

# 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 2021.

In this latest edition, our colleagues from 13 countries provided an update on recently introduced legislations and cases; in particular, the adoption of certain OECD guidelines. Additional developments in the field of transfer pricing, including the implementation of the BEPS into the laws of the various countries, are presented.

### Europe

In **France**, to deduct the full amount of intergroup interests, a French company must prove that the paid interests are not excessive. Our French colleagues outline some of the principles behind this regulation.

In **Spain**, the settlement of tax disputes in the European Union has been implemented into Spanish domestic law.

The **Swedish** Tax Agency has issued new guidance on financial guarantees. Swedish taxpayers can now rely on the OECD approach as suggested in Chapter X.

Our **Ukraine** colleagues explain Law 466-IX that has introduced comprehensive changes within the Ukrainian tax code, including the implementation of the BEPS three-tier reporting standard.

### Further Countries

In **Argentina**, the Argentine Revenue Service has added new transfer pricing documentation requirements for operations with intermediaries. More specifically, the requirements for transfer pricing documentations have been extended with a focus on imports and exports through international intermediaries.

**Chile's** Internal Revenue Service published Resolution 101, which incorporates two new affidavits regarding transfer pricing compliance, which must be submitted by the taxpayer in certain cases.

Our colleagues in **Costa Rica** explain recent updates in local tax law affecting transfer pricing and provide three examples on how the tax administration has adjusted the mentioned decrees.

The Central Board of Direct Taxes in **India** has issued a detailed Guidance on MAPs for the process to be followed by Indian authorities, and also guidance on issues related to MAPs.

In **China**, the Administration of Taxation has released the 2019 APA report, which serves as a practical guidance and manual for the companies interested in an APA.

The contribution from **Nigeria** sheds light on the transfer pricing decision of the Nigerian tax appeals tribunal about compliance in connection with the arm's length principle, APAs and corresponding adjustments.

**Senegal** signed the Multilateral Convention to modify existing bilateral tax treaties so as to implement the BEPS measures and reduce the possibilities of tax avoidance.

The **Taiwan** Ministry of Finance announced draft amendments to the regulations governing the assessment of income tax on non-arm's-length transfer pricing. The amendments refer to the OECD Transfer Pricing Guidelines.

In **Vietnam**, the government has issued new decrees to introduce a change of the acceptable arm's-length range and adjust the filing obligations of country-by-country reporting.

Yours sincerely,

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## France



### Proof of the interest rate applied between related companies

Under treasury agreements, cash loans between related companies are common.

Interests paid between related companies are normally deductible up to the limit of the annual average of the average effective rates charged by credit institutions for variable-rate loans granted to companies. However, interests may be deducted based on the rate, if it is higher, that the borrowing company could have obtained from independent financial institutions or organisations under similar conditions. It is then up to the borrowing company to justify this rate by any means.

Since 10 July 2019, the French Supreme Court had softened the burden of proof by allowing companies to use **bond benchmarks** to demonstrate the arm's-length nature of an intra-group interest rate if issuing bonds is a realistic alternative to an intra-group loan. Subsequently, the Administrative Court ruled that the company demonstrated that the interest rate was not excessive in relation to the yield on bonds issued by companies in comparable economic conditions (*SAS Wheelabrator Group*, 6 December 2019) by stating that the Supreme Court referred to OECD principles.

However, the Court does not provide any details on the notions of "comparable economic conditions" or a "realistic alternative to an intra-group loan", so the probative force of the comparable presented by the companies is examined on a case-by-case basis.

Thus, the Paris Administrative Court of Appeal (*Apex Tool Group*, 10 March 2020) refused to deduct interests on a loan between related companies when the credit rating assigned to the loan did not correspond to the **intrinsic situation of the borrowing company**. The Court maintained that the grade took into account the aggregated financial statements of the sub-group that this company formed with four of its subsidiaries and sub-subsidiaries. In other words, it is allowed to refer to companies provided they have "comparable economic conditions". However, this condition cannot be regarded as fulfilled for the companies where it is only explained, on the one hand, that they have credit ratings close to those attributed to the borrowing company's loan, and, on the other hand, that they have gone to the bond market for transactions with the same duration and maturity.

Recently, the Paris Administrative Court of Appeal also rejected the comparable used (*Willink*, 23 September 2020) since the level of risk used as a comparison tool was based on a statistical model that took into consideration some historical quantitative data from companies that are not representative of the market - with defaulting companies being over-represented - and was determined on the basis of only around ten pieces of financial data.

**Thus, for deducting interests paid to affiliated entities, the French company must prove that the interest rate it pays is the one that it could have obtained from independent financial institutions or organisations. The company can succeed in proving that the rate is not excessive by using the yield on bonds issued by companies in comparable economic conditions.**

As can be seen from the case law mentioned above, lower Court judges maintain a very narrow interpretation regarding the evidence that the borrowing company must furnish so as to justify the market rate of its intra-group loans. However, the French Supreme Court seems to have a more flexible position on this matter.

On 11 December 2020, the French Supreme Court ruled a case in which the company BSA presented 3 different supporting documents justifying that the intra-group rates applied did not exceed the average effective rates applied by the banks. Indeed, the rates applied were the result of the addition of three elements: the fixed rate resulting from an interest rate swap contract based on the variable rate that constitutes the lender's cost of funds – produced by the company Bloomberg – (i), the cancellation premium rate, which is the counterpart of the right to prepayment with which the loans were associated (ii), and the credit line – produced with the Riskcalc software developed by the rating agency Moody's – (iii).

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**The French Supreme Court annulled the Court of Appeal's judgment because it considered that the Court of Appeal had rejected the supporting documents submitted to it without providing sufficient justification for said rejection.**

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**This recent decision demonstrates a more flexible position of the French Supreme Court, which reminds the lower Courts that when rejecting supporting documents presented to them, they must substantiate their rejections.**

## Spain



### Transposition of directive 2017/1852, of the council of 10 October 2017, relating to the integration of mechanisms or the resolution of tax disputes in the European Union into Spanish domestic law

In Spain, the incorporation of Directive 2017/1852 of the Council, 10 October 2017, on the mechanisms for the resolution of tax disputes in the European Union took place through the approval of Royal Decree - Law 3/2020 of 4 February 2020, on urgent measures that incorporated into Spanish law various European Union directives in the field of public contracting in certain sectors; private insurance; pension plans and funds; taxation and tax disputes.

This has involved:

- the modification of the Non-Resident Income Tax Law (LIRNR),
- the modification of Law 29/1998, of 13 July, regulating the Contentious-Administrative Jurisdiction (LJCA) and
- the draft amendment to the Mutual Agreement Procedure Regulations approved by Royal Decree 1794/2008, of 3 November, in the process of public consultation, pending approval.

### Modification of the LIRNR

- It extends its scope to the new procedures provided for in Directive 2017/1852.
- It establishes the suspension of internal review appeals while MAP is substantiated and until its completion with respect to the elements of the tax obligation subject to MAP.
- On the contrary, in the case of challenging sanctions, the suspension of MAP processing is established until the internal appeal against the sanction is finally resolved, when these sanctions exclude access to the arbitration phase of the mutual agreement procedure and, specifically, in the case of the mutual agreement procedure provided for in Convention 90/436/EEC. Here, the existence of a final sanction would prevent access to MAP or, where appropriate, would imply its termination.

For this purpose, the sanction cases are defined in the Spanish regulations: tax crimes, serious and very serious offences.

- It deletes the reference to the non-accrual of interests during the processing of MAP.
- It establishes the competence of the Central Economic Administrative Court (TEAC) to constitute the arbitration commissions.

### Modification of the LJCA

It establishes the suspension of contentious-administrative appeals while MAP is being processed and until completion with respect to the elements of the tax obligation subject to MAP.

On the contrary, the pre-eminence of challenges against the sanctions is established and therefore, not the suspension of the contentious-administrative appeal against them, but the suspension of the processing of MAP, when the existence of these prevents access to that arbitration phase and, specifically in MAP regulated under Convention 90/436/EEC.

### Project for the modification of the Mutual Agreement Procedure rules

Lastly, the incorporation of the Directive at a regulatory level will be reflected in the future modification of the Regulation of Mutual Agreement Procedures, currently being edited, which will entail the adaptation of MAP processing to the provisions of the Directive so as to improve and homogenise them, the incorporation of the regulation of the new MAP provided for in the Directive, as well as the possibility of opting for the latter, even if the procedure was initiated under the two pre-existing possibilities (MAP provided for in the DTI (Double Taxation Agreements) or MAP regulated under Convention 90/436/EEC).

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## Sweden



### New guidance on financial guarantees

The Swedish Tax Agency ("STA") has issued new guidance on financial guarantees with reference to the published Chapter X by OECD about financial transactions, replacing previous guidance on the same topic issued in 2007.

In earlier Swedish case law (12 cases primarily from 1998 – 2004), no compensation had to be paid to Swedish companies providing financial guarantees to subsidiaries and group companies, as the provision of financial guarantees was not considered a standard part of the business of the Swedish companies, and because the Swedish companies did not have

any costs relating to the issued guarantee. In one scenario, the Swedish company's taxable result was adjusted on the basis of the Swedish arm's-length rule, because the Swedish company had itself incurred costs in relation to the provided guarantee but had not charged its subsidiary for the provided guarantee.

The STA acknowledges that the Swedish case law was issued during a time when guidance regarding intra-group financing was limited and that it is obsolete as of today. Furthermore, the STA states that guidance regarding intra-group financing should be found in Chapter X. In addition to previous guidance, which was limited to guarantees paid to shareholders and did not affect how other types of financial guarantees should be treated, the STA confirms that the arm's-length principle should be applied in all situations, including situations of tax deductibility where foreign companies have provided the Swedish company with a guarantee.

We welcome the STA's guidance as it clarifies an issue where there has been uncertainty for a longer period than necessary. Swedish taxpayers - both recipients and providers of guarantees - can now rely on the OECD approach as suggested in Chapter X when assessing the arm's-length value of a guarantee provision.

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## Ukraine



### New business purpose test in Ukrainian tax law

The Ukrainian tax code has contained the definition of the reasonable economic purpose (business aim) of transactions since its adoption back in 2010. Yet this definition was unclear, and the methods for its practical application were limited.

Law 466-IX (in force since May 2020) introduced comprehensive changes into the Tax Code of Ukraine including the implementation of the BEPS three-tier reporting standard. Alongside these important changes, the rules on business purpose were also amended.

According to the definition, a "reasonable economic purpose (business aim)" is that which may occur if a taxpayer aims at reaching a certain economic goal as a result of business activities.

Law 466-IX supplemented this definition with the explanation of what such an economic goal may be and which transactions should be deemed as not having "reasonable economic purpose". An economic goal (effect) particularly but without limitation should mean an increase (saving) of the taxpayer's assets and/or of their value in the future.

At the same time, for taxation purposes a transaction with a non-resident is considered not to have a reasonable economic purpose if:

- Its principal aim or one of them is non-payment (underpayment) of taxes and/or a decrease of the profit tax base.
- In comparable circumstances, an entity would not be prepared to sell (purchase) such goods, works or services, intangible assets, or other items from an unrelated party.

The Law 466-IX also specified how the business purpose test may influence the tax position.

Thus, new adjustment of the profit tax base was introduced into Article 140.5 of the tax code. According to this, the taxpayer shall increase the amount of taxable profit by the amount of expenses incurred in transactions with non-residents if such transactions lack a business purpose. The burden of proof here lies with the tax office.

In other words, in Ukrainian interpretation the business test would be applicable to any purchases from non-residents. And if the tax office challenges the business purpose, such expenses may be disregarded when calculating the profit tax base.

The only difference for the transactions falling under TP control is that taxpayers will have to add to their TP documentation a justification of the business purpose of expenses for services, works, IP and other items that are not goods. Respective amendments were introduced into Article 39 of the tax code setting forth Ukrainian TP rules. Hence, for the controlled transactions the burden of proof effectively lies with the taxpayer.

The effective date of this material is considered by the Ukrainian Parliament to be draft law 4065 of 09/07/2020. According to this draft law, the application of the business purpose test would be limited to transactions with goods, works, services and the payment of royalties in controlled transactions with related non-residents or non-residents which are subject to TP control because they fall under the list of "low tax" states (territories) or the list of organisational forms of non-residents, adopted by the Cabinet of Ministers of Ukraine.

To conclude, irrespective of the adoption of the above draft law, taxpayers subject to TP control or dealing with non-residents from one of the lists of the Cabinet of Ministers should be prepared to provide justification of the business purpose of expenses. If these amendments are not passed, then the same is valid for any Ukrainian taxpayer dealing with non-residents.

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## Argentina



### Argentina adds new transfer pricing documentation requirements for operations with intermediaries

The milestone of 2020 is certainly the enactment of the new transfer pricing regulations. On 15 May, the Argentine Revenue Service ("ARS") released the much-awaited general resolution 4717 ("GR 4717").

In this regard, GR 4717 introduces new transfer pricing documentation requirements, including a TP report, master file and annual transfer pricing form. The minimum requirements of the TP report and the master file are generally consistent with the OECD standards, but with some deviations, such as the mandatory use of the local taxpayer as the tested party.

GR 4717 particularly focuses on transactions of imports and exports of goods carried out through international intermediaries. Taxpayers that carry out transactions of imports or exports of goods through international intermediaries must obtain and keep the following documentation regarding such foreign intermediaries:



- Evidence providing the actual presence of the intermediary in its territory of residence according to the regulation of that jurisdiction, having to demonstrate its registration as a legal entity, commercial or similar registration in the country and its registration with the tax authorities of such jurisdiction.
- Audited financial statements
- Certification issued by a competent professional in the jurisdiction of the international intermediary, certifying the detail of the direct taxes to which the entity is subject in such jurisdiction, and the tax identification of the entity in the jurisdiction of residence.
- Certification issued by a competent professional in the jurisdiction of the international intermediary, certifying both the remuneration of the international intermediary related to its intervention in the transactions and – if the international intermediary is a related party – also certifying the details of the purchase and selling prices, and expenses associated with the transactions.

As you may note, GR 4717 increases the documentation burden for a greater number of taxpayers alongside the complexity of the required studies, as well as the process for submitting the documentation on an annual basis. The detailed process of submitting transfer pricing documentation will require a solid coordination between the local taxpayer, its advisors, and the parent company. Companies should consider increasing their resources as they strive to comply with local requirements.

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## Chile



### Adoption of new transfer pricing requirements: master file & local file

On 31 August last year, Chile's Internal Revenue Service (SII) published Resolution 101, which incorporates two new affidavits ("annual master file affidavit-F1950" & "local file affidavit-F1951") regarding transfer pricing compliance. The scope and content of these new requirements are in line with the commitments agreed in Action 13 of the BEPS Action Plan, and imply a large amount of information. These efforts are intended to fully align Chile with the global trend of greater fiscal transparency in multinational transactions.

The master file affidavit (F1950) must be submitted by the following taxpayers:

- Parent or controlling entity of the Multinational Enterprise (MNE) with residence in Chile, to the extent that the consolidated revenue of the MNE is at least EUR 750 billion as of 31 December of the reported year; or
- The entity belonging to the MNE with residence in Chile that has been designated as the sole substitute to file the CBC report affidavit, on behalf of the parent or controlling entity.

Additionally, an Annex must be submitted online to F1950, referring to the descriptive information of the annual master file such as: (i) Information on the main activities of the MNE, supply chain analysis, main geographic markets, risk & functional analysis for each entity of the MNE and business reorganisation operations; (ii) Information regarding intangible assets of the MNE, global strategies, transfer pricing policies and some relevant details about intangible assets within the MNE; and (iii) information regarding financial activities of the MNE and description of financing sources and centralised financing if this is the case.

On the other hand, the local file affidavit (F1951) must be submitted by the taxpayers:

- Considered within the segment of "large companies"<sup>1</sup>;
- The parent or controlling entity of the MNE had to file the CBC report in Chile or abroad; and
- Having carried out operations for amounts greater than CLP 200 billion (approx. EUR 216 million) with related parties abroad.

Among the items to be declared online in this F1951: organisational structure; business strategies, main competitors; chain value analysis; business restructuring activities; contractual support between the local entity and its related parties; transactions and its benchmarking analysis with related parties, individual annual financial statements of the local entity and full financial information of the comparable used in the benchmarking analysis.

Finally, the deadline for submitting the aforementioned annual affidavits and their annexes will expire on the last business day of June of the respective year, with regard to the operations carried out during the immediately preceding business year. This term may be extended only once, for up to three months.

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## Costa Rica



### Transfer pricing update for Costa Rica

#### Transfer pricing – tax provision updating

Before the amendments made to the Income Tax Law (ITL) on 1 July 2019, the arm's-length principle was in a decree of transfer pricing.

Even prior to the amendments, the transfer pricing rules applied for corporate income tax purposes. There were issues regarding the principle of legality, however they were not accepted by the Tax Administration (TA), the Administrative Tax Court (TFA), the Judicial Tax Court, and even the Constitutional Chamber of the Supreme Court recognised their application throughout these years, even if they were not included in the law, but a decree.

Regarding the formal obligations, the TA has not issued the regulations to make the taxpayers comply with the informative tax returns about transactions, functions, shareholders' chart, and related entities outside of Costa Rica (CR).

#### Recent cases

##### TFA 256-P-2020

The TA adjusted the prices between related entities and made a bracket for the comparable periods of 3 years.

The taxpayer appealed and said that the OECD rules do not include a range of comparable information and that the correct way should be to obtain the info and do the test for several years.

1 According to the criteria established in Exempt Resolution SII No. 76 dated 23 August 2017.

#### TFA 463-P-2020

The TA has adjusted the prices between related entities about the sales and compared the CR entity's net margin with the USA entity, making a bracket for the comparable periods of 3 years.

The taxpayer (agriculture sector) appealed and said that the TA did not take into account the weather – economic cycle issues in CR, e.g. if the weather in the USA was favourable for the plantations and not for CR, it would be understandable that CR's entity would incur fiscal losses.

In fact, the ITL deems the fiscal losses as deductible expenses; the taxpayer can use them during the following 5 years, so the ITL has a broader recognition of the existence of economic/agriculture cycles.

#### TFA 07-P-2020

The TA adjusted the expenses regarding payments of royalties. Previously, the intangible assets had been transferred to the entity that exploits the trade brand. The TA said the expense did not proceed based on the fact that the shareholder was the same for the two entities. In this case, they did not accept the transfer pricing rules.

The taxpayer appealed and argued the violation and lack of validation of the transactions between related entities and its eventual fiscal impact on joint transactions.

In this case, the relation among affiliated entities was deemed as tax fraud.

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## India



### Updates on the Mutual Agreement Procedure (MAP)

The Central Board of Direct Taxes (CBDT) issued a detailed Guidance on MAP in August 2020 for the process to be followed by an Indian Competent Authority (CA) and field officers, and comprehensive guidance on issues related to MAP processes.

#### Key features

##### Part A – Procedural guidelines and conditions for a MAP application

- MAP application to be filed within 3 years from the first notification of the action giving rise to taxation, not in accordance with the relevant tax treaty.
- CAs shall endeavour to complete the MAP case within 24 months.

##### Part B – Access and denial of MAP

###### Access to MAP is available:

- When a taxpayer faces issues due to transfer pricing adjustments, determination of existence of a permanent establishment and attribution of profits thereof, re-characterisation of income or expenses (royalty or fees for technical services or interest), domestic anti-abuse provisions invoked by Indian tax authorities, etc.

CAs in India would provide access to MAP and request CAs of treaty partners to furnish correlative relief when some outcome has been agreed in the situations below:

- Where the taxpayer has entered into a Unilateral Advance Pricing Agreement with CBDT
- Where the taxpayer has applied safe harbour provisions and return of income is accepted by the tax authorities; and
- Where the Income-Tax Appellate Tribunal in India has passed an order regarding the same issues/years that are also being examined under MAP.

#### **Denial of access to MAP**

- If CAs in India conclude that the objection raised by the taxpayer on the action taken by the tax authorities is not justified.
- In the case of incomplete MAP application/documents/information.
- If income-tax settlement commission has passed a settlement order or if the Authority of Advance Ruling has ruled on the same issues under a MAP application.
- In respect of issues that are purely governed by India's domestic law.

#### **Part C – Guidelines on procedural technicalities**

- MAP resolution cannot reduce the returned income. However, in respect of MAP cases involving adjustments made by tax authorities of a treaty partner, CAs in India may go below the returned income of the Indian taxpayer so as to implement the MAP resolution.
- CAs in India may resolve recurring issues based on the same principles, as adopted in a prior MAP resolution, if a separate application is filed for each year.
- Under MAP, CAs in India cannot consider consequential issues such as disputes relating to interest and penalties, as these will continue to be administered under the domestic laws.
- CAs in India are now required to cover the secondary adjustments in the MAP resolution.

#### **Part D – Guidelines on implementation of MAP**

- The intimation of acceptance of MAP resolution by the taxpayer to be made in 30 days.
- The tax office to make the MAP resolution effective within one month from the end of month in which it receives the letter from the Indian CA.

#### **Updates on tolerance range**

Recently, on 19 October 2020, the Government of India retained the tolerance range applicable for transfer pricing for fiscal year 2019-20 at 1% for wholesale trading and 3% for all other cases.

## China



### China publishes annual APA report

On 29 October 2020, China's State Administration of Taxation released the "2019 Advanced Pricing Arrangement Annual Report" (2019 APA report). The 2019 APA report introduces the latest TP policies, application procedure and statistics of the China APA program by 2019, which also serves as a practical guidance and manual for the companies interested in an APA.

#### More APA cases signed

2019 has seen increased efficiency in dealing with APA applications. By 2019, China has signed a total of 101 cases of unilateral APAs, and 76 cases of bilateral APAs. In 2019 alone, 12 unilateral APAs and 9 bilateral APAs were signed, a record high in the APA history.

#### Average time to settle an APA

According to the report, almost 90% of unilateral APAs and 62% of bilateral APAs can be settled within 2 years after the APA applications have been officially submitted. Nevertheless, the process is still characterised by a long pre-negotiation period. Pre-negotiation may be influenced by many factors, such as the quality of the information, the nature of the transactions and the extent of disclosure, etc. In 2019, the APA pre-negotiation requests have doubled with a surprising 77 cases (2018: 39 cases). New APA applicants may need to expect more waiting time due to the considerable backlog.

#### More focus on services and intangibles

More than 60% of the signed APA cases are for tangible assets transfer. Yet there is a rising trend of APAs in service transactions (21.72%) and intangible transactions (17.62%). This corresponds with the recent Chinese developments in service sectors, and focus on non-tangible transactions, such as R&D services, intangible assets and marketing activities.

#### Diversified transfer pricing methods

The transactional net margin method is still the most widely adopted transfer pricing method in APAs. However, the Chinese tax authority is open to accepting more complicated methods such as the profit split method (2019: 5 cases). After all, Chinese entities are assuming more important roles than ever in group value creation these days and are calling for more complicated methods for profit allocation.

#### Our observation

The Chinese tax authorities have gone to considerable efforts to process APA applications, such as building a professional team with well-founded experience in transfer pricing and anti-tax avoidance, improving the transparency and convenience of APAs, and shortening the time for concluding the APA cases. More companies with substantial related-party transactions can have access to the Chinese APA programme so as to obtain more taxation certainty.

Besides, companies having on-going APAs, but who were severely impacted by special events such as COVID-19 or the trade war, need to report to the tax authority in a timely manner, and request any offered flexibility with regard to APA implementation.

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## Nigeria



### Averting penalties on TP transactions by means of proper TP compliance

Part 2 of the Income Tax (transfer pricing) Regulations 2018 (TP Regulations) focuses on compliance with the arm's-length principle, Advanced Pricing Agreements and corresponding adjustments. Section 5 of the TP regulations clearly cites that in determining whether a transaction is compliant with the arm's-length principle, such a transaction must be guided by the available TP methods as listed thereunder.

The determination of the appropriate TP method is key to averting penalties on TP-related transactions, as once a method for a specific transaction has been chosen, the parties are expected to maintain the use of this appropriate TP method until such a time as the available variables are no longer in alignment and would therefore prompt a change to the applicable method. Both the OECD guidelines and the UN manual on TP emphasise the need for consistency in the applicable method. The Tax Appeal Tribunal ("TAT") in the case of Prime Plastichem Nigeria Limited (PPNL) v. FIRS ruled in favour of the tax authorities by affirming the additional assessment, penalties and interest raised against the appellant. The Appellant in the above-mentioned case (PPNL) was inconsistent in the TP method adopted for its transactions and may have triggered an assessment on its transaction. In effect, parties involved in TP-related transactions are expected to carry out diligent TP comparability analysis and benchmarking studies to ensure that the TP method adopted conforms with the regulations, OECD Guidelines and UN Manual. Specifically, the OECD and UN comprehensively provide a framework position on how parties may determine an appropriate method for TP transactions. The frameworks suggest which TP method is most suited for which transactions. The choice of TP method is to be decided after a proper comparability analysis on each TP method and its effect on the transaction given all available and reliable information.

Alternatively, the TP regulations of 2018 make provisions for parties to enter into Advanced Pricing Agreements ("APA" or "Agreement"). This entails connected parties entering into an agreement with tax authorities to establish a set of criteria for which arm's-length may be determined on a certain future transaction. The regulation provides that the request for such agreement must be accompanied by a document showing the scope of the transaction, its functional analysis, the assets and risk involved and duration of the agreement.

A significant advantage to such agreements is that the parties involved and the tax authorities already have an understanding on the appropriate TP method and so there can be no further assessment due to the use of an inappropriate TP method as in the case of PPNL v. FIRS.

#### Conclusion

With the decision of the TAT in the case in question, Nigeria's TP regime can be said to be in full motion; the laws regulating TP-related transactions have now been widened by the companies' income tax (Significant Economic Presence) order of 2020. Admittedly, TP compliance and obligations are rigorous and shrouded with considerable uncertainty. Averting TP penalties requires diligent compliance with TP obligations. This summarily entails proper TP planning and prompt preparation. At the core of a connected party's business operation it is expected that its tax consultants have a well-founded understanding of the complexities of TP and that their operation is in compliance with Nigeria's TP regulations.

## Senegal



### The Multilateral Convention of OECD BEPS project: Senegal's position and its impact on its bilateral DTTs

Within the framework of the OECD Convention on Mutual Administrative Assistance relating to Taxation, Senegal has signed the Multilateral Convention called **MLI**.

The purpose of the MLI is to modify existing bilateral tax treaties so as to implement the BEPS measures by "preventing the abusive use of treaties, improving dispute resolution, preventing the artificial avoidance of permanent establishment status, neutralising the effects of hybrid mismatch arrangements", reducing the possibilities of tax avoidance.

Based on the flexibility guaranteed by the MLI and which makes it possible to consider the specific tax policies relating to tax treaties, Senegal, when signing the MLI, has expressed some reservations and adopted a position on a certain number of provisions of the said MLI.

For the purposes of this newsletter, we outline the ones we consider to have a significant impact on the current international tax rules applicable in Senegal.

#### The DTTs notified by Senegal as covered tax agreements

In accordance with Article 2 of the MLI, Senegal has informed the OECD of the below-mentioned DTT it has signed as the covered tax agreements.

We split the DTTs in two parts:

- First category: the DTTs currently in force that Senegal has concluded with Mauritania, France, Tunisia, Belgium, Norway, Qatar, Italy, Canada, Lebanon, Morocco, Spain, Malaysia, Portugal, the United Kingdom and the Grand Duchy of Luxembourg.
- Second category: the DTTs concluded with Egypt, Kuwait, the United Arab Emirates and Turkey, which have not yet been ratified until now.

It should be noted that Senegal, being aware that the DDT it has signed with Mauritius is not in its favour and the tax provisions are disadvantageous for the country, has decided to end said DTT which was among the covered tax agreements it had notified the OECD about.

#### The method for elimination of double taxation chosen by Senegal

In its Article 5, the MLI provides three (3) methods for elimination of double taxation. Therefore, the signatory States are free to choose the option that suits them.

Senegal has chosen to apply option C which allows a foreign resident to be able to deduct the tax they have paid in Senegal from the amount of income tax that they must pay in their country of origin.

Such deduction shall not, however, exceed that part of the income tax or capital tax, as computed before the deduction is given, which is attributable to the income or the capital which may be taxed in that other contracting jurisdiction.

As such, the bilateral DTTs between Senegal and respectively Belgium and Canada are those which include in their provisions the option C chosen by Senegal.

### **Position of Senegal regarding the prevention of abuse of tax treaties**

Article 7.1 of the MLI provides that "Notwithstanding any provisions of a covered tax agreement, a benefit under the covered tax agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, regarding all the relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the covered tax agreement".

Senegal reserves the right not to apply this Article 7.1 to its covered tax agreements which already set out certain provisions that deny all of the benefits granted if the main purpose or one of the main purposes of a contract or transaction was to obtain those benefits.

In addition, Senegal states that it temporally accepts the application of Article 7.1 and intends to adopt, through bilateral conventions, a limitation rule for benefits when possible, in addition to or in replacement of Article 7.

From these two positions of Senegal, we notice some contradiction which is likely to temporarily lead to controversial interpretations in the tax treatment of transactions that are within the scope of a covered tax agreement.

### **The impact of the ratification of the Multilateral Convention on the bilateral conventions concluded by Senegal**

The MLI potentially modifies any bilateral tax treaty that each of the two signatories shall notify to OECD. Thus, it offers concrete solutions to governments to sort out the shortcomings of the provisions of any bilateral DTT in force by integrating into said DTT the package of measures developed under the OECD/G20 BEPS project.

Each State will therefore have to analyse each provision and make any reservations it deems necessary.

The impact of the MLI provisions on the DTTs will depend essentially on the reciprocity of the positions or options made by the States concerning the covered tax agreement, and for each DTT, the selected articles and/or reservations made.

If the positions of the two signatory States of a bilateral tax treaty converge, the application of the latter would be efficient. Otherwise, the covered tax agreement would be subject to divergent interpretations.

**Note:** Senegal has just signed the MLI but has not yet ratified the same.

However, the draft law authorising the President of the Republic to ratify the MLI has already been adopted by the Council of Ministers on 14 October 2020.

It has been submitted to the vote of the National Assembly. Generally speaking, the ratified treaty is textually the same as the one adopted by the Government.

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## Taiwan



### Draft amendments to transfer pricing assessment rule

On 18 August 2020, the Taiwan Ministry of Finance (MOF) announced draft amendments to the Regulations Governing Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's-Length Transfer Pricing (TP Assessment Rules). The amendments refer to the OECD Transfer Pricing Guidelines (July 2017) (OECD TP Guidelines) and incorporate provisions from the guidelines regarding transactions involving the use of intangible assets and risk assumption to provide guidance for value-chain arrangements of MNEs. The main revisions of the amendments are:

#### Intangible assets – a step towards certainty

Transfer pricing issues relating to intangibles have become a key concern of tax authorities. These were also addressed in the G20/OECD base-erosion profit-shifting (BEPS) action plans. Taiwan's amendments contain changes adopted from the OECD TP Guidelines Chapter VI, which incorporate recommendations in relation to BEPS final reports.

##### → Define "Intangibles"

The current version of the TP Assessment Rules does not provide an explicit definition of "intangible assets", but instead lists various rights (e.g. business rights, copyrights, patents, trademarks, enterprise names and brand names, etc.) as examples. The amendments incorporate the definition of intangible assets from OECD TP Guidelines, which define "intangible" as something which is (a) not a physical asset or a financial asset and (b) meets the following conditions:

- › capable of being owned or controlled for use in commercial activities; and
- › the use or transfer of which would be compensated had it occurred in a transaction between independent parties in comparable circumstances.

##### → Evaluate transactions involving intangible assets' DEMPE functions

The amendments provide the much-needed clarity to evaluate transactions involving intangible assets. Firstly, they include additional factors to be considered when evaluating the degree of comparability of intangible assets, such as terms of transfer, stage of development, and rights to future enhancement. Secondly, they add a detailed functional analysis to identify the parties performing functions, using assets, and managing risks related to development, enhancement, maintenance, protection, and exploitation while evaluating the respective contribution of participants in transactions involving intangible assets.

#### Risk analysis – six steps

In the past, taxpayers and tax authorities have heavily relied on written agreements or documents while determining the arm's-length outcome for risk assumption. The amendments add detailed guidance on steps, considerations, and compensation when conducting risk analysis.

#### Penalty – non-disclosure

To protect the domestic tax base, the MOF decided to lower the threshold on penalties for the non-disclosure of controlled transactions. If a taxpayer fails to disclose all of its controlled transactions and the non-disclosed amount assessed by the tax authority reaches (1)

5% of the taxpayer's annual taxable income and (2) 15% of the taxpayer's annual net operating revenue, the taxpayer would be subject to a fine of at the most two times the amount of the tax evaded as a result of the non-disclosure.

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The amendments are expected to be implemented by the end of 2020. MNEs engaged in commercial activities in Taiwan should review their intercompany arrangements to see if certain transactions have not been disclosed to prevent any possible penalties that may arise.

## Vietnam



### New decrees on transfer pricing

The Vietnamese Government recently issued 2 decrees on TP: Decree 132/2020/ND-CP (**Decree 132**) dated 5 November 2020 which replaces Decree 20 and is valid for the fiscal year 2020 and Decree No. 126/2020/ND-CP (**Decree 126**) dated 19 October 2020.

The fundamental TP regulations on the principles and methods for declaring and determining taxable prices in related-party transactions, esp. on deductible expenses and the cap on loan interest cost deduction remain unchanged. Decree 132 implements the following notable changes:

- Changing the acceptable arm's-length range  
The acceptable arm's-length range is now defined as from the 35<sup>th</sup> percentile to the 75<sup>th</sup> percentile. This was previously for the 25<sup>th</sup> to the 75<sup>th</sup> percentile.
- Strengthening inter-countries exchange: based on the international cooperation on taxation between tax authorities (**TA**), Decree 132 strengthens this regime with the automatic exchange of information on CbCR with foreign TAs based on Multilateral Competent Authority Agreements (**MCAA**) which Vietnam has not joined up to now.
- Obligations to file the CbCR:
  - › If the taxpayer is the ultimate parent company (**UPC**) registered in Vietnam and has a global consolidated revenue of 18k billion VND (around 800 Mio USD) or more in the tax period, a CbCR must be submitted to the tax authority within 12 months after the end date of the fiscal year of the UPC.
  - › If the Vietnamese taxpayer has a foreign UPC then they must submit a CbCR according to the regulations of the country of residence,
    - where the MCAA - Automatic Exchange of Information (**AEOI**) exists and is applicable, the local taxpayer is not required to submit a CbCR.
    - the Vietnamese taxpayer is obliged to submit a CbCR to TA in the following cases:
      - The country where the UPC resides has not signed an MCAA - AEOI with Vietnam at the deadline of submitting a CbCR.
      - The country where the UPC resides has signed the MCAA but has suspended the AEOI or is not automatically provided to Vietnam.

- › If a multinational corporation has more than one taxpayer in Vietnam, and the taxpayer is designated by the multinational corporation to submit a CbCR, then it is obliged to submit the CbCR along with the written notice of designation to the TA before or at the end of the fiscal year of the UPC.

It is noted that Vietnam is preparing for the era of AEOI, even if it has not yet been implemented.

Decree 126 details the Law on Tax Administration. It recognises the commercial database provided by data business organisations and has a more specific definition on the permitted sources to be used by both taxpayers and TA.

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As Decree 132 takes effect from 20 December 2020 but applies for the fiscal year 2020, taxpayers must re-evaluate their TP strategy for 2020.

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## Glossary

<b>AEOI</b>	Automatic Exchange of Information	<b>DEMPE</b>	Development, Enhanceme, Maintenance, Protection and Exploitation
<b>APA</b>	Advance Pricing Agreement	<b>DTT</b>	Double Tax Treaty
<b>ARS</b>	Argentine Revenue Service	<b>EBIT</b>	Earnings before Interest and Taxes
<b>ATAD</b>	Anti-Tax Avoidance Directive	<b>EBITDA</b>	Earnings before Interest, Tax, Depreciation and Amortisation
<b>BEPS</b>	Base Erosion and Profit Shifting	<b>EEC</b>	European Economic Community
<b>CA</b>	Competent Authority	<b>EU</b>	European Union
<b>CbC</b>	Country by Country	<b>FTA</b>	German Foreign Tax Act (AStG)
<b>CbCR</b>	Country by Country Reporting	<b>FY</b>	Fiscal Year
<b>CBDT</b>	Central Board of Direct Taxes	<b>GPM</b>	Gross Profit Margin
<b>CIT</b>	Corporate Income Tax	<b>GR 4717</b>	General Resolution 4717
<b>CR</b>	Costa Rica	<b>IC</b>	Intercompany
<b>CUP</b>	Comparable Uncontrolled Price (Method)		

## Glossary

<b>IP</b>	Intellectual Property	<b>PE</b>	Permanent Establishment
<b>ITL</b>	Income Tax Law	<b>PLI</b>	Profit Level Indicator
<b>LF</b>	Local File	<b>PPLN</b>	Prime Plastiche Nigeria Limited
<b>LICA</b>	Contentious-Administrative Jurisdiction	<b>RPM</b>	Resale Price Method
<b>LIRNR</b>	Non-Resident Income Tax Law	<b>SII</b>	Chile's Internal Revenue Service
<b>LTA</b>	Vietnam Law on Tax Administration	<b>STA</b>	Swedish Tax Agency
<b>MAP</b>	Mutual Agreement Procedure	<b>TA</b>	Tax Administration
<b>MCAA</b>	Multilateral Competent Authority Agreements	<b>TAT</b>	Tax Appeal Tribunal
<b>MF</b>	Master File	<b>TEAC</b>	Central Economic Administrative Court
<b>MLI</b>	Multilateral Convention	<b>TFA</b>	Administrative Tax Court
<b>MNE</b>	Multinational Enterprise	<b>TNMM</b>	Transactional Net Margin Method
<b>MNEG</b>	Multinational Enterprise Group	<b>TP-Assessment Rules</b>	Regulations Governing Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's-Length Transfer Pricing
<b>MOF</b>	Taiwan Ministry of Finance	<b>TP</b>	Transfer Pricing
<b>OECD</b>	Organization of Economic Cooperation and Development	<b>UPC</b>	Ultimate parent company
<b>OECD Guide-lines</b>	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations	<b>VAT</b>	Value Added Tax
<b>OECD MTC</b>	Model Tax Convention on Income and Capital		

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