

Transfer Pricing Country Summary

Colombia

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1. Introduction

Colombia became a full member of the Organization for Economic Cooperation and Development On 28 April 2020. Although it's a member, OECD Guidelines are not legally obligatory. Nonetheless, Tax Authorities employ Guidelines as technical reference standards for TP procedures in their routines.

2. Laws & Regulations

a) References to OECD/EU/Local Rules

The legal framework for transfer pricing was introduced by Law 788 of 2002, Law 863 of 2003 and the Regulatory Decree 4349 of 2004. The regime was modified, starting 2013 transactions, by Law 1607 of 2012, and Decree 3030 of 2013.

Although Colombia is not a member of the OECD, the Colombian tax authorities, Dirección de Impuestos y Aduanas Nacionales (DIAN), generally accepts the OECD Transfer Pricing Guidelines as a specialized technical reference but not as a supplementary source of law interpretation.

Sections 260-1 to 260-11 of the Colombian Tax Code ("CTC") include positive regulation regarding the Transfer Pricing regime in Colombia which is applied only for income tax purposes. Section 260-11 describes the cases in which non-compliance with the transfer rules gives rise to penalties.

Colombia implemented the Local file, Master File and Country by Country Report ("CbCR") according to article 108 of Decree 1819 of 28 December 2016.¹ The obligation to file this three-tier documentation was also incorporated in article 260-5 of the CTC² and regulated by Decree 2120 of 15 December 2017.³

b) Definition of Related Party

Related parties are defined in article 260-1 of the Colombian Tax Code. The concept includes situations ranging from statutory to economic dependency and control of companies by individuals (subordination):

- Controlled company with its parent company;
- Subsidiaries offices with its headquarters;
- Agencies with the economic group it belongs;
- Permanent establishments;

¹ See

<http://es.presidencia.gov.co/normativa/normativa/LEY%201819%20DEL%2029%20DE%20DICIEMBRE%20DE%202016.pdf>

² See Article 260-5 CTC :

<http://www.dian.gov.co/dian/15servicios.nsf/0108fdc3639d83ff05256f0b006abb3d/870840d7c813592305256f0c0077a028?OpenDocument>

³ See:

<http://es.presidencia.gov.co/normativa/normativa/DECRETO%202120%20DEL%2015%20DE%20DICIEMBRE%20DE%202017.pdf>

- Transaction is between related parties through unrelated third parties.

Transfer Pricing documentation includes transactions with a related parties located in Colombian free zone. Transactions with residents or persons domiciled in tax havens must be documented. If the company located in the tax haven is a related party, comprehensive information regarding this party –including functions, assets and risks- must be documented. Further information is available section d.

c) Nature of Transfer Pricing Documentation

Taxpayers undertaking transactions with related parties located abroad where the transaction amounts equal or exceed any of the following thresholds need to annually file a TP informative return:

- Gross equity (assets) of 100.000 UVT at the end of the year; or
- Gross income of 61.000 UVT during the year.

Taxpayers undertaking transactions with residents or persons domiciled in a low tax jurisdiction, irrespective of the amount of their gross equity or gross income, also need to annually file TP informative return. The Informative Return should contain the following data:

- Taxpayer's fiscal identification;
- Income identification and country of domicile of the related parties involved in controlled transactions;
- Transfer pricing method used in determining the prices or profit margins;
- Price or margin obtained in the controlled transaction;
- Inter-quartile range obtained by application of the transfer pricing methodology; and
- Assessment of sanctions, when applicable.

Taxpayers also must document transactions carried out with individuals or entities located in tax havens if the total amount of those transactions exceeds 10,000 UVT (approx. \$100,000). The supporting documentation must be filed with the tax authorities by July, depending on the taxpayer's ID.

d) Tax Havens & Blacklists

Tax haven countries and territories were listed in Decree 2193 of 2013 (in effect on Jan 1, 2013), modified later by Decree 1966 of 2014 (in effect on Jan 1, 2014) which included Republic of Panama as a tax haven. Two weeks later, the Government issues Dec. 2095 of 2014 (21-Oct) and excludes Panama, United Arabian Emirates, Monaco and Barbados from the list of tax havens.⁴

⁴ See <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=59638>

Recently, the Executive Branch has issued criteria and standards, including conditions for recognizing preferred tax regimes, in order to make the application of Tax Code article 260-7 smoother. The amendments are made by Decree 1357, which takes effect on 29 October 2021. The conditions are:

- the jurisdiction does not tax / apply low tax rates to transactions that would otherwise be completely taxable,
- the jurisdiction does not have an effective exchange of information, or the jurisdiction has administrative rules and/or practices that hinder the effective interchange of information,
- a lack of legal, administrative, or organizational transparency in the country
- The jurisdiction's legislative structure does not specify the requirement of engaging in a real economic activity.
- The jurisdiction adopts regimes that exclusively apply to non-residents (ring-fencing).

e) Advance Pricing Agreement (APA)

APA procedures are ruled by Decree 1602 of 2012. Taxpayers can request an APA to the tax administration (DIAN). APA's can be agreed for a maximum term including the year prior to the formal request and three years following the signature of the agreement. The tax authorities should either approve or deny an APA request within nine months from the date of filing of the application. In case of a bilateral or multilateral APA, the time to accept or reject the APA request will be determined between the competent tax authorities and the taxpayers. The taxpayer must file a simplified annual report to prove compliance with the conditions of the APA.

f) Audit Practice

Tax authorities have started transfer pricing audits, requesting that a taxpayer amend its income-tax return when failing to fulfil the arm's-length principle. It is expected that such requests will be brought before courts. Tax authorities have become more aggressive and have improved their transfer pricing knowledge. They have focused on:

- taxpayers failing to fulfil transfer pricing rules • informative return formal penalties (e.g., late filing)
- requests for income tax return amendments for failure to comply with the arm's length principle
- inter-company debt
- inter-company services fees, formalities to deduct and supporting documents to prove the benefit and rendering of the service. It is expected that upcoming audits will focus on method selection and accepted/ rejected comparables.

There are no records or evidence of any direct communication between customs and tax authorities regarding TP.

3. Transfer Pricing Documentation

a) Level of Documentation

Taxpayers subject to filing an informative return should also submit supporting documentation (Local File, Mater File and CbCR) if total annual operations with related parties reaches 61.000 UVT. Only types of transactions that reached 45.000 UVT in the fiscal year must be documented. Supporting documentation includes:

The content of the CbCR, Local file and Master file is detailed described in Decree 2120 of 15 December 2017. In general, the Local File must include:

- Executive summary;
- Functional analysis;
- Industry analysis;
- Economic analysis;

In general, the Master File must include:

- Organizational Structure;
- Business description; Intangibles of the MNE;
- Intercompany financing transactions;
- Tax and finance policies of the MNE.

Taxpayers with annual consolidated group revenue equal to or exceeding 81 million UVT's (USD 814 million) on the previous fiscal year must file CbCR in case it is the "ultimate controller" of the MNE, or has been designated as "substitute entity" by the MNE headquarter to send the CbC report.

b) Industry Analysis

By identifying value drivers for the relevant industry, a first indication of the level of profitability common in the industry is being given.

c) Company Analysis

A description of the management structure of the local entity, a local organisation chart, and a description of the individuals to whom local management reports and the country(ies) in which such individuals maintain their principal offices.

A detailed description of the business and business strategy pursued by the local entity including an indication whether the local entity has been involved in or affected by business restructurings or intangibles transfers in the present or immediately past year and an explanation of those aspects of such transactions affecting the local entity.

d) Functional Analysis

In conducting a functional analysis, an assessment is made of the significant activities and responsibilities that are performed by the related parties relevant to the Intercompany Transactions

under review, the tangible and intangible assets that are employed and the risks that are borne in undertaking the business activities. Such an assessment is consistent with the recommendations that have been made in the OECD Guidelines at paragraph 1.51.

e) Choice of Transfer Pricing Method

The rules and regulations specifying the methods available for performing transfer pricing and comparability analyses are in line with those contained in the OECD Transfer Pricing Guidelines. Article 260-3 of the Tax Statute specifies the following five transfer pricing methods:

- Comparable uncontrolled price method (CUP);
- Resale price method (RPM);
- Cost plus method (CPM);
- Profit split method (PSM); and
- Transactional net margin method (TNMM).

In practice, taxpayers are required to select the most appropriate method for the analysis of a transaction and to provide adequate support for the rejection of other methods.

The rules and regulations require Colombian GAAP to be used for determining the income, costs, gross profit, net sales, expenses, operating profit, assets, and liabilities of the controlled transaction for performing the transfer pricing analyses.

In 2017, DIAN decided that the comparable uncontrolled price method is the most appropriate methodology to determine the arm's length price in acquisitions of tangible used goods and in commodities transactions.

f) Economic Analysis – Benchmark Study

Colombian companies are required to publish their annual accounts by filing them with the Colombian Superintendent Board of Companies (Superintendencia de Sociedades). This financial information is considered quite reliable and can be accessed through the Internet. However, due to the lack of functional information such data is rarely used for domestic comparability purposes. Therefore, foreign comparables are often used and up to now this approach has been accepted by the DIAN. The DIAN has access to the Osiris database (and other BvD databases), Compustat and other similar databases.

g) Inter-company (IC) Legal Agreement

Although an Inter-company legal agreement formalizes the business and financial relationship between group entities, the legal agreements have a lower ranking since the OECD 2017 Guidelines made the “conduct of parties” the prevailing concept.

h) Production Process for TP Relevant Returns, Documents, Forms and Financials

In the chart below, the existence of the filing requirements with the details of which format is used, the latest filing date, notification requirement and its deadline, thresholds to be applied in case it exists, and the required languages are demonstrated. This information can be seen respectively for CIT, master file, local file, CbCR, local forms, annual accounts and segmented P&L documentations. All the forms can be found in this particular page of the website of Tax Authority.⁵

	Prepare or File?	Format	Deadline	Notification Deadline*	Threshold* (Yes/No)	Local Language (Yes/No)*(If "No", it can be filed in English)
Corporate Income Tax	File	Electronic	On the date specified by DIAN yearly. (April)	N/A	N/A	Yes (Spanish)
Master File (Form 5231 V-2)	File	Electronic	Depending on TAX ID digit. Between 12 th and 23 rd December	N/A	Gross assets 100,000 UVT, or gross income 61,000 UVT, or 45,000 UVT per transaction	No
Local File (Form 1729 V-)	File	Electronic	Depending on TAX ID digit. Between 7 th and 20 th of September	N/A	Gross assets 100,000 UVT, or gross income 61,000 UVT, or 45,000 UVT per transaction (10,000 UVT for tax havens)	Yes (Spanish)

⁵ <https://www.dian.gov.co/atencionciudadano/formulariosinstructivos/Paginas/default.aspx>

CbCR (Form 5254)	File	Electronic	12 months after previous FY	On the date specified by DIAN yearly.	81 million UVTs (USD 814 million)	Yes (Spanish)
Form 120	File	Electronic	Depending on TAX ID digit. Between 7 th and 20 th of September	N/A	Gross assets 100,000 UVT, or gross income 61,000 UVT, or 45,000 UVT per transaction (10,000 UVT for tax havens)	Yes (Spanish)
Annual Accounts	Prepare	IFRS	120 days after the end of the financial year	No	Yes	Yes
Segmented P&L	Prepare	Excel/Other	Ready upon filing CIT/TP documents.	No	No	Yes
* Country has signed the MCAA agreement for the filing of CBCR on 21 June 2017.						
* Country does not request as much and detailed information from smaller and less complex enterprises (SME's included) than it does from large and complex enterprises.						

The deadlines for filing the TP documentation are established each FY at the end of that FY year (generally on November or December) and depends on the last digit of the tax identification number (NIT). For FY 2017 the deadlines are regulated in the Decree 1951 of 28 November 2017. The deadline to submit the Transfer pricing documentation is generally mid-September of the following year. The statute of limitation is two years from the date due to file the tax return and five years for documentation. Income Tax, in general, can be audited within two years from deadline.

i) Mandatory Language

Documentation should be in Spanish; however, some information (e.g., business description of foreign comparables) may be submitted in English. Colombian tax authorities may require a translation into Spanish of such information.

j) Notification Requirement

All constituent entities of an MNE group, which is tax resident in Colombia, must notify the tax office whether it is the surrogate parent entity (SPE) or the UPE, and if it is neither the SPE or the UPE, the identity and tax residence of the reporting entity must be reported to the finance tax authorities. Constituent entities that are required to file a TP return can also file a CbCR notification using the same TP return form. Other constituent entities must get a special form from the tax authority's website and submit it to preciostransferencia@dian.gov.co with the subject "Notification - Country by Country Report."

k) Record Keeping

Records must be kept in accordance with the provisions of the Commercial Code and in compliance with Colombian GAAP.

l) Penalties and Interest Charges

The Colombian transfer pricing regime issues penalties stemming from the supporting documentation and the transfer pricing return.

Transfer pricing documentation

- Late filing: 0.1% of the total value of the transactions subject to TP up to 1,250 UVTs
- Information inconsistencies: 1% of the value of the transactions reported with inconsistencies that were carried out with related parties, limited to 5,000 UVTs
- Omitted information (transactions): 2% of the value of the omitted transactions carried out with related parties, limited to 5,000 UVTs; additionally, rejection of cost and expense related to omitted operations may apply
- Omitted information (related parties located in tax havens): 4% of the total value of the transactions carried out with related parties, limited to 10,000 UVTs; additionally, rejection of cost and expense related to omitted operations may apply
- Amendment of transfer pricing documentation: penalties may be reduced by 50%

Transfer pricing return

- Late filing: 0.1% of the total value of the transactions subject to TP up to 1,250 UVTs
- Information inconsistencies: 0.6% of the total value of the transactions carried out with related parties, limited to 2,280 UVTs
- Omitted information (transactions): 1.3% of the total value of the transactions carried out with related parties, limited to 3,000 UVTs; additionally, rejection of cost and expense related to omitted operations may apply
- Omitted information (related parties located in tax havens): 2.6% of the total value of the transactions carried out with related parties, limited to 6,000 UVTs; additionally, rejection of cost and expense related to omitted operations may apply

- Non-filing of transfer pricing return: 4% of the total value of the transactions carried out with related parties, limited to 20,000 UVTs

The penalties mentioned above do not include additional fines and penalties that taxpayers incur for the amendment of income tax returns or transfer pricing adjustments.

Penalties related to the CbCR: Article 260 of the CTC states that penalties that would apply are established in article 651 of the CTC according to which penalties for failure or incorrect submitting information are up to 15,000 UVTs considering the following criteria: a) 5% of the amounts not reported; b) 4% of the amounts incorrectly reported; c) 3% of the amounts that were reported after the deadline to submit the CbCR. These penalties are described in article 651 of the Colombian Tax Code and article 1.2.2.2.3.1. of the Decree 2120 of 15 December 2017.

The transfer pricing regime gives taxpayers in Colombia penalty relief, as described below:

For Transfer pricing documentation:

- Reduced penalty (before the tax authority's penalty order):
- When the taxpayer amends its transfer pricing documentation for inconsistencies or omissions before the tax authority issues its penalty order, the penalty will be reduced to 50% of the amount determined in the official assessment.

For Transfer pricing return (Reduced sanction before the tax authority's penalty order):

- When the taxpayer amends its transfer pricing return for inconsistencies or omissions before the tax authority issues its penalty order, the penalty will be reduced to 50% of the amount determined in the official assessment.
- The transfer pricing return can be voluntarily amended for two years from the original date of the filing.

The tax authority has a period of five years from the original filing date to start an administrative process to impose penalties regarding noncompliance of formal transfer pricing duties.

In case of Transfer pricing adjustments, a penalty of up to 160% of the additional tax could apply. For a self-assessment or acceptance of the challenges made by the tax authorities, this fine could be decreased to 10%.