

Transfer pricing rules are applied in order to calculate the amount of profits which are liable to tax. These special rules are needed because in the case of transactions between related entities, the motivations for arriving at a certain price may be different from and not as balanced as two unrelated parties negotiating. For this reason, transfer pricing rules adjust the actual results to the results that would have occurred had the parties negotiated ‘at arm’s length’.<sup>323</sup>

The arm’s length principle is based on a comparison of the internal transfer price under scrutiny with a price independent third parties would have arrived at. This can be achieved either by comparison with agreements between two independent third parties conducted under the same or comparable conditions (so-called external comparison) or by comparison with agreements concluded by one of the dependent parties with one independent party, for example a licensee (so-called internal comparison).<sup>324</sup> Finding such comparable agreements with regard to intellectual property assets is generally extremely difficult and sometimes impossible, because such transactions either do not exist (there is no comparable IP asset) or are rarely publicised (e.g. licencing agreements).<sup>325</sup> The valuator needs to realise this and adjust his calculations accordingly.

There are a number of rules and guidelines on national and international levels which deal with this complex of issues. The OECD has issued transfer pricing guidelines<sup>326</sup> which are – together with the American IRC sec. 482 rules<sup>327</sup> – the practically most important ones.<sup>328</sup> Even though these rules do not concretely stipulate how the arm’s length principle is to be operationalised, they lay down a number of methods by which an arm’s length price can be calculated, such as the licence-based methods ‘Comparable Un-

322 *Ernst&Young*, 2005-2006 Global Transfer Pricing Surveys – Global Transfer Pricing Trends, Practices, and Analysis, November 2005, p. 4.

323 This arm’s length principle is the foundation of all international rules on transfer prices, cf. *Ernst&Young*, Business Restructuring – Three Taxation Issues, p. 4.

324 *Wurzer/Reinhardt*, Bewertung technischer Schutzrechte. Praxis der Patentbewertung, p. 142.

325 Cf. 2.2.2.1.

326 *Organisation for Economic Co-operation and Development (OECD)*, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. These guidelines are of such central importance that even some non-OECD member countries such as China and Chile orient by them.

327 The *Internal Revenue Service (IRS)* issues the Internal Revenue Code (IRC).

328 *Wurzer/Reinhardt*, Bewertung technischer Schutzrechte. Praxis der Patentbewertung, p. 142.