

Checklist – Intercompany Agreements for Transfer Pricing Compliance

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Support Services (including head office, back office, strategic management services, marketing services and other services not ‘resold’ to third parties)

1. **Contracting model:** Ensure you have an accurate understanding of the relevant contracting model (including which entities act as principal in the provision of services to third party customers, which act as principals in purchasing services from third party suppliers) and the ‘waterfall’ of services within the group (if applicable). Consider which parties (if any) are required to hold regulatory approvals or licences, and for which the procurement of services from related parties may be regarded as ‘outsourcing’ from a regulatory perspective.
2. **Parties:** Identify legal entities correctly with company registration numbers and tax ID numbers etc. Identify whether any parties are acting through a branch / P.E. For arrangements between an entity and its own branch / P.E., include a recital explaining the status of the document (not a contract) and appropriate corresponding provisions.
3. **Bilateral / multilateral format:** If there are multiple service recipients or multiple service providers to the same recipient(s), consider the relative merits of using a series of bilateral agreements or a single multilateral agreement.
4. **Commencement date / effective date:** Consider carefully any attempt at retrospective economic effect, especially as regards allocation of risk. Where appropriate, refer to availability of evidence that the parties’ historic conduct is consistent with the terms of the agreement.
5. **Scope of services:** Define appropriately. Allow for flexibility to modify services without unnecessary revision of the agreement. Where appropriate, exclude ‘shareholder services’ which benefit the service provider and not the ‘recipient’.
6. **Service levels / standard of care:** Consider what obligations should apply as regards the standard of care or any service levels / results to be achieved by the service provider in performing the services. This may include any duty to comply with ‘back-to-back’ obligations of the service recipient. Reflect the intended allocation of risk and avoid unnecessarily prescriptive terms.
7. **Control procedures:** Avoid unnecessarily prescriptive provisions, but make it clear which party exercises control in deciding how services will be provided on a day-to-day basis.
8. **Associated intellectual property (including trade marks, software and rights in work products):** Consider whether there is any associated intellectual property which is being licensed as part of the arrangements, and if so how the legal relationship between the parties regarding that intellectual property should be defined. Consider whether it is appropriate to refer to any separate IP licence (if applicable). Provide for the ownership of IP in work products created in the course of performing the services.
9. **Regulatory risks:** Ensure consistency with the regulatory structure and the intended risk allocation. Consider whether any ‘boilerplate’ provisions regarding compliance with laws etc are appropriate.

10. **Limitation of liability / caps on claims:** Ensure consistency with intended allocation of risk, and that they do not conflict with the intended effect of any contractual warranties or indemnities.
11. **Pricing of services and cost keys:** Ensure framework for pricing of the services is expressed with 'legal certainty' and is consistent with intended allocation of economic risks. Where applicable, include appropriate definitions of costs and mark-up percentages. Consider whether a mark-up should apply (a) on third party costs specifically incurred for a particular service recipient, or (b) on costs recharged from other related parties in a 'waterfall' of service recharges. Provide for post year-end true-up or true-down adjustments as appropriate.
12. **Allocation keys:** Relevant for allocating the cost of providing services centrally for the benefit of multiple entities. Depending on the complexity of the group, consider whether (a) different allocation keys should apply for different service types, and (b) whether the agreement should refer to a separate allocation key policy document which may be updated from time to time. Ensure the arrangements are expressed with 'legal certainty'.
13. **Payment provisions:** Ensure consistency with intended risk allocation. Relevant provisions include due dates for payment, VAT treatment, provisions for default interest. Grossing up provisions are unlikely to be appropriate, unless it is intended to allocate tax risks to the recipient. Consider interaction with documentation of intercompany loans / balances.
14. **Currency risks:** Ensure consistency with intended risk allocation, e.g. through definition of currency of payments.
15. **Term and termination:** Ensure that they make commercial / economic sense from the perspective of each participating entity. Especially relevant for a service provider which depends on this agreement to recoup set-up costs or ongoing overheads. Consider any provisions for termination on occurrence of events of defaults or force majeure events, and whether they reflect an arrangement which the directors of each participating entity can properly approve.
16. **Obligations on termination:** Ensure consistency with the intended commercial nature of the transaction. Includes treatment of customer / user data, treatment of stock, and inclusion / exclusion of rights to compensation or indemnity on expiry or termination of the agreement. Post-termination restrictive covenants are unlikely to be appropriate in most cases.
17. **General provisions:** Avoid unnecessary 'boilerplate' provisions which may undermine the clarity of the document and which may inadvertently contradict the intended risk allocation or functional analysis.
18. **Applicable law:** Include a clear and legally binding choice of applicable law and jurisdiction.
19. **Translations:** Consider whether notarised, certified or simple translations may be required. Specify which language version of the agreement prevails if there is any conflict.
20. **Other formalities:** Consider what (if any) additional formalities apply, e.g. execution as a deed, requirements to comply with mandatory local laws etc.
21. **Due execution, dating and archiving:** Ensure that the resulting agreement(s) are duly signed / executed and dated, and that signed copies are archived appropriately and are available when needed to respond to enquiries and tax audits.



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Comments welcome

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