
Evolutions and tendencies regarding the Romanian transfer pricing legislation: is there a need for change?

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Abstract

In the context of internationalization and globalization of businesses an important attention has been paid to the transfer pricing legislation. Moreover, starting with 2016 Romania has adopted new transfer pricing regulations which have a significant impact on the groups of companies. Therefore, one of the objectives of our research was to analyse the Romanian transfer pricing legislation in order to capture an evolution of it. To achieve this objective we performed a comparison between Order 222/2008 and Order 442/2016. Other objectives of the research were to capture the perception of the tax specialists about the transfer pricing subject and the Romanian related legislation, especially about the new regulations and to identify if there is necessary a change in the Romanian transfer pricing legislation. To achieve these two objectives, the main investigative tool used was a questionnaire distributed to members of the Romanian Chamber of Tax Consultants. The collection of the information based on questionnaire was conducted in the period 11 – 27 June 2016. The study's results show that the Romanian transfer pricing legislation contains some efficient regulations, but however it needs some changes which would contribute to a better prevention of the base erosion and profit shifting between multinationals and which would avoid any misunderstandings and possible disputes between taxpayers and tax authorities.

Keywords: Transfer pricing, legislation, change, Romania, Order 442/2016

JEL Classification: M48, K34, F23

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Introduction

Once with the increasing of the number of multinational enterprises, the number of related party transactions rose as well offering to the groups of companies the opportunity to shift income from a high-tax jurisdiction into a low-tax one. This situation represents a high risk for the governments of all countries of the world, as its tax revenues could be reduced. Given this, more and more countries are introducing and extending the transfer pricing phenomenon in order to prevent and combat the base erosion and profit shifting between multinationals (Lohse *et al.*, 2012).

Romania is one of the countries which during 2016 adopted new transfer pricing phenomenon, this event having a significant importance in the evolution of the Romanian transfer pricing phenomenon and also a significant impact on the business environment. In this respect, the most important transfer pricing regulations were adopted through Order 442/2016 regarding the value of transactions, the preparation terms, the content and the conditions under which the transfer pricing documentation file is to be requested and presented and the procedure for adjusting/estimating the transfer prices.

In this paper we analysed the new transfer pricing regulations stipulated by Order 442/2016 (applicable from 2016) by comparison with the old ones provided by Order 222/2008 regarding the content of the transfer pricing file (applicable until the end of 2015). Through this comparison we tried to capture the evolution of the Romanian transfer pricing regulations and to identify the advantages and disadvantages of this evolution for the groups of companies.

In addition, the paper presents the perception of the tax specialists about the transfer pricing subject and the related legislation, especially about the new regulations brought by Order 442/2016 and analysis if there is a need for additional changes in the Romanian transfer pricing legislation.

Summarizing, the main objectives of the paper were: to analyse the Romanian transfer pricing legislation in order to capture an evolution of it; to capture the perception of the tax specialists about the transfer pricing subject and the related legislation, especially about the new regulations brought by Order 442/2016 and to identify if there is necessary a change in the Romanian transfer pricing legislation.

The motivation of our research is represented by the fact that the new transfer pricing order adopted by Romania in 2016 brought important changes to the Romanian transfer pricing legislation, being a controversy subject for the business environment. We were also motivated by the fact that until now no study was performed in relation to the new Romanian transfer pricing regulations. Therefore, we consider that our study have an important contribution to the transfer pricing literature and in the same time could represent a starting point for future research.

The rest of the paper is organized as follows. Section 1 discusses the background literature on transfer pricing legislation. Section 2 describes the research methodology. Section 3 analyses the new transfer pricing regulations in Romania. Section 4 presents the perception of the tax specialists about the transfer pricing subject and the related legislation. In the final section, the conclusions are accompanied by a description of tentative avenues of research.

1. Literature review

Transfer prices represent the prices charged between affiliated companies for the provision/acquisition of services (including administrative services and financial services) or for the sale/acquisition of goods (Matei and Pîrvu, 2011).

According to the literature review, prices at which goods or services are transferred between affiliated companies influence the profit obtained by each of these companies and the corporate income tax which should be paid. Due to this fact, the transfer pricing subject becomes increasingly important for groups of companies (Sansing, 2014).

Therefore, considering the fact that multinationals own entities in different countries of the world, they could profit from differences in tax rates (Peralta, 2006) and they could try to use transfer pricing in order to shift the profit from high-tax countries into low-tax countries.

Moreover, Neighbour (2002) pointed out that transfer pricing can deprive governments of their fair share of taxes from multinationals. Yao (2013) stated that as a consequence to this situation, most countries have adopted regulations to "assess the appropriateness of the transfer prices quoted by MNEs".

In addition, according to Ito and Komoriya (2015) in order to combat the profit shifting between

multinationals, governments have implemented, among other rules, transfer pricing regulations. These two authors analysed for the period between 2009 and 2012 the transfer pricing regulations of OECD member countries and conducted a research in order to observe the impact of these regulations on the location decisions of multinationals. The conclusion of the survey was that in the location decisions, an important role is played by the transfer pricing regulations. In this respect, the authors noted that rules with regards to the transfer pricing documentation decrease the foreign direct investments.

Lohse and Riedel (2013) performed a study at the level of pan-European countries and noticed that the transfer pricing regulations significantly reduce the profit shifting activities of multinationals. Moreover, the authors stated that the transfer pricing rules “may be socially desirable despite the high administrative burden they impose on firms and tax authorities”.

On the other hand, Silberztein (2008) considered that a transfer pricing system involves more than enacting of legislation. She stated that an effective transfer pricing system should be based, among others, on the development of the transfer pricing expertise within tax authorities, development of dispute resolution mechanism which could eliminate double taxation, development of guidance for complex transactions etc.

1.1. Global evolutions regarding the transfer pricing legislation

Keuschnigg and Devereux (2013) considered that once with the increasing of the multinational enterprises, the collection of corporate taxes has become a challenging task. Therefore, in order to protect the tax base countries implemented the arm's length principle. According to this principle, the prices charged between related parties should be the same to the prices charged between unrelated parties if they had trade the same products or services, under the same circumstances as the related parties (Eden and Smith, 2001).

The first country which implemented the arm's length principle and adopted a transfer pricing legislation was US (Mirjam, 2015).

Having as a starting point the US legislation, and in order to develop global transfer pricing regulations, the Organisation for Economic Cooperation and Development (OECD) published a report about the

allocation of profit and costs between affiliated companies.

In 1995 OECD published the document Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (“OECD Transfer Pricing Guidelines”), which has been revised in 2010. This document contains, inter alia, details about the transfer pricing documentation and the analysis which should be performed in order to assess if transfer pricing complies with the arm's length principle (OCDE, 2010).

In order to prevent the profit shifting between multinationals, in 2013 OECD originated the Action Plan on tax base erosion and profit shifting – BEPS Action Plan (Lamers *et al.*, 2014).

Furthermore, on 15th of June 2016, OECD announced the amendments of the Transfer Pricing Guidelines, according to the provisions of BEPS Action Plan, more exactly according to the provisions of Actions 8-10 “Aligning Transfer Pricing Outcomes with Value Creation” and Action 13 “Transfer Pricing Documentation and Country-by-Country Reporting” (<http://www.oecd.org>).

1.2. OECD Transfer Pricing Guidelines

The OECD Transfer Pricing Guidelines contain recommendations on the application of the arm's length principle as the appropriate means of determining applicable transfer prices for transactions carried out by related parties. Multinational enterprises are encouraged to follow the OECD Guidelines regarding transfer pricing, as subsequently amended and supplemented, in order to ensure compliance with the arm's length principle when determining transfer prices. The OECD Guidelines view the arm's length principle as a method which “*provides the closest approximation of the workings of the open market in cases where property (such as goods, other types of tangible assets, or intangible assets) is transferred or services are rendered between associated enterprises*” (OECD, 2010: 36).

The OECD Guidelines present the main steps to be analysed when applying the arm's length principle to transactions performed between affiliated companies. The Guidelines are intended to help tax administrations (both of OECD member and non OECD member countries) and multinational enterprises by indicating ways to find mutually satisfactory solutions to transfer pricing cases, thereby minimising conflict among tax

administrations and multinational enterprises and avoiding costly litigation. Taxpayers are encouraged to follow the Guidelines in evaluating for tax purposes whether their transfer pricing complies with the arm's length principle.

In order to analyse whether a transaction has been carried out at arm's length, one of the general accepted methods, as provided by the OECD Guidelines, and also by the Romanian Tax Code must be applied by the taxpayers: the comparable uncontrolled price method, the cost plus method, the resale price method, the transactional net margin method and the profit split method.

When choosing the most appropriate transfer pricing method in order to determine the comparability range of a transaction between affiliated parties, the facts and circumstances of that transaction should be considered for (i.e. there should be performed a functional analysis of the related parties transactions, presenting the functions carried out, the risks incurred and the assets used by each party involved in transactions). The selection of the method should offer the most appropriate measurement or the best estimate of the market value.

Transfer pricing methods

The *comparable uncontrolled price method* involves the comparison of the prices charged by related parties with the prices charged by independent companies. This method should be applied only if the conditions and circumstances of the transactions performed between related parties are similar with those carried out between unrelated parties (e.g. there are similar products sold/ services provided, comparable quantities etc.). In practice, it is used to test the arm's length principle of transactions which suppose the payment of commissions, royalties or interest.

The *cost plus method* is used in order to test the compliance with the arm's length principle of the prices charged by a service provider or a manufacturer to its related parties. The application of this method involves the comparison of the mark-up added by the service provider/manufacturer to the costs incurred in order to provide the services/ manufacture the goods and sell them to an affiliated company with the mark-up applied by independent companies to the costs incurred in order to provide similar services/ manufacture similar products.

The *resale price method* is used when a company purchases a product from an affiliated company and resells it to a third party. The application of this method begins with the determination of the price at which that product was resold to third parties (i.e. the resale price). After that, the price at which the product was purchased from the affiliated company is determined as a difference between the resale price and the margin added in order to resale it to third parties. In the next step, the margin applied by a company in order to resell to a third party the products purchased from an affiliated company is compared with the margin applied by independent companies which resell in similar circumstances, similar products. If this margin is situated in the interval of margins used by independent companies, then the price at which the goods resold was purchased from the affiliated company complies with the arm's length principle.

The *transactional net margin method* operates in the same way as the cost plus method and the resale price method, the only difference being represented by the fact that these methods suppose the comparison of gross mark-up/margins, while this method compares net mark-ups/margins.

The *profit split method* is used when the transactions between affiliated companies are interrelated, and so it would be impossible to identify comparable transactions.

1.3. Evolution of the Romanian transfer pricing legislation

The arm's length principle was introduced in the Romanian tax legislation in 1994, but only in 2000 was developed the legal framework for the application of this principle.

In September 2006 Romania introduced the transfer pricing documentation requirement, but the first detailed regulations regarding the content of the transfer pricing documentation file and the deadline for its submission were published in the Romanian Official Gazette in February 2008 (i.e. Order 222/2008).

Starting with 2007, the Romanian taxpayers which perform transactions with affiliated companies have the possibility to ask the tax authorities for the issue of an advance pricing agreement (APA).

The Romanian transfer pricing legislation follows the principles stipulated within the OECD Transfer Pricing Guidelines.

The year 2016 has brought substantial changes to the Romanian transfer pricing legislation. In this year the Order 442/2016 was published. Compared with Order 222/2008 (applicable until the end of 2015), this new order contains more detailed regulations with regards to the structure of the transfer pricing file and brings new substantial changes regarding the preparation and presentation of the transfer pricing file.

Moreover, considering the fact that the Romanian transfer pricing legislation is based on the provisions of the OECD Transfer Pricing Guidelines which will be amended according to BEPS Action Plan, it is expected that the transfer pricing legislation of our country to be also amended.

In this respect, on 2 June 2016 the Romanian Government approved the ascension of the Romania as associate to the BEPS Implementation Forum in order for our country to implement the BEPS measures at national level.

1.4. Previous studies performed in relation to transfer pricing legislation

Lohse *et al.* (2012) considered that in order to exist a transfer pricing legislations, countries should include in their national tax law, in addition to the arm's length principle, key concepts such as related parties, controlled transactions, methods for the determination of the transfer pricing and documentation requirements. Moreover, these authors performed a comparison of the transfer pricing regulations across 44 countries over a period of nine years (2001-2009). In order to show the differences between the regulations of countries analysed, they categorized the transfer pricing regulations as follows:

- Category 0 – no transfer pricing regulation exists;
- Category 1 – the arm's length principle exists in the national tax law, but there is no documentation requirement;
- Category 2 – the arm's length principle exists in the national tax law, documentation requirement is not implemented in the national tax law, but the documentation is required in practice (during an audit);
- Category 3 – the arm's length principle exists in the national tax law, documentation requirement is implemented in the national tax law, but the full documentation is available only upon request;

- Category 4 – the arm's length principle exists in the national tax law, documentation requirement is implemented in the national tax law and a short disclosure of documentation is required;
- Category 5 – the arm's length principle exists in the national tax law, documentation requirement is implemented in the national tax law and a long disclosure of documentation is required.

According to Lohse *et al.*, during 2003 – 2006 Romania was situated within the category 2, and between 2007 and 2009 within the category 3.

Oosterhoff (2011) analysed the results of the 2010 Global Transfer Pricing Survey conducted by Ernst & Young based on interviews with 877 multinational enterprises across 25 different countries and noticed that the importance granted by respondents to transfer pricing differs per industry. The industry which recorded the highest percentage (more than 70%) of respondents which considered transfer pricing as the most important issue is represented by the pharmaceuticals industry. The lowest percentage (close to or below 20%) was recorded, among others, by the banking and capital industries. Moreover, the author pointed out that more than half of the respondents interviewed in the parent companies prepared documentation contemporaneously with the filling of their corporate income tax return.

Corlaci and Tiron Tudor (2014) performed a survey regarding the perception of professionals with regards to the specific aspects related to the Romanian transfer pricing. In this respect, they used a questionnaire which was distributed to members of CECCAR (The Body of Licensed Accountants and Expert Accountants in Romania), CCF (Romanian Chamber of Tax Consultants) and CAFR (Chamber of Financial Auditors of Romania). The objective of this questionnaire was to identify the following elements:

- The level of the transfer pricing knowledge of the target group;
- The conditions in which the target group would attend professional courses in the field of transfer pricing;
- The general perception of the target group in relation to the technical aspects regarding transfer pricing (e.g. the importance of transfer pricing subject, the persons which should be involved in the preparation of a transfer pricing file, the capacity of companies to

deliver accuracy information about related party transactions etc.);

- The perception of the target group regarding the Romanian transfer pricing legislation. In this respect the results of the research showed that one of the most important factors which determine the Romanian companies to pay attention to the transfer pricing aspects is represented by the legislative regulations.

Stana (2016) analysed the business perspective on transfer pricing and related legislation using also a questionnaire as a research tool. Compared with the questionnaire designed by Corlaciuc and Tiron Tudor (2014), this one outlined the perception of the specialists in relation to the preparation of the transfer pricing file and to the application of the transfer pricing legislation by the Romanian tax authorities. The target group was represented by companies from different industries and was selected using various contacts from LinkedIn.

Until now, no research was performed in relation to the perception of the specialists on the new transfer pricing regulations implemented by Romania through Order 442/2016.

2. Research methodology

Below we presented the three main objectives of our survey. For each objective, we described the research methodology used in order to achieve it.

The first objective was to analyse the Romanian transfer pricing legislation in order to capture an evolution of it. Given the fact that the most important legislative amendments are related to the presentation, preparation and structure of the transfer pricing file, our analysis was concentrated on the regulations provided by Order 222/2008 (applicable until the end of 2015) and Order 442/2016 (applicable starting with 2016).

The research methodology used in this step of the research was represented by the analysis of the provisions of the two orders. After that, in order to capture the evolution of the transfer pricing regulations, we performed a comparison between Order 222/2008 and Order 442/2016 and we identified the advantages and disadvantages of this evolution for the groups of companies.

The second objective was to capture the perception of the tax specialists about the transfer pricing subject and

the related legislation, especially about the new regulations brought by Order 442/2016.

The research methodology used in order to achieve this objective was represented by the design of a questionnaire.

The questionnaire used contains 18 questions grouped in 4 categories of information as follows:

- Category 1: information about respondents (questions 1-5). In order to gather information about respondents we used 4 closed questions with multiple choice answers and 1 dichotomous question (i.e. question that ask respondents to answer with yes or no);
- Category 2: general information regarding the transfer pricing subject and the related legislation (questions 6-10). In this section we included 1 mixed question (where the respondents were given the possibility to fill in the answer where none of the answers provided were considered adequate), 1 dichotomous question and 3 questions using the Likert scale of answer options (where 1 represents the lowest value and 5 the highest one);
- Category 3: technical information regarding the new transfer pricing regulations adopted by Romania through Order 442/2016 (questions 11-16). In order to gather this type of information we used 3 closed questions with multiple choice answers, 2 mixed questions and 1 dichotomous question;
- Category 4: information related to the need of amendment the Romanian transfer pricing legislation (question 17-18). In this section we used 1 mixed question and 1 open question.

The questionnaire was designed using the funnel technique (Chelcea, 2001, pp.101). According to this technique, the structure of the questionnaire should be based on the shift from general aspects to particular ones.

Taking into consideration the fact that transfer pricing subject is a new one for the professionals, we chose as target group only the members of CCF (Romanian Chamber of Tax Consultants). We considered that these members have more experience and knowledge in transfer pricing area, compared with members of other professional bodies. Given this, we considered that the answers offered by members of CCF could be more relevant in order to perform our research than the answers of members of other professional bodies.

The questionnaire was distributed via e-mail. The e-mail addresses of CCF members were collected from the website of the Romanian Chamber of Tax Consultants (<http://www.ccfiscal.ro/>). We tried to perform an exhaustive research and in this respect we collected the e-mail address of all CCF active members (i.e. 4,486 members).

The computer software used in order to design the questionnaire and to store the answers received is represented by the online platform GoogleDocs. In order to send the questionnaire to the target group we used the Gmail platform and in order to interpret the results obtained we used the Microsoft Excel application.

The period during which we sent the questionnaire and collected the answers is between 11th of June and 27th of June 2016.

The third objective of the research was *to identify if there is necessary a change in the Romanian transfer pricing legislation*. This last research step was based on the results of the questionnaire. More exactly, based on

the answers received we performed an analysis in order to identify if Romania needs additional transfer pricing regulations or if the existing regulations should be amended or presented more detailed.

3. The new Romanian transfer pricing legislation and its impact on business environment

The **Table no. 1** below presents a comparison between the new Romanian transfer pricing legislation (i.e. the provisions of the Order 442/2016) and the old one (i.e. the provisions of the Order 222/2008). Through this comparison we tried to identify the impact of the new regulations on the business environment, more exactly we tried to identify the advantages and disadvantages of the new regulations from the taxpayers' point of view.

Table no. 1. New vs. old Romanian transfer pricing regulations			
I. Preparation and presentation of the transfer pricing file			
Items	Order 222/2008	Order 442/2016	Impact
Mandatory annual preparation of the transfer pricing file	n.a. (i.e. Order 222/2008 did not request companies to prepare an annual transfer pricing file)	<p>By whom?</p> <p>Large taxpayers which record an annual value of the transactions performed with affiliated companies higher than or equal to any of the following thresholds:</p> <ul style="list-style-type: none"> ○ EUR 200,000 for interest paid/ received; ○ EUR 250,000 for services provided/ received; ○ EUR 350,000 for sale/ acquisition of tangible and intangible goods. <p>When?</p> <p>The deadline for the preparation of the transfer pricing file is represented by the deadline for the submission of the annual corporate income tax return.</p> <p>How?</p> <p>The transfer pricing file should be presented upon the request of the tax</p>	<p>This new regulation represents a disadvantage for the large taxpayers, compared with the other categories of taxpayers. The obligation to prepare an annual transfer pricing file could represent a tax burden and large taxpayers should allocate considerable resources in this respect.</p> <p>However, the advantage is represented by the fact that only transactions which exceed the thresholds should be analysed within the transfer pricing file, and not all the transactions.</p> <p>In addition, due to this new regulation, starting with 2017 it is expected that the number of tax audits increases for the large taxpayers. Given this, we consider that this new regulation is an efficient one in order to prevent</p>

I. Preparation and presentation of the transfer pricing file			
Items	Order 222/2008	Order 442/2016	Impact
		authorities either during a tax audit or outside such process. The file should be presented in maximum 10 days from the request date, but not earlier than 10 days from the annual deadline mentioned above.	the base erosion and profit shifting between multinational companies.
Preparation of transfer pricing file upon request	<p>By whom? All taxpayers which perform transactions with affiliated companies, irrespective of the annual value of the transactions.</p> <p>How & When? The transfer pricing file should be presented upon the request of the tax authorities during a tax audit. The deadline for the presentation of the file upon request is of maximum 3 months and can be extended only once with a period equal with that initially established.</p>	<p>By whom? Large taxpayers which do not exceed the thresholds mentioned above (for the mandatory annual preparation of the transfer pricing file), small and medium taxpayers which record an annual value of the transactions performed with affiliated companies higher than or equal to any of the following thresholds:</p> <ul style="list-style-type: none"> ○ EUR 50,000 for interest paid/ received; ○ EUR 50,000 for services provided/ received; ○ EUR 100,000 for sale/ acquisition of tangible and intangible goods. <p>How & When? The transfer pricing file should be presented upon the request of the tax authorities during a tax audit. The deadline for the presentation of the file upon request is of 30 to 60 days and can be extended only once with maximum 30 days.</p>	<p>This new regulation presents some advantages, as follows:</p> <ul style="list-style-type: none"> ○ for the taxpayers targeted by this regulation there is no obligation regarding the annual transfer pricing file preparation; ○ only transactions which exceed the thresholds should be analysed within the transfer pricing file, and not all the transactions. <p>The disadvantage is represented by the diminishing of the presentation deadline.</p> <p>However, we consider that the diminishing of the presentation deadline represents an efficient regulation, as this encourage the taxpayers to prepare a transfer pricing file, irrespective they are or not subject to a tax audit.</p>
Other documentation rules	n.a.	<p>Taxpayers who perform intra – group transactions below the thresholds mentioned above (for the preparation of the transfer pricing file upon request) should not prepare a transfer pricing file. They have only the obligation to document, during a tax audit, the compliance of the transfer pricing with the arm's length principle. This should be performed according to the general rules provided by the financial-accounting and tax legislation in force.</p> <p>Order 442/2016 does not define the practical approach of documenting the arm's length nature of transfer pricing according to the general rules provided by the financial-accounting and tax legislation in force.</p>	<p>We consider that this regulation is an efficient one and represents an advantage for the taxpayers, as it eliminates the situation in which the costs incurred by a taxpayer in order to prepare the transfer pricing file would be higher than the value of the intra-group transactions performed.</p> <p>On the other hand, the fact that there is no definition with regards to the documentation which should be performed represents a disadvantage for taxpayers, as this situation might lead to misunderstandings and possible disputes to the tax authorities.</p>

II. The content of the transfer pricing file	
Order 222/2008 vs. Order 442/2016	Impact
<p>The structure of the transfer pricing documentation file provided by Order 442/2016 is more complex compared with the structure provided by Order 222/2008. The new structure requires, inter alia, the presentation of more detailed information about the group of companies (e.g. a description of any business restructuring that occurred within the group; a general description of the group research and development activity; a general description of the transfer pricing policy regarding financial arrangements concluded between affiliated companies within the group etc.).</p>	<p>The modification of the content of the transfer pricing file involves the allocation of more resources in order to prepare it. This thing could represent a disadvantage for taxpayers. However, we consider that the advantage is represented by the fact that the presentation of the new information requested by Order 442/2016 could be relevant in order to perform an accuracy transfer pricing analysis.</p>
III. Transfer pricing adjustment and estimation procedures	
Order 222/2008 vs. Order 442/2016	Impact
<p>In the case that taxpayers fails to submit the transfer pricing file or submit an incomplete one, the tax authorities could perform the <i>estimation of transfer prices</i>. The estimation process is followed by the <i>adjustment of the transfer prices</i>. The adjustment of transfer prices is also performed when taxpayers carry out related party transactions which do not comply with the arm's length principle.</p> <p>According to Order 222/2008 the estimation of transfer prices was performed based on the arithmetic average of the amount of three similar transactions carried out between independent companies and selected by the tax authorities.</p> <p>According to Order 442/2016 transfer prices are adjusted/ estimated based on the level of the central tendency of the market (i.e. the median value of the comparison range of the prices or margin used by independent companies which perform comparable transactions).</p>	<p>The modification of the estimation procedures based on the level of the central tendency of the market represents an advantage for the taxpayers, as it avoids the abusive approach of the tax authorities of selecting those three transactions which are the most unfavourable for the taxpayers.</p>

Source: own processing

4. The perception of the tax specialists about the transfer pricing subject and the related legislation: results and interpretations

Given the fact that almost for each new transfer pricing regulation we have identified both advantages and disadvantages, and considering that these regulations represent a controversy subject for the business environment, we found it interesting to identify the general perception of the tax specialists about the transfer pricing subject and the related legislation and to

identify if there is need for a change in the Romanian transfer pricing legislation.

In the **Table no. 2** below we presented the number of persons involved in the research, as well as the questionnaire response rate.

Information presented within **Table no. 2** was provided by the online platform GoogleDocs and the Gmail platform.

The percentage values were computed as follows:

- E-mails: error sending = E-mails: error sending/ E-mails: total available
- E-mails: actually sent = E-mails: actually sent/ E-mails: total available
- Effective responses = Effective responses/ E-mails: actually sent

Table no. 2. Questionnaire response rate

Element	Number	%
E-mails: total available	4,486	100%
E-mails: error sending	315	7%
E-mails: actually sent	4,171	93%
Effective responses	167	4%

Source: own processing

In the following sections we presented the interpretation of results obtained based on the answers received from 167 tax consultants which completed the questionnaire.

4.1. General information about the respondents

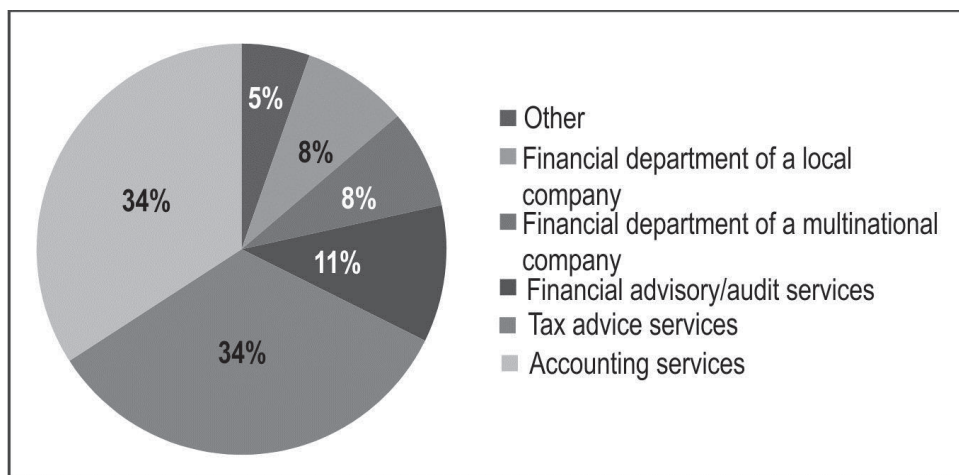
According with the statistics generated by the online platform GoogleDocs, the responses were received as it follows:

- 25% from the responses were received from people who are only members of CCF;
- 50% from people who are members of both CECCAR and CCF;
- 19% from members of the following three professional bodies: CECCAR, CCF and CAFR;
- The difference of 6% represents answers received from members of CCF and ACCA; CCF and CAFR; CECCAR, CCF and ACCA; CECCAR, CCF, CAFR and ACCA.

The **Figure no. 1** below presents the field in which the respondents are working. As could be observed, a big part of the respondents is working in the field of tax advice (34%) and in the field of accounting services (also 34%).

Moreover, 83% of the respondents have an experience of over 10 years. The hierarchy is completed by persons with prior professional activity between 6 and 10 years (14% of respondents) and finally by those with less than five years of experience.

Figure no. 1. Areas in which respondents are working



Source: own processing

In addition, 52% of the respondents worked in transfer pricing projects and have experience in this domain.

Regarding the participation to transfer pricing courses, 73% of the respondents would attend such courses on their own initiative, while 20% of the respondents would participate to this kind of courses only at the request of professional bodies. The difference of 7% would

participate to transfer pricing courses only upon the request of the employer.

Overall, we consider that the fact that most of the respondents are members of other professional bodies in addition to CCF, have an experience of over 10 years, worked in transfer pricing projects and have experience in this domain and would participate to transfer pricing

courses on their own initiative, represents a positive aspect in our research and ensures us that the responses to the questionnaire have a high quality level.

4.2. General perception of the respondents about the transfer pricing subject and about the related legislation

General perception about the transfer pricing subject

Our research aimed to gather the opinion of the respondents about the following three aspects related to the transfer pricing subject:

- The importance that the groups of companies should pay to transfer pricing aspects;
- The transfer pricing documentation;
- The involvement of the professional organizations in the training of the transfer pricing specialists.

Regarding the importance that groups of companies should pay to transfer pricing aspects, 58% of the respondents consider that the transfer pricing subject

should be highly important for the groups of companies and 31% of the respondents consider this subject important.

Respondents who stated that transfer pricing subject should be highly important for groups of companies are those who are working in the tax advisory field and in accounting services field and have more than 10 years of experience.

Furthermore, 8% of the respondents believe that the group of companies should pay a medium importance to transfer pricing aspects, while 3% consider that transfer prices should have a low importance for groups of companies.

Following, we tried to capture the perception of the respondents about the factors which make the transfer pricing documentation process a difficult one. These factors have been classified using the Likert scale. Therefore, the answers could take values from 1 (the lowest value) to 5 (the highest value). The hierarchy of the factors which cause the difficulty of the transfer pricing documentation, set based on the answers obtained, is shown in **Table no. 3** below.

Table no. 3. Hierarchy of factors which cause the difficulty of the transfer pricing documentation process

Factor	Rank based on average	Average	Minimum	Maximum	Standard Deviation
Access to the database in order to identify comparable companies	1	4.28	1	5	1.12
The lack of detailed guidelines with regards to the technical aspects used in the transfer pricing documentation process	2	4	1	5	1.23
Lack of technical knowledge required for the individuals within a company who are involved in the transfer pricing documentation process	3	3.77	1	5	1.12
Characteristics of business environment	4	3.43	1	5	1.26

Source: own processing

It is observed that the most important factor that causes the difficulty of the transfer pricing documentation process is represented by the access to the database in order to identify comparable companies. It was an expected result as a company should incur considerable costs in order to access a database with comparable companies and as a consequence many companies externalize the transfer pricing documentation to specialized firms.

The second important factor which makes the transfer pricing documentation process a difficult one is represented by the lack of detailed guidelines with regards to the technical aspects. Also, as a solution to this situation, companies externalize the transfer pricing documentation process to specialized firms. *Furthermore, we consider that we identify a need for the introduction in the Romanian transfer pricing regulatory framework of detailed guidelines with regards to the*

technical aspects used in the transfer pricing documentation process (e.g. steps which should be followed in order to perform a benchmark analysis, guidelines regarding the presentation of the functional analysis etc.).

According to the answers received the characteristics of business environment have the lowest influence on the transfer pricing documentation process.

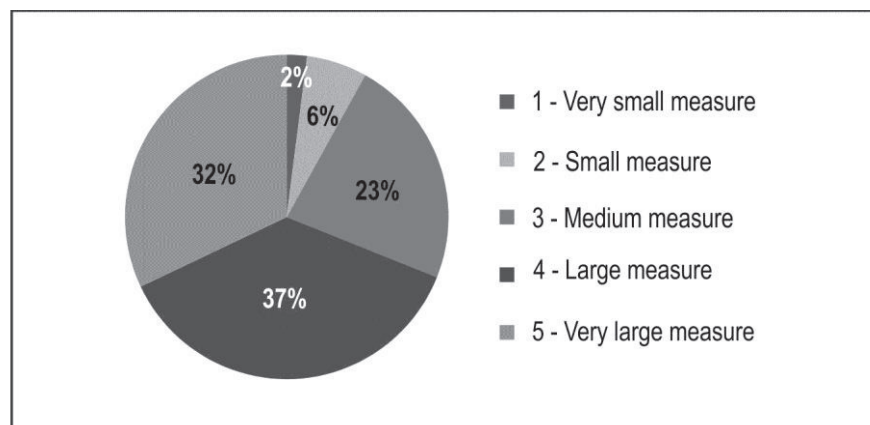
Another factor which makes the transfer pricing documentation process a difficult one is represented by the lack of technical knowledge required for the individuals within a company who are involved in the transfer pricing documentation process. In this respect, 94% of the respondents believe that the professional organizations should be involved in the training of the transfer pricing specialists. They also believe that such

involvement would be useful for the professionals in the field of finance and accounting.

General perception about the transfer pricing legislation

According to Figure no. 2, most of the respondents (37%) consider that the Romanian transfer pricing legislation could contribute in a large measure to the prevention of the opportunistic practices of multinationals regarding the manipulation of the tax result through transfer pricing mechanism. The hierarchy is completed by the respondents who consider that the Romanian transfer pricing legislation could prevent the manipulation of tax result in a very large measure (32%), in a medium measure (23%), in a small measure (6%) and in a very small measure (2%).

Figure no. 2. Romanian transfer pricing legislation



Source: own processing

Moreover, 64% of the respondents consider that the Romanian transfer pricing legislation is ambiguous and too summary, while 20% of the respondents believe that it is properly structured and easy to understand. This result is converging with that of previous works (Corlaci and Tiron Tudor, 2014).

The rest of the respondents (16%) filled their own response in relation to the Romanian transfer pricing legislation. The most important remarks made by these respondents are the followings:

- The legislation is difficult, ambiguous and consuming of financial and human resources;

- The legislation is not properly structured, but it is clear;
- The principles of the legislation are solid (as they are in line with the OECD Guidelines), but many practical issues need to be better regulated/clarified;
- The legislation is easy to understand, but its implementation in practice is deficient;
- The Romanian transfer pricing legislation is insufficient and not properly structured;
- The legislation leads to misunderstandings and possible disputes between tax authorities and taxpayers.

Based on the responses received we identified the need for a properly structuring of the Romanian transfer pricing legislation, in order to be easy to understand and to avoid any misunderstandings which could conduct to disputes between taxpayers and tax authorities.

4.3. Perception of the respondents about the new transfer pricing regulations

With regards to the new transfer pricing regulations adopted by Romania in 2016, 73% of the respondents consider that these regulations, compared with the old ones, will determine companies to pay more attention to the transfer pricing subject.

Furthermore, in this section of the questionnaire we tried to gather the opinion of the respondents about the following aspects related to the new transfer regulations:

- The thresholds used in order to assess if a taxpayer has the obligation to prepare a transfer pricing file for the transactions performed with its affiliated companies;
- The preparation and presentation of the transfer pricing file (i.e. the modification of the deadline established for the presentation of the transfer pricing file upon the request of the tax authorities and the introduction of the mandatory annual preparation of the transfer pricing file for large taxpayers);
- The new content of the transfer pricing file.

We chose to capture the perception of the specialists on these aspects, because as we have already presented above within section 4, these new regulations have a significant impact on the activity of the groups of companies.

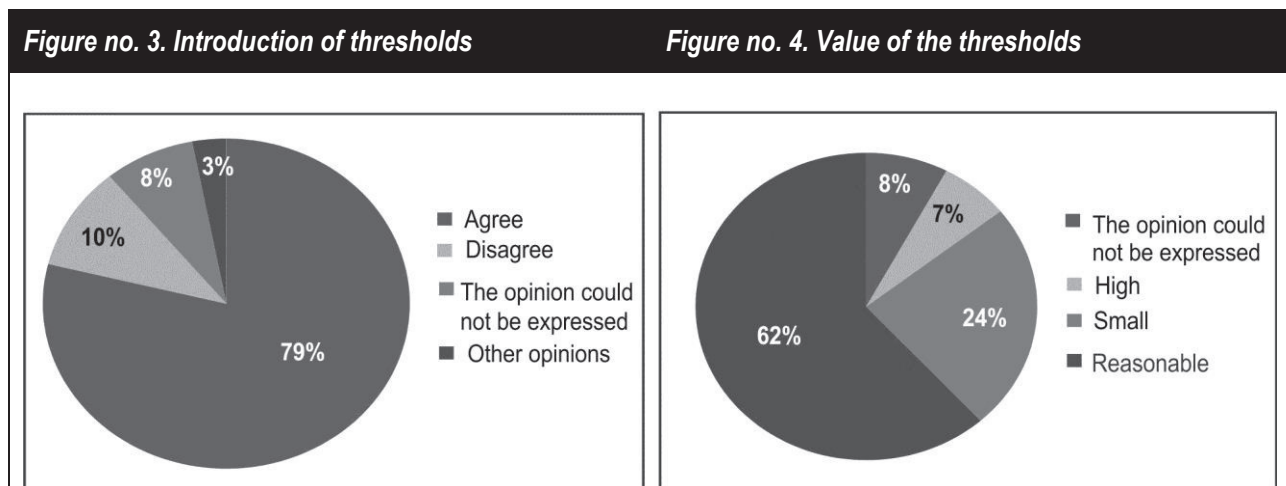
Thresholds

79% of the respondents agree with the introduction of thresholds in order to assess if a taxpayer has the obligation to prepare a transfer pricing file and believe that this represents an efficient legislative amendment, but only 62% of the respondents consider that the values of the thresholds are reasonable. 7 % of the respondents consider that the values of the thresholds are too high, while 23% consider them too small.

On the other hand, 10% of the respondents do not agree with the introduction of thresholds in order to assess if a taxpayer has the obligation to prepare a transfer pricing file and believe that all taxpayers should have the obligation to prepare a transfer pricing file, irrespective of the value of the transactions performed with affiliated companies. In addition, 3% of the respondents have other opinions about the introduction of thresholds. We mentioned herein the most important two opinions in this respect: *“the threshold criterion is not exhaustive and sufficient in order to remove the obligation regarding the transfer pricing documentation”, “only time can prove the effectiveness of these thresholds”*.

A percentage of 8% of the respondents could not express any opinion about the introduction of thresholds and its values because they do not have any knowledge about this topic.

Figure no. 3 and Figure no. 4 summarize the results obtained and interpreted above in relation to the thresholds used in order to asses if a taxpayer has the obligation to prepare a transfer pricing file.



Source: own processing

Source: own processing

Presentation and preparation of the transfer pricing file

71% of the respondents agree with the new regulation brought by the Order 442/2016 which provides that the large taxpayers (which perform intra-group transactions exceeding certain thresholds) should prepare an annual transfer pricing documentation file until the deadline for the submission of the annual corporate income tax return.

On the other hand, 25% of the respondents believe that the mandatory annual preparation of the transfer pricing file should exist for all taxpayers, irrespective of its categories (i.e. large, medium, small). The difference of 4% is represented by those respondents which cannot express any opinion because they do not have any knowledge about this topic.

Regarding the diminishing of the deadline (from maximum 6 months in 2015 to 90 days in 2016) established for the preparation and presentation of the transfer pricing file upon the request of the tax authorities, within a tax audit, more than half of the respondents (52%) agree with this new regulation. In this respect, they consider that the diminishing of the deadline will determine the companies to pay more

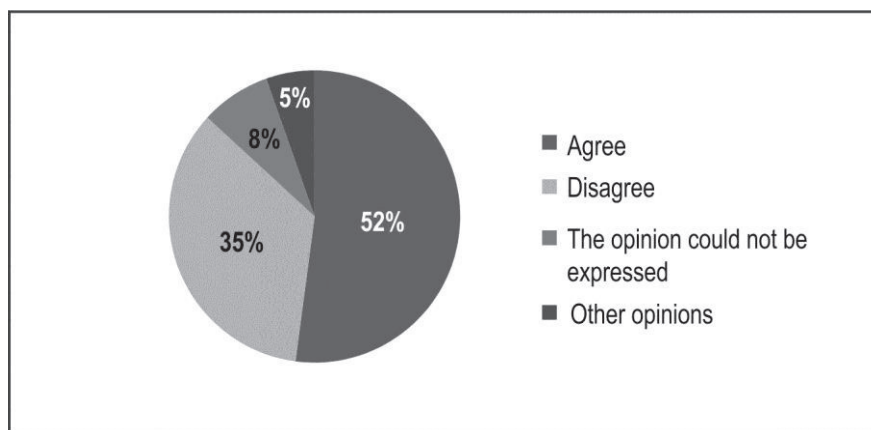
attention to the transfer pricing documentation file, preparing it in time, irrespective they are or not subject to a tax audit.

35% of the respondents do not agree with this new regulation and consider it as an abusive measure of the tax authorities.

A percentage of 8% of the respondents could not express any opinion about the diminishing of the deadline because they do not have any knowledge about this topic, while a percentage of 5% of the respondents have other opinions, from which the most important are: "the new deadline is very short, but the taxpayer should learn from this to prepare the transfer pricing file regularly, without waiting a tax audit", "I agree with the new deadline, but I think it should be established exceptions to this rule, depending on the profile of the company (turnover, number of clients, etc.)".

Figure no. 5 summarizes the results obtained and interpreted above in relation to the diminishing of the deadline established for the preparation and presentation of the transfer pricing file upon the request of the tax authorities, within a tax audit.

Figure no. 5. Deadline established for the preparation and presentation of the transfer pricing file



Source: own processing

Content of the transfer pricing file

With regards to the new content of the transfer pricing file, according to Figure no. 6, there are controversy opinions. As could be observed, 40% of the respondents do not agree with the new structure

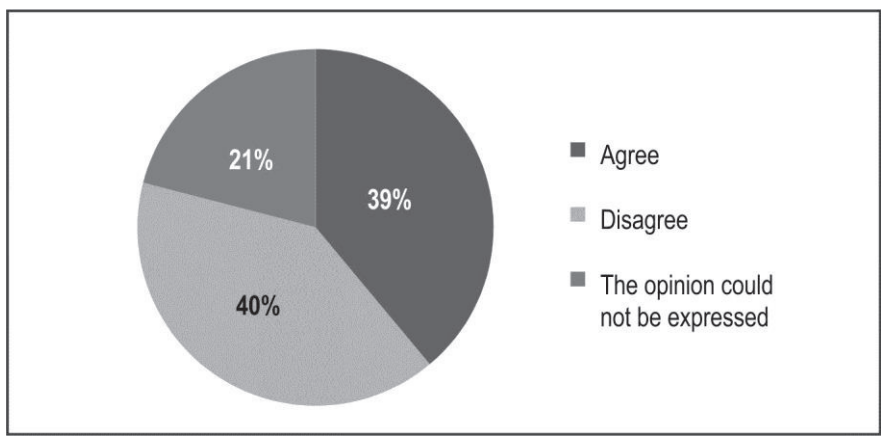
of the transfer pricing documentation file considering that it is too detailed and requests information which is not relevant.

On the other hand, 39% of the respondents agree with the new structure of the transfer pricing documentation

file and consider that the new information requested is relevant and useful for the analysing of the transfer prices.

21% of respondents could not express any opinion because they do not have any knowledge about the new content of the transfer pricing documentation file.

Figure no. 6. Content of the transfer pricing documentation file



Source: own processing

We would like to emphasise the fact that the respondents to our questionnaire pay a special attention to the transfer pricing subject, as only a little percentage (i.e. 8%) is not informed about the recently regulations in terms of transfer pricing. Moreover, we consider that the fact that only a percentage of 21% of the respondents does not have knowledge about the content of the transfer pricing file represents a positive aspect as this information is a technical one and presents a big importance only for the transfer pricing specialists.

4.4. Is there a need for change in the Romanian transfer pricing legislation?

As we already mentioned above, most of the respondents believe that the transfer pricing legislation could contribute in a large measure to the prevention of the opportunistic practices of multinationals regarding the manipulation of the tax result through transfer pricing mechanism.

Table no. 4. Changes needed by the Romanian transfer pricing legislation

Change	No. of respondents	Rank
Implementation of BEPS Action 13 "Transfer Pricing Documentation and Country-by-Country Reporting"	89	1
Publication of the transfer pricing documentation file by the listed companies	49	2
Introduction of higher fines and penalties for the failure to prepare the transfer pricing documentation file	20	3
The preparation and submission of the transfer pricing documentation file to be annually and mandatory for all taxpayers	17	4
Other changes (e.g. encouraging of the taxpayers to use APAs, detailed guidelines with regards to the technical aspects used in the transfer pricing documentation process, encouraging of the taxpayers to document the intra-group transactions by granting tax deductions/facilities etc.)	16	5

Source: own processing

However, the respondents consider that in order for the Romanian transfer pricing legislation to represent an effective and efficient measure in terms of prevention of tax results' manipulation, there should be included new regulations. In the **Table no. 4** we presented the most important changes that the Romanian transfer pricing legislation needs in this respect.

As could be observed, the most important amendment that needs the Romanian transfer pricing legislation is represented by the implementation of the BEPS Action Plan, more exactly of Action 13 "*Transfer Pricing Documentation and Country-by-Country Reporting*". The following important change could be represented by the publication of the transfer pricing documentation file by the listed companies. Changes such as the introduction of higher fines and penalties for the failure to prepare the transfer pricing documentation file and the introduction of the annual mandatory preparation of the transfer pricing file for all taxpayers are not so important in order to prevent the manipulation of the tax results through transfer pricing mechanism. This result converges with that presented above, according to only a small part of the respondents believe that the mandatory annual preparation of the transfer pricing file should exist for all taxpayers, irrespective of its categories (i.e. large, medium, small).

According to the responses received to the open question, the most important changes that the Romanian transfer pricing legislation needs are represented by:

- Definition of the practical approach of documenting the arm's length nature of transfer pricing according to the general rules provided by the financial-accounting and tax legislation in force. Such a definition would avoid misunderstandings and possible disputes between taxpayers and tax authorities;
- Definition of the concept of incomplete transfer pricing file. This definition would also avoid misunderstandings and possible disputes between taxpayers and tax authorities, as in the case of an incomplete file the tax authorities could perform the estimation of transfer prices;
- The deadline for the mandatory annual preparation of the transfer pricing file should be established after the submission of the annual financial statements and not until the submission of the annual corporate income tax return;

- Order 442/2016 should be accompanied by norms;
- Implementation of a common practical guide for taxpayers and tax authorities in order to ensure a uniform application of the legislative provisions;
- Publication of a template for the transfer pricing file that should be used by all taxpayers.

In addition, almost all respondents consider that Romania does not need only a change in the transfer pricing legislation. Romania also needs well trained transfer pricing specialists and tax inspectors. In this respect, a solutions proposed is represented by the organization of transfer pricing courses and seminars financed by European funds. Another solution could be represented by the implication of the professional organizations in the training of transfer pricing specialists.

5. Conclusions

During 2016 the Romanian transfer pricing legislation was subject to significant amendments which impact the business environment. The major amendment and one of the most important events in the evolution of the Romanian transfer pricing legislation is represented by the publication in the Romanian Official Gazette of Order 442/2016.

The research performed by us through the comparison of the provisions of the Order 222/2008 (applicable until the end of 2015) with the ones of Order 442/2016 (applicable starting with 2016), and also the opinions expressed by the specialists questioned led us to conclude that the new transfer pricing regulations adopted by Romania present advantages and disadvantages for groups of companies, but overall they are efficient and represent a big step for the prevention of the base erosion and profit shifting between multinationals.

In this respect, the respondents considered that the introduction of thresholds in order to assess if a taxpayer has the obligation to prepare a transfer pricing file represents an efficient legislative amendment. In addition, according with the answers of the respondents, the diminishing of the deadline established for the preparation and presentation of the transfer pricing file upon the request of the tax authorities, the introduction of the mandatory annual preparation of the transfer pricing file and the new information requested to be

included in a transfer pricing file documentation represent important steps in order to prevent the base erosion and profit shifting, but all these new regulations are not still sufficient in this respect.

Therefore the Romanian transfer pricing legislation needs some changes which would contribute to a better prevention of the base erosion and profit shifting (e.g. implementation of BEPS Action 13 “*Transfer Pricing Documentation and Country-by-Country Reporting*”; publication of the transfer pricing documentation file by the listed companies etc.).

Furthermore, the respondents noted that the Romanian transfer pricing legislation is ambiguous and not very well structured and due to this it might led to misunderstandings and possible disputes between taxpayers and tax authorities. In order to avoid these misunderstandings, the results of our research show that the Order 442/2016 should be accompanied by application norms which should define and clarify some concepts like that of incomplete transfer pricing file or that of documentation of the arm’s length nature of the transfer pricing according to the general rules provided by the financial-accounting and tax legislation in force. Other changes that the Romanian transfer pricing regulatory framework needs are represented by the implementation of detailed guidelines with regards to the technical aspects involved by a transfer pricing analysis (e.g. the benchmark analysis, the functional analysis of the intra-group transactions etc.).

With regards to the limit of the research, it is represented by the relatively limited number of answers received. However, considering that there is no study performed in relation to the perception of the tax specialists on the

new transfer pricing legislation adopted by Romania starting with 2016 and there was not investigated if the Romanian transfer pricing legislation needs other amendments, we consider that our research improves the transfer pricing literature and could provide new insights for future researches related to the transfer pricing legislation.

In this respect, future research directions could be represented by the comparison of the Romanian transfer pricing legislation with the transfer pricing legislation of other European countries and also by the comparison of the perception of the tax specialists on Romanian transfer legislation with the perception of these specialists on the transfer pricing legislation of other European countries.

The paper could represent a starting point for all future research directions mentioned above.

Moreover, taking into account that the Romanian Government approved the ascension of the Romania as associate to the BEPS Implementation Forum in order for our country to implement the BEPS measures at national level, a future research direction might imply the analysis of the BEPS Action Plan and the capture of the specialists’ perception about the implementation of the BEPS measure at the level of Romania.

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