May 2020
1.2020

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WTS Transfer Pricing Newsletter

Editorial

Dear Reader,

It is our pleasure to present to you the first edition of our WTS Transfer Pricing Newsletter for 2020.

Certainly, the global economic and social impacts of the coronavirus disease (COVID-19) are the key news these days. WTS Global has created an overview of the measures taken by various countries to respond to the tax aspects of this crisis, which can be found at the following link: https://wts.com/global/insights/covid19

Apart from this, the current issue of the WTS Transfer Pricing Newsletter provides you with an update on the recent news and cases in the field of transfer pricing in 14 countries as well as an OECD update on Pillar 1.

Europe

Austria has implemented the EU directive on tax dispute resolution mechanisms into local law.

Our **Belgian** colleagues discuss the recently published circular letter of the Belgian tax administration grouped under three main takeaways, one being the retroactive entry into force.

In **Germany**, recent decisions of the German Federal Fiscal Court revised a decade-long jurisprudence on I/C financing relations, implicating that group support no longer represents a valuable arm's length security.

Two recent Court decisions in **Italy** deal with the applicability of the full range of benchmarking studies to be compliant with the arm's length principle.

Poland has introduced the obligation to prepare a transfer pricing information (TP R) report to increase the effectiveness of the transfer pricing controls.

DAC 6 requirements were implemented into local law in **Romania**, and **Serbia** changed the rulebook on transfer pricing related to the treatment of purchasing fixed assets.

Via Presidential Decree no. 2151 (dated 25 February) several important amendments were made on the **Turkish** corporate income tax code following the OECD BEPS Action 13 recommendations.

The three-tier approach and BEPS Action 13 recommendations were also implemented into **Ukrainian** law on 16 January, resulting in considerable amendments to the Ukrainian tax code.

Rest of world

Argentina postponed the deadlines for filing the transfer pricing documentation for the FYs 2018 and 2019 until 18 May. In addition, a new draft transfer pricing regulation is currently under review.

Brazil could see the implementation of a major transfer pricing reform, as Brazil is discussing the option to align the Brazilian transfer pricing rules with the OECD standard.

The latest transfer pricing regulations of **Senegal** are being presented with respect to transfer pricing documentation and CbCR.

Thailand's Revenue Department has announced specific requirements for companies that are obligated under the transfer pricing act to prepare a documentation with affiliated companies.

Since TP audits are getting more attention in **Vietnam**, the importance and practical significance of the APA is increasing.

The taxation of digital business models is one of the key topics these days. Therefore, the **OECD** has published a consultation document (Pillar 1) with many important aspects regarding this topic which are summarised by our digitalisation experts.

If you have any questions regarding any aspects of this newsletter, our Global Transfer Pricing experts will be happy to answer them.

Yours sincerely,

WTS Global Transfer Pricing Team

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Argentina

"Argentine Transfer Pricing News – 2020 First Trimester"

At the start of 2020, three major transfer pricing developments are worthy of note in Argentina. From a normative perspective, by the end of 2019 the Argentine Revenue Service (ARS) published a draft transfer pricing regulation aimed at lining up the existing one with the latest amendments to the income tax law (Law 27,430) and its implementing decree. However, after the recently elected president took office, these draft regulations have been subject to further review. Consequently, by the end of March, the ARS issued resolution 4689 to postpone the deadlines for filing the 2018 and 2019 transfer pricing studies until between 18 and 22 May. Covid-19 has further grounded this deadline extension.

From a case law perspective, two major cases were recently decided by the Federal Supreme Court and the Federal Court of Appeals; in connection with debt to equity re-characterisations and the use of the transactional net margin method by car manufacturing companies.

There follows a summary of these recent transfer pricing decisions.

Debt to Equity Re-characterisation; the TESA Case (26 December 2019)

For more than fifteen years, the ARS has challenged the taxpayer's use of tax inflationary adjustment, despite the levels of domestic inflation. Consequently, intra-group indebtedness in foreign currency would trigger foreign exchange losses in view of the devaluation rate, but would not have the countervailing effect of a taxable gain in view of the inflation rate after converting a loan of this nature into local currency.

To challenge the "winners" of the government policy, the ARS aggressively confronted intra-group indebtedness, to characterise it as "equity". The *TESA* case is the first one decided by the Federal Supreme Court on this topic, and it was entered for the taxpayer.

The Court not only sets doctrine as to the proper standard for a debt to equity re-characterisation, but also expressly indicates the relevance of transfer pricing studies. The Supreme Court noted that the ARS failed to properly review the suitable documentation and benchmarking of the intra-group financing for transfer pricing purposes, meriting no challenge from the arm's length point of view.

Benchmarking Car Manufacturing Companies: the Volkswagen Argentina S.A. Case (26 December 2019)

One of the transfer pricing core assumptions is that the market return for some activities is clearly identifiable, and, consequently, if a company gets such a return in its related-party transactions, it is presumed to have agreed arm's length prices. While market conditions are relevant for any transfer pricing analysis, the information often acquired from developed market comparables is extrapolated to an emerging market analysis without an appropriate evaluation of the underlying market differences. To fill this gap, Argentine Tax Courts have upheld – among other comparability techniques – the so-called taxpayer's self-inflicted adjustments, so that the taxpayer could segregate extraordinary losses from its operating results. For example, a capacity adjustment is permitted in the *Volkswagen* case, to evidence that the selected comparables do not face the same economic downturn. The decision under analysis ratifies the viability of this kind of adjustment, as well as the standards for its proper application. However, this outcome does have former precedents.

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The novelty of this case is that the Federal Court of Appeals supports taxpayer's criterion as to the use of discharge of indebtedness income to improve the tested party's operating profit. To support such criterion, the Court considered the evidence provided by the taxpayer regarding the use of such proceeds to improve working capital and its factory premises. This decision is in line with the previous one of the lower Tax Court. For this reason, the draft transfer pricing regulations under current review expressly indicates that financial results may not be computed to increase operating profits.

The Volkswagen decision also supports averaging the tested party's results for three years; a topic that also proved controversial. The draft regulations also prohibit averaging for such a party. Expectations are based on the final version of these regulations.

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Austria

Implementation of the EU Directive on Tax Dispute Resolution Mechanisms

The "EU-Besteuerungsstreitbeilegungsgesetz" (EU-BStbG), which was introduced in implementation of the **EU directive on tax dispute resolution mechanisms,** provides for mandatory and binding arbitration proceedings **with fixed settlement periods** in **all cases of impending double taxation within the EU.** This increases the chances for taxpayers to actually resolve double taxation conflicts in the foreseeable future. The scope of arbitration proceedings has been expanded considerably to include all cases of impending double taxation. If the requirements are met, there is a **right to choose** which procedure is used. In practice, however, the new process should largely replace the previous processes.

The EU-BStbG was published on 22 July 2019 as part of the "EU Finanzanpassungsgesetz". In this context, there were procedural adjustments in the BAO (Federal Procedure Code): The reformulated Section 48 BAO is worthy of note in this context. This provides for **assessment decisions** in the course of the initiation and termination of the procedure. In addition, this previously provided for relatively uncomplicated temporary relief from double taxation for the duration of the mutual agreement procedure.

The new Section 48 (5) considerably limits the scope. **Temporary relief** for profits raised abroad is only possible within Austria if no bilateral agreement or arbitration is possible, i.e. if there is no DTA between Austria and the country concerned. Temporary relief for the duration of the mutual agreement procedure in DTA countries is now to be sought in the respective other country. This can result in temporary double taxation for the taxpayer for the duration of the mutual agreement or arbitration proceedings.

Updated Ministry of Finance advice on mutual agreement and arbitration proceedings **("BMF-Info zu Verständigungs- und Schiedsverfahren")** was published on 24 July 2019. It replaces the advice of 31 March 2015. However, this does not yet affect procedures under the EU-BStbG. Updated Ministry of Finance advice that includes the EU-BStbG can therefore be expected in the short term. In addition, as a result of the change in the OECD update on guidelines regarding country-by-country reporting, the Ministry of Finance advice on transfer pricing documentation **("BMF-Info Verrechnungspreisdokumentation")** was updated on 17 December 2019. However, the material effects are only minor.

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Belgium

Belgian Tax Administration (BTA) published final version of the circular letter "Transfer Pricing"

On 25 February 2020, the Belgian Tax Administration (BTA) Published the Final Version of the Circular Letter "Transfer Pricing" (Circular Letter 2020/C/35). T/A economics provided extensive detailed feedback and was part of subsequent discussions with the BTA regarding the feedback received. The circular letter confirms that the BTA adheres to the 2017 OECD Guidelines, but also includes the interpretations and preferences of the BTA as regards various transfer pricing topics.

Retroactive Entry into Force

Our first key takeaway concerns the crucial topic of the circular letter's entry into force. After heavily debating a retroactive implementation of the latest version of the OECD Guidelines, the circular letter now stipulates that it is applicable for intercompany transactions as of 1 January 2018. However, certain paragraphs - concerning the interpretation of the BTA, or a Belgian-specific consideration - will only enter into force as of 1 January 2020. Nevertheless, we note that some of our concerns regarding the retroactive effect of certain other paragraphs that in our view deviate from the 2017 OECD Guidelines, and hence constitute an interpretation, remain in place. **Considering that retroactivity as such is based on strict principles in case of legislation and the circular letter de facto cannot be applied in a retroactive way (under penalty of the infringement of the principles of good administration), taxpayers may consider developing procedural as well as economic argumentation to their advantage when tax administrations refer to this circular letter.** Nevertheless, the circular letter confirms that advance decisions granted before the issuance of the circular letter are not subject to review in retrospect following the views stated in the circular letter.

Fundamental Issues

Another key takeaway is that several of our fundamental inputs provided in the second discussion round were not taken into account. These inputs relate to **fundamental discrepancies between the (literal) reading of the 2017 OECD Guidelines and the final circular letter,** most notably in relation to the first Chapter, including the basic translation of the arm's length principle itself containing such discrepancy (circular letter refers to 'transactions' rather than to 'relations' as per Article 9 of the OECD Model Tax Convention).

Financial Transactions

As a final key takeaway, we note that the BTA includes a specific Chapter X on financial transactions referring to the recently published OECD report (February 2020) on this matter. This Chapter X of the circular letter is said to be **entering into force as of 1 January 2020 notwithstanding the OECD report was only published formally in February 2020.** Further commentary will follow on this topic. Regarding the circular letter itself, we already note that paragraph 267 – on a **cash pooling** transaction being short term and a measurement of **structural positions being 12 months** – is a prime example of where an incorrect definition of the arm's length principle may lead to. A cash pool transaction may be short term indeed, a cash pool arrangement however, may constitute a longer term relation implying a different assessment method.

Finally, we note that a circular letter is only binding for the Tax Authorities, not for taxpayers. Thus, a taxpayer is not obliged to follow the circular letter, and certainly not if the circular Letter seems to be contra legem, or wrongly interprets the OECD Guidelines.

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Brazil

Dialogue Between Brazil and OECD on the Alignment of Brazilian Transfer Pricing Rules with the OECD Standard

Brazil could be moving towards an alignment of its transfer pricing rules with the OECD standard, as communicated in two events held in Brasília in July and December 2019 to disclose the results of a joint project of the OECD and the Brazilian Federal Revenue Service ("RFB"). During the 15-month project, the OECD and RFB evaluated differences and similarities of Brazilian transfer pricing rules and the OECD transfer pricing approach.

In December, the OECD and RFB launched a report outlining the strengths and weaknesses of the current Brazilian transfer pricing system and the amendments required to comply with international transfer pricing standards. In the events, the OECD representatives conveyed the message that the alignment was a necessary step for the accession of Brazil to the OECD.

The project included a gap analysis based on five objective criteria, namely the prevention of BEPS risks, avoiding double taxation, ease of tax administration, ease of tax compliance and maintaining tax certainty.

One important topic analysed in the report is the status of the arm's length principle in Brazil. Although the Brazilian transfer pricing legislation was originally inspired by the OECD when enacted in 1996, it has not been significantly amended since then, and the report concludes that it does not explicitly reflect the arm's length principle. Such conclusion is mainly based on the fact that Brazilian transfer pricing methods basically rely on fixed margins regardless of the nature of the transaction, and on the absence of an actual and complete comparability analysis.

The report also identifies other gaps between Brazilian transfer pricing legislation and the OECD framework, such as: (i) Brazilian taxpayers can freely choose the applicable transfer pricing method; (ii) Brazilian transfer pricing rules do not allow the use of profit/based methods such as the transactional net margin method or the profit split method; and (iii) there are no rules specifically designed for transactions involving intangibles and financial transactions, nor rules on the allocation of profits to permanent establishments.

The report also evaluates how a convergence with the OECD standard in Brazil could be reached, i.e. whether the amendments to local rules could be immediately or gradually introduced. According to the report, the gradual implementation with a progressive transition of taxpayers into the new system is the favourable option, since it would be easier for all involved parties to cope with the challenges of a transfer pricing reform in Brazil.

It is worth noting that if the transfer pricing legislation is reformed and aligned with the OECD standard, the implementation and adoption of new transfer pricing rules would be a major challenge for taxpayers and especially for the RFB, which would require professionals prepared for an analysis focused on an economic approach instead of a mathematical perspective. Taxpayers may benefit from the experience of the group companies outside Brazil who use the OECD's transfer pricing approach. In the above-mentioned events, RFB

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representatives highlighted the need for training tax auditors to deal with a new transfer pricing approach, as well as having administrative Court judges prepared to analyse transfer pricing cases.

Even though the report of the OECD and the RFB does not provide a clear timeline for the alignment of Brazilian transfer pricing rules with the OECD standard, nor outlines the possible future rules, it is a big step towards a Brazilian transfer pricing reform.

Germany

I/C Financial Transaction and Transfer Pricing: Final OECD Guidance and Germany's Bilateral Position

Until recently, there was only limited guidance on transfer pricing of intercompany (I/C) financing relations. Following up on the BEPS project, on 3 July 2018 the OECD released the discussion draft on financial transactions. The discussion draft represented a non-consensus document, so it took a certain amount of time up until the final guidance was published in February 2020. In light of any missing OECD guidance on I/C financial transactions in 2019, the German Federal Fiscal Court revised a decade-long jurisprudence on I/C financing relations, and the German Federal Ministry issued suggested law changes with a treaty override as part of a Draft Ministerial Bill on the implementation of the Anti-Tax Avoidance Directive ("ATAD"). The following provides some highlights of the change in German jurisprudence regarding I/C finance relations, the suggested German law changes on I/C finance relations and the new Chapter X of the OECD Guidelines on financial transactions.

Recent Decisions of the German Federal Fiscal Court

In 2019 and continuing throughout 2020, the German Federal Fiscal Court revised a decade-long jurisprudence on I/C financing relations, as a result of a new formation of the Court. In a series of decisions, the German Federal Fiscal Court decided that implicit group support does not represent a valuable arm's length security. In the underlying cases, a German company acted as a lender, whereas a foreign subsidiary was in poor economic shape and was no longer able to service the loan. The German lenders waived the receivable and de-recognised it, thereby reducing profit. Because the loans were not secured, the German Federal Fiscal Court disregarded the income reduction, arguing there would not have been any income reduction if the loans had been secured. Based on this line of argumentation, the German Federal Fiscal Court decided that a security represents a condition in the sense of § 1 Foreign Tax Act (FTA). Therefore, Article 9 (1) of the OECD Model Tax Convention no longer has precluding effect with regard to § 1 (1) FTA. Furthermore, the Court has been of the opinion that the income correction does not contradict the Hornbach-Baumarkt ruling of the EU Court of Justice. The German Federal Fiscal Court has not analysed in detail the appropriateness of the interest rate.

By neglecting the effect of implicit group support, this could imply from a transfer pricing perspective that the pricing of I/C financial transactions would have to be performed on a stand-alone basis of the borrower. This contradicts the 2017 OECD Guidelines, and also the new Chapter X of the OECD Guidelines suggests that the effects of passive group association shall be analysed and - depending on the facts and circumstances - considered. As detailed in the following, also the suggested changes to German law released in December 2019 place a certain emphasis on the group credit rating.

Although no rules have been provided in German law as of yet, the decisions of the German Federal Fiscal Court mark the current direction of German jurisprudence. However, considering the suggested changes to German law, final OECD guidance and a further expected change of the German Federal Fiscal Court's formation next year, it is possible that also German jurisprudence may change again soon in this regard.

Draft Ministerial Bill on the Implementation of ATAD

On 11 December 2019, the German Draft Ministerial Bill on the implementation of the ATAD was released, suggesting national regulations on I/C financing transactions with a treaty override. The draft bill was published at a time when a final version of the OECD guidance on I/C Financial Transactions had been awaited for some time but had not yet been published. The new rules on I/C finance transactions shall be governed in a new § 1a of the Foreign Tax Act ("FTA"). In line with final OECD guidance on Financial Transactions, which were published on 13 February, the suggested changes to German law introduce a substance test at the level of the borrower. Specifically, if it cannot be shown that (i) the principal payments for the entire duration of the financing relationship could have been repaid from the beginning and (ii) the financing is economically necessary and used for the purpose of the company; or if the interest rate payable by the German taxpayer for a cross-border financing relationship with a related party exceeds the interest rate at which the multinational enterprise group could be financed by third parties, then the interest expense shall be deemed to be non-deductible at the level of the I/C borrower. Additionally, the envisaged changes suggest limiting the compensation for low-function and low-risk financial activities such as mere intermediary of forwarding activities to a risk-free interest rate. It was envisaged that the changes would generally be applicable from 2020 onwards. An updated version of the German Draft Ministerial Bill on the implementation of the Anti-Tax Avoidance Directive is currently awaited, possibly with revisions also on I/C financing relations.

Final OECD Guidance on Financial Transactions

On 11 February 2020, the OECD finally released the final report on I/C financial transactions. It contains an addition to the first Chapter of the OECD Guidelines (Delineation) and an official new Chapter X solely concentrating on financial transactions. The new Chapter X of the transfer pricing guidelines deals with the classification of debt financing, treasury functions (intra-group loans, cash pools and hedging), financial guarantees and intra-group (captive) insurance. A considerable emphasis has been placed on the accurate delineation of the transaction. The distinction between equity and debt capital is tied to the borrower's ability to (i) raise the capital on the financial market and to (ii) bear the relevant costs. Credit ratings are referred to as a suitable method for quantifying default risks within a group. Within this context, it should be analysed if and how implicit group support has to be considered for determining an arm's length interest rate. Treasury functions such as loans, cash pool and hedging are generally to be considered as a support function, and a remuneration is correspondingly low. If the classification of the debt capital shows that the affiliated entity granting the financing does not bear any risks or does not carry out any decision-relevant activities, the latter should only be remunerated at most with a risk-free interest rate in order to reflect an appropriate remuneration. The guidance on guarantees is restricted to financial guarantees. Although Chapter X suggests that guarantee transactions shall be analysed both from the perspective of the guarantor and the guaranteed entity, the final guidance suggests that a borrower would usually only be willing to pay for a guarantee if the guarantee provides a benefit to the borrower.

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Concluding Remarks

I/C financing transactions and their arm's length nature are a frequently discussed topic in tax audits. The new Chapter X of the OECD Guidelines provides taxpayers with a set guidance. The suggested changes to German law are in several aspects similar to the OECD guidance but are also expected to be subject to further revisions. It remains to be seen how the German legislator will react with updated and final law changes in light of the recent developments.

Italy

Arm's Length Range – Recent Case Laws

On 14 May 2018, the Ministry of Finance issued transfer pricing guidelines consistent with *"international best practices"* (hereinafter the *"Decree"*) in accordance with the new principles introduced by BEPS project – Actions 8-10, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Administrations* in the version issued in 2017 (*"2017 OECD Guidelines"*).

Article 6 of the Decree provides that the entire range obtained from the selected profit level indicator ("PLI") is acceptable as compliant with the arm's length principle, as stated in paragraph 3.62 of the OECD guidelines: *"where the range comprises results of relatively* ***equal and high reliability,*** *it could be argued that any point in the range satisfies the arm's length principle".* More precisely, the Decree refers to a *"homogeneous"* level of reliability.

In spite of this, the entire range is applicable only in case of *"perfect"* comparability among uncontrolled and controlled transactions. Such an approach will require further clarification with regard to the *"perfect"* comparability and a circular letter from tax administration is long awaited by Italian taxpayers, together with additional instruction concerning the use of databases, choice of geographic market of reference, period(s) to be used for the analysis, possible inclusion of loss-making companies, dimension of comparables and comparability adjustments.

As mentioned in Article 3 of the Decree, an independent transaction is considered comparable to a controlled transaction when:

- → there are no material differences that significantly affect the profit level indicator that can be used in application of the most appropriate TP method;
- → where differences emerge, such differences can be eliminated or materially reduced through comparability adjustments.

For these purposes, comparability adjustments (e.g. *working capital adjustment* aimed at reducing/eliminating different levels of account receivables, account payables and inventory between the tested party and the comparable companies) seem to be legitimated.

The notion of comparability therefore reflects the *"economically relevant characteristics"* or *"comparability factors"* as set forth in the 2017 OECD Guidelines.

The abovementioned application of the full range of the benchmark has been recently applied in various Tax Courts' decisions also for litigations concerning fiscal years that closed before the issue of the Decree.

The Provincial Tax Court of Milan was one of the first to mention the Decree. In fact, decision no. 5445/2018 has held that each value included in the range (including minimum and maximum) must be considered compliant with the arm's length principle, and has rejected adjustments to the median proposed by the Tax Authorities.

The mentioned decision is consistent with two other judgments of particular interest: no. 188/13/20 issued by the Provincial Tax Court of Milan and no. 5005/19/18 of the Regional Tax Court of Milan.

The first assessment took place considering a "segregation" between the various business lines of the Italian company, and it was focused on the arm's length remuneration of the distribution activity tested through the application of the TNMM, where ROS was considered as the proper PLI. Said approach can be considered in line with the best domestic and international practice. Thus, tax inspectors also included in the ROS result some severance incurred by the Italian company (and attributable to the distribution activity) deriving from workforce restructuring with a reduction of the related personnel; in addition, the benchmark analysis proposed by the taxpayer was not accepted. The outcome of the tax audit was a TP adjustment on the median of the relevant benchmark.

Under the described scenario, the Tax Court did not deal with the inclusion of the severance costs in the company's ROS (that under the best practice should be considered as an extraordinary item of income in order to establish the consistency of the TP policy applied), but it rejected the TP adjustment since the actual ROS realised through the distribution business was included in the full range of the benchmark, considering outliers observations as well as re-determined by the same tax administration.

The second case, no. 5005/19/18, is related to the activities performed by the taxpayer that were limited to tool manufacturing and limited risk distribution. The judges considered that each point in the interquartile range, also below the average value, was representative of the arm's length value due to functions, risks and intangibles.

Notwithstanding the above described Tax Court decisions, under common practice the benchmark range considered as consistent with the arm's length principle should be included between the lower and the upper interquartile, where minimum and maximum observations can be acceptable should specific circumstances be verified.

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OECD

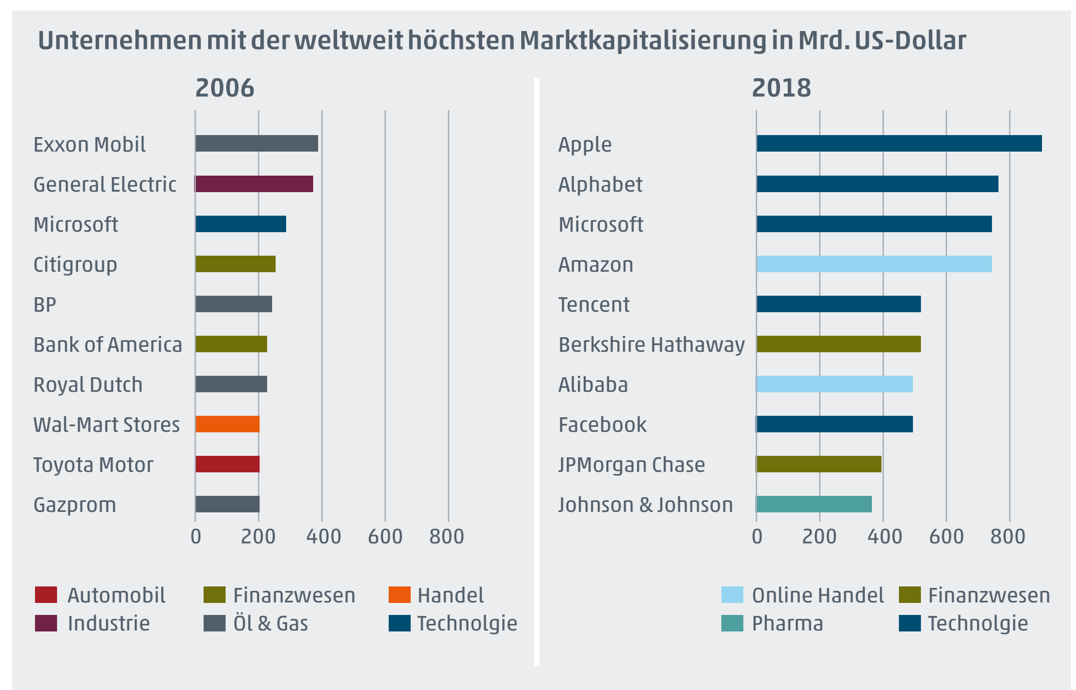
Pillar One – Not Only the Taxation of Digital Business Models is Under Discussion!

Background

As part of the BEPS project, Action Point 1 "Challenges for Taxation of the Digital Economy", a "Programme of Work" was adopted in May 2019 (and approved by G20 Finance Ministers and Heads of Government in June 2019), according to which the OECD is to develop a two-pillar model to address the BEPS aspects of digital business models. Pillar One of this model deals with the extension and redistribution of taxation rights between resident and market countries, while Pillar Two provides for a global minimum taxation.

On 9 October 2019, the OECD Secretariat published a consultation document which contains a proposal for the taxation of digital business models (Pillar One). With more than 300 comments submitted, and with the public hearing in Paris on 21/22 November 2019, the topic is becoming increasingly explosive.

The shift in power from the "traditional" to the digital economy is clearly illustrated by the following diagram and also justifies the public interest:



Source: Financial Times 2006,"Global 500"; PwC 2018,"Global Top 100 companies by market capitalisation".

The main contents of the consultation document are the definition of a new nexus that no longer requires a physical presence, the distribution of taxation rights outside the arm's length principle, and the consideration of the specifics of digital business models. It also examines questions such as how narrowly digital business models are defined or which profits (routine profits vs. residual profits) should be part of the redistribution of taxation rights.

To ensure legal certainty for taxpayers and tax administrations in the new system, the distribution of profits is to take place in a three-tier system:

- The so-called **Amount A** corresponds to the share of the residual profit that is distributed among the market states according to a formulaic breakdown.
- The so-called **Amount B** is intended to remunerate routine functions for marketing and sales in market countries.
- **Amount C** is intended to ensure that any activities in market states that go beyond routine functions are adequately remunerated by means of binding and effective dispute settlement mechanisms. The challenge here is that the profit to be distributed may also accrue in several companies in different states.

Detailed technical explanations and detailed questions on the determination of these amounts are contained in the consultation paper.

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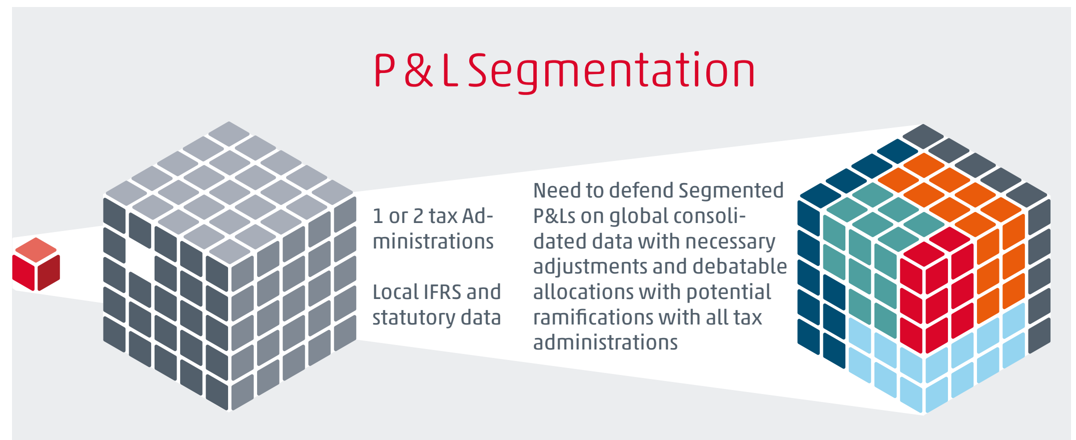
The Need for Full Segment Reporting

We would like to take this complex profit distribution system, which is currently the subject of heated debate, as an opportunity to address the associated need for segment reporting. The application and implementation of segment reporting is again brought into focus by the distribution of taxation rights discussed in Pillar One.



The segmentation of P&Ls has always been a painful issue for multinational corporations (MNEs), as the available reporting systems provide the best guidance for this segmentation - usually based on the management approach – but are far from sufficient for completely separate P&Ls. The trend within MNEs towards business segmentation (via management centres, business units or divisions) has also not yet been implemented in full.

Before the technical aspects of Amount A (as residual profit, allocation to market states) can be discussed, the crux of the matter will be the delimitation of consolidated profits and the numerous intra-group allocations that will be required. This concerns, for example, global infrastructure costs, central costs, or even more problematic costs such as research and development (as these costs do not correlate with existing revenues).

The following aspects should explain the scope of the problem in detail:

1. In the absence of clear rules or frameworks, we will extend the uncertainty of complex national laws (arm's length principle) to a globalised uncertainty related to the allocation of consolidated profits.

2. The segmentations provided by listed MNEs are not yet all completely separate P&Ls. At best, they are fully allocated to revenue and cost of sales. These P&Ls can only provide a starting point, but a large amount of other costs are not fully allocated to the segments.

3. It will be necessary to integrate the preparation of consolidated fully segmented P&Ls with the consolidation process itself, which is usually a very complex procedure.

4. A centralised system for the transmission and validation of consolidated segmented data must be established, which, inter alia, automatically creates consistency asymmetry of data between the countries bearing the central costs compared to the markets.

An Opportunity – Automation for the Consolidation and Validation of Data

For MNEs, it might be important to think about the scope of P&L segmentation, starting from the interest in carrying out this segmentation by business unit, but also taking into account the processes for preparing country P&Ls in the context of consolidation and, moreover, in determining the tax rates of the respective countries along the value chain within the group.

The prerequisite for the application of segment reporting is a functioning internal financial reporting system from which all externally reportable segment information can be taken. Due to the direct reference to the internal planning, control and management system, the external reporting addressees are to be given an operational insight into the company or the group from the perspective of top management.

The following advantages for implementing segment reporting based on the management approach reinforce both the opportunity and the need for automation:

- Avoidance of additional costs by reclassifying data from internal financial reporting,
- Data harmonisation of internal and external reporting information,
- Greater familiarity of management with externally disclosed data,
- Higher decision relevance of the data, and
- Better verifiability of the data (or higher objectivity).

More than ever, companies should consider automation, at least to some extent, because of its use and traceability (and possibly the need to have these figures verified by third parties). Thus, audits are limited to checking the algorithm or the specifications of the software that performs the calculation based on pre-validated data (group report), rather than exposing themselves to cross-border audits involving huge amounts of data.

We at WTS advise many of our clients in the area of "Operational Transfer Pricing" on process optimisation and automation of the implementation of transfer pricing (focus on data availability, accuracy and reliability), in which segment reporting plays a key role. Inefficient processes cost companies considerable sums here. By professionally operationalising your transfer pricing system, you can achieve positive effects in terms of quality, efficiency, employees, cost savings and reduction of operational risk. Furthermore, by eliminating daily disruptive factors, employee satisfaction can increase and cooperation with other company departments can improve.

The trend is clear – the need for full segment reporting exists and should be automated to the highest possible degree.

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Poland

New Transfer Pricing Reporting Obligations

Since 1 January 2019, new transfer pricing regulations have been in force in Poland. The purpose of the changes was primarily to align Polish regulations to the OECD guidelines and BEPS 2015 project outcome, as well as to reduce the transfer pricing documentation burden by raising documentation thresholds and limiting the documentation requirements for domestic transactions.

Despite many beneficial changes for taxpayers resulting from the amended regulations, additional reporting obligations were introduced. Failure to meet these obligations may result in the taxpayers' management boards or individuals responsible for financial matters being fiscally responsible.

Statement on Completion of the Local File

Taxpayers (related parties) obliged to prepare the local file are required to submit electronically a statement on the transfer pricing documentation. The deadline is the end of the ninth month after the end of the financial year. In the statement, all members of the taxpayer's management board declare that the local file for a given year is ready and the transfer prices are arm's length. A lack of statement, its delayed submission or inaccurate data could result in the management board members becoming fiscally responsible.

In order to mitigate such risk, related parties should ensure proper evidence is in place to prove that the transfer prices are arm's length, such as up-to-date comparable studies and other economic justification. The Polish transfer pricing regulations require the comparable study to be updated at least every three years.

Transfer Pricing Information (TP-R Report)

The new rules also introduced an obligation to report transfer pricing information electronically by the end of the ninth month after the end of the financial year. Related parties are required to provide both general information on their operations such as the economic activity codes, financial ratios and detailed data on specific transactions with related parties. In particular, the TP-R report should provide information on the transfer pricing method, comparable range as well as transfer pricing adjustments. Failure to submit the information, late submission or providing inaccurate data can result in fiscal responsibility. The aim of introducing such a reporting requirement is to increase the effectiveness of the transfer pricing controls by targeting specific companies.

As part of the public consultation on the draft TP-R e-form, many comments were made on its technical and logical correctness. The objections were mainly due to the significant simplification of the form, which made it difficult for most of the taxpayers to complete it correctly. Due to numerous doubts and technical issues, taxpayers appealed to the Ministry of Finance to postpone the deadline for first TPR submission. However, at this point in time only the deadline for taxpayers that have a tax year starting after 31 December 2018 shorter than 12 consecutive months is postponed to 30 September 2020 due to the current COVID-19 situation.

At present, taxpayers are waiting for a new TP-R e-form to be published. The Ministry of Finance announced that it will issue the explanations on TP-R (most probably in FAQ form). However, due to the current COVID-19 situation, concerns have arisen regarding a possible timing of such works.

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Romania

Transfer Pricing update for Romania

The Romanian tax environment is seeing continuous changes including tax reforms, legislation updates and significant amendments to the practice of the Tax Authorities.

When analysing the last 4-5 years of the Romanian tax environment, we see an increased interest of the Tax Authorities with regard to the transfer pricing area, which has resulted in an exponential growth of the number of transfer pricing audits during these years.

Given this focus of the Tax Authorities, documentation of transfer prices has become a very important matter of taxation that must be faced by the Romanian and multinational enterprise groups.

The following provides a summary of the most important changes that occurred in the local transfer pricing legislation during recent years, along with some details about current developments.

Relevant Transfer Pricing Requirements and Rulings

Romania is not a member of the OECD, but the provisions of the local tax legislation (the Romanian fiscal code and the related norms) clearly specify that the Tax Authority should also consider the OECD Guidelines when analysing the transfer prices.

During 2016, the National Agency of Fiscal Administration (ANAF) issued Order 442/2016, on the content of the transfer pricing documentation file applicable for administrative procedures, which had a great impact by introducing some new provisions and requirements for tax contributors.

The most important amendments introduced by Order 442/2016 are the following:

- Large taxpayers are required to prepare TP documentation annually (only applicable from 2016 onwards)*).
- Materiality thresholds for transaction types carried out with related parties for large contributors**): EUR 200,000 in the case of interest for financial services; EUR 250,000 for services; EUR 350,000 for acquisitions/sales of tangible or intangible assets.
- Materiality thresholds for transaction types carried out with related parties for other types of contributors**): EUR 50,000 in the case of interest for financial services; EUR 50,000 for services; EUR 100,000 for acquisitions/sales of tangible or intangible assets.

*) The annual TP documentation should be prepared within the legal deadline for submission of the annual corporate income tax return.

**) Obtained by cumulating the value of all transactions of that specific type undertaken during the year with all related parties, excluding VAT.

During 2017, the National Agency of Fiscal Administration (ANAF) issued Order 3049/2017, approving the template and content of the country-by-country report, as subsequently completed and amended.

Recent Developments

In January 2020, the Government Ordinance 5/2020 was published in the Official Gazette, which transposed to local legislation the requirements of Directive 822/2018, also known as DAC 6.

Thus, from 1 July 2020, we can discuss the obligation to report cross-border tax arrangements, both for taxpayers and intermediaries involved in the transaction (e.g. notaries, accountants, tax consultants etc.). Companies that will not comply with the provisions that will be transposed into the fiscal procedure code risk receiving fines of up to RON 100,000 (approximately EUR 22,000). The content of this Government Ordinance also includes specific hallmarks concerning transfer pricing.

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According to the latest public declarations of ANAF's representatives, the agency is currently involved in a collaboration with the International Monetary Fund (IMF), so as to identify solutions to reform the fiscal inspection process and also to implement BEPS Actions 5, 13 and 14.

Senegal

The New Regulation Provided by Law no. 2018-10 Amending the Senegalese Tax Law on Transfer Pricing

In Senegal, transfer pricing was laconically regulated by Law no. 2012-31 of 31 December 2012. On 30 March 2018, the lawmakers amended it with Law 2018-10, which provides the major evolutions noted in the field of international taxation through "BEPS" (Base Erosion and Profits Shifting) which aims to provide the States with the most effective mechanisms of international taxation.

The main measures provided for in this Senegalese Law on Transfer Pricing relate, among other things, to the transfer pricing summary declaration and the country-by-country reporting.

The Transfer Pricing Summary Declaration

This documentation justifying the pricing policy is supposed to contain legal, economic, fiscal, accounting and methodological information regarding the methods of determining and validating transfer pricing.

Transfer Pricing Summary Declaration Filing Conditions

Any company established in Senegal that is dependent on foreign affiliated companies within the meaning of Article 17 of the Senegalese general tax code shall file the transfer pricing declaration provided that one of the following conditions is fulfilled:

- It has an annual turnover exclusive of taxes or a gross asset of at least XOF 5,000,000,000; or
- At the end of the financial year, it holds, directly or indirectly, more than half of the capital share or voting rights of a company established or incorporated in Senegal or abroad with an annual turnover exclusive of taxes or gross assets of at least XOF 5,000,000,000; or
- More than half of its share capital or voting rights, at the end of the financial year, directly or indirectly, are held by a company having an annual turnover exclusive of taxes or a gross asset of at least XOF 5,000,000,000.

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Content of Transfer Pricing Summary Declaration

This annual declaration relating to the operations carried out during the previous year aims to provide the tax administration with two types of information, namely:

- General information on the group of affiliated companies: general information on the activity carried out and the transfer pricing policy, etc.
- Specific information regarding the reporting company: changes during the year, details of transactions and clarification request from the Tax Authorities, etc.

This declaration shall be filed by 30 April at the latest.

Failure to subscribe to this declaration is punishable by a significant tax fine.

Country-by-Country Report

This declaration, which is different from the one described above, shall be filed by the companies that meet the criteria provided in Article 31 of the general tax code, namely:

- Multinationals established in Senegal that achieve an annual consolidated turnover exclusive of taxes equal to or over XOF 491,000,000,000 in the year preceding that for which the declaration relates and which establish consolidated accounts, which hold or control companies or branches outside Senegal that are not owned by Senegalese or foreign companies subject to country-by-country reporting requirements;
- Companies established in Senegal and that belong to a foreign multinational meeting the criteria set forth in the abovementioned new Article 31 of the Senegalese tax code, when they have been designated by the group for this purpose, or when they cannot prove that another entity (either Senegalese or foreign) has been designated for this purpose.
- This applies in particular to Senegalese subsidiaries of multinationals established in a State that has not provided the country-by-country report in its domestic legislation. In this case, two possibilities are offered:
  - The Senegalese subsidiary of the foreign multinational company sends to the Senegalese tax authorities a country-by-country report on the group as a whole; or
  - Another affiliate of the group, established in a country that has introduced the country-by-country reporting, has been designated to transmit country-by-country information for the entire group.

This last declaration must be filed electronically in the 12 months following the closing date of the group's financial year.

Failure to subscribe to this declaration is more heavily sanctioned than failure to file the transfer pricing summary declaration.

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Republic of Serbia

Transfer Pricing Treatment of Purchasing Fixed Assets

The Ministry of Finance of the Republic of Serbia published changes to the legislation on transfer pricing in December of the previous year. These changes are applicable for the 2019 fiscal year as well as following fiscal years.

The amendments relate to the transfer pricing treatment of purchasing fixed assets for which tax depreciation is calculated. Namely, if there is a positive difference between the purchase value in a controlled transaction and the value of assets in accordance with the "arm's length"' principle, 20% of calculated difference will be included in company's tax balance sheet of the current fiscal year. The same amount of correction (20% of the calculated difference) also needs to be included in company's tax balance sheet for following four fiscal periods. Therefore, the tax burden of the positive difference between the purchase value in a controlled transaction and the value of assets in accordance with the arm's length principle will be separated in five consecutive fiscal periods.

Regarding the tax depreciation of fixed assets purchased from a related party, the calculation base is a purchase value in a controlled transaction, which is in line with the Article 10b of the Corporate Income Tax Law.

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Thailand

Transfer Pricing update for Thailand

The Transfer Pricing Act

The Transfer Pricing Act, which came into force on 1 January 2019 and changes the revenue code, essentially stipulates the following:

- "Affiliated companies" are those in which a company or its shareholders directly or indirectly hold(s) at least 50% of the shares in the other company, or which are otherwise connected to one another in terms of capital, management or control in such a way that they cannot be managed independently of one another (Sec. 71 to paragraph 2 Revenue Code).
- Companies that have generated revenue of more than THB 200 million (approx. EUR 6 million) in the tax year in question must present comprehensive transfer pricing documentation on transactions with affiliated companies (Sec. 71 Ter Revenue Code).
- If the documentation requirements are not met, a penalty of up to THB 200,000 (approx. EUR 6,000) can be imposed.

According to this, taxpayers are particularly encouraged to prepare transfer price documentation on an annual basis and to submit it to the Tax Authorities.

The New Announcement by the Revenue Department

With the announcement of the revenue department on 18 November 2019, there are now, for the first time, specific instructions for the companies concerned, such as the documentation requirements under Sec. 71 Ter Revenue Code that must be complied with.

The form published as part of the announcement asks in particular for the following information:

- Information regarding all affiliated companies (including the registration number if it is a Thai company or the country of domicile if it is a foreign company) and whether transactions have been made with these affiliated companies.
- If transactions have been carried out with affiliated companies, the respective transaction amount must be stated and categorised as operating income; other income; acquisition of goods and raw materials; acquisition of land, buildings and machinery; loan; other expenses (to be broken down into royalties, management services fees, technical services fees, commission, interest or other).
- Indication of whether a consolidated tax return must be submitted; if yes: amount of consolidated income.
- Indication of whether restructuring measures took place between affiliated companies during the tax year; if yes: whether the restructuring resulted in an increase or decrease in income, operating costs or gross margin.
- Whether intangible property has been transferred to affiliates.
- Confirmation from the managing director that all the information is true and complete and can be substantiated by accounting documents.

The form must be submitted together with the tax return for all tax years that began on or after 1 January 2019. Unless a different tax year has been specified, affected companies must submit their tax return for the tax year 2019 including transfer pricing documentation by 31 May 2020.

Companies whose revenue is below the threshold of THB 200 million do not have to prepare such a declaration.

Summary

The specification of the documentation requirements finally creates clarity about what information is expected from the companies concerned. Since this obligation only affects large companies (annual turnover > THB 200 million), it is often possible to fall back on a group-wide transfer pricing documentation that is already available.

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Turkey

Legislative Works with Regard to BEPS Action 13 are Completed via Presidential Decree No: 2151

In accordance with the Presidential Decree no. 2151 which became effective as of 25 February 2020, several amendments were made on Article 13 of Corporate Income Tax Code numbered 5520. These amendments which mainly include regulations regarding the OECD BEPS Action – 13 TP Documentation are as follows:

- Update of "related party" definition
- Definition of several new concepts
- Regulating Country-by-Country Report (CbCR) and Master File (MF) within the scope of the TP documentation requirement
- Revision of Advance Pricing Agreement (APA) mechanism

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- 50% discount on tax penalties with respect to the disguised profit distribution through transfer pricing
- Other amendments

"Related Party" Definition

A 10% threshold condition will be applied for the real or legal persons who directly or indirectly hold the shares, voting rights or dividend rights of a company in order to be considered within the scope of the disguised profit distribution. While the spouses of the shareholders, siblings and ancestors of the shareholders and up to third decree (inclusive) natural and in-law relatives of the shareholders are still considered as related parties, the "related party" definition has also been updated by taking into consideration the real persons and real persons definition from the perspective of income tax law.

Definition of Several New Concepts

Definition of several new concepts that are introduced are as follows;

- Group
- Multinational Corporation (MNC)
- Entity
- Reporting Entity
- Ultimate Parent Company
- Surrogate Entity
- Authority Agreement
- International Agreement
- Systemic Failure

Master File (MF), Local Report and Country-by-Country Report (CbCR)

The new documentation requirements are introduced. In this respect; the three-stage documentation which consists of;

- Master File (MF)
- Local report
- Country-by-Country Report (CbCR)

has been made compulsory.

Accordingly, in addition to the current annual TP documentation report (local file) require-ment, "MF" and "CbCR" preparations must also be realised by the corporate income taxpayers which fall within the scope of the current local TP documentation rules starting from FY19.

Master File (MF)

MF preparation requirement will be applicable for Turkish corporate income taxpayers which are members of an MNC and which have an asset value and net sales revenue income amounting to TL 500 million and above on the previous year-end balance sheet and income statement respectively.

Preparation of the MF should be completed by the following year end, and the MF should be kept ready to submit if requested by the Tax Authority.

The first MF preparation obligation will be realised for FY19. However, the first MF preparation obligation by the companies which are subject to the special accounting period will be realised for the accounting period starting after 1 January 2019.

MF will have five main categories which can be seen below:
- Organisational structure of MNC
- MNC's description of operating activities
- Intangibles owned by MNC
- Intercompany financial transactions of MNC
- Financial and tax position of MNC

CbCR

The CbCR preparation requirement will be applicable for the Turkish-resident ultimate parent company of an MNC that do have total consolidated annual revenue amounting to EUR 750 million or above in the previous fiscal year.

Submission of the CbCR must be made electronically within 12 months following the end of the relevant fiscal period. In this respect, the first CbCR preparation obligation will be realised for FY19 and this CbCR must be submitted by 31 December 2020. However, the first CbCR preparation obligation by the Turkish-resident ultimate parent company of an MNC which is subject to a special accounting period that begins after 1 January 2019 will be filed electronically to the Turkish Revenue Authority (TRA) by the end of the following special accounting period.

CbCR should include the following information which can be seen below:
- The information below for each country that the MNC operates:
  - Revenue
  - Profit/loss before tax
  - Corporate income tax / income tax paid
  - Corporate income tax / income tax accrued
  - Share capital
  - Previous year's profits
  - Number of employees
  - Tangible assets other than cash and cash equivalents
- The information below for each MNC group member company on a country basis:
  - Legal title of each company resident in the corresponding country
  - The name of the country where the company was established and name of business activities that are carried out in this country by each MNC group member company if the country where the company was established and the country where the company is tax resident are different

The Turkish resident MNC group member company (or one of the Turkish resident MNC group member companies on behalf of the others if there are more than one) should submit the CbCR electronically to TRA by the end of the 12th month of the following relevant fiscal year **if the MNC has a total consolidated annual revenue amounting to EUR 750 million or above in the previous fiscal year** if one of the three conditions below are satisfied:

TRA Turkish Revenue Authority

- The country where the ultimate parent company is resident does not require CbCR
- Turkey has an effective bilateral tax agreement but does not have an effective competent authority agreement with the country where ultimate parent company is resident and
- There is a systemic failure with the exchange of information

Turkish resident members of the MNC that meet the CbCR requirements will notify the Turkish tax administration on behalf of the MNC regarding which country the CbCR will be submitted in and by which entity. Notifications for FY2019 must be submitted by the end of August 2020, whilst notifications shall be submitted annually by the end of June of the relevant year for following years.

Furthermore, if the consolidated financial statements are not prepared in EUR, the average foreign exchange buying rate of the Central Bank of the Republic of Turkey with respect to the financial year prior to the reporting period should be taken into consideration for the calculation of the abovementioned EUR 750 million threshold.

APA Mechanism

The APA mechanism is revised by making the changes mentioned below:

- The effective period for APAs is increased from 3 to 5 years.
- Submission of the renewal request for APA should be realised at least 6 months (instead of 9 months) before the APA expires.

The retroactive application of the APA implementation is also enabled under certain conditions stated in the legislation.

Application of 50% Discount on Tax Penalties

50% discount on tax penalties for late accrued or incompletely accrued taxes with respect to the disguised profit distribution through transfer pricing will be applicable for those taxpayers that fulfil their TP documentation obligations fully on time.

Other Amendments

The section regarding "Transactional Net Margin Methods" is revised in line with the amendments made in the relevant OECD guidelines in 2010. Two different alternative methods in this respect are recognised in the law.

These methods are:

- Transactional Net Margin Method
- Profit Split Method

With the amendment cited above, the priority of traditional methods (CUP, cost +, resale minus) in comparison to transactional net margin methods and profit split methods has been terminated. Nevertheless, traditional methods must still be preferred in cases where both traditional and transactional methods are applicable in line with the explanations given in the OECD TP guidelines.

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Ukraine

Ukrainian Parliament Implements Three-Tier Approach to TP Documentation and Other Important Changes to the Tax Code

On 16 January 2020, the Ukrainian Parliament adopted the hugely debated draft law #1210 which introduced considerable amendments to the Ukraine tax code.

BEPS Implementation

A large portion of the new legislation concerns the implementation of TP-related actions of the BEPS plan into Ukrainian tax law. The most important changes are as follows:

The law adopts a three-tier approach to transfer pricing documentation according to Action 13 of BEPS. Namely, TP documentation shall consist of a (i) master file, (ii) local file and (iii) country-by-country (CbC) report. In addition, Ukrainian entities of multinational companies will have to file a notification about participation in the international group of companies.

Suggested amendments are generally in line with BEPS recommendations. Yet there are also some differences. For instance, although it envisages a general threshold of EUR 750 million for the submitting of the CbC Report, the master file may be requested by Ukrainian tax authorities if annual consolidated group revenue is equal to or exceeding EUR 50 million.

The law introduces new penalties for the failure to comply with added reporting requirements which may be very material. They are linked to subsistence wage amounts which are gradually revisited. By way of illustration, the penalty for the failure to submit the CbC Report is 1,000 times the subsistence wage, which currently would amount to UAH 2 million (around EUR 74,000 under current exchange rate).

Business Purpose

A key novelty is the introduction of the principle of the business purpose of transactions. Namely, taxpayers will be obliged to prove in the TP documentation that controlled transactions have a clear business purpose. When calculating the profit tax base, the Tax Authorities may disregard the transactions that do not have a reasonable business purpose.

Deemed Dividends

According to the law, the amount of TP adjustment that increases the tax base in Ukraine may be treated as deemed dividend distribution. Such dividend distribution would be subject to withholding tax (WHT) in Ukraine under a regular WHT rate of 15% unless otherwise provided by applicable double tax treaties.

Independence Threshold

The threshold for the recognition of the parties as related would be raised to 25% as compared to 20% which is applied currently. This change would bring Ukrainian legislation closer to the dominant international practice.

Special TP Rules for Commodities

The law introduces new rules for transactions with commodities. Namely, the taxpayers would need to apply the so-called quoted prices for TP analysis of some transactions with commodities. The quoted prices are defined as pricing data which includes exchange quotations, price indices published by recognised agencies, statistical and government agencies.

The law envisages that the list of commodities which are subject to these rules as well as the procedure of application of the quoted prices would be adopted by the Cabinet of Ministers of Ukraine.

There are also other changes, including the introduction of rules on controlled foreign corporations (CfC) and specific adjustments of profit tax on transactions with non-residents which fall under the Ukrainian list of low-tax States or list of organisational forms (covering fiscally transparent entities).

In conclusion, the law provides for a dramatic overhaul of the Ukrainian tax system. Yet, it shall be noted that as of the date of this material the President of Ukraine is yet to sign the law. Reportedly, the President is considering vetoing it. Yet even in the case of a veto, we expect that BEPS-related amendments would still be introduced soon as the separate law comprising most of the rules outlined above.

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Vietnam

Advance Pricing Agreements gaining importance

The extent of economic restraints caused by COVID-19 cannot be known as of yet, and also the Vietnamese economy will not grow as recently estimated. This will make it necessary to reduce the estimation regarding the tax revenue from normal tax declarations. It can be assumed that this re-estimation will further increase the expectation of the Government of Vietnam, that the Vietnamese Tax Authorities (TA) will increase the additional revenue from tax audits.

In the past, the general tax audits and TP tax audits were mostly held separately. The very recent tendency is to incorporate TP issues in the normal tax audits, which multiplies the audits that involve TP issues. According to the plan for the 2020 tax audit, TP audits continue to be the priority of the TA, especially in foreign-invested companies.

The regulations on the Advance Pricing Agreement (APA) are not new, but until now the practical importance was rather limited. The APA is an agreement between the taxpayer and the TA that determines in advance the basis of tax calculation, methods of determining taxable prices and the arm's length prices of one or more related-party transactions in a certain period of time.

With the TA increasingly focusing on TP, this instrument is becoming more interesting for taxpayers and also Tax Authorities as a method for reducing risks and uncertainties. Possible are:

- → A unilateral APA between a taxpayer and a Vietnamese TA regarding national Vietnamese issues;
- → A bilateral and multilateral APA between a taxpayer, a Vietnamese TA and one or more foreign tax authorities regarding issues under a tax treaty.

An APA will be concluded when the TA and the taxpayer negotiate the application of the regulations on Corporate Income Tax regarding transactions with related parties on following the arm's length principle.

An APA application shall be processed in the following order:
a) Consultation before official submission of the application;
b) Official submission of the application;
c) Evaluation of the APA application;
d) Negotiation of the APA;
e) Conclusion and use of the APA.

The APA is effective for up to 5 years and may be extended, but not for more than 5 years.

No TP documentation must be prepared by companies that have signed an APA and have submitted the annual report insofar as the transactions are covered by the APA.

The procedure of seeking consultation on the intended APA, drafting and negotiating the APA requirements is causing a considerable workload. Without very careful preparation, it cannot be successful. Seeking an APA will only be cost-effective in cases of major economic importance.

The current management model of Vietnam's TAs requires that figures forming the basis for signing the APA are supported by a tax audit of the financial operations of the business.

But if agreed, the APA will be an effective measure for taxpayers in mitigating TP risks, preventing the taxpayer from facing very inconvenient disputes during tax audits, and double taxation when applying bilateral and multilateral APA.

Especially multinational groups having a producing entity in Vietnam which is totally or mostly selling the products to other entities of the group might want to consider seeking a multilateral APA, because the volume of transactions and therefore the risk is otherwise considerable.

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Glossary

APA	Advance Pricing Agreement
BEPS	Base Erosion and Profit Shifting
CbC	Country by Country
CbCR	Country by Country Reporting
CIT	Corporate Income Tax
CUP	Comparable Uncontrolled Price (Method)
EU	European Union
FY	Fiscal Year
IP	Intellectual Property
LF	Local File
MAP	Mutual Agreement Procedure
MF	Masterfile
MNC	Multinational Corporation
MNE	Multinational Enterprise
OECD	Organization of Economic Cooperation and Development
OECD Guidelines	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
OECD MTC	Model Tax Convention on Income and on Capital
PE	Permanent Establishment
TNMM	Transactional Net Margin Method
TP	Transfer Pricing
TRA	Turkish Revenue Authority
VAT	Value Added Tax

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