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WTS Transfer Pricing Newsletter

Editorial

Dear Reader,

It is our pleasure to present the first edition of our WTS Transfer Pricing Newsletter in 2019.

The global transfer pricing environment is changing in a dynamic way. To keep you up-to-date, our WTS Transfer Pricing Newsletter therefore gives you an overview of current transfer pricing developments in selected countries.

We hope you will find this newsletter useful and we would appreciate your feedback and suggestions.

Experts at the WTS Global TP team will be happy to answer any questions you may have regarding any aspects of this newsletter.

Yours faithfully,

WTS Global Transfer Pricing Team

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

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Australia

Australia introduces new Transfer Pricing Guideline for "inbound distributors"

The Australian Tax Office (ATO) is aggressively challenging the transfer pricing arrangements of foreign-owned multinationals operating in Australia. This ATO focus is attracting significant public and media attention, as the cross-border dealings of multinationals and the role of their "Big 4" advisors (who provide both legal and non-audit services) have become front-page news in Australia.

One particular area of focus is the transfer pricing arrangements involving inbound Australian distributors as set out in a draft ATO Guideline: Transfer pricing issues related to inbound distribution arrangements (PCG 2019/1).

What is an inbound distributor?

An inbound distributor is an Australian business that predominately distributes goods purchased from related foreign entities for resale, primarily to business-to-business customers, not end consumers.

ATO approach – 3 risk zones

The ATO has identified 3 risk zones: high, medium and low. If inbound distribution arrangements are identified as high risk, the ATO has suggested they will engage in activities such as monitoring the transfer pricing arrangement or commencing a review on an entity.

How does the ATO assess inbound distribution arrangements?

The ATO compares the profit achieved by the arrangement against profit markers identified by the ATO for specific industries. The measurement the ATO will use to analyse the profit achieved by an inbound distributor is **Earnings before Interest and Tax (EBIT) relative to sales.** The ATO will assess these profit markers on an industry basis as summarised below.

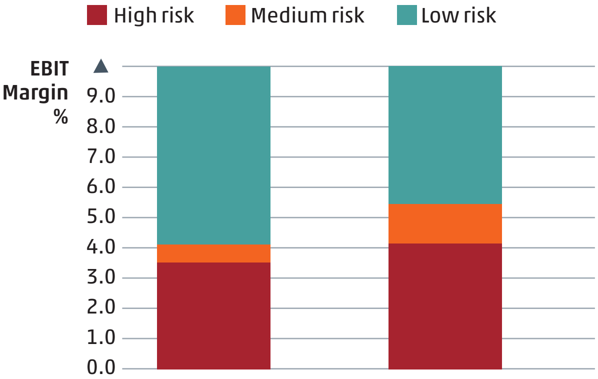
1. **General distributors:** Entities from a wide range of sectors would fit into this category.

2. **Life science:** Entities engaged in the discovery, development, production, sales and marketing of medicine, separated into three categories:
   Category one: Distribution of life science products, including detailing, marketing, logistics and warehousing.
   Category two: Activities specified in category one, and activities associated with regulatory approval, market access or government reimbursement.
   Category three: Activities specified in categories one and two, and specialised technical services such as training in surgical procedures involving medical devices.

3. **Information and communication technology (ICT):** Computer hardware and software products and any services related to technology, separated into two categories:
   Category one: Entity engaged in the distribution of ICT products.
   Category two: Entity engaged in activities specified in category one, and any other activities such as complex sales processes, direct selling which supports the main distribution activities, and large customer relationship management.

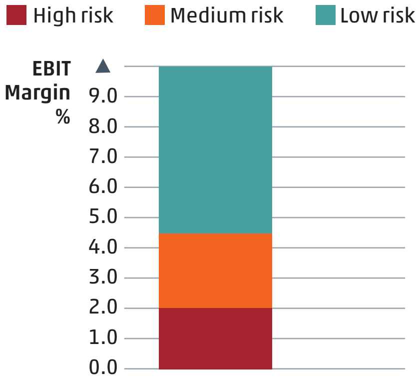
4. **Motor vehicles:** Any activities associated with motor vehicles such as marketing, sales, after sales, procurement, administration, insurance, transportation, warehousing and inventory management.

ICT sector risk assessment framework



	Category 1	Category 2
High risk	Below 3.5%	Below 4.1%
Medium risk	Between 3.5% – 4.1%	Between 4.1% – 5.4%
Low risk	Above 4.1%	Above 5.4%

Motor vehicles risk assessment framework



High risk	Below 2%
Medium risk	Between 2% – 4.3%
Low risk	Above 4.3%

What should companies do?

ATO Practical Compliance Guidelines provide law administration guidance regarding the ATO's method of assessing tax compliance risk, and how it is likely to deploy its audit resources. Multinationals should review their Australian distribution arrangements. Where they fall into the "High Risk" zone, companies should consider why, and prepare for ATO compliance action. This may include engaging proactively with the ATO to best manage the multinational's risk profile.

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Austria

Horizontal monitoring

The Annual Tax Act of 2018 introduced monitoring in Austria as of **1 January 2019,** as an **alternative to the traditional external audit.** In this process, companies and the fiscal authorities are in constant contact to ensure that levies are paid in due time and in the correct amount. Horizontal monitoring encompasses **corporate taxes** but not the Joint Audit of All Wage-Dependent Levies.

Companies must implement an **Internal Control System (ICS)** and accept extended disclosure requirements. Thus, even before declarations are submitted, circumstances that may entail a serious risk of discrepancies with the fiscal authorities and have substantial potential impact on the tax balance must be disclosed. At least four times a year, **meetings** must be held between companies and the fiscal authorities. The tax monitoring system must be reviewed by a **tax adviser** before implementation and then at intervals of max. three years (expert opinion).

The possibility of submitting an **application** (via finanzonline) for monitoring is subject to a number of **conditions:**

- Company accounting according to the Austrian Commercial Code,
- No intentional or grossly negligent financial offences in the last five years,
- Revenues of at least EUR 40 million in the last two financial years,
- Confirmation from a tax consultant or auditor that the company has introduced a functioning tax monitoring system.

Another condition is **that its management, registered office or domicile is in Austria, or that the company has a permanent establishment in Austria.**

If the **conditions** are met, an external audit must be carried out if no such audit has taken place over the last five years.
The Ministry of Finance has issued **regulations** concretising the requirements for the tax monitoring system (**https://www.bmf.gv.at/steuern/Text_SKS_PV.pdf?6n94x5**):

Ongoing monitoring by the tax authorities eliminates the need for ex-post audits, which has the following **advantages:**

- There is only a short period of time between the time of audit and the period under review.
- The ICS eliminates the need to examine routine processes and everyday business transactions.
- Accumulated back payments for periods long in the past are avoided.
- Timely and ongoing coordination with the fiscal authorities gives companies a high degree of planning security.

However, it should be noted that considerable one-off and recurring costs must be borne by companies that choose to undergo ongoing monitoring. Its implementation in practice will reveal if the benefits outweigh these costs.

In any case, the monitoring will be evaluated on an ongoing basis over the next few years, and an **evaluation report** will be presented on 31 December 2024.

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Egypt

Egypt's Transfer Pricing Guidelines

Introduction

This text sets out the views of the Egyptian Tax Authority (ETA) on the application of transfer pricing rules according to Article (30) of Income Tax Law No. 91 of 2005 ("the Law") and the amended Articles (38), (39) and (40) of the Executive Regulations thereof. The circular quoted is an update of the "Egyptian Transfer Pricing Guidelines" issued in 2010, and will be updated regularly in accordance with the legislative requirements and practical application.

What has changed

A large part of the updates **relate** to the introduction of the three-tiered approach to TP documentation in order to enhance transparency.

The requirements for each of these three tiers are given in Part 1 Chapter 5 of the ETPG, and are broadly in line with those set out in the OECD Guidelines.

The ETPG confirms that the new documentation requirements will be implemented for FYs (i.e. consolidated reporting periods for financial statement purposes) ending 31 December 2018. This is therefore unaffected by taxable years or financial reporting periods of subsidiary entities.

The thresholds for Country-by-Country Reporting ("CbCR") have been set out in the ETPG.

- Egyptian parented groups with a foreign subsidiary / subsidiaries, with an annual consolidated group revenue of equal to or exceeding EGP 3 billion (approx. EUR 145 million) will be required to prepare and file a report with the ETA.
- Egyptian subsidiaries of foreign-parented groups will be subject to the OECD threshold of EUR 750 million, and are required to file a report with the jurisdiction of tax residence of the ultimate parent entity.

Documentation filing deadlines

The ETPG confirms that taxpayers are now required to submit their TP documentation on an annual basis. (Previously, the ETA did not require taxpayers to submit their TP records and documents at the time they filed their tax returns. Instead, documentation was to be submitted to the ETA on request in a timely manner for tax audit purposes).

Master file –	in line with the group ultimate parent's tax return filing date
Local file –	within 2 months of filing the tax return
CbCR –	within 1 year of the year-end to which the report relates. The first report should be prepared for the group's fiscal year ending 31 December 2018.

The four-step approach

Taxpayers are advised to follow the four-step process described below, in order to price their controlled transactions according to the arm's length principle:

1- Identifying any controlled transactions and understanding the nature of such transactions;
2- Selecting the most appropriate pricing method(s);
3- Applying the selected pricing method(s);
4- Determining the arm's length amount and introducing a review process to reflect any future changes.

Comparability analysis

- The role of the comparability analysis has been highlighted as a fundamental tool in applying the arm's length principle to controlled transactions.
- The first and the third steps of the four-step approach require taxpayers to conduct a comparability analysis as one of the critical measures through which they can appropriately select comparable uncontrolled transactions and thus be capable of establishing reliable arm's length prices for their controlled transactions.
- The main aim of this is therefore to provide taxpayers with more practical details on the significance of the comparability analysis, how to conduct such an analysis, and which factors to consider.

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Pricing methods

Keeping in mind that the second and the third steps of the four-step approach were all about guiding taxpayers to select and apply the appropriate pricing method to set arm's length prices for their controlled transactions, this chapter of the EPTG discusses the acceptable transfer pricing methods under the Law. Taxpayers should be aware of highly significant issues, such as the pricing methods available, the characteristics of each method, the factors for determining the most appropriate transfer pricing method to be applied, and which methods are highly recommended to be used in particular cases.

Conclusion

The steps taken by the ETA to provide updated Guidelines demonstrate its commitment to implementing the minimum standards under the BEPS Inclusive Framework and enhancing transparency. The updated ETPG are also welcome in that they provide greater clarity to taxpayers in some areas, for example on the application of the arm's length principle, the choice of TP methods, and the general compliance requirements. Finally, the newly introduced APA regime is good news for taxpayers looking to gain certainty over their TP methods and tax outcomes.

However, there are some pertinent aspects for taxpayers to consider, including:

- Annual preparation, and mandatory filing, of three tiers of documentation
- Incorporating the search for appropriate local or regional comparable in line with the Guidelines
- The unique compliance requirement for smaller Egypt-parented groups resulting from a significantly lower CbCR threshold (approx. EUR 145m compared to the OECD threshold of EUR 750m)
- Consequences of non-compliance with the rules, including the risk of audit and therefore adjustments and penalties
- Application of the TP rules to include transactions between associated enterprises resident in Egypt
- Experience of TP audits in Egypt, while awaiting further guidance in the Unified Tax Procedures Law
- Managing the APA process while practical experience in using the Guidelines develops

There are also significant questions on the practical application of the rules in other areas, though these may be addressed as future guidance is released by the ETA.

One thing is clear: taxpayers should plan and execute especially carefully, with the onus firmly on them to be compliant, and to be able to demonstrate compliance, with the laws. They should view these updates as a signal of change, as well as an opportunity to review their transfer pricing practices accordingly.

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Hungary

Recent developments in Hungarian transfer pricing

Introduction

Hungarian transfer pricing broadly follows the OECD principles with respect to both the methods available to determine arm's-length prices and the documentation obligation.

As a general rule, transfer pricing documentation must be available by the filing deadline of a Hungarian taxpayer's annual corporate income tax return (which is 31 May for companies where the business year corresponds to the calendar year); however, this does not have to be filed with the Tax Authority. General exemption from the obligation to prepare transfer pricing documentation exists (amongst others) for transactions completed in a particular tax year with an aggregate value below HUF 50 million (approx. EUR 156,000). Simplified documentation can be prepared for qualifying *low-value-adding intra-group services.*

The OECD three-tiered approach

Hungary adopted the 2017 OECD guidelines, as a result of which transfer pricing documentation is split into two main parts, the *Master File* and the *Local File.* Compared to previous legislation, new rules require, in general, a more detailed description of related financial data, whereas as a third tier, a *Country-by-Country Reporting (CbCR)* obligation also exists in certain cases. The new rules will be first applied for the 2018 tax year.

Group taxation scheme

Effective as of 1 January 2019, Hungary introduced a group taxation model for corporate income tax purposes (a group taxation scheme for value added tax purposes existed already prior to 2019). The scheme provides for an *exemption from transfer pricing provisions in transactions concluded between members of a corporate income tax group during the existence of the tax group* (including the documentation obligation and potential corporate income tax base adjustments).

Transfer pricing rules must, however, still be considered for transactions carried out prior to establishing a tax group, and also with respect to transactions of tax group members with associated enterprises having foreign tax residency (these cannot be part of a domestic tax group), where the transfer pricing documentation is to be prepared at the level of the tax group.

CbCR treaty with the USA

Hungary and the United States of America concluded an agreement on the automatic exchange of CbC reports, effective from 21 December 2018, which can be considered an important step for Hungarian companies with ultimate parents resident in the US. The agreement enables exemption for Hungarian group members from submitting Country-by-Country reports to the Hungarian Tax Authority, an obligation that would generally exist if there is no bilateral treaty (applicable if the Hungarian group member was not initially designated by the group for CbC Reporting in Hungary).

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Transfer pricing audits

Based on the Tax Authority's own statistics, more than 250 transfer pricing-focused tax audits were completed in 2018, resulting in a difference of more than HUF 1.7 billion (approx. EUR 5.5 million) corporate income tax owed by taxpayers. Transfer pricing audits mainly targeted financial transactions (cash pool arrangements, loan transactions), qualification issues pertaining to automotive industry suppliers (fully pledged or contract manufacturers), lack of transfer pricing documentation (e.g. misinterpretation of exemptions), and erroneous application of qualitative adjustments in benchmark studies.

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Italy

Corresponding adjustments made easier

Eliminating economic double taxation deriving from transfer pricing adjustments on transactions with Italy may become easier in the future thanks to recent statutory and practice developments.

Italy has recently introduced new rules concerning dispute resolution and corresponding adjustments. New Article 31(4) of Presidential Decree 600/1973 now also allows the Revenue Agency – upon taxpayer request – to make unilateral downward adjustments, where a foreign tax authority has made a primary adjustment under the arm's-length principle.

Under the old legislation, downward adjustments were admissible *"only to the extent necessary for the application of the agreements concluded with the competent authorities of foreign countries pursuant to mutual agreement procedures foreseen by international conventions against double taxation of income"*. The provision dated back to 1988 and was adopted in order to adapt the Italian transfer pricing rules to the (former) bilateral treaty with the USA, the first to include a corresponding adjustment clause.

The common feature of the new and the old rules is non-recognition of compensatory tax adjustments: downward adjustments cannot thus be made by the taxpayer in the tax return (with no accounting records) where a transaction has been adjusted for tax purposes in any other country, either by the other enterprise or by its Tax Authority.

Decision 108954/2018, issued on 30 May 2018 by the Director of the Revenue Agency, provides further details on the new unilateral corresponding adjustments. Activation of the procedure requires the primary adjustment in the foreign country to be final (or at a final stage), and compliant with the arm's-length principle. The foreign country must also have entered into a treaty with Italy which includes the adequate exchange of information.

The application does not prevent access to other dispute resolution procedures (i.e. a mutual agreement procedure, or the procedures under the Arbitration Convention or the EU Tax Dispute Resolution Directive), the activation of which may be requested using the same form.

The request must include all information on the case, and should attach a courtesy translation in Italian (or English) of the foreign tax assessment. A decision on admissibility is made within 30 days; the procedure must be completed within 180 days, with approval or refusal of the unilateral corresponding adjustment. The Revenue Agency may invite the taxpayer to discuss the issues examined, or require additional documentation when examining such a matter. After each meeting, a copy of the relevant minutes will be provided.

Under the new rules, downward adjustments are also permitted following tax inspections into international cooperation activities, the outcomes of which are shared by the participating countries. An explicit reference to the Arbitration Convention is also included.

Overall, with the introduction of Article 31(4) to Presidential Decree 600/1973, Italy appears to have aligned itself with the international standards set out in BEPS Action 14.

The new rules are expected to reduce the time needed to resolve mutual agreement procedures and lower the number of unresolved cases, as part of a development that has seen significant improvements in Italian cases. The most recent Mutual Agreement Procedure Statistics of the OECD indicate that 48 cases involving Italy were concluded in 2017. The standstill of the past has been overcome, and dispute resolution procedures can now be considered supplementary to domestic court litigation. This brings some changes to the framework of taxpayers' strategy for meeting international tax challenges.

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Saudi Arabia

Tax current developments and their impacts on permanent establishments (PEs)

- In order to keep pace with changes in the global tax frameworks and consolidate its position as an attractive foreign investment destination, the Kingdom of Saudi Arabia (KSA), a G20 member, introduced significant changes to its tax regime during 2018.
- The Saudi Arabia tax regulator – the General Authority of Zakat and Tax (GAZT) – kicked off the year with the implementation of VAT and issued draft Transfer Pricing Bylaws on 10 December 2018 followed by the respective final version on 15 February 2019.
- In addition to the aforementioned changes to the KSA tax system, GAZT also issued a new draft Zakat regulation on 10 January 2019 for public consultation; the final version is still pending at the time of the editorial deadline .
- These recent changes in the Kingdom's tax regime are having a profound impact on tax filing requirements and documentation for KSA permanent establishments (PE).

KSA income tax law: PE definition:

- The KSA tax laws permit a non-resident entity to have a PE in KSA under certain circumstances. In such cases, the PE is effectively the place, in full or in part, at which the non-resident entity carries out its activities in KSA (e.g. a construction site), or the place of its KSA agent.
- All PEs registered in KSA shall comply with Saudi tax laws, documentation and audit, including VAT, income tax, withholding tax (WHT) and TP filing requirements.

GAZT publishes draft TP bylaws:

- GAZT took a big move forward upon enacting TP tax regulations for the first time in the KSA in February this year.
- Underscoring the Kingdom's policy to introduce laws and regulations that build on relevant international standards, GAZT implemented the Organization of Economic Cooperation and Development (OECD) BEPS recommendations regarding TP.
- Moreover, the draft bylaws, as in the OECD guidelines, set forth requirements for three tiers of documentation (Master File, Local File, Country-by-Country Reporting) and an annual disclosure for controlled transactions.
- The TP bylaws apply to all taxable persons pursuant to the law and implementing regulations. That, by default, would include PEs.
- In line with the OECD Guidelines, the draft bylaws identified the following 5 methods for TP reporting purposes. Companies should select the most appropriate method for their context.

  - Comparable uncontrolled price method
  - Resale price method
  - Cost plus method
  - Transactional net margin method
  - Transactional profit split method

On 15 February 2019, the TP bylaws were issued in their final form including the two following major amendments, together with FAQs (in both English and Arabic) as additional guidance:

- Setting deadlines for submission of TP documentation
- A requirement for taxpayers to submit the Disclosure Form of the Controlled Transactions together with a mandatory affidavit from a licensed auditor, through which the auditor certifies that the transfer pricing policy of the MNE is consistently applied by and in relation to the taxpayer.

Key TP reporting requirements and deadlines:

- **Master File / Local File:**
  - Should be submitted by corporate income tax (CIT) entities / CIT and Zakat-paying entities only if the annual value of such entities' controlled transactions exceeds SAR 6m (USD 1.6m).
  - Might be requested at any time by the GAZT **after 120 days from** the corporation's fiscal year-end.
  - Deadline to provide the report is within 30 days upon request for both files; an additional 60-day extension shall be granted only in 2019 upon request.

- **Country-by-Country Report (CbCR):**
  - Should be submitted by CIT entities / CIT and Zakat-paying entities as well as Zakat-paying entities with consolidated group revenues exceeding SAR 3.2bn (USD 853m).
  - Should be filed **not later than 12 months after** the last day of the reporting year of the multinational entities (MNE) group.

› **CbCR notification** should be submitted, as a part of the annual declaration by KSA-based constituent entities, to GAZT **within 120 days** following the end of the reporting year.

→ **Disclosure form:**
› Should be submitted by CIT entities / CIT and Zakat-paying entities, only, including an affidavit from a KSA-licensed auditor to certify the consistent application of the TP policy.
› Deadline to submit is **within 120 days** from the fiscal year-end.

Language of documentation

→ As per the TP FAQs question no. 6, GAZT encourages the submission and documentation in the official language of KSA (Arabic), to the extent that this is reasonably possible.

Penalties

→ The bylaws do not mention any provisions regarding penalties, although the FAQs explain that failure to comply with the TP guidance in KSA may lead to imposition of related penalties and fines applicable under the Income Tax Law.

Summary

KSA introduced significant changes to the country's tax regime at the start of 2018, including VAT and the TP bylaws. The latter draws on many of the OECD TP reporting guidelines.

The new KSA tax developments will have significant reporting implications for all taxpayers including multinational companies, which will have to adopt significantly different reporting and filing requirements.

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Gulf Cooperation Council (GCC)

Transfer Pricing in the GCC

The subject of transfer pricing (TP) has gained a great deal of momentum globally over the past couple of years. Most of the OECD and G20 countries had implemented TP legislations even before the BEPS initiative, and have issued further regulations following finalisation of the BEPS Action Plan reports. The Gulf Cooperation Council (GCC) countries – Bahrain, Kuwait, Oman, Qatar, Saudi Arabia (KSA) and the United Arab Emirates (UAE) – have not been immune to global TP developments. Additionally, while Kuwait, Oman, Qatar and KSA contain provisions in their respective income tax laws providing for related party transactions to be at arm's length, TP arrangements were not really being challenged by tax authorities in much detail until recently.

While detailed TP provisions have only recently been issued by KSA and Qatar, GCC-headquartered groups are already filing Country-by-Country (CbC) Reports and preparing Master Files and Local Files in other countries in which they operate, and which have the underlying TP legislation.

This article contains a summary of the existing TP legislative framework in the GCC countries. The following table summarises the existing TP legislation / compliance requirements in these countries:

Country	CbC	Master File	Local File/ TP document
Bahrain	✗	✗	✗
Kuwait	✗	✗	✗[1]
Oman	✗	✗	✗[1]
Qatar	✓	✗	✗[1]
KSA	✓	✓	✓
UAE	✗	✗	✗

1 No specific documentation requirements: only arm's length provision for related party transactions

As outlined in the table above, Bahrain and UAE do not have any TP legislation at present. This stems from a lack of corporation tax regimes in these countries to form the basis for any TP legislation, warranting payment of appropriate taxes in countries where value generating activities are performed.

The TP principles applied by tax authorities in Kuwait, Oman and Qatar are applied broadly as anti-avoidance measures. Accordingly, during tax audits, where it is determined that the taxable income is understated due to any related party transactions, the tax authorities may request evidence to support the arm's length nature of such transactions. Increasingly, multinational companies with operations in these countries are preparing local documentation to support and defend TP enquiries during audits, even in the absence of formal requirements.

A summary of KSA's TP regulations

The KSA TP bylaws are broadly in line with the OECD TP Guidelines and contain the requirements for maintenance of three-tiered TP documentation (from the year ended 31 December 2018 onwards), i.e. Master File, Local File and CbC Report for taxpayers meeting certain thresholds. Some of the key features of the new KSA TP regulations are:

- Broad definition of "controlled transactions": departure from OECD TP Guidelines and existing KSA income tax law;
- Requirement of filing the Disclosure Form of the Controlled Transactions along with income tax return and certification from a licensed auditor regarding consistent application of the TP policy;
- Not applicable to Zakat payers[2] (except for CbC provisions);

KSA has not yet signed the CbC MCAA[3] providing for exchange of CbC Reports between countries and is expected to do the same shortly.

2 Entities owned by GCC nationals

3 Multilateral Competent Authority Agreement on the exchange of Country-by-Country Reports

CbC provisions in Qatar

Qatar published the CbC requirements in its official gazette on 9 September 2018. Accordingly, Qatar tax resident entities that are members of multinational groups having annual consolidated revenues exceeding QAR 3bn (approximately EUR 700m) in the previous year are required to comply with the CbC Report filing requirements in Qatar for fiscal years commencing on or after 1 January 2017. Qatar signed the CbC MCAA in 2018.

According to a recent circular released by Qatar's Ministry of Finance, Qatar-resident entities that are not the ultimate parent entity of an MNE group are not required to file notifications or CbC Reports for the years 2017 and 2018. Further clarity and instructions are expected soon.

The future of transfer pricing in the GCC

Five out of six GCC countries (not Kuwait) have joined the BEPS inclusive framework and accordingly, are required to adopt the four minimum BEPS standards[4], one of which relates to TP documentation and CbC reporting. Being a G20 member, KSA was expected to be the first of the GCC countries to endorse the Action 13 report and to introduce formal TP law in respect of documentation requirements. Other countries are also expected to follow suit in due course and CbC provisions are expected to be announced soon.

TP audits are on the rise in the GCC countries, and tax authorities have begun asking questions regarding the TP policies for intra-group transactions; this is also due to the global focus on TP issues. In the absence of local TP legislation, taxpayers and tax authorities in the GCC often refer to the guidance and principles listed in the OECD TP Guidelines.

There have been discussions around potential introduction of a corporation tax framework in the UAE[5] in future. Once this happens, we might expect introduction of TP principles embedded in the corporation tax law. The UAE may introduce CbC provisions sooner, as UAE is a BEPS Inclusive Framework member, and has already signed the CbC MCAA providing for exchange of CbC Reports.

In the context of KSA, given that the year ended 31 December 2018 is the first to be covered by the newly issued TP bylaws, one will have to wait to see how the GAZT implements the bylaws in practice. Also, once the CbC Report exchanges begin, it will be interesting to see how the tax authorities in the GCC use the information documented in these reports to make transfer pricing risk assessments.

Sign of shifting sands in the GCC!

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4 he four minimum standards are Countering harmful tax practices (Action 5), Countering tax treaty abuse (Action 6), Transfer pricing documentation and CbC reporting (Action 13), and Improving dispute resolution mechanisms (Action 14)

5 Although each Emirate has his own corporate tax decree, taxes are not practically imposed on entities other than specified oil and gas sector entities and branches of foreign banks

Republic of Serbia

Interest rates under the arm's length principle for 2019 fiscal year

According to Article 61 paragraph 3 of the Corporate Profit Tax Law, the Ministry of Finance of the Republic of Serbia has the right to set interest rates under the arm's length principle. The Ministry executes this right by publishing a rulebook on interest rates ''out of reach'' for each fiscal year. The rulebook for the 2019 fiscal year was published in March this year.

Interest rates for banks and financial leasing companies are as follows:
- 2.72% on short-term RSD loans
- 3.64% on EUR loans and EUR-denominated loans
- 5.05% on USD loans and USD-denominated loans
- 2.98% on CHF loans and CHF-denominated loans
- 3.91% on SEK loans and SEK-denominated loans
- 4.25% on NOK loans and NOK-denominated loans
- 1.92% on GBP loans and GBP-denominated loans
- 1.41% on RUB loans and RUB-denominated loans

Interest rates for other companies are as follows:
- 4.98% on RSD short-term loans
- 5.69% on RSD long-term loans
- 2.71% on EUR short-term loans and EUR-denominated loans
- 2.90% on EUR long-term loans and EUR-denominated loans
- 7.61% on CHF long-term loans and CHF-denominated loans
- 3.08% on USD short-term loans and USD-denominated loans
- 4.12% on USD long-term loans and USD-denominated loans

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South Africa

Extending the scope of transfer pricing rules in South Africa

In 2019 the South African National Treasury announced a proposed amendment to align the wording of the transfer pricing provisions with that of Article 9 of the OECD Model Tax Convention (OECD MTC) and the OECD Guidelines, which will effectively broaden the ambit of the South African transfer pricing rules.

In summary, the current South African transfer pricing legislation in Section 31 of the Income Tax Act 58 of 1962 (ITA) requires all "affected transactions" to be conducted at arm's length. An affected transaction is (1) a cross-border transaction (as defined) that is (2) entered into directly or indirectly by persons who are (3) connected persons in relation to each other (as defined).

The proposed amendment to the definition of "affected transaction" will in effect replace the term *connected persons* with the OECD's definition of *associated enterprises*. It is important to note that this amendment is made solely for the purposes of the transfer pricing rules and does not seek to amend the general definition of *connected persons* insofar as it applies to other provisions of the ITA.

It has long being recognised in South Africa that the definition of *connected persons,* mainly in respect of companies, is much more restrictive, especially when compared to the more liberal OECD definition of *associated enterprises* (as defined in Article 9 of the OECD MTC and referenced in the OECD Guidelines).

Concerns relating to the *connected person* definition primarily include its over-reliance on shareholding (which is akin to "participation in the capital" under the OECD's definition of *associated enterprises*), whereas the OECD's definition of *associated enterprises* covers, in addition to the foregoing, participation in the control and management of an enterprise.

Neither the OECD MTC nor the Transfer Pricing Guidelines proves clarity on the meaning or interpretation of the terms "management", "control", or "capital" for the purposes of Article 9. These terms will need to be defined in domestic legislation. In practice, however, "management" refers to the ability to significantly influence the decisions of the company, "control" is represented by the number of voting rights held, and "capital" is represented by the number of shares held.

What has yet to be considered in respect of this proposed legislation is the number of voting rights required for a person to be subject to South African transfer pricing legislation. Further, a domestic test needs to be developed for "significant influence" as a prerequisite for being subject to transfer pricing rules. It is my submission that the number of shares required for the application of South African transfer pricing legislation should remain the same as those under the current *connected persons* definition. It is through these actions, together with other necessary terms and definitions, that the proposed amendment will achieve the required outcome.

From the above, it is clear that this proposed amendment will have a significant impact on the ambit of South African transfer pricing legislation and will limit the potential of legislative circumvention of transfer pricing rules.

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Thailand

The new Transfer Pricing Act, effective 1 January 2019

The Thai Revenue Department has significantly expanded its review of transfer pricing policies for Thai companies in recent years. The stricter transfer pricing rules, outlined in the Transfer Pricing Act, are effective as of 1 January 2019. One of the reasons for the amendment was the OECD's BEPS Action Plan, which Thailand joined in June 2017.

The Transfer Pricing Act, which amends the Revenue Code, essentially stipulates the following:

a) Definition of the term "affiliated companies"
The newly inserted Section 71 paragraph 2 states that companies are "affiliated" if one of the following conditions applies:

- One company directly or indirectly holds at least 50% of the shares in the other company.
- The shareholders of one company directly or indirectly hold at least 50% of the shares in the other company.

- The companies are interconnected in terms of capital, management or control so that they cannot be run independently of each other.
- Details will be determined by a ministerial regulation (yet to be issued).

b) Reporting obligation
Section 71 ter requires companies to prepare and file a transfer pricing report together with the tax return, provided that their revenue in the tax year in question exceeds THB 200 million (approx. EUR 5 million). Companies whose revenue is below this threshold are not required to prepare such reports (unless explicitly requested during a general tax audit). Details will be determined by a ministerial regulation (yet to be issued).

The Revenue Department may request additional information from the taxpayer within five years of the due date of the transfer pricing report. The requested information must then be submitted within 180 days.

c) Penalty
Taxpayers who submit the transfer pricing documentation or the additional requested information incorrectly, incompletely or late can be fined up to THB 200,000 (approx. EUR 5,000).

In recent years, it has been observed that the tax authorities are adopting a more aggressive audit practice in the area of transfer pricing. In addition, the permanent reduction of the Thai corporate tax rate to 20% since 2013, the reform of the income tax system in 2017, and the considerable investment in the country's infrastructure have increased the pressure on the tax authorities to use the remaining tax resources more effectively.

Hence, it is to be expected that the tax authorities will focus even more on transfer pricing reviews. The new transfer pricing rules mean large companies (annual turnover > THB 200 million) have to provide transfer pricing documentation to justify the transfer prices in transactions with affiliated companies. Multinational companies can use their worldwide transfer pricing study, which is used for example in Germany and has already been accepted by the German tax authorities (in the context of an advanced pricing agreement or within the framework of a tax audit).

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Turkey

Current status of the BEPS Action Plan in Turkey from the view-point of Turkish legislation

Over the last couple of years, the Turkish Tax Authority has taken several steps with respect to BEPS Actions. Current and recently introduced legislation with respect to domestic implementation are summarised as follows:

Action 1 – Digital economy

In accordance with VAT legislation enacted in September 2016, the services provided by means of digital economy are included in service transactions which are subject to the VAT withholding mechanism in order to keep track of transactions carried out on the Internet. Non-resident businesses providing services to non-taxpayer real persons in Turkey by means of digital economy were made responsible for declaration and payment of the VAT stemming from electronically provided services through VAT Return No. 3 in January 2018. Furthermore, in January 2019, cross-border online advertising services became subject to 15% and 0% withholding tax under certain conditions.

Action 3 – Controlled Foreign Corporation (CFC) rules

Turkish resident companies and real persons who have invested in foreign subsidiaries might be subject to CIT in accordance with the CFC regime, as stated in Article 7 CIT Law.

Action 4 – Interest deductions

Companies' interest deductions had been restricted in 2013 under certain conditions, in order to encourage companies to choose equity financing over debt financing in case of financial need. However, the regulation has not yet come into effect since it remains to be confirmed by the Council of Ministers.

Actions 8 – 10 Transfer pricing

Current TP regulations set out by CIT Law regulate the preparation of annual TP reports and the submission of annual TP forms. In addition, a draft CIT General Communiqué, regulating mandatory three-tier documentation – Master File, Local File and CbCR– was published in March 2016. This Communiqué also includes several amendments and definitions of new concepts in order to harmonise Turkish TP rules with the guidelines related to BEPS Actions 8–10. However, the draft Communiqué still awaits approval and is thus not yet effective.

Article 13 – TP documentation

Law no. 6728 entered into force in December 2017, making the APA mechanism more attractive. It also made several major amendments to Turkish TP regulations, such as introducing new TP methods, amending the "related party" definition, reducing the tax penalty for taxpayers under certain conditions, and enabling retroactive application of APA, etc.

Action 15 – Multilateral Instrument (MLI)

The MLI, which came into force in March 2018, was signed by Turkey in June 2017. Turkey has reservations with regard to Articles 4, 5, 6, 8, 9, 10, 11 and 14 of MLI. The MLI is not effective in Turkey since the process of approval by the local executive authority is not yet complete. Approval of Turkey's signing of the MCAA was given in November 2017, and Turkey then passed a law ratifying the Convention on Mutual Administrative Assistance in Tax Matters, effective as of July 2018. A draft Communiqué regarding CRS was also prepared in 2018. Furthermore, Turkey signed a bilateral automatic exchange of information agreement on the financial accounts with Latvia and Norway; this entered into force as of December 2018. However, the MCAA regarding CbC Reports is as yet unsigned, since CbC Reporting is not yet mandatory.

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Ukraine

New changes in Ukrainian transfer pricing rules in 2019

As of 1 January 2019 the Tax Code of Ukraine has been supplemented with new provisions in Article 39, which sets forth TP rules for Ukrainian entities. Some of these rules in fact represent the implementation of TP-related BEPS Actions into Ukrainian tax law. The most important changes are as follows:

The substance-over-form principle

Since 2019 the substance-over-form principle has been introduced into TP rules. This means that from now on taxpayers/tax authorities must analyse the functions performed by the parties of controlled transactions based on:

1) Concluded agreements
2) Accounting data
3) Actual actions of the parties and the circumstances of transactions

Should actual actions of the parties and their non-documented agreements differ from those declared in the contract, actual actions and conditions shall prevail.

If transactions are actually performed but not arranged by any documents and not reflected in the accounting data of the taxpayer or its counterparty, such transactions may still be subject to TP rules if the tax authority finds evidence of the actual conduct of these transactions.

We understand that such new rules are in line with the recommendations of BEPS Actions 8–10. These rules should encourage actual agreements between parties to be examined, to determine their actual contributions to transactions and the non-recognition of transactions which make no commercial sense to be authorised.

New criteria for the selection of the tested party

The Tax Code of Ukraine provides that when a taxpayer opts to apply the TP method, based on comparison of profitability, the taxpayer should also select the tested party, namely the party to the transaction whose profit margin would be analysed according to the TP Method. The rules stipulate that a taxpayer shall select the party for whom the TP method with the most accurate results should be applied, and for whom the most reliable comparable transactions can be found. A new criterion for selecting the tested party was added in 2019: the party for which the most comprehensive financial information and accounting data is available must be selected. The wording of this rule may be interpreted in the way that it can usually be met only by parties to transactions with residence in Ukraine. Hence, this rule may significantly limit the possibility to choose a non-resident of Ukraine as a tested party. In turn, this could bring a massive change in general approach to TP analysis of large numbers of transactions where a non-resident party was usually tested.

Controlled transactions with involvement of "unrelated" intermediaries

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The Tax Code of Ukraine provides that transactions between a Ukrainian entity and its related non-resident shall fall under TP control even if an intermediary is placed between such entities, provided that such an intermediary does not perform significant functions and does not use significant assets and/or does not bear significant risks. Starting from 2019, the rule will be applied not only to transactions between related parties but also between Ukrainian entities and special kinds of non-resident entities registered in "low tax" jurisdictions according to the list adopted by the Cabinet of Ministers of Ukraine (CMU), and with non-resident entities with special legal form included in another list adopted by the CMU.

Glossary

APA	Advance Pricing Agreement
BEPS	Base Erosion and Profit Shifting
CbC	Country by Country
CbCR	Country by Country Reporting
CIT	Corporate Income Tax
EBIT	Earnings before Interest and Tax
MCAA	Multilateral Competent Authority Agreement on Automatic Exchange of Information
MNE	Multinational Enterprise
OECD	Organization of Economic Cooperation and Development
OECD Guidelines	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
OECD MTC	Model Tax Convention on Income and on Capital
PE	Permanent Establishment
TP	Transfer Pricing
VAT	Value Added Tax
WHT	Withholding Tax

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