted by the Parliament at the time this article was finalized).
The summary information table contains information on the operational profile of the enterprise, such as:
- the group to which it belongs;
- the functions performed and the risks undertaken;
- a list of the controlled intra-group transactions that take place within the financial year of reference and for which documentation is required; and
- a brief description of the transfer pricing methodology that is applied.

The documentation file is kept by the enterprise and is presented to the competent auditing authority during the tax audit, within a reasonable time frame, which may not exceed 30 days.

If the market conditions change after the documentation file is prepared and these changes affect the content of the documentation file, the enterprise must update the information contained in the documentation file no later than the end of the financial year in which the changes took place. In such a case, the enterprise must submit the summary information table within 50 days from the end of the financial year in which the update took place. 55

The broad legislative framework on the transfer pricing documentation described above is to be complemented by a detailed ministerial decision that will address such special issues that are necessary for the application of the transfer pricing documentation provisions, such as:
- the obligatory content of the documentation file;
- the content of the summary information table;
- the language in which the information is to be drafted;
- the methods, ways and procedures for the determination of the pricing of the controlled transactions; and
- the procedure for updating the documentation files.

Under article 39A(8) of the ITC, and given the fact that enterprises must have the documentation file ready and the summary information table submitted by 10 May 2013, 56 the said ministerial decision that would provide guidance was supposed to have been issued within an exclusive time limit of one month after Law 4110/2013 was published in the Official Gazette; 57 the exclusive time limit for the administration to act was completed without the much awaited ministerial decision having been issued. 58 In order to avoid any doubts as to whether the ministerial decision that will eventually be issued after the expiration of the exclusive time limit provided for by the law, will indeed be lawful, the government proposed an amendment to the existing legislation to the effect that this requirement has been abolished and the administration is not bound by the strict one-month time limit that has expired anyway. 59

3.4.3. Penalties

Penalties are imposed in the following cases: 60
- for late filing of the summary information table, the penalty is 1/1000 of the gross revenue of the enterprise. This penalty may not be less than EUR 1,000 nor more than EUR 10,000. No penalty is imposed if the late filing is due to an act of God and the enterprise files the summary information table within ten days after the extraordinary circumstances cease to exist;
- for late presentation of the documentation file to the tax auditors, the penalty is also 1/1000 of the gross revenue of the enterprise. Again, this penalty may not be less than EUR 1,000 nor more than EUR 10,000;
- for failure to file the summary information table, the penalty is 1/100 of the gross revenue of the enterprise that has the obligation to file the table. This penalty may not be less than EUR 10,000 nor more than EUR 100,000; and
- for failure to present the documentation file to the tax auditors, the penalty is also 1/100 of the gross revenue of the enterprise that has the obligation to present the file during the audit. This penalty may not be less than EUR 10,000 nor more than EUR 100,000.

3.5. Undocumented transactions

The prices of controlled transactions deemed to be undocumented: 61
- when the documentation file is not prepared or when it is not made available to the competent auditors during a tax audit;
- when the documentation file is inadequate or inaccurate to the extent that the auditors are unable to make the necessary verifications or calculations that prove the validity of the transfer prices, and this deficiency is not cured by the additional information that the enterprise provides during the audit; or
- when no additional information is provided by the enterprise or when such additional information is inadequate or inaccurate to the extent that the tax auditors are unable to verify the conformity of the transfer prices with the arm’s length principle.

If the transfer prices are deemed to be undocumented, the tax administration may determine the appropriate prices based on the information available to it. The tax administration has the discretionary power to apply any price from the range of prices that it determines as complying with the arm’s length principle. The tax administration may use the median price, if the range of prices that is determined

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55. Art. 39A(6) ITC.
56. As previously mentioned, it is already proposed that this deadline for the first application of the legislation be extended to 10 July 2013; see supra n. 54.
57. In fact, the text of the provision mentions “the date that the present law is in effect”; in practice, however, this is not possible to calculate in an unequivocal way, as different provisions of Law 4110/2013 go into effect on different dates. The most appropriate way to construe this phrase is to take as starting point the date that Law 4110/2013 was published in the Official Gazette, unless stated otherwise in the law itself, the date a law comes into effect is ten days after its publication in the Official Gazette.
58. The ministerial decision provided for in article 39A(8) of the ITC has not yet been issued, at the time this article was finalized.
59. See article 64(3)γ’ of the draft legislation submitted to the Parliament on 10 June 2013 by the Ministry of Finance, amending article 39A(8) of the ITC (the bill has not yet been adopted at the time this article was finalized).
60. Art. 4(5) and (6) Law 2523/1997, as amended by art. 11(5) Law 4110/2013.
61. Art. 39B(1) ITC.
following a transfer pricing analysis is not accepted by the tax administration.\textsuperscript{62}

The rules on when the tax administration may reject the prices of a transfer pricing analysis need some clarification, as it may leave much room for arbitrary decisions. In any case, even if the concerned enterprise has not managed to sufficiently document the transfer prices, the rejection by the tax administration of the range of prices or of the range of profit margins that have been determined following a proper transfer pricing analysis must be justified. The recourse to the use of the median by the tax administration seems to be the last option, when no other option is available, and therefore it must be used with caution and after all other possibilities have been exhausted.

The enterprise is liable to tax penalties\textsuperscript{63} only where the finding of undocumented prices leads to a violation of the arm’s length principle laid down in article 39(1) of the ITC, which in addition results in a shifting of profits.\textsuperscript{64} Although the wording of the law is not clear on this point but does make a general reference to article 39(1) of the ITC, it must be accepted that when no transfer of profits has been effected, there is no room for imposing penalties on the enterprise, even if it has not observed the arm’s length principle.

3.6. Overall assessment of the amended transfer pricing rules

The amended transfer pricing rules create a comprehensive body of rules by ending the fragmentation that existed since 2008 and creating an enhanced obligation for Greek affiliates to maintain transfer pricing documentation for their intra-group transactions. Although the legislation sets forth the basic principles and the necessary rules for the provisions to be effective, a large amount of secondary legislation, in the form of ministerial decisions, remains to be issued in order to actually give effect to the transfer pricing legislation and the obligations imposed on enterprises.

The Greek transfer pricing rules follow the generally accepted rules on transfer pricing as elaborated by the OECD and the European Union. This makes the interpretation and application of the relevant rules easier for the tax administration, as there is an extensive body of literature available on the relevant issues. At the same time, the concerned enterprises, especially multinationals already exposed to transfer pricing legislation and documentation requirements in other jurisdictions, should not find it very difficult to comply with the Greek transfer pricing rules, especially because, as already mentioned, the detailed Greek documentation rules, as they will be elaborated by ministerial decisions, are not expected to deviate from the EU Transfer Pricing Documentation rules and the OECD Guidelines.

Last but not least, the penalties connected with formal violations of the transfer pricing legislation have been rationalized to a great extent, as compared to the previous regime – which is considered to be a positive development. On the other hand, the sanctions imposed for the shifting of profits by using undocumented transfer prices are those of the general sanctions regime that apply in the same manner as for any other violation of tax law.

4. Conclusion

The legislation adopted in January 2013 brought two major changes in the transfer pricing legislation in Greece: it introduced an APA regime, expressly following the EU guidelines on the subject, and it provided for comprehensive transfer pricing legislation, expressly following the OECD Guidelines on this subject. Both developments offer a clearer and safer environment for multinational enterprises that are active in Greece, while at the same time safeguard by using widely accepted methods the reasonable tax revenue expected from profits generated in Greece.

It is true that after the recent amendments, the transfer pricing legislation is still very broadly drafted and a number of ministerial decisions are expected to be issued and expand upon many issues, providing detailed information and official guidance to both taxpayers and the tax administration on how to effectively implement the new transfer pricing rules. It is a bit problematic that although the new transfer pricing rules cover the 2012 accounting period, due to a delay in the preparation of the necessary ministerial decisions, taxpayers have not as yet been duly informed on the full extent of their obligations.

Regarding the newly introduced APA regime, the Greek tax administration does not have any significant previous experience with APAs. Various attempts in the past to introduce some kind of APA were partial and were soon abandoned, as they did not yield the expected results. The fact that the new APA regime is available from 1 January 2014 allows taxpayers enough time to prepare in advance and be able to use the APA option in order to better protect their revenue. It is expected that the necessary ministerial decisions detailing the procedure and other administrative issues in relation to APAs will be issued in due time, so that a large number of interested parties may profit by using the new regime.