



Transfer Pricing  
**Country Summary**

**Brazil**

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## 1. Introduction

Brazilian transfer pricing rules were originally enacted in 1996 and just a few amendments have been made since then, mostly in 2012. The rules were substantially different from the Organization for Economic Cooperation and Development's ("OECD") Transfer Pricing Guidelines. Where these latter provided for comparability and functional analysis, the Brazilian transfer pricing rules relied mostly on fixed markup rates, and mandatory formulas for price calculation that varied according to the segment of industry and nature of the payment. There was almost no room for subjective approaches.

Recently, the Brazilian transfer pricing scenario changed drastically, since new transfer pricing rules were enacted on December 28, 2022 by the Temporary Measure ("MP") 1,152/2022.

MP 1,152/2022 must be converted in Law within 120 days as of its enactment (60-day deadline extendable for additional 60 days), being voted and approved by both Houses of the Parliament. If not, MP 1,152/2022 will not produce any effect and the former transfer pricing rules will continue in force in 2023 and on.

As of the publishing of this report, MP 1,152/2022 had not yet been converted in Law. However the Federal Government has recently confirmed that it will use all political tools and effort to obtain the necessary approval of MP 1,152/2022 in both Houses. This report shall be updated should any alteration take place.

## 2. Laws & Regulations

### a) References to OECD/EU/Local Rules

The new legislation is mostly relied on the OECD Transfer Pricing Guidelines, effectively electing the arm's length principle as the corner stone of the legal framework.

The once used mathematical formulas and mandatory margins were revoked. Taxpayers are required to focus on the accurate delineation of the controlled transactions, relying not solely on the actual terms of agreements, but mainly on the economical substance of the transactions, including on how the functions and risks are allocated between the parties.

Traditionally, the legislation provided for three methods to determine the parameter price on import transactions and four methods on export transactions, as well as an additional method for commodities (on imports and exports). In summary the methods were versions of the OECD's Cost-Plus Markup, Resale Price Less Markup and Compared Uncontrolled Prices methods.

The MP now provides for the actual OECD methods including those methods that were not comprised in the former Brazilian legislation, such as the Transactions Net Margin and Profit Split methods.

### b) Definition of Related Party

MP 1,152/2022 provides that parties are considered to be related when at least one of them is subject to influence, exerted directly or indirectly by another party, which may lead to terms and conditions that differ from those that would be established between unrelated parties in comparable transactions. The following entities will be deemed to be related to the Brazilian company:

- the controlling shareholder and its controlled entities;
- the entity and its business unit, when treated as a separate taxpayer for income tax purposes, including the parent company and its branches;
- affiliated companies;
- entities included in consolidated financial statements, or that would be included if the ultimate parent of the multinational group of which they are part were to prepare such statements if its capital were traded on the securities markets of its country of residence;

- entities in which one of them has the right to receive, directly or indirectly, at least twenty-five percent of the profits of the other or of its assets in the event of liquidation;
- entities that are directly or indirectly under common control or in which the same partner, shareholder or owner holds twenty percent or more of the share capital of each;
- entities in which the same partners or shareholders, or their spouses, partners, relatives, consanguineous or affines, up to the third degree, hold at least twenty percent of the share capital of each; and
- the entity and the natural person who is a spouse, partner or relative, consanguineous or affined, up to the third degree, of a counselor, director or controller of that entity.
- The control relationship is characterized when an entity:
  - holds, directly or indirectly, alone, or jointly with other entities, including due to the existence of voting agreements, rights that ensure preponderance in corporate resolutions or the power to elect or dismiss the majority of managers of another entity;
  - holds, directly or indirectly, more than fifty percent of the share capital of another entity; or
  - holds or exercises the power to administer or manage, directly or indirectly, the activities of another entity.

### c) Nature of Transfer Pricing Documentation

Currently, rules dealing with transfer pricing documentation are the ones in force on December 31, 2022. Thus, taxpayers must submit the Tax-Accounting Bookkeeping (ECF), which replaced the Corporate Income Tax Return of Legal Entities ("DIPJ") in 2015. It contains transfer pricing information on the operations of the Brazilian legal entity. The ECF must be filed by the end of July of the subsequent year and is an obligation imposed on legal entities established in Brazil. The ECF is part of the Brazilian SPED (Public System of Digital Bookkeeping), a platform for a massive integration, standardisation and sharing of tax and accounting data of federal, state and municipal public treasuries and regulatory agencies.

There is no threshold for the ECF. The taxpayer shall mention in the ECF all the operations that influence the composition of the calculation basis and the amount due from Corporate Income Tax (IRPJ) and Social Contribution on Net Income (CSLL). Thus, taxpayers must disclose in their corporate income tax return information regarding their inter-company transactions and, in the case transfer pricing rules are applicable, their accurate information.

By the end of 2016, Brazil implemented the Country-by-Country Report ("CbCR") in connection with BEPS Action 13. Although it does not seem that the CbCR will be used primarily by Brazilian tax authorities for transfer pricing scrutiny purposes, it may serve as an additional tool in tax audits. The CbCR in Brazil is required for entities that, as the ultimate parent company of a multinational group, are residents of Brazil for tax purposes and that have total consolidated group revenue of the fiscal year before the year of the CbCR of an amount greater than RS 2.26 billion if the controller is domiciled in Brazil or €750 million (or the equivalent in local currency) if the controller is domiciled abroad. The CbCR is to be filed along with the taxpayer's ECF for the related year and its submission to the tax authorities in the file named "Block W".

The CbCR in Brazil became effective from 31 December 2016 and applies for fiscal years beginning or after 1 January 2016. There are penalties for non-filing / filing late. The OECD's XML Schema standardised electronic format has been adopted for this.

A Brazilian entity that is not the parent of a multinational group will be obliged to deliver the CbCR of the group if:

- The parent company of the group is not obliged to deliver the CbCR in its jurisdiction;
- The jurisdiction of the parent company has a DTT with Brazil but did not agree with Brazil about the final deadline for delivery of the CbCR; or

- There is a systematic failure of the parent company's jurisdiction that the Federal Revenue notified of Brazil to the Brazilian resident entity.

#### d) Tax Havens & Blacklists

Brazilian law distinguishes tax heaven from countries that provide for privileged tax regimes. Tax heaven means jurisdictions whose rate is lower than 20% (or 17% in certain cases) or whose laws do not allow access to information relating to the shareholding of legal entities within a jurisdiction that provides the aforementioned advantages.

The current list provided by Normative Ruling 1,037/10 comprises the following jurisdictions: Andorra; Anguilla; Antigua and Barbuda; Aruba; Ascension Island; The Commonwealth of The Bahamas; Bahrain; Barbados; Belize; The Bermuda Islands; Brunei; Campione d'Italia; Channel Islands (Alderney, Guernsey, Jersey and Sark); Cayman Islands; Cyprus; Cook Islands; Djibouti; Dominica; United Arab Emirates; Gibraltar; Granada; Hong Kong; Kiribati; Labuan; Lebanon; Liberia; Liechtenstein; Macau; Maldives; Isle of Man; Marshall Islands; Mauritius Island; Monaco; Montserrat Island; Nauru; Niue Island; Norfolk Island; Panama; Pitcairn Islands; French Polynesia; Qeshm Island; American Samoa; Eastern Samoa; Saint Helena Island; Saint Lucia; Saint-Pierre and Miquelon Island; Saint Vincent and the Grenadines; Seychelles; Solomon Islands; The Kingdom of Swaziland; The Sultanate of Oman; Tonga; Tristan da Cunha; Turks and Caicos Islands; Vanuatu; U.S. Virgin Islands; British Virgin Islands; Curaçao; Saint Martin; and Ireland.

#### e) Advance Pricing Agreement (APA)

MP 1,152/2022 also provided for specific rules that are the equivalent to (but not identical) the OECD's Advance Pricing Arrangements, which are based on the consultation process governed by Law 9,430/96.

#### f) Audit Practice

Transfer pricing may be reviewed as part of a comprehensive tax audit or through a specific transfer pricing audit. In recent years, tax authorities have considerably increased the number of audits, mainly in strategic sectors (e.g. pharmaceuticals, electronic, auto-parts, etc.).

### 3. Transfer Pricing Documentation

MP 1,152/2022 is not detailed enough in many aspects including transfer pricing documentation. As of this date, many items in this chapter are still governed by the rules in force on December 31, 2022, but tax authorities are expected to soon publish new regulation on transfer pricing documentation.

#### a) Level of Documentation

Documentation necessary to support corporate income tax return are incoming invoices, accounting information, agreements, commercial invoices, export registers, import registers. There is no exemption for documentation obligation; any related party transaction must be documented. There is no limited transfer pricing documentation or threshold for documentation.

There are no specific documentation requirements in addition to the disclosure of transactions in the ECF explained before but, when (and if) requested, a taxpayer must provide the tax authorities with information on the method applied, the documentation used to support the price and the respective calculation records. If a taxpayer does not provide the tax authorities with this information or provide insufficient or inappropriate information, it may be subject to the determination of prices by the tax authorities based on documents available, applying one of the methods prescribed by Law 9,430/96.

About the Country-by-Country (CbC) Reporting, Normative Instruction Nn. 1681/16 introduced rules to incorporate the minimum standards recommended by the Base Erosion and Profit Shifting (BEPS) project Action 13. The rules are applicable as of 1 January 2016.

#### 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 of 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.

#### e) Choice of Transfer Pricing Method

MP 1,152/2022 provided for the following methods: Cost-Plus Markup, Resale Price Less Markup, Compared Uncontrolled Price, Transactions Net Margin and Profit Split methods.

The taxpayer is not allowed to elect the least burdensome method. The best method approach requires the identification of the most appropriate method, taking in consideration the greater reliability in determining the terms and conditions that would be agreed upon by unrelated parties.

There is a preference for the Compared Uncontrolled Prices method, especially in the case of commodities, unless there is evidence that a different method is more adequate to the transaction.

#### f) Economic Analysis – Benchmark Study

Brazil arguably followed the guidance on comparability analysis outlined in Chapter III of the OECD TP Guidelines. The Brazilian tax authorities accept foreign comparable as long as geographic differences have no material impact on the comparability.

#### g) Inter-company (IC) Legal Agreement

Although an Inter-company legal agreement formalises 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) Financial Statements

Not applicable.

i) 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. These information can be seen respectively for CIT, master file, local file, CbCR, local forms, annual accounts and segmented P&L documentations.

As mentioned previously, MP 1,152/2022 expressly delegates to tax authorities the task of dealing with transfer pricing documentation rules. The new regulation has not yet been provided, therefore the information below is based on the legislation in force on December 31, 2022.

	Prepare or File?	Format	Deadline	Notification Deadline*	Threshold* (Yes/No)	Local Language (Yes/No)*(If "No", it can be filed in English)
<b>Corporate Income Tax</b>	File	Electronic (ECF)	July, 31 <sup>st</sup> .	N/A	No	Yes
<b>Master File</b>	N/A	N/A	N/A	N/A	N/A	N/A
<b>Local File</b>	File	Electronic (ECF)	July, 31 <sup>st</sup> .	N/A	No	Yes
<b>CbCr</b>	File	Electronic (ECF)	July, 31 <sup>st</sup> .	Yes	Yes	Yes
<b>Local form</b>	File	Indicate existence of transactions in ECF	July, 31 <sup>st</sup> .	N/A	No	Yes
<b>Annual Accounts</b>	N/A	N/A	N/A	N/A	N/A	N/A
<b>Segmented P&amp;L</b>	N/A	N/A	N/A	N/A	N/A	N/A

\* Brazil has signed the MCAA agreement on 21 October 2016 for the filing of CBCR, and it gained effect on 1 January 2017.

\* There is no specific transfer pricing rules and regulations for SME's.

Documentation (ECF) must be available to tax authorities by the end of July of each year (when the income tax assessment from the previous year must be concluded and paid).

The information regarding transfer pricing submitted to the tax authorities with the corporate income tax return shall be submitted up to the last business day of July every year. Please note that transfer pricing documentation must be filed in the ECF as mentioned before, and detailed information on calculations and supporting documentation should be available to tax authorities, upon request, in case of tax inspection.

During a tax audit, the tax authorities set a deadline for providing documentation. It usually ranges from 5 to 30 days, depending on the circumstances, and the taxpayer has the right to request an extension if required and fair. Also, the limitation of 5 years for Audits applied after the end of the financial year (exception is made, e.g. for fraudulent transactions).

According to the Brazilian transfer pricing legislation, if the average sales price of goods, services or rights to related parties abroad is not lower than 90% of the average sales price of these same goods, services or rights to Brazilian non-related entities, the taxpayer is dismissed from the duty to comply with the Brazilian transfer pricing rules on export transactions. The legislation includes other two types of safe-harbours for export transactions involving related parties, the first one for companies with export revenues equal to or below 5% of the total turnover on a given calendar year and the second one for companies that present minimum profitability on export transactions equivalent to 10% of the corresponding export revenues, the revenues derived from export transactions to related parties does not exceed 20% of the total revenue derived from export transactions. However, these safe-harbours do not imply definitive acceptance.

#### j) Mandatory Language

According to the tax legislation, all accounting and fiscal documentation shall be presented in Portuguese (documents in other languages shall be translated). With respect to CbCr, taxpayers are allowed to choose one of the three following languages to fill the free text fields: Portuguese, Spanish or English.

#### k) Notification Requirement

If the ultimate parent entity is resident in Brazil for tax purposes, a Brazilian tax resident subsidiary that is part of that multinational group is dismissed from the CbC report file if the multinational group's total consolidated revenue in the fiscal year before the fiscal year of the report is less than BRL 2,260,000,000 (EUR 750,000,000). In this case, the notice of whether or not a CbC report is required should take place on the same day as the CbC report submission. It is the last working day of July as ordinary.

#### l) Record Keeping

Documentation to support the transfer pricing methods must be kept for a period of 5 years after the end of the financial year for which the documentation was prepared as it is the period during which the tax authorities ordinarily are allowed to make assessments.

#### m) Penalties and Interest Charges

Although the transfer pricing legislation establishes no specific penalties, should the taxpayer not provide the tax authorities with the proper information, it may be subject to the arbitration of prices by tax authorities based on available documents and information, applying one of the methods established in Law 9,430/96. In this case, should the arbitration result in any adjustments on the company's income tax basis and, as a consequence, in a tax deficiency, such amount is generally subject to interest penalties based on the Selic rate and fines.

Penalties in the current tax law:

- Untimely filing: RS 1.500,00 (approximately US\$ 450) for each month or fraction of delay;
- Omitted, incomplete or inaccurate information: 3% of the amount not informed correctly;

- General penalty: may vary from 75% to 150% in case of evasion, fraud or collusion.