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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 Global Transfer Pricing Newsletter 2023.

In this latest edition of the WTS Transfer Pricing Newsletter, our colleagues from 13 countries share valuable insights on recently enacted legislations and significant cases, ensuring you stay up to date with the latest developments in the field of Transfer Pricing.

General Transfer Pricing topic
The **Transfer Pricing Digital Team** in Germany explores the opportunities of utilising data analytics tools like Alteryx and visualisation platforms such as PowerBI to enhance Transfer Pricing documentation projects.

Country-specific Transfer Pricing topics
The **Argentine** Supreme Court's landmark ruling invalidates the presidential decree on Transfer Pricing, providing crucial tax relief to the commodity exporting sector.

In **Australia**, the proposed legislation would lead to the first unrestricted worldwide mandated public reporting of all CbCR data combined with additional Information by jurisdiction. More details about which companies are concerned and the new disclosures required can be found in the article.

Costa Rica's government has submitted a tax reform proposal to the Legislative Assembly, aiming to introduce significant changes to the country's income tax system. The proposed reform includes a shift to a mixed tax system for residents, consolidation of individual income tax, a general 15% tax rate for non-residents and expanded powers for the Tax Administration.

France launches a comprehensive anti-fraud plan, aiming to target the "ultra-rich" and multinational companies, strengthen Transfer Pricing obligations and enhance tax transparency measures, showcasing its determination to tackle tax evasion effectively.

In **Germany,** new legislation has been adopted to tighten Transfer Pricing documentation rules, allowing tax authorities to demand records at any time, reducing submission deadlines and imposing stricter penalties for non-compliance.

India's recent rulings and regulatory updates in Transfer Pricing cases have underscored the importance of robust comparability parameters and international guidelines for determining arm's-length prices, shaping the landscape of tax regulations.

Recently, **Malta** has introduced Transfer Pricing rules which will take effect from the financial year 2024. The rules require companies to include the arm's-length principle of cross-border arrangements with associated enterprises in determining their total taxable income, with additional guidelines expected to be issued to determine the methodologies for establishing the arm's-length principle.

The **Netherlands** has implemented anti-Transfer Pricing mismatch rules to counter double non-taxation, and a recent decree provides clarification that these rules do not apply to entities exempt from or not subject to profit tax, reducing uncertainties for pension funds and other exempt entities.

Our colleagues in **Poland** dealt with the conflicting approach of Polish tax authorities regarding the tax treatment of Transfer Pricing adjustments.

In **Saudi Arabia** requirements for the master file and local file, with compliance varying based on the value of transactions with related parties, were introduced.

The **Senegalese** tax authorities prioritise local comparables over quoted prices for Transfer Pricing, emphasising their accuracy in reflecting company profitability, but the specific conditions for applying the arm's-length principle remain undefined.

The **UAE** has implemented new Transfer Pricing regulations aligned with OECD guidelines, requiring businesses to maintain documentation and adhere to the arm's-length principle. The article provides a roadmap for taxpayers to evaluate the impact of new TP rules.

Our team in **UK** focused on examining the latest statistics and developments provided by the HMRC regarding the usage of APAs, ATCAs and MAPs.

Yours sincerely,

WTS Global Transfer Pricing Team

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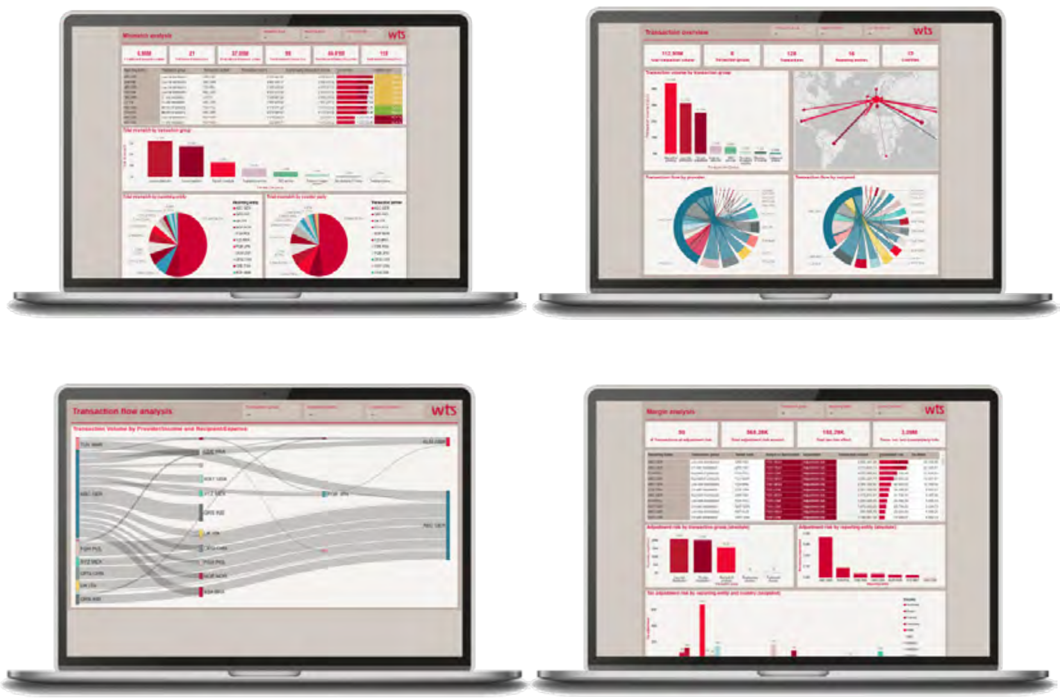
Please find the complete list of all contacts at the end of the newsletter.

Global

How data analytics can add value in your global TP documentation projects

In almost all countries, companies must prepare TP documentation to meet TP compliance requirements. The basis for the creation of the Local Files is transaction-specific information such as transaction volumes per company, transaction parties, transaction groups and, if applicable, transaction-specific margins in the period to be documented. Often, such information is put aside after completion of the documentation project and not analysed further. In doing so, taxpayers waste a lot of the potential which targeted data analytics offers.

Using D&A tools, the data collected as part of global TP documentation projects cannot only be used for their immediately intended purpose – the preparation of the Local File – but to uncover tax risks and opportunities. Low-code solutions such as Alteryx are ideal for data analytics. Such solutions are flexible to use, user-friendly and can be run as often as required at the push of a button. The results can then be graphically illustrated using visualisation tools such as PowerBI or Tableau to make the key information and insights easily accessible for a wide range of recipients.



This provides companies with the following advantages:

1. Increase transparency: A transparent visualisation of the transaction flows between the transaction parties helps setting priorities when preparing the Local File and highlights potential inconsistencies, e.g. transactions between companies that contradict their business purpose or the functional profile of the companies.

2. Uncover mismatches: If transactional data is collected decentrally, inconsistencies can quickly arise if a company reports a transaction with a counterparty which the counterparty in turn does not report, or with differing amounts. In practice, such inconsistencies often result from an incorrect mapping of journal entries to transaction groups and often account for a large proportion of documented transactions. In times of increasing information exchange between tax authorities, such inconsistencies present potential risk positions. Mismatch analyses provide information on the extent of the inconsistencies, the need for action and recommended prioritisation to correct the numbers.

3. Monitor margins & risks: To demonstrate the arm's-length nature of Transfer Prices, transaction-specific margins are often determined and compared with ranges of margins identified in benchmark studies. If routine companies earn "too little" or "too much" compared to the benchmark results, a potential tax risk arises. BI tools support the preparation of margin analyses and ongoing risk assessments, which can be visualised for any number of data points. The aggregated value of potential unilateral adjustments provides information on the overall risk position of the group – multiplied by the respective tax rate of the country, a risk indication on the tax effect of potential tax authority adjustments can be derived.

4. Identify tax potential: The available information about company margins can also be used to assess whether tax potential could be exploited through a proactive operational TP management. It is assumed that TP adjustments are possible to steer the operating margins of routine companies to a value that always lies within the range of the benchmark results to ensure arm's-length outcomes. The tax potential is simulated based on a bilateral income adjustment for both transaction parties and calculation of the resulting tax effect. In a variable model, the resulting tax effects can be optimised by selecting different points within the range for the margin adjustment of different companies.

Conclusion

Tax data analytics can offer great advantages to companies in terms of increasing their compliance and uncovering tax potential. With the targeted use of flexible low-code solutions, taxpayers can analyse large amounts of data at the push of a button and create insightful visualisations. A lot of relevant data is already available for existing compliance requirements, which can be used to increase transparency and provide actionable insights by means of targeted data analytics.

Using an example of data collected during a Transfer Pricing documentation project, it is shown how companies can use their tax data – alongside the immediately intended purpose (e.g. the preparation of Local Files) – to identify risk positions, improve compliance and recognise tax potential using Data & Analytics tools and Low-Code solutions.

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Argentina

Argentine Supreme Court rules set Transfer Pricing regs enacted by presidential decree unconstitutional

The Argentine Supreme Court ("CSJN") has recently decided on the highly expected *"Vicentin SAIC"* case, concerning the constitutional challenge of Executive Branch Decree 916/04 ("Decree 916/04"), which regulated the scope of the so-called "sixth method" of Transfer Pricing (Law 25,784). In the *Vicentin SAIC's* case, the upper court sided with the taxpayer by concluding that the regulations extended the "sixth method" in a way inconsistent with the standards set forth by Law 25,784.

Said law amended the Argentine Income Tax ("ITL") to include the so-called "sixth method" of Transfer Pricing, which was aimed at burdening triangular commodity exports to any affiliated party by means of an unsubstantiated international intermediary (e.g. a trader). In such cases, the sixth method allowed the Argentine Revenue Service ("ARS") to assess the Transfer Prices by applying the higher of the following two: i) the commodity listed price on the shipment date, and (ii) the price agreed with the international intermediary on the export agreement date. In practice, there could be a gap of one to twelve months between the two prices, thus creating a burdensome tax risk on the commodity exporting industry. The Law also set the "substance" standards that, if met by the trader, would exclude the transaction from the "sixth method".

While the law predicated about an internationally triangular transaction, the implementing decree extended the taxable event to any commodity export in which the foreign purchaser would not meet the substance standards set forth by the law. Furthermore, the decree included a retroactive application of these regulations to one fiscal year before its enactment and also worsened the statutory substance requirements contained in the ITL.

Vicentin SAIC challenged Decree 914/2004 on constitutional grounds and obtained favourable decisions at the first and second court levels. In view of the revenue sensitivities around this case, the Government appealed it to the Federal Supreme Court.

The upper tribunal finally ruled on the case last month by sustaining that:

(i) Decree 916/2004 was unconstitutional since it bypassed the triangular-transaction requirement set forth by the Law as a condition precedent to apply the "sixth method".
(ii) Decree 916/2004 was also unconstitutional since it applied the standards implemented in fiscal year 2004 retroactively, namely, to fiscal year 2003, thus compromising the legality principle; and
(iii) Decree 916/2004 was further unconstitutional since it worsened the third substance ratio of ITL Section 15 – as modified by Law 25,784 – by excluding from its denominator those transactions performed by the trader with its Argentine affiliated party. Such an inclusion lacked any normative background.

The decision is highly material for the whole commodity exporting sector, as the key exporting companies still have significant tax assessments pending a decision from the lower courts, which were expecting the final opinion of the supreme tribunal in the *Vicentin SAIC* case.

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Australia

Australia proposes new public country-by-country reporting obligations

1. On 5 April 2023, the Australian Treasury released Exposure Draft legislation and accompanying Explanatory Memorandum for consultation which outline a proposed new set of rules that would require in-scope multinational groups with an Australian presence to publish information about their tax and financial positions for all jurisdictions in which they operate (**the proposed legislation**). The Australian Treasury subsequently published an accompanying Explanatory Memorandum on 22 June 2023, which provided additional details and refinements to the Exposure Draft (**June Explanatory Memorandum**).

2. If legislated, this would be the first unrestricted world-wide mandated public reporting of all Country-by-Country (**CbC**) report data combined with additional information by jurisdiction, which extend beyond Global Reporting Initiative's Sustainable Reporting Standards Disclosure 207 (**GRI 207**) requirements.

3. The proposed legislation also includes a requirement for taxpayers to report additional disclosures that are not currently required under Australia's CbC rules. Significantly, the June Explanatory Memorandum removed the proposed requirement that taxpayers provide a list of all intangible assets (and their book value) held by the group in each jurisdiction.

4. The CbC reporting parent is required to publish selected tax information on an Australian government website in an approved form, with the Commissioner of Taxation (**the Commissioner**) facilitating publication. Penalties will apply for non-compliance.

Who will be affected by the proposed legislation

5. Currently, large multinational enterprises are subject to confidential CbC reporting (in accordance with Action 13 of the OECD's base erosion and profit shifting project (**BEPS**)) in Australia. Broadly, the reporting obligation applies to multinational entities that are a member of a group with an annual global income of A$ 1 billion (currently Euro 610m) or more. The same annual global income thresholds apply to the proposed the proposed legislation.

6. In some circumstances, companies may be eligible to apply for an exemption from the Commissioner. The proposed legislation is drafted quite generally indicating that the Commissioner has discretion to determine when a 'class of entity' is not subject to the reporting obligation. We await further guidance as the circumstances in which these exemptions may apply.

What will be required under the proposed legislation

7. Broadly, the information required to be published relates to presence and tax dealings across jurisdictions and is intended to provide detail on how the entity structures its tax affairs in Australia and globally.

8. The proposed legislation requires specific information which must be reported, and that the information must be based on amounts as shown in the audited consolidated financial statements of the parent entity.

9. Most of the information required to be published under the proposed legislation will already be reported by entities as part of their existing Australian CbC reporting obligations. The proposed legislation will operate in parallel to the existing CbC reporting requirements and there is considerable overlap between the relevant information to be disclosed in each.

10. The disclosures have partly been adopted with reference to GRI 207 and OECD recommendations for CbC reporting. However additional disclosures under the proposed legislation include:

    - a description of the group's "approach to tax", and
    - the reasons for the difference between income tax accrued (current year) and the amount of income tax due if the income tax rate applicable to the jurisdiction were applied to profit and loss before income tax.

Next Steps – How and when will taxpayers need to report under the proposed legislation

11. If enacted as currently drafted, the proposed legislation will require taxpayers to report additional information to the ATO for income years commencing 1 July 2024. Relevant taxpayers will need to report the information to the ATO within 12 months after the end of the income year.

12. The CbC reporting entity will be required to publish selected tax information on an Australian government website in an approved form, where the Commissioner will then facilitate publication. The information is to be reported in a standardised format, with further guidance to be provided.

13. Finally, the Exposure Draft proposes amending the Taxation Administration Act 1953 to add a new strict liability offence where an affected entity fails to comply with its obligation to give the information to the ATO in the required manner.

14. Careful analysis is recommended to determine the potential timing and application of the proposed legislation. Impacted taxpayers and their groups should ensure systems are in place to comply with these proposed new reporting obligations as soon as possible.

The proposed legislation Exposure Draft can be accessed from:

- Exposure Draft – Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Multinational tax transparency – Tax Changes

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Costa Rica

Costa Rica's Possible Tax Reform

18 May 2023 saw the Costa Rican Government submit a comprehensive tax reform proposal to legislation. It proposes to settle an Income Tax (for individuals), a Corporate Tax (for companies and other entities) and a Non-residents Tax (for both individuals and companies). Such a proposal differs from the actual, and more intricated, income tax system.

Costa Rica has historically upheld a territorial tax system, meaning that its residents are only taxed on income from Costa Rican sources. Unfortunately, in the last few years, the Tax Administration and the Courts have upheld numerous decisions contradicting such specific wording of the law. Especially regarding passive income (interests, dividends or royalties), the authorities and certain courts came with original interpretations of what an income from a Costa Rican source means. The tax reform intends to settle such a discussion. If the proposal is approved, a mixed tax system will prevail in the legal text: global taxation for residents on passive income, and territorial taxation for residents' other income (business profits, professional services, income from employment, etc.). The good news for Costa Rican residents is that this global taxation on passive income will give them the right to credit taxes paid abroad, something that doesn't happen at the moment.

For non-residents, the new proposal removes several currently existing tax rates to use just one general 15% tax rate (non-deductions allowed). Non-residents with income attributable to a permanent establishment will be taxed as any other residents on a 30% rate permitting different deductions (regular deductions for businesses).

For Costa Rican residents, the Income Tax on Individuals suffers many structural changes with the new proposal. The new income tax will consolidate most of an individual's income instead of the current schedular tax system. There will be a "general tax base" that includes most of the income and a "special tax base" affecting only capital gains and what is known in Costa Rica as "mobiliary income gains" (dividends, interests, royalties, rent of mobiliary property, etc.). The highest income tax bracket will be a 30% rate instead of the current 25% rate, for income higher than US$70,000 per year (approximately).

Corporate Tax will have a 30% rate, instead of the current progressive rate that starts at 10% and ends at 25%.

The most relevant issues of the tax reform proposal concern the new legal attributions and powers given to the Tax Administration, and a new set of joint and several liabilities. According to the new rules, the proposal gives the Tax Administration the option to decide liability on shareholders, directors, members of the board and even company groups. It also gives the Tax Administration a whole set of attributions to audit and collect taxes with more expeditious proceedings, many of which are very questionable from a due process perspective.

It is unknown if the Costa Rican Government, the ruling political party and its potential allies will succeed with this proposal; it's possible that it will suffer changes during the legislative process. Still, it's the most ambitious intent to modernise the Costa Rican tax system in recent years.

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France

New fraud prevention action plan in France: Transfer Pricing obligations to be strengthened

On 9 May 2023, the French Minister of Public Accounts announced a new plan to combat tax evasion, with one guideline: *"target the 'ultra rich' and multinationals"*. Every year, several tens of billions of euros in tax revenue escape the notice of the French tax authorities.

The plan includes several tax and customs measures, including tougher criminal penalties.

Particular emphasis is placed on the desire to concentrate efforts on the departments responsible for tax audits:

- by targeting the most sophisticated fraud schemes, which often have international implications;
- however, by making tax audits less burdensome for SMEs, giving priority to regularisation measures rather than audits, and putting in place better support systems,
- by increasing the number of auditors in charge of tax audits by 15% and the number of tax audits of high net worth individuals and multinational companies by 25%.

To counter financial opacity, France will lead an international initiative to promote tax transparency. This will involve immediately initiating work to share useful information between countries more quickly and more effectively, particularly with the development of data mining. Building on the work of the OECD, the aim is to have a complete picture of the world's wealth holdings.

The plan also includes a section on Transfer Pricing, which will be included in the Finance Bill for 2024: the purpose is to strengthen the administration's ability to detect and punish abusive Transfer Pricing by multinationals and to make large companies more accountable.

In France, there has been an obligation to submit Transfer Pricing documentation (Master File and Local File) since 2010 in the event of a tax audit, which was reinforced in 2018 and broadly follows the OECD's recommendations in this area. This obligation is triggered mainly when a threshold of EUR 400 million in turnover or gross assets is crossed (a French company exceeding one of these two thresholds or directly or indirectly held abroad or in France by a company exceeding one of these two thresholds).

This threshold for triggering the obligation to present full documentation of the Transfer Pricing policy should be lowered and this documentation will be enforceable. In addition, the statute of limitation within which the tax authorities can audit the transfers of intangible assets should be extended to enable the tax authorities to fully apply the rules defined by the OECD for controlling the prices of such transfers.

In return for these extended reporting obligations for companies, a reinforcement of the administration teams will help to reduce the time taken to process companies' requests for APAs so as to simplify their management.

With this anti-fraud plan, France is demonstrating its determination to restrict the grey area between legality, illegality and tax evasion.

Increased focus on Transfer Pricing by French tax authorities

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Germany

Tightening of the German Transfer Pricing documentation rules

The German parliament adopted the DAC7 Transposition Act on 16 December 2022. Besides transposing the DAC7 Directive concerning tax transparency in the digital platform economy, it also focuses on procedural aspects of the tax audit. The latter includes rules that tighten the taxpayer's obligations regarding the submission of Transfer Pricing documentations.

As the law currently stands, Section 90(3) Sentence 5 of the German Tax Code (Abgabenordnung, AO) provides that, as a rule, tax authorities should require the submission of records only for the purpose of conducting a tax audit. Exceptionally, in duly justified individual cases, they may also do so within the context beyond tax audits. Under the new Section 90(4) AO, however, tax authorities can now demand the submission of records in accordance with Subsection (3) at any time. Moreover, taxpayers subject to tax audit will in future be required to submit records automatically within 30 days of notification of the audit order, although this period can be extended where justified. This represents a tightening of the rules – at present these records only need to be submitted if expressly requested by the auditors. In another tightening of the rules, the general submission deadline, previously 60 days, has now been reduced to 30 days.

The rules relating to the scope of the records that auditees must submit have also been made more stringent: currently, a request for records pursuant to Section 2(6) of the German Attribution of Profit Records Regulation (Gewinnabgrenzungsaufzeichnungs-Verordnung, GAufzV) must adequately identify the business units and business relations subject to audit and the nature and scope of the records requested. This means that the tax authority cannot simply ask for a taxpayer's Transfer Pricing documentation – it must request only those records which are relevant for the tax audit it is conducting. As the new Section 90(4) AO relates to records pursuant to Section 90(3) AO, according to the wording of the provision, a taxpayer undergoing a tax audit would need to submit both the Master File and the Local File in full. The result is that the taxpayer is required to document every aspect of their Transfer Pricing virtually contemporaneously.

The penalty mechanisms applicable if these obligations are not satisfied have also been sharpened. According to the explanatory memorandum to the Act, the new Section 162(4) AO makes a distinction regarding the date on which any penalties are imposed: if no records are submitted, or if the records which are submitted are of no use, the penalty will be imposed following completion of the tax audit. In cases where usable records are submitted late, however, the penalty will be imposed as soon as the submission deadline is exceeded. In addition, it will be possible to impose penalties for full weeks and months in instalments.

The new rules will apply for tax periods commencing after 31 December 2024. They will also apply to tax liabilities and tax rebates which arise before 1 January 2025, in respect of which notification of an audit order pursuant to Section 196 AO is issued after 31 December 2024.

In view of the significant tightening of the German rules on the submission of Transfer Pricing documentation, taxpayers should implement processes that ensure timely documentation of cross-border, intra-group transactions.

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India

Few landmark rulings and regulatory update

I. Supreme Court rules on 'substantial question of law' in Transfer Pricing cases

In India, after the income tax scrutiny assessment, the litigation step involves four stages: an appeal before the Commissioner of Income Tax (Appeals) or Dispute Resolution Panel, followed by the Income Tax Appellate Tribunal ("ITAT"). The ITAT serves as the final fact-finding authority for disputes between taxpayers and the Indian Revenue Service. Only matters that concern a substantial 'question of law' can be adjudicated by the next appellate forum, which is the High Courts, and finally, the Supreme Court of India. The decisions of the Supreme Court are binding on other Indian courts, as well as the Union and state governments.

In Transfer Pricing disputes, the selection of companies as comparables for determining the arm's-length price has long been considered a matter of 'question of facts' without any significant 'question of law' arising by the High Courts across the country. In one such matter, the issue of whether the selection of companies as comparables involves 'question of law' was brought before the Supreme Court of India.

The Supreme Court held that the arm's-length price determination to be *de hors* the relevant provisions of the Act and Rules can be considered as perverse, and it may be considered as a substantial 'question of law' as perversity itself can be said to be a substantial 'question of law'. It was stated that High Courts can examine the question of comparability of two companies or selection of filters and examine whether the same is carried out judiciously and on the basis of the relevant material/evidence on record.

The ruling should be viewed as a reminder for the taxpayers to have a robust and contemporaneous documentation in place with objective and well-defined comparability parameters. Once the comparability parameters are backed by substantive research and work, then it would be extremely difficult to allege the results to be de hors the relevant TP provisions.

II. Income Tax Appellate Tribunal ("ITAT") relies on 'yield approach' to determine arm's-length price of corporate guarantee

The determination of corporate guarantee fees has consistently been a contentious issue under Indian Transfer Pricing regulations. Taxpayers have experienced a fluctuating situation, initially with the guarantee fees not being considered as international transactions, then being assessed at arm's-length rates ranging from 0.38% to 1% based on bank quotes, and subsequently being considered again as not international transactions due to the absence of a specific charge.

Both the UN and OECD have updated their respective Transfer Pricing guidelines in 2021 and 2022, including a chapter on financial transactions that specifically addresses the principles for determining arm's-length prices in the case of corporate guarantees. The Indian courts have been observed to rely on these guidelines when adjudicating such matters.

In a recent case of a taxpayer involving the determination of the arm's-length pricing of the corporate guarantee, the ITAT observed that the corporate guarantee fee at 0.35% was determined by the assessor on the basis of following:

1. Evaluating credit rating of the borrower using Moody's credit ratings;
2. Search for comparable loan arrangements on the Deal Scan database to determine interest rate on loan without guarantee;
3. Determining the appropriate interest savings by calculating the difference between the guaranteed and non-guaranteed rate of interest; and
4. Thereafter attributing the savings between the two parties.

In consideration of the above, ITAT observed that the benchmarking methodology of the taxpayer of the corporate guarantee fee was based on yield approach and is the appropriate methodology for determining the arm's-length price.

It has been observed that the Indian Courts continue to place their reliance on the OECD Transfer Pricing Guidelines and the UN TP Manual when adjudicating the Transfer Pricing matters.

III. Changes in timeline for furnishing information or document from fiscal year 2023–24 onwards

The Finance Act, 2023 reduced the time limit for furnishing Transfer Pricing documentation under the Income-tax Act, 1961 from 30 days to 10 days during the course of Revenue Audit, starting from the date of receipt of a notice. This move reaffirms the condition under the Act of preparing and maintaining the Transfer Pricing documentation on a contemporaneous basis.

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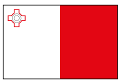

Malta's Transfer Pricing rules

Malta is one of the last jurisdictions in the EU to introduce formal Transfer Pricing rules. Following Malta's commitment to introducing such rules as part of its post-pandemic Recovery and Resilience Plan (approved by the EU Commission and ECOFIN), the Maltese legislator introduced enabling legislation by way of Article 51A of Malta's Income Tax Act in 2021. This was shortly followed by a set of Transfer Pricing Rules (the 'Rules') on 18 November 2022, via Legal Notice 284 of 2022, that will come into effect from financial year 2024.

The Rules introduce deeming and computational provisions requiring in-scope companies to include the arm's-length value of any amount incurred, due, accrued or derived thereby with respect to cross-border arrangements ('CBAs') between associated enterprises in ascertaining the total taxable income. It is expected that these Rules shall soon be supplemented by guidelines issued by the Commissioner for Revenue detailing the methodologies to be used to determine the arm's-length amount.

A CBA is defined as an arrangement with an associated enterprise where at least:

- One party to the arrangement is not resident in Malta, and at least one party is a company resident in Malta; or
- One party to the arrangement maintains a permanent establishment ('PE') outside Malta to which the arrangement is effectively connected, and at least one party is a company resident in Malta; or
- One party to the arrangement is not resident in Malta and at least one other party (not resident in Malta) is a company maintaining a PE in Malta to which the arrangement is effectively connected, or otherwise derived income or gains arising in Malta.

Associated enterprises are defined as bodies of persons where one controls the other, or the same person/s control/s two or more bodies, via direct or indirect holding of over 75% in voting rights or ordinary capital, or by virtue of any powers conferred by a document regulating the other body. A 50% threshold applies where the bodies of persons are constituent entities of an MNE group.

The "arm's-length amount" is the amount that independent parties would have agreed to had they entered that arrangement in comparable circumstances. The methodologies for establishing the arm's-length amount are to be determined by the guidelines.

Exceptions:
- Securitisation transactions in terms of Malta's Securitisation Transactions (Deductions) Rules
- Arrangements falling below de minimis thresholds, where the aggregate arm's-length value of all items of income and expenditure of a revenue nature from CBAs in the financial period does not exceed €6m, and aggregate arm's-length value of all items of income and expenditure of a capital nature from CBAs in the financial period does not exceed €20m.

Parties to excepted CBAs may make a request to the Commissioner to issue a determination that the Rules be applied regardless of the applicability of an exception.

The Rules also provide for unilateral Transfer Pricing rulings, and advance Transfer Pricing agreements between foreign competent authorities and the Commissioner, with respect to CBAs commencing on or after the date of request, and for already existing CBAs.

Whilst providing certainty and transparency with regard to CBAs, the Rules are expected to have considerable tax implications and increased compliance costs to in-scope entities. Entities should therefore thoroughly assess these implications prior to entering into or modifying existing CBAs.

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Malta implements long-awaited formal Transfer Pricing rules into its income tax legislation

Netherlands

Clarification on the scope and application of the Dutch anti-Transfer Pricing mismatches legislation

Background

As of 1 January 2022, the Netherlands has implemented legislation which counters double non-taxation through Transfer Pricing mismatches. The anti-Transfer Pricing mismatch rules aim to eliminate unilateral downward Transfer Pricing adjustments in situations where no corresponding upward adjustment is recognised at the level of the (foreign) counterparty. Part of this legislation (i.e. Article 8bd of the Dutch Corporate Income Tax Act 1969 ("**DCITA**")) specifically prevents double non-taxation due to a valuation difference between jurisdictions in certain situations.

Article 8bd DCITA is aimed at situations where assets and liabilities are transferred through (i) capital contributions, (ii) distributions or (iii) mergers and demergers. In these situations, for Dutch corporate income tax ("**DCIT**") purposes, the value recognised for assets is at the most (or for liabilities at a minimum) the value of the item included in the transferor's tax base.

In practice, Article 8bd DCITA led to uncertainty regarding the treatment of entities that are exempt from, or not subject to, profit tax. For this purpose, 24 January 2023 saw the Dutch State Secretary of Finance issue a decree (the "**Decree**") which further clarifies the scope and application of Article 8bd DCITA.

Clarification

The Decree clarifies that Article 8bd DCITA does not apply (i.e. the fair market value of the item can be considered for DCIT purposes) in cases where contributions and distributions are made by entities that are subjectively exempt from profit tax or established in a state that does not provide for profit tax. This exception to the "main rule" is subject to the condition that the fair market value of the contribution or distribution is reflected in both (i) the related relevant legal documentation and (ii) the annual accounts of the transferor and the Dutch taxpayer.

In our view, the Decree is in line with the purpose of the Dutch legislation which counters double non-taxation through Transfer Pricing mismatches. Additionally, the Decree provides further clarification which reduces many of the uncertainties raised by the implementation of Article 8bd DCITA, especially for pension funds and other exempt entities.

Key takeaways

- The Netherlands implemented legislation which counters double non-taxation through Transfer Pricing mismatches as of 1 January 2022.
- Part of the implementation of this legislation was the introduction of Article 8bd DCITA, which specifically prevents double non-taxation due to a valuation difference between jurisdictions in certain situations.
- Article 8bd DCITA is aimed at situations where assets and liabilities are transferred through (i) capital contributions, (ii) distributions or (iii) mergers and demergers.
- In practice, Article 8bd DCITA led to uncertainty on the treatment of entities that are exempt from, or not subject to, profit tax. For this purpose, the Decree was issued by the Dutch State Secretary of Finance on 24 January 2023 which further clarifies the scope and application of Article 8bd DCITA.
- The Decree clarifies that Article 8bd DCITA does not apply in cases where contributions and distributions are made by entities subjectively exempt from profit tax or established in a state where the entity is not subject to profit tax.

Should you have any questions or concerns, please feel free to reach out to the Transfer Pricing team of Atlas!

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Poland

Transfer Pricing adjustment – conflicting approach of Polish tax authorities

The Polish tax authorities are showing a growing interest in Transfer Pricing adjustments. There are doubts as to whether such adjustments should be included in the tax returns. Moreover, Transfer Pricing adjustments are the subject of numerous requests for individual interpretations and are carefully audited during tax controls. As follows from the case law of the administrative courts, in many individual rulings and tax inspections the taxpayers have been denied the right to reduce their taxable income by the value of Transfer Pricing adjustments.

Up until the end of 2018, the CIT Act did not contain any specific provisions relating directly to Transfer Pricing adjustments. However, the amendment to Transfer Pricing regulations of 1 January 2019 introduced, among others, express regulations concerning such adjustments. Historically, the National Tax Information (NTI) has repeatedly expressed the view that a Transfer Pricing adjustment may be recognised as revenue under the general terms but may not be treated as an expense, since it is not related to revenue.

The Voivodeship Administrative Courts (WSA) usually disagreed with this position and pointed out that the same economic event cannot be recognised differently for tax purposes depending on whether it results in income or expenses. Nonetheless, after 1 January 2019, the Supreme Administrative Court (NSA) has passed several judgements denying the possibility of reporting a Transfer Pricing adjustment as a tax deductible item (e.g. judgement of the NSA of 19 January 2021, case ref. no. II FSK 2644/18).

As of 2019, the provisions of Article 11e, Article 12(3j) and (3l) and Article 15(4i) and (4k) of the CIT Act relating explicitly to Transfer Pricing adjustments came into effect, and there have been many commentaries concerning these rules. It may seem that the issue of Transfer Pricing adjustments has been settled in detail in connection with the right to include the adjustment in tax settlements (and the conditions related thereto), and the accounting period to which the adjustment should be assigned. However, in practice, there are still instances where the tax authorities challenge the very possibility of accounting for Transfer Pricing adjustments under tax cost items (even when the conditions specified in Article 11e of the CIT Act are met).

One example is the judgement of the WSA in Poznań of 10 June 2022 (case ref. no. I SA/Po 1080/21), in which the court overruled an individual ruling issued by the NTI denying the taxpayer the right to reduce income by adjustments made to related party settlements (in-minus). It follows from such cases that the tax authorities tend to ignore the fact that Transfer Pricing adjustments do not constitute separate transactions which should be reviewed in terms of their relationship to the taxpayer's activities and its income or sources of income. True-ups are made to ensure the arm's-length settlement of transactions between related parties and should be considered in conjunction with transactions to which they pertain.

Transfer Pricing in transactions within a group of related parties are often determined on the basis of planned values, including budgeted costs and revenues. As a consequence, common practice is to subsequently adjust the accounts to ensure they are consistent with market conditions. Such adjustments are generating uncertainties related to their correct inclusion in the tax accounts.

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Saudi Arabia

Saudi Arabia approves new amendments to the Transaction Pricing (TP) regulations

20 March 2023 saw the Board of Directors of the Zakat, Tax and Customs Authority (ZATCA) in the Kingdom of Saudi Arabia approve the proposed amendments to the TP regulations.

Taxpayers who are subject to zakat will comply with the new amendments that would come into effect for the fiscal years beginning on or after 1 January 2024.

The provisions of the APA will come into effect on the tax/zakat years that begin on or after 1 January 2024.

Except for what is expressly stated in the Transfer Pricing Bylaws, the provisions of Articles (16) and (17) (Master and Local files) shall be applied to taxpayers subject to zakat as follows:

First phase

- Taxpayers who are subject to zakat and whose transactions with related parties exceed an amount of Saudi riyal (SAR) 100 million, will have to comply with the requirements of the Master File and the Local File.
- Taxpayers who are subject to zakat and whose transactions with related parties exceed the amount of SAR 48 million and less than the amount of SAR 100 million can choose to comply (optional) with the requirements of the Master File and the Local File.
- Taxpayers who are subject to zakat and whose transactions with related parties are estimated at SAR 48 million or less will not be subject to the requirements of the Master File and the Local File.

Second phase

- Taxpayers who are subject to zakat and whose transactions with related parties exceed the amount of SAR 48 million will have to comply with the requirements of the Master File and the Local File.
- Taxpayers who are subject to zakat and whose transactions with related parties are estimated at SAR 48 million or less will not be subject to the requirements of the Master File and the Local File.

The first phase includes all taxpayers subject to zakat, except for financing funds. The second phase of the implementation will begin three years after the implementation of the first phase and it includes all taxpayers who are subject to zakat in addition to financing funds.

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Senegal

Arm's-length principle in Transfer Pricing: Senegalese tax authorities favour local comparable

The Senegalese tax legislation explicitly includes the arm's-length principle in Article 17, Paragraph 1 of the General Tax Code (CGI). Additionally, the legislation recognises the concept of related parties in Article 17.4 of the CGI.

However, it is important to note that the instruction on the appropriate Transfer Pricing method is currently being finalised in Senegal (Ref. Senegal – Transfer Pricing country sheet, February 2022).

While awaiting the signature of this OECD instruction, a doctrinal opinion (No. 4907/ MEFP/CAB/CT/JK) was issued by the General Directorate of Taxes and Domains (DGID) on 17 July 2019 and published in October 2022. This opinion suggests that the Senegalese tax authorities favour a Transfer Pricing method based on local comparables for determining Transfer Pricing.

The issue of this doctrinal opinion stemmed from a general accounting audit for the 2013 fiscal year and a dispute over the sales prices of crude groundnut oil charged to a related entity.

The taxpayer disputed the tax authorities' allegations of non-compliance with the arm's-length principle. The tax authorities accused the taxpayer of using "quoted" prices expressed in Cost-Assurance-Freight (CIF) Rotterdam values and the "MUNDI" index of international exchange values for agricultural raw materials instead of using the "Free on Board (FOB)" value preferred by the auditors.

In response to the taxpayer's appeal, the tax authorities pointed out that the use of a "quoted" price was recommended by the OECD in its 2015 final report on Base Erosion and Profit Shifting for commodities like crude groundnut oil. However, they emphasised that this type of comparable should only be used when a relevant local comparable is not available.

According to the Senegalese tax authorities, a relevant local comparable provides a better reflection of the company's profitability. The above-mentioned doctrinal opinion supports the tax auditors' decision to prioritise relevant local comparables over the quoted price when identifying indirect profit transfers.

Two conclusions can be drawn from this Senegalese doctrinal opinion:

- Transfer Pricing is both an international and a local concern. Tax authorities retain their sovereignty and can apply OECD principles until they are incorporated into domestic law.
- Although the arm's-length principle is incorporated into Senegalese law, the specific conditions for its application are not yet clearly defined in the country's tax system. This situation poses a challenge to multinational companies operating in Senegal as it does not guarantee tax certainty. Therefore, it is essential for these companies to maintain open, pragmatic and educational communication with Senegalese tax authorities to minimise the risk of tax reassessment.

In our opinion, the first line of defence against the risk of tax reassessment regarding a company's pricing policy is to establish comprehensive Transfer Pricing documentation that sufficiently justifies the group's pricing policy. In addition to this documentation, the use of advance pricing agreements with the tax authorities is now necessary to reduce exposure to the above-mentioned tax risk.

Summary

According to the Senegalese tax authorities, when assessing Transfer Pricing, utilising a comparable local entity provides a more accurate reflection of the company's profitability. The authorities maintain that tax auditors are justified in prioritising relevant local comparables over the quoted price to identify any potential indirect profit transfers.

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United Arab Emirates

New Transfer Pricing regulation in the UAE: are you prepared?

The UAE has witnessed significant changes in the legislative landscape as a global business hub and financial centre and with its business transactions. These developments emanate from the global consensus towards Global Minimum Tax (GMT) and best practices to counter harmful tax practices.

Since the UAE joined the OECD Inclusive Framework on BEPS on 16 May 2018, it has committed to implementing BEPS minimum standards, including Transfer Pricing Documentation and CbCR.

The purpose of CbCR is to eliminate any gaps in information between the taxpayers and tax administrations regarding the information on where the economic value is generated within the MNE Group and whether it matches where the profits are allocated, and the taxes paid on a global level. In the UAE, CbCR requirements apply only to the UAE-headquartered MNE Groups (having a total consolidated revenue that is equal to or more than AED 3.15 billion) with 'financial reporting years' starting on or after 1 January 2019.

According to the UAE Federal Decree-Law No. 47 of 2022 on the taxation of corporations and businesses (CT Law), introducing corporate tax (CT) and TP, companies will become subject to CT from the beginning of their first fiscal year that starts on or after 1 June 2023, with the tax rate of 9% on taxable income above AED 375 million. In line with the upcoming Pillar Two OECD BEPS initiative, large businesses may be subject to 15%.

The UAE TP rules are in line with the internationally accepted OECD TP Guidelines and the arm's-length principle, which aims to ensure that transactions between related parties are carried out as if between independent parties (a 'market value'). Thus, it is vital for companies to take appropriate actions to adhere to the new regulation.

UAE businesses need to prepare and maintain a Master File and a Local File in case any of the following conditions are met:

- Total revenue in a relevant tax period of at least AED 200 million; OR
- Belonging to a multinational group with total consolidated revenue of AED 3.15 billion

TP as a concept is new to many UAE businesses and it is imperative that a thorough analysis should be conducted to evaluate the impact of the CT/TP law accompanied by the implementation. A few aspects which UAE businesses should consider while preparing for the TP regime include:

1. Determine the applicability of TP compliance based on threshold requirements.
2. Identify related parties, connected persons and transactions with them based on criteria such as foreign jurisdiction transactions, presence in free zones, transactions with residents claiming business relief or any other exempt persons.
3. Consider the possibility of forming a tax group to enjoy the benefits of being out of TP scope.
4. Review existing TP policy (if any). In case there is no policy in place, it is essential to set up a robust TP policy (based on functional and risk profiles) with an arm's-length approach.
5. The UAE TP regulations provide flexibility to taxpayers to select either one or a combination of the prescribed OECD methods or to adopt any other method which they deem fit to justify the arm's-length price. This flexibility would reduce the compliance burden on taxpayers.
6. Proactively prepare and maintain Local Files and Master Files to be submitted to the Federal Tax Authority.
7. Prepare and file the TP Disclosure Form to be filed along with the CT return detailing transactions and arrangements with related parties and connected persons; and
8. The existing IT systems should be updated to reflect transactions with related parties and connected persons.

UAE businesses should act now and should be mindful of the TP regulations and prepare themselves for the first reporting period, which is approaching. Evaluation of the TP regulations, including the impact of the UAE CT law, must be assessed to satisfy legislative requirements and mitigate unnecessary administrative and financial burdens.

This article is intended to provide a roadmap for taxpayers to evaluate the impact of new TP rules enacted in the UAE on their business structures to ensure setting up internal processes required for efficient operation, planning and compliance.

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United Kingdom

APAs, ATCAs, MAPs and HMRC Statistics

In February 2023, the HMRC (Tax Authority) published statistics on TP and diverted profits tax for the tax year 2021 to 2022. While the number of APA applications had increased in 2021/22, the number of APAs agreed was lower than in the previous year. A key concern for taxpayers who wish to conclude an APA (or Advance Thin Capitalisation Agreement (ATCA)) is that it often takes a relatively long time to reach an agreement.

Transfer Pricing

The HMRC have a proven track record of challenging TP arrangements which do not result in an appropriate amount of profits being taxed in the UK. 175 enquiry cases were settled in the 12-month period up to 31 March 2022, which is a substantial increase from the 124 cases settled in 2020/21. However, the additional tax revenue generated decreased from £2.162 billion in 2020/21 to £1.482 billion in 2021/22.

Advance Pricing Agreements

APAs are written agreements which are concluded between a business and a tax authority and provide companies with greater certainty about their tax liabilities. In 2021/22, 40 APA applications were made and 20 APAs were agreed. For comparison, in 2020/21, 24 APA applications had been made and agreed. The average time to conclude an APA had increased in recent years from 32.8 months in 2016/17 to 58.3 months in 2021/22.

Advance Thin Capitalisation Agreements

An ATCA is an agreement concluded between a business and the HMRC which sets out how TP rules apply to intra-group funding. ATCAs are unilateral agreements and TP issues can arise with the tax authorities in the jurisdiction where the counterparty is located.

The number of ATCAs agreed declined from 124 in 2016/17 to only 7 ATCAs in 2021/22. The average time to conclude an ATCA increased from 14.9 months in 2016/17 to 44 months in 2021/22.

In 2017, Corporate Interest Restriction ("CIR") rules had been introduced in the UK which can restrict interest deductions to a lower amount than would have been permitted under the arm's-length principle. One reason for the diminished interest in ATCAs is that some taxpayers may have chosen not to apply for an ATCA following the introduction of these rules.

Mutual Agreement Procedures

MAPs allow taxpayers to resolve double taxation by means of consultation and agreement between the concerned tax administrations. In 2020–21, 96 new MAP cases were admitted to HMRC, which is close to the average number of 96.4 new cases admitted over the preceding five years. HMRC resolved 131 cases in 2020/21, almost twice the number of 67.2 cases which were resolved on average over the preceding five years. The average time to resolve a case decreased from 34.4 months in 2020/21 to 21.1 months in 2021/22.

It should be noted that MAP applies to other issues as well as TP. The HMRC-published figures relate only to TP and PE profit attribution.

Diverted Profits Tax

The DPT regime targets contrived arrangements which MNEs might use to minimise their tax liabilities in the UK. Companies must notify HMRC if they have arrangements that potentially fall within the scope of the DPT legislation. In 2021/22, HMRC received 30 DPT notifications and DPT in a net amount of £198 million. The additional tax from TP settled investigations into DPT (primarily corporate tax) was £453 million.

Closing comment

Taxpayers who wish to use MAPs, ATCAs or APAs should be mindful that these often take time to complete. In 2021/22, the average time to resolve a MAP case was 1 year and 9 months. The average time to reach agreement was 3 years and 8 months for ATCAs and 4 years and 10 months for APAs.

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Glossary

AO	Abgabenordnung (fiscal code)
APA	Advance Pricing Agreement
ARS	Argentine Revenue Service
ATO	Australian Taxation Office
BEPS	Base Erosion and Profit Shifting
CBA	Cross-border arrangements
CbC	Country-by-Country
CbCR	Country-by-Country Reporting
CGI	General Tax Code (French: *Code général des impôts*)
CIT	Corporate Income Tax
CIF	Cost-Assurance-Freight (CIF)
CIR	Corporate Interest Restriction
CT	Corporate Tax
CUP	Comparable Uncontrolled Price (Method)
CSJN	*Corte Suprema de Justicia de la Nación* (National Supreme Court of Justice)
DCIT	Dutch Corporate Income Tax
DCITA	Dutch Corporate Income Tax Act
DGID	General Directorate of Taxes and Domains (French: *Direction générale des impôts et des domaines*)
DPT	Diverted Profits Tax
EU	European Union
FOB	Free on Board
FY	Financial Year
GAufZV	*Gewinnabgrenzungsaufzeichnungs-Verordnung*
GMT	Global Minimum Tax
GRI 207	Global Reporting Initiative's Sustainable Reporting Standards Disclosure 207
HMRC	His Majesty's Revenue and Customs (Tax Authority)
IP	Intellectual Property
ITAT	Income Tax Appellate Tribunal
ITL	Argentine Income Tax
LF	Local File
MAP	Mutual Agreement Procedure
MF	Master File
MNE	Multinational Enterprise
NSA	Supreme Administrative Court (Polish: *Naczelny Sad Administracyjny*)
NTI	National Tax Information
OECD	Organisation 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
SM	Small and Medium Enterprise
TNMM	Transactional Net Margin Method
TP	Transfer Pricing
UN	United Nations
VAT	Value Added Tax
WSA	Voivodeship Administrative Courts
ZATCA	Zakat, Tax and Customs Authority

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About WTS Global

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