Bloomberg Tax

Transfer Pricing Forum

Transfer Pricing for the International Practitioner

Transfer Pricing: A Year in Review

It has been another active year in terms of global transfer pricing developments. The goal of this forum is to identify key transfer pricing developments in your country during 2019 and to discuss how your transfer pricing practice has been impacted by these developments. And, although it may be difficult at this point to predict what is in store for 2020, we would like to hear your preliminary thoughts as you look forward to 2020.

Please share your insights, with a focus on the following general areas:

Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

Transfer Pricing Examinations/Audits. Describe key features or developments in the transfer pricing examination/audit process in your country. Please consider the following points in your response:

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- With enhanced, post-BEPS transfer pricing documentation in several countries, have you encountered challenges in meeting the tax authorities' expectations for adequate transfer pricing documentation and supporting data?
- One of the goals of the BEPS project was increased transparency. To date, have you noticed an increase in the number or types of inquiries in response to an increase in data available to tax authorities (i.e., CbC report, rulings, etc.)?
- What are the primary areas of focus by the tax authorities during transfer pricing examinations/audits?

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country. Please consider the following points in your response:

- One of the commitments made by countries as part of the BEPS project was to resolve treaty disputes in a timely, effective, and efficient manner. Have you noticed a change in the timeliness of a typical MAP case?
- Many countries have enhanced their MAP procedures in response to the BEPS initiative. To date, have you noticed a change in the number of MAP cases initiated in your country, or an increased willingness by taxpayers to consider MAP?

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

Legal Framework

The Argentine Revenue Service ("ARS") circulated a draft Resolution with material changes to the existing transfer pricing resolution, i.e., Resolution No. 1,122 (the "Resolution"). The ARS posted the draft Resolution for comment by businesses and tax experts. Since this comment phase is now concluded, it is anticipated the final Resolution will be released shortly.

1.1. Legal Background

In December 2017, the Argentine Congress passed Law N 27,430, effective as of January 1, 2018, which introduced significant changes in the Income Tax transfer pricing rules. The following changes are worth noting:

(a) First, the reform added new provisions to the Income Tax Law ("ITL") concerning the level of income attributable to an Argentine permanent establishment ("PE") of a foreign company. ITL section 14 provides that any Argentine PE that performs activities that directly or indirectly benefit its foreign head office should be allocated a profit that is commensurate to its functions and contributions.

(b) Second, the reform heavily regulated international triangular transactions between related parties to ensure that the level of income attributable to the intermediary is commensurate with the value it contributes to the supply chain. If an Argentine resident importer or exporter purchases or sells goods from an international intermediary, it must show evidence that the margin the trader receives for its services is commensurate with the contributed assets, the assumed risks, and the functions performed. This new substance test applies to triangular cases if the foreign middleperson is either related to or affiliated with the Argentine party, or if the exporter at origin (or importer at destination) is related to or affiliated with the Argentine resident party. The Argentine party must provide supporting documentation showing the substance of the intermediary's contribution. Under the draft Resolution, this detailed report would now be regulated.

(c) Third, the law replaced the so-called "sixth method" for taxing commodity exporters, which Argentina created in 2003, with a new set of standards that were inspired by the OECD BEPS Action 10 report. The new set of norms for internationally triangular exports of commodities is levied on oil, gas and derivative exports and imports. If an Argentine commodity exporter is involved in an international triangular transaction described in (b), above, or if the exporter sells to a trader located in a low-tax or non-cooperative jurisdiction (i.e., deemed affiliation), the exporter must register the sale agreement with the ARS. The filing must contain a full disclosure of the main components of the export agreement (such as parties, traded goods, quantity, price, and quality) as well as the information on the comparability adjustments performed whenever the export price differs from the listed prices for the traded commodities. If such registration is not made or if it does not comply with the new registry's standards, the ARS can price the export by the shipment date, rather than based on the export agreement. The ARS draft Resolution elaborates on these regulations; however, it does not rule on the registrýs framework, which is yet to come.

Law N 27,430 was subsequently implemented by Decree 1170/18, which was released almost one year later on December 27, 2018, and which provided the following transfer pricing norms:[1]

(i) Regulated the cases of affiliation, be it actual or deemed affiliation (broadly defined).

(ii) Elaborated in more detail on the different transfer pricing methodologies and the comparability analysis, as well as the standards to properly select the "best method" on a case-by-case basis.

(iii) Stated the need of detailed segmented data to support the transfer pricing analysis.[2]

(iv) Stated that if the related party transaction does not fall within the interquartile range of comparables, it should be adjusted to the median (i.e., no reduction of 5%, as in the previous regulations), except for commodities with listed values (i.e., where averaging is allowed).

(v) Allowed averaging of the comparables data, when it is proved justified, but does not allow averaging of the tested party data.

(vi) Provided detailed rules as to intermediaries mentioned in (b), above, including the need to provide evidence that the level of remuneration obtained is grounded on a detailed functional analysis (i.e. equivalent to a full-fledged transfer pricing report).

(vii) Set the "basic" framework for registering commodity export agreements. Such "basic" registry requires documenting at least twelve items of data for every single commodity export. The filing should be set by a separate resolution from the ARS that is yet to come, but it is expected to be done within a day after closing the export agreement, as provided for the filing of agri-commodities in general. Such a registry is required in addition to the annual compulsory transfer pricing report. Companies that do not ad-

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equately comply with the registry requirements will be benchmarked on the shipment date, as mentioned above. The draft Resolution provides that the ARS should target the higher of the contract price on the agreement date or the market value on the shipment date. This outcome has been criticized for lacking legal background, thus resembling the former "sixth method," that was repealed by the tax reform.

(viii) Set the legal framework for the need to file the CbC Report and the Master File.

In view of the previous legal and implementing decree framework, the deadlines for filing the 2018 transfer pricing reports (mid 2019) were postponed. The draft Resolution provides that such filing should be done from March 16 through 20 of 2019, despite the fact that the draft Resolution is not final yet. This deadline was first set for December 2019 and has been extended recently by the newly appointed head of the ARS.

2.1 The ARS Draft Resolution

While the draft Resolution has not been finalized, it is expected to be substantially aligned with the discussion below, in view of the coming deadlines. The following discussion summarizes the main aspects of the draft Resolution:

a) *Tested party*. While the existing Resolution provided that the tested party was the Argentine affiliate only, the draft Resolution allows testing the foreign affiliate, (i.e., as is common under comparative law). This requires proving that the *margins* obtained by the local party may be otherwise compromised, which raises a question as to the ability to use this exceptional rule when applying transactional methods. Supplementary analysis on the local tested party is nevertheless required. If a profit split analysis is properly applied to benchmark the tested party, then all relevant related parties should be analyzed.

b) *Deemed affiliation*. The draft Resolution clarifies the term "special tax regimes" (i.e., regimes which trigger a deemed affiliation). A special tax regime is a jurisdiction where the effective corporate income tax rate is lower than 60% of the Argentinian rate; an outcome that may result from any resolution, regulation, *ad hoc* authorization, or any other procedure established in the foreign-counterpart's jurisdiction. To the extent relevant, tax refunds and incentives should be considered, which may prove cumbersome.

A foreign counterpart that is a single client or single supplier is also regarded as a "deemed affiliate" with the Argentine tested party. The draft Resolution defines these terms as applicable in those cases in which the counterpart's temporary or definitive absence could adversely affect the tested party's activity or line of business.

c) *Definition of "intermediaries" subject to special audit (see 1.1.b above.)*. The draft Resolution defines an intermediary as any tested-party foreign counterpart that does not take physical possession of the goods exported from Argentina. To prove substance of such intermediary, the draft Resolution requires a detailed functional analysis, which can be replaced by the intermediaries' "transfer pricing study"; provided, however, that the transfer pricing study is in line with Argentine standards. If the intermediarýs economic analysis results in excessive remuneration, such excess shall be considered as additional taxable income of the Argentine tested party. Notwithstanding, the draft Resolution provides that such excess cannot be added to the transfer pricing profitability analysis, thus leading to double taxation.

Intermediaries may be excluded from the substance test if they meet the existing ITL Section 15, eight- paragraph a) and b) tests (i.e., require due registration, regular filing of financial statements, tax ID, and do not have as the primary goal to collect passive income nor to intermediate in the transaction of goods to or from Argentina). The exclusion test lacks a legislative background, although it will not be challenged by taxpayers profiting from such exclusion.

d) *Commodity Exports*. The draft Resolution provides that commodity exports could be benchmarked in view of a "marked product" (i.e., a product whose price is used for setting the international prices of the underlying goods); if such standards are commonly used for pricing formulas between unrelated parties. It is not required that the exported goods match the reference values, as long as this pricing methodology is proved consistent with the arḿs length standard. For example, if the exported goods and the marked product are similar but not identical, a reliable comparability adjustment should be made.

e) *Cross border services between related parties*. The transfer pricing analysis should consider the compliance with the ordinary and necessary tests; the parties conduct (i.e., which resembles the OECD's "delineation of the actual transaction"); the contractual terms; as well as a benefit analysis (i.e., which should provide evidence that the profit or value obtained by the tested party is commensurate with the price paid for the service). The draft Resolution does not allow for a deduction of any service fee for services performed in the self-interest of the foreign affiliate or of any other affiliate; nor for services unrelated to the Argentine partýs business. Cross-border services that are deemed duplicative may not be deducted either. This is a test that should be analyzed in view of the arḿs-length standard, on a case-by-case basis.

f) *Associated transfer pricing compliance burdens*. The draft Resolution amends Argentina's transfer pricing compliance burdens, including cumbersome reporting and documentation rules with regard to cross-border, unrelated-party transactions with commodities. Likewise, related party transactions are also subject to new, detailed transfer pricing study and associated filing requirements (F. 2668). A special CbC filing is required from any local party that is a member of an MNE group; these requirements go beyond the OECD CbC standards. While threshold rules are provided for most of these compliance requirements, the thresholds have been consistently criticized for being extremely low.

Despite that the draft Resolution has been disapproved for its complexity, the ARS anticipates more rules in the near future, especially with regard to the *ad hoc* registry of commodity exports.

Transfer Pricing Examinations/Audits.
Describe key features or developments in the transfer pricing examination/audit process in your country.

In light of the tax reform passed as Law N 27,430, effective January 1, 2018, it is envisioned that international triangular transactions, be they commodities or not, will be a core focus of ARS audits. This is due to the fact that the 2018 tax reform also requires Argentine taxpayers to demonstrate that the compensation paid to intermediaries is aligned with the functions, assets, and risks involved in the transactions (see the discussion in point 1.1., above). For a summary of the major topics of ARS current tax audits, see point 4, below.

Mutual Agreement Procedures (MAP).
Describe key features or developments in the MAP process in your country.

The tax reform, passed as Law N 27,430, amended the Tax Procedure Act to speed up mutual agreement procedures (MAPs).

Historically, the ARS took the position that once a tax assessment was debated in court, the competent authorities could not intervene. Law N 27,430 included a new MAP process aimed at overcoming this restriction and appointed the Ministry of Finance as the relevant competent authority for MAP proceedings. Law N 27,430 also included "joint transfer pricing assessments," namely advanced pricing agreements, despite the pending implementing regulations.

In addition, it is worth noting that before the tax reform, a number of transfer pricing adjustments made by the ARS did end up in the MAP process before treaty jurisdictions competent authorities. These controversies were grounded in the violation of double tax treaties, like the treaties with Brazil, Chile, Switzerland, and the Netherlands, among others. Such longstanding controversies have not been activated by the competent authority.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

Currently, more than 100 transfer pricing cases are being litigated before the Tax Court, the Federal Courts of Appeal, and the Federal Supreme Court. These cases involve the services industry, industrial manufacturing, the pharmaceutical industry, and the commodity export sector.

The latest tax controversies involving industrial manufacturing industries are focused on the appropriate profit level indicator. Argentine courts have sustained a preference for the return on capital employed (ROCE) over the mark up on total costs. In this regard, last year the Federal Court of Appeals ratified the previous Tax Court decision in the case *Acindar Industria Argentina de Aceros SA* (April 5, 2018), upholding the ARS's position regarding the ROCE. This case illustrates that any change in the taxpayer's transfer pricing methodology should be carefully evaluated prior to its implementation to ensure that proper arguments are available to support the change. The ARS will always look at such a change as a red flag.

In 2018, new controversies arose regarding debt-to-equity recharacterization based on the non-arm's length terms of a loan agreement between affiliates, despite the fact that the leading case is still pending a decision from the Federal Supreme Court (TESA SA). After 10 years of controversy, the case received a decision by the Attorney General that sustained the taxpayer's argument as to the existence of actual debt rather than equity, regardless of the lack of timely repayment of principal and interest. In reaching the decision, the Attorney General noted that the taxpayer's economic performance was compromised by governmental action, a substantial factor that should be properly pondered to correctly evaluate the appropriate solution to the controversy. Despite the fact that such decision is not binding on the Court, the agreement is the most common outcome.

As for commodity exporters, local taxpayers are also expecting a major decision from the Federal Supreme Court as to the constitutional validity of Decree 916/04, which expanded the Argentine sixth method on international triangular transactions between affiliates beyond the legal terms. The decree made the method applicable to even unrelated party transactions in cases where the trader was considered unsubstantiated. In December 2018, a leading case received a decision from the Attorney General that sustained the taxpayer's argument in this regard (Vicentin SA).

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

In the short term, the amendment to the existing transfer pricing rules in ARS Resolution No. 1,122 should be released soon, before March 2020, to ensure that transfer pricing compliance burdens are regularly fulfilled before the deadlines. In the medium term, the new federal government's tax reform package, which has been passed as Law 27,541, is expected to be implemented in early 2020. However, this tax reform did not alter the existing income tax transfer pricing framework.

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NOTES

[1] Decree 1170/18 was published in the official bulletin on December 27, 2018.

[2] New regulations were anticipated on this point; however, the draft Resolution does not elaborate on this issue.

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Australia

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In preparing this paper we were fortunate to be able to discuss the year in review with Ms. Sophie Lewis, Assistant Commissioner - Public Groups and International with the Australian Taxation Office ("ATO"). Ms. Lewis heads up the ATO's transfer pricing economist group and was able to provide considerable insight into how the ATO is endeavoring to manage its transfer pricing compliance and assurance programs. The ATO also publishes the transcripts of public speeches made by senior personnel on its website. It does this to assist in disseminating the ATO's views on a range of tax matters, and this again provides excellent insight into the ATO's compliance and assurance programs. In this regard, we have reviewed and sought to summarize in this paper some of the views expressed in three recent speeches by Mr. Jeremy Hirschhorn, Second Commissioner - Client Engagement, being:

- *Transfer pricing a key focus for ATO*, delivered as the welcome address and opening remarks at the Tax Institute National Transfer Pricing Conference, Sydney, August 14, 2019;
- *Reflections on being a large market tax adviser*, delivered to large market tax advisory firms, July–September 2019; and
- *Tax in a Transparent World*, delivered at CFO Live event hosted by the Australian Financial Review and Group of 100 in Sydney, November 7, 2019.

Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

After several years of legislative change in and around the Australian transfer pricing scene (including the major legislative rewrite in 2012/2013 and then the addition of quasi-transfer pricing anti-avoidance measures, such as the Multinational Anti-Avoidance Legislation ("MAAL") and the Diverted Profits Tax ("DPT")), 2019 saw no new transfer pricing-related legislation being enacted by the Australian Parliament. However, as has been the way over recent years, the ATO released new guidance material in relation to various transfer pricing matters. This guidance is generally provided through the release of Practical Compliance Guidelines ("PCG") materials. Although not law, the PCGs provide taxpayers with insight into the ATO's views and an understanding of how the ATO will likely approach certain issues. The PCGs are an important part of the ATO's compliance assurance strategies and are designed to help taxpayers to self-assess their transfer pricing risks. The objective of this is to encourage taxpayers to proactively manage their transfer pricing positions and obviously the more taxpayers that self-regulate, the more the ATO can focus its resources on key issues and what some in the ATO refers to as "transfer mis-pricing" matters.

The new guidance issued in 2019, which provides taxpayers with parameters to self-assess their transfer pricing risks, consisted of:

- PCG 2019/1 Transfer pricing issues related to inbound distribution arrangements;
- PCG 2019/6 OECD hybrid mismatch rules - concept of structured arrangement;
- PCG 2019/D3 ATO compliance approach to the arm's length debt test; and
- PCG 2019/D5 ATO compliance approach to transfer pricing issues related to projects involving the use in Australian waters of non-resident owned mobile offshore drilling units.

The ATO also updated PCG 2017/2, which provides certain small taxpayer record keeping concessions.

The PCGs provide the ATO's risk assessment parameters, documenting what it considers safe "green zone" arrangements in relation to transfer pricing issues, as well as detailing what are considered riskier "red zone" arrangements. While the PCGs do not set out the ATO's views on arm's length conditions or pricing in relation to any particular transaction, they are intended to help taxpayers make decisions about the amount of tax risk to which they want to be exposed, including: (i) their compliance risk in relation to transfer pricing and (ii) the likelihood and extent of compliance activity (if any) by the ATO. The PCG's use *profit-markers* to determine low- and high-risk ranges. The ATO stresses that these *profit-markers* are not benchmarks and should not be used as proxy-benchmarks. We understand that these *profit-markers* are an aggregation of a range of data from a multitude of sources, including benchmarking data, APA data, audit data, and broader industry data. Therefore, while relevant for risk-assessment purposes, they do not represent a credible alternative to a thorough transfer pricing analysis involving appropriate functional and economic analyses.

The ATO considers that the PCG program has led to taxpayers looking to engage with the ATO earlier than in the past to endeavor to address and resolve historic and current-year issues and "lock in" future arrangements – this provides assurance certainty for the ATO and tax certainty for the taxpayer moving forward.

Transfer Pricing Examinations/Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

There has been a subtle change in the approach of the ATO to its transfer pricing compliance program. Traditionally the ATO approach was based on risk-assessments. More recently, as part of the ATO's "Justified Trust" initiative involving the Top 1000 corporates in Australia, the ATO is effectively performing tax due diligence reviews on those Top 1000 companies, and is seeking a more comprehensive understanding of the company's affairs rather than merely focusing – as it perhaps did previously – on perceived high-risk transactions and dealings.

The ATO is seeking to become more transparent with taxpayers as to areas of both assurance and potential concerns, providing detailed review reports to the taxpayer at the end of the assurance reviews. The ATO is also trying to be more transparent in relation to specific tax and transfer pricing issues especially since, as a developed economy with significant inbound and outbound investment and trade, Australia necessarily has a complex corporate tax system. Transfer pricing falls squarely within the ATO's Justified Trust program, especially since many of the most significant tax issues involve the pricing of cross-border dealings. The ATO has therefore been quite deliberate in sharing its risk-assessment frameworks with the taxpaying community with the expectation that this transparency allows companies to make informed decisions as to the risk profile that they wish to adopt, rather than potentially inadvertently taking on transfer pricing and tax risk.

One of the more interesting developments – which is at least partly attributable to the BEPS initiatives – is the increased collaboration between revenue authorities. The ATO is actively sharing data and intelligence with other revenue authorities in an effort to fight tax evasion. To this end, the ATO Commissioner Mr. Chris Jordan chairs the Joint International Tax Shelter Information and Collaboration (JITSIC) Network. JITSIC brings together 40 of the world's national tax administrations to collaborate on current domestic and international tax risks. This network can share information and respond collectively to data leaks, such as the Paradise Papers, in the future. The ATO is also part of a network involving the United States, Canada, the Netherlands, and the United Kingdom (the Joint Chiefs of Global Tax Enforcement or the "J5"), sharing data and intelligence in an effort to detect, disrupt, and deal with offshore tax evasion, including transnational tax crime and money laundering. While this may be more relevant to high-net-wealth individuals and their efforts to deliberately hide assets and income from revenue authorities, these networks – including the International Exchange of information (EOI) - also share information related to the operations of multinational corporations that is relevant to the administration and enforcement of each other's domestic tax laws.

Country-by-Country (CbC) reporting, which is another BEPS initiative, has also made the operations of multinational corporations much more transparent to the world's revenue authorities. The information obtained through this reporting and exchange forum helps the ATO to understand international structures and tax settings. Australia is currently one of the 80 tax jurisdictions signed up for the multilateral competent authority agreement for CbC reporting and, to-date Australia has received almost 5,000 CbC reports through the automatic exchange mechanism with over 50 tax jurisdictions.

As part of its assurance program, the ATO also has a strong focus on tax governance and tax control frameworks. This applies equally to transfer pricing for multinational taxpayers. The ATO expects that taxpayers have well-designed, appropriate, and compliant tax control frameworks in place and that the tax control framework is applied and operated as intended – that is, the form of the tax control framework matches its substance.

In his *Transfer pricing a key focus for ATO* speech, Mr. Hirschhorn touched on three compliance areas:

- Related party loans of which he said the ATO has made great inroads in addressing taxpayers who have sought to achieve artificial transfer pricing benefits through these arrangements. He cites the fact that the ATO has brought about $80 billion in previously high-risk related party loans into low risk or "green zone" arrangements and expects this to increase as they resolve existing issues;
- Marketing hubs. Mr. Hirschhorn said that again, by working actively with taxpayers to resolve these matters, the ATO is seeing a positive impact of its hubs strategy on reducing the use of these arrangements to reduce tax in Australia (for example, he refers to the BHP settlement, referred to below);
- Lastly, he referred to the ATO's focus on inbound supply chains and the perceived *race to the bottom* in terms of the profit landed in Australia. He said action was required because distributor pricing was not only reducing the Australian tax base but it was also clogging up the ATO's APA process, adversely affecting taxpayers with genuine prices seeking certainty.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

We have previously highlighted the transfer pricing guidance issued by the ATO in 2019. There was one significant transfer pricing decision in 2019 – *Glencore Investment Pty Ltd v. Commissioner of Taxation of the Commonwealth of Australia [2019] FCA 1432* ("Glencore") – and one high profile transfer pricing settlement.

The *Glencore* case involved the pricing of copper concentrate, mined by a Glencore company in Queensland, and sold in an unrefined state to the parent company in Switzerland, which then sold the concentrate to smelters in Japan, Korea, India, China, and the Philippines, which then turned the concentrate into copper. In the ATO's view, the Australian entities were underpaid for that unrefined copper concentrate product by approximately $241 million over three years; the ATO claimed tax, interest, and penalties exceeding $92 million. The key issue in the case was the nature of a hypothetical copper concentrate offtake agreement, and the extent that this hypothetical offtake agreement could differ from the actual offtake agreement.

The decision – although relating to the old law (Division 13 and Subdivision 815-A) rather than the new 2013 version (Subdivision 815-B) – was significant in that it confirmed that the Australian transfer pricing rules operate to ensure that the pricing of the transactions or arrangements actually entered into are arm's length rather than empowering the Commissioner to price an alternative arrangement that the Commissioner considers to be more appropriate than that which the taxpayer entered into. In essence, the ATO's case was not that the price was wrong, but that the deal was wrong as unrelated sellers would not have agreed to the actual arrangement entered into. Justice Davies rejected the ATO's arguments, holding that the determination of the arm's length amount should be based on the form of the actual transaction between the associated enterprises,

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but under the assumption that the parties are independent and dealing at arm's length. The Commissioner is appealing the *Glencore* decision.

There is conjecture amongst transfer pricing practitioners and academics as to whether the decision would have been different under the new Subdivision 815-B rules and specifically the Commissioner's power to reconstruct arrangements under Section 815-130.

One of the areas of significant focus from the ATO in recent years – and that resulted in the issuance of PCG 2017/1 – is the use by Australian resources companies of marketing hubs in low-tax jurisdictions. Singapore and Switzerland have traditionally been the focus of the ATO's investigations in relation to these types of arrangements. The ATO has been working with affected taxpayers to endeavor to resolve the issues associated with marketing hubs and, in 2019, reached a settlement with BHP pursuant to which BHP will now be paying their full Australian tax on their Singapore hub, and that their on-going arrangements are in line with the ATO's "green zone" set out in PCG 2017/1. The ATO sees this as a significant development in its marketing hubs strategy and, considering that BHP is one of Australia's major taxpayers, this settlement sends a strong signal to taxpayers with similar arrangements in that industry, as well as to the emerging oil and gas industry. The BHP dispute with the ATO and the resulting settlement are a matter of public record.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

Based on both our discussions and the material in the various speeches made by the ATO, it is clear that 2020 will involve a continuation of the ATO's compliance assurance program for the Top 1000 corporates and we are likely to see some further actions in relation to some of those corporates. This further action will likely include combinations of further information requests and reviews, invitations into the APA program, or other compliance activity (i.e., audits).

From a risk perspective, we expect the ATO will continue to focus on:

- Related party funding arrangements and structuring, leveraging the risk-assessment guidance provided in PCG 2017/4 in relation to inbound related party funding;
- The role of Australian companies associated with intangibles – including the characterization (or perhaps mischaracterization) of Australia's role in performing DEMPE functions and assuming DEMPE risks, and the valuations attributable to any transfer of intangible assets either into or out of Australia;
- The use in supply chains involving Australian companies of marketing hubs and potentially other types of hubs in lower-tax jurisdictions and the focus on the relative contribution of the various parties in that supply chain to the derivation of the channel-profits;
- The returns being derived by the Australian distribution entities of multinational groups, leveraging the risk-assessment guidance provided in PCG 2019/1 – we would expect that the ATO is likely to focus on those high-risk industries that are specifically addressed in PCG 2019/1, including information and communication technology companies, life science companies (including pharmaceutical companies), and motor vehicle companies; and
- Global and particularly regional service charges levied on Australian companies. We understand there are two potential areas of concern for the ATO: (i) firstly that the use of certain allocation keys for these charges – especially revenue-based allocations for regional service fees – may not produce charges that are commensurate with the value provided from the service, especially where the Australian business may have a significant local infrastructure; and (ii) where regional roles performed in Australia may have DEMPE implications rather than merely involving the provision of services.

From a legislative perspective, the principal material for interpreting the Australian transfer pricing legislation is the OECD Guidelines. Currently the 2010 version, plus BEPS Action items 8-10, is the relevant interpretation. We understand that The Treasury is working on preparing the legislation required to put before Parliament next year measures to update the principal interpretation to be the 2017 version of the OECD Guidelines, which incorporates the new business restructuring chapter. It is expected that the legislation needed to update the guidance to the 2017 OECD Guidelines will be tabled in Parliament in 2020.

In many ways we expect 2020 to merely be a continuation of the ATO's vigorous transfer pricing compliance program. We expect the ATO will issue more guidance – by way of PCGs – in relation to the key issues it is seeing, especially where there is a material mismatch between the ATO's expectations, and the outcomes being achieved by taxpayers. We are also likely to see further scrutiny of affected taxpayers following changes in the financial reporting requirement in relation to tax provisions and tax uncertainties. Based on overseas experiences – such as the former FIN 48 disclosures in the U.S. – transfer pricing issues are likely to be high on the list of a multinational taxpayer's tax uncertainties. It is possible that these additional financial reporting obligations could spark an increase in the interest for APAs going forward.

In closing it is fair to say that transfer pricing compliance will remain a priority for the ATO into 2020 and beyond. Time will tell as to how the application and interpretation of the new transfer pricing rules in Subdivision 815-B will evolve (as it takes a long time for disputes to be dealt with by the Courts). What is certain however, is that the ATO and taxpayers/practitioners will continue to have divergent views of the law and its application. What is also certain is that taxpayers must continue to be diligent in managing their Australian-specific transfer pricing positions in the specific context of the Australian transfer pricing rules and the legislative test of whether the taxpayer derives a *transfer pricing benefit*. The due diligence associated with managing the taxpayer's transfer pricing position must be documented, as that is the only way that the taxpayer can evidence its compliance with its statutory obligations. As we always say, it is very clear that transfer pricing is not an *optional extra* for multinationals in Australia.

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Austria

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

In the past few months, several new laws have been passed in Austria, primarily as part of the Austrian Annual Tax Reform Act 2020. Amongst the most predominant changes is the introduction of new anti-hybrid provisions pursuant to the EU directive ATAD II. The anti-hybrid provisions, as formulated in para 14 of the Austrian Corporate Income Tax Act (KStG), aim to neutralize any tax discrepancies, resulting from either double deduction or double non-inclusion of income, as part of a hybrid structure. New provisions on reportable cross-border arrangements ("EU-Meldepflichtgesetz") to implement the EU directive DAC 6 have also been introduced. These provisions include an obligation of the intermediary (primarily) to report relevant cross-border arrangements, as defined in the new act, to the Austrian competent authority. Further, the new law introduces a digital tax of 5% on the revenue generated by large online advertisers with consolidated worldwide revenue exceeding 750 Million Euro and generating at least 25 Million Euro annually from online advertising activities in Austria.

Furthermore, large administrative changes were introduced as part of the Austrian Financial Reorganization Law, which foresees a huge organizational merger as of July 1, 2020. The regional tax offices are to be pooled together into one central tax office for medium to large-sized companies, tax groups and private trusts ("Finanzamt für Groszbetriebe") and one tax office for smaller companies and individuals ("Finanzamt Österreich"). Also, there will be a separate authority for customs issues and also an individual department for fiscal crimes ("Amt für Betrugsbekämpfung") and for wage-dependent levies ("Prüfdienst für lohnabhängige Abgaben und Beiträge"). The primary aim of this reform is to bundle expertise, increase professional quality and make processes more efficient. Once this reform is in place, tax returns and other applications can be filed with any of the regional offices in Austria.

The Austrian Ministry is also working on an update of the Austrian transfer pricing guidelines, which were issued in the form of an administrative decree in 2010. Currently, these guidelines do not represent comprehensive guidance on the determination and documentation of transfer prices (besides citing rulings issued by the Austrian Ministry of Finance on a no-name basis) but instead primarily refer to the OECD Guidelines. The Austrian guidelines should allow for a dynamic interpretation, considering recent developments with respect to the OECD Guidelines. According to our understanding, the updated Austrian transfer pricing guidelines will refer even more to the OECD Guidelines in view of the fact that many changes to the OECD Guidelines implemented in the past few years are deemed highly unspecific and Austria does not want to be a pioneer with its own interpretation before an international understanding of the recent changes has been developed. The update is expected to be issued in early 2020.

Further, a draft update of the Austrian corporate income tax guidelines is available, which specifically addresses topics of required substance under the new CFC regulations.

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

Increased media coverage regarding large transfer pricing controversies has raised awareness on the topic but has also increased the taxpayer's uncertainty. To date, we have thus seen an increasing interest towards a solid transfer pricing structure and documentation, not only by medium to large-sized enterprises, but also by smaller taxpayers, who are not yet legally required to prepare transfer pricing documentation. It should be noted however that, all Austrian taxpayers face a general requirement to prepare documentation based on the obligation to keep books and records and disclosures under Articles 124 and 131 of Austrian Federal Fiscal Code ("FFC").

In our daily practice, we have observed an increased requirement for solid documentation to prove that transactions are commercially meaningful and are at arm's length. What's more, Austrian tax authorities often do not only ask for proper documentation of an entity's functions, risks and assets (i.e. by way of a functional analysis in the Local File), but also for details on its contribution to the group's value chain, as well as evidence that the "direct-benefit-test" is met. Even though not required by the Austrian Transfer Pricing Documentation Act ("VPDG"), the Austrian tax authorities increasingly request an entire value chain analysis as part of the transfer pricing documentation. Also, in tax audits, tax authorities have recently started to test transfer pricing models against a simulated profit split. Care must thus be taken as to what information is disclosed in the transfer pricing documentation such that local tax authorities are not

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"invited" to test existing transfer pricing models by a profit split simulation.

Further, financial transactions are often the focus of tax audits though there is currently very little guidance on the transfer pricing aspects of financial transactions in the Austrian transfer pricing guidelines or at the OECD level, which invites challenges by the tax authorities. This uncertainty has increased with the OECD publishing a draft report on financial transactions, which highlights the needs for increased documentation of the relevant broader fact pattern without providing certainty on how to price the transactions.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

In the past few years, we have observed an increasing number of MAP procedures in Austria (to our knowledge, there are currently around 311 open MAP cases). The competent authority team at the Austrian Ministry is working very efficiently; however, due to a significant lack of personnel resources, Austrian tax authorities lag behind in resolving an increasingly large number of MAP cases. Taxpayers thus should anticipate a long timeframe for the processing of their individual MAP application. We have not yet observed a trend reversal towards a timely, effective and efficient processing of MAP applications in Austria. It is hoped that under the new government, an increased need for adequately compensated, highly-skilled officials is recognized and related steps are taken.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

In an anonymous letter ruling (Express Answering Service No 3415) issued by the Austrian Federal Ministry of Finance ("BMF"), the Ministry published its view that "a fixed location or facility" within the meaning of para 29 BAO (Austrian Federal Fiscal Code) may also exist if the employee uses a laptop and/or a mobile phone provided by the employer to perform office work in his or her private home (so called "home office"). The BMF further emphasizes that the effective power of the employer to use that location can also be factually achieved with the operational use of the home office.

We thus recommend a careful review of existing arrangements with individual employees and cross-border commuters to ensure that a permanent establishment is not created.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

Some developments have already been mentioned under the first question above. In addition, the Austrian financial administration system will undergo major changes in 2020. Part of this reform is the creation of a tax office for medium to large sized companies, which will consequently lead to a bundling of competencies. Further, it may be expected that many legal disputes will no longer be initially dealt with by the tax authorities in an administrative procedure, but instead will be directly brought to the court of first instance.

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Belgium

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

Revised Version of the Draft TP Circular Letter

On November 9, 2018, the Belgian tax authorities published a draft Circular letter on transfer pricing, which sets out the positions of the Belgian tax authorities on multiple items stemming from Base Erosion and Profit Shifting ("BEPS") developments.

The draft Circular was subject to public consultation until December 12, 2018. A revised version was circulated on June 17, 2019 to the parties that provided comments on the initial draft. While the second version of the draft Circular did take into account an important number of comments provided, certain positions are still subject to discussion.

It is expected that the Belgian tax authorities will release a final version of the Circular letter on transfer pricing soon.

The draft Circular appears to be generally aligned with the 2017 edition of the OECD Transfer Pricing Guidelines and aims to adopt and address some of the recently introduced OECD concepts for Belgian tax purposes. The draft Circular letter covers chapters 1 to 3 and chapters 6 to 9 of the OECD Transfer Pricing Guidelines.

With regard to the determination of transfer prices, it is formally clarified that existing contracts should be seen as the starting point. However, if the functional analysis of the transaction deviates from the terms of the contract, the behavior of the parties involved in the transaction takes precedence over the contractual provisions (the latter being ignored by the Belgian tax administration). The importance of each risk-taking party having control over those risks, and having the financial capacity to bear those risks, has also been highlighted.

In discussing the transfer pricing methods, some points of concern are discussed in further detail, including:

- Potential rejection of benchmarking studies that show an arm's length range that is considered too wide;
- The use of budgeted costs versus actual costs;
- The calculation of the cost base and the treatment of pass-through costs (i.e., costs with an advance nature);
- The use of Belgian accounting standards versus other accounting standards; and
- The calculation of net margins and the impact of the non-recurring costs and revenues.

The chapter discussing the comparability analysis mentions that an update of the original comparability analysis should be performed every three years, in line with OECD guidance.

When testing the arm's length nature of the transaction, the result of the tested party will be accepted when the result of the tested transaction falls within the interquartile range. The initial draft mentioned that when the result of the tested transaction falls outside the interquartile range, the Belgian tax administration could make adjustments toward the median of the range. This provision has been removed in the second version dated June 17, 2019.

With regard to hard-to-value intangibles ("HTVI"), the draft Circular letter confirms a number of positions that are aligned with the OECD report published on June 21, 2018. For example, it is assumed that there is always an information asymmetry between the taxpayer and the tax authorities. For this reason, the Belgian tax administration may consider ex post outcomes as presumptive evidence on the appropriateness of the ex ante pricing arrangements. This principle will only be applied by the Belgian tax administration on controlled transactions involving HTVI that have taken place on or after October 5, 2015.

For low value-adding services, a simplified approach may be applied for the determination of arm's length charges. If an activity qualifies for the simplified approach, a mark-up of 5 percent of the relevant cost base may be applied.

On business restructurings, a number of principles with respect to the termination or substantial renegotiation of existing arrangements are discussed in the draft Circular letter. In this respect, the question arises as to whether the restructured entity would be entitled to compensation under arm's length conditions.

Finally, the draft Circular letter refers to the Authorized OECD Approach with respect to the attribution of profits to permanent establishments. In this respect, a distinction is made between double tax treaties based on the OECD Model Conventions before 2010 and those from 2010 onwards. It is observed that this section has been shortened considerably in the revised draft Circular letter dated June 17, 2019.

The draft Circular also includes additional guidance on intercompany financing, having adopted various concepts from the yet-to-be finalized OECD discussion draft on the transfer pricing aspects of intercompany financing. Specific positions related to intercompany financing are discussed, including the following:

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- A company in a multinational group would not require any payment for "implicit support" (i.e., the benefit of a better credit rating that may arise from being part of a multinational group);

- Preference for the "yield approach" when determining compensation for guarantees;

- Deposits or borrowings that remain for a longer period could be recharacterized as short-term loans. Note that the wording applied is softer in the revised draft Circular letter. The initial Circular letter made reference to an automatic requalification of a deposit into a loan after a six-month period;

- All cash pool participants are considered to have the same credit rating; and

- Cash pool leaders acting as administrators to the cash pool should not be remunerated more than a market-based service fee, which would typically be determined based on a cost-based approach.

The Directive on Administrative Cooperation in the Field of Taxation ("DAC6")

Following a proposal put forward by the European Commission, the new mandatory disclosure requirements ("MDR") were published in the Official Gazette on December 30, 2019 and will apply from July 1, 2020. The implemented legislation broadly follows the terms of DAC6.

DAC6 introduced an obligation on intermediaries (including advisers) to disclose to their domestic tax authorities information on cross-border arrangements that meet certain criteria and to introduce rules for the subsequent exchange of this information between tax administrations. As of July 1, 2020, all disclosures must be made within 30 days of implementation. Intermediaries (including advisers) and relevant taxpayers will thus be required to map and disclose information on reportable cross-border arrangements.

The DAC6 rules target all kinds of cross-border arrangements that fall under a "hallmark" of the Directive. Some hallmarks target specific transfer pricing arrangements, such as arrangements that involve the use of unilateral safe harbor rules, arrangements involving the transfer of a HTVI, and arrangements involving an intra-group cross-border transfer of functions and/or risks and/or assets (if certain conditions are met).

Earnings Stripping Rules

The new earnings stripping rules in Belgium entered into force on January 1, 2019 and apply from assessment year 2020 (relating to a taxable period starting the earliest at 1 January 2019)..

In general, according to the earnings stripping rules, the deduction of net interest (i.e., the difference between interest paid and interest received, "exceeding borrowing costs") is limited to the higher of 3 million EUR or 30% of EBITDA.

The tax authorities recently released a circular letter that, in part, addresses the "grandfather rule" for certain loans under the new earnings stripping regime. Under the "grandfather rule," interest on loans concluded before June 17, 2016 can be excluded from the calculation of the excess borrowing costs if those loans have not been subject to a "fundamental change" as of that date. According to the circular letter, a fundamental change includes a change in parties, interest rate, loan duration, or amount borrowed.

Transfer Pricing Examinations/Audits.

Describe key features or developments in the transfer pricing examination/audit process in your country.

The Belgian tax authorities have slowly started using the transfer pricing forms filed with the tax authorities to make informed decisions about which companies should be selected to undergo a transfer pricing audit.

Although it is the intention of the Belgian tax authorities to develop an automated risk detection tool for selecting taxpayers for which future transfer pricing audits will be performed, we understand that such a tool is not available yet.

As a result, to date, there is no clear link between the transfer pricing forms submitted by taxpayers and the questions raised during a transfer pricing audit.

In the past, the data mining tool used by the special transfer pricing audit department ("TP Cell"), was based on published statutory accounts and had rather limited information as to the volume and types of intercompany transactions.

It is assumed that in the future the various transfer pricing forms that have been filed with the tax authorities will be used by the TP Cell to select the entities where the likelihood of a transfer pricing adjustment is high.[1] Furthermore, the standard transfer pricing information request sent to taxpayers will most likely be replaced by specific questions based on the information included in the Master File (Form), Local File (Form) and Country-by-Country Report.

For this reason, it will be important to ensure consistency in the way information is presented in the different transfer pricing forms.

Focus on Transfer Pricing and Complex International Tax Issues in General

The Belgian tax authorities have expanded their transfer pricing team. As the Belgian tax authorities are flooded with transfer pricing information and documentation following the rather recent requirement for qualifying taxpayers to file a Master File (Form), a Local File (Form), and Country-by-Country Report (and notifications), they have decided to invest considerably in manpower to review all of these documents (with the assistance of software tools) and to perform audits on the detected issues. In doing so, a three-layered approach will be followed.

Three-Layered Approach

First, the TP Cell will increase its number of transfer pricing inspectors from 27 to over 35.

Second, to enhance cooperation with the Large Companies Department, specialists in the TP Cell have organized transfer pricing trainings for the audit centers of the Large Companies Department over the past two years. In total, more than 200 people from the Large Companies Department (of which more than 100 are inspectors) have been trained. Each of the 20 teams in the Large Companies Department has been assigned to a number of multinationals that have been subject to a thorough transfer pricing and international tax audit. During these audits, the teams in the Large Companies Department are assisted and supported by the specialists in the TP Cell. Consequently, the teams in the Large Companies Department of the Belgian tax authorities are focused on transfer pricing and international tax issues when auditing large multinationals.

In addition, the Special Investigation Squad (Bijzondere Belastinginspectie - BBI/Inspection Spéciale des Impôts – ISI) has concluded a protocol with the TP Cell, whereby BBI/ISI will focus more on transfer pricing issues by coordinating and liaising with the TP Cell.

These investments have led and will continue to lead to the performance of an increased number of transfer pricing audits. Another remarkable change as a result of the transformation of the transfer pricing department of the Belgian tax authorities is that transfer pricing audits can start at anytime throughout the year, not just the beginning of the year.

Specific Areas of Focus

In line with the position described in the draft transfer pricing Circular letter, transfer pricing inspectors are systematically reviewing cash pooling arrangements, short term loans versus long term loans, use of early repayment clauses, credit rating analyses,, and guarantee fees. Transfer pricing adjustments related to intercompany financing transactions continue to top the list of transfer pricing audit adjustments.

Besides a clear focus on intercompany financing transactions, experience has shown that recurring transfer pricing controversy topics also include the requalification of the functional profile of a company, the spread retained by foreign central procurement centers, and the transfer and licensing of intellectual property ("IP"). Other classic topics remain relevant (e.g., management fee recharges, business restructuring, challenging of benchmarking studies, length of start-up losses, etc.).

Other Recent Developments Concerning the Transfer Pricing Audits

As discussed, the BBI/ISI has concluded a protocol with the TP Cell. As a consequence, transfer pricing audits are now also being conducted by the BBI/ISI, whose mission is to fight against serious and organized tax evasion or fraud. The approaches and methods of this department are more aggressive compared to the TP Cell.

Similarly, we have also noted a new trend in applying tax increases (penalty tax in arrears) to transfer pricing adjustments. In Belgium, adjustments to the taxable basis (including transfer pricing adjustments) are subject to a tax increase ranging from 10% (e.g., in the case of a first infringement) up to 200% (e.g., in case of fraud), as provided in the Belgian Income Tax Code ("BITC").

In the past, tax increases were generally not applied in cases where a TP audit led to a transfer pricing adjustment, if certain conditions were met.[2]

Recently, based on an internal circular within the Belgian tax authorities, we note that more often tax increases are effectively applied to transfer pricing adjustments.

Finally, it is important to note that the OECD BEPS Report on HTVI provides support to the TP Cell to make post-factum judgments and adjustments. The draft Circular letter confirms the assumption that there is always an information asymmetry between the taxpayer and the tax authorities.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

MAP procedures are still perceived by multinational enterprises ("MNEs") as time-consuming and are therefore only initiated for larger transfer pricing adjustments. Moreover, we feel that MNEs are often afraid that entering a MAP could trigger a transfer pricing investigation at the level of the country of the counterparty.

When a MAP procedure is initiated, we observe that the Belgian MAP department is rather reactive and has the right technical competences. In this respect, the OECD conducted a review of how peers experienced the Belgian MAP department. Several countries confirmed that Belgium's MAP department "took actions to accelerate the resolution of MAP cases, among which the scheduling of more face-to-face meetings and the use of electronic channels of communication."[3]

Furthermore, the OECD investigated the average timeframe needed to resolve MAP cases. According to the OECD's research, it took Belgium on average 15.92 months to resolve MAP cases. In our experience, the timeline of a MAP case highly depends on the country of the counterparty.

The number of MAP procedures did not increase significantly. There was even a slight decrease in the total MAP caseload over the 2016 – 2017 period[4], meaning that a lot of companies are still incurring double taxation following unilateral adjustment by the Belgian tax authorities.

However, we expect the number of MAP cases to increase in future years, given the important number of transfer pricing audits conducted in Belgium and abroad.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

In the past year, there were no landmark Belgian transfer pricing cases, although there have been a number of small cases. In Belgium, transfer pricing audits are still concluded with a common agreement in over 90% of the cases. Therefore, there are relatively limited litigation cases (especially considering the fact that other procedures are available, such as the MAP or the procedure under the European Arbitration Convention ("EAC")).

The most recent transfer pricing rulings are in line with previous years' rulings. The number of transfer pricing rulings and pre-filing meetings (i.e., a first meeting where a discussion with the ruling commission is held on an informal basis) remained stable compared to previous years. However, the number of innovation income deduction rulings, which often include a description of intercompany transactions, almost doubled in 2018 compared to 2017.[5]

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

BEPS 2.0

BEPS 2.0 arose from the discussions emerging from the 2015 BEPS project, particularly with regard to Action 1, which recognized the tax challenges of digitalization and the resulting business models. BEPS 2.0 has resulted in a series of questions on taxing rights and how income should be allocated among countries. The OECD is currently working on proposals for BEPS 2.0, and a consensus is expected towards the end of 2020. It is important that multinationals start considering the potential impact of BEPS 2.0 and what it means to them, as well as identifying areas in their transfer pricing models that might need to be reassessed.

Final Transfer Pricing Circular to be Published

As discussed, it is expected that the Belgian tax authorities will release a final version of the Circular letter on Transfer Pricing soon. We expect that the major parts of the draft Circular letter will remain unchanged in the final version. We expect the Belgian tax authorities to more actively use the specific positions taken in the Circular letter to perform transfer pricing adjustments.

Increased Number of Transfer Pricing Audits

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Taking into account the recent changes in transfer pricing documentation and the investments the Belgian tax authorities made in the transfer pricing department, we expect a further increase in the number of transfer pricing audits. We also expect the use of data mining to improve the exploitation of the information contained in the transfer pricing forms submitted to the tax authorities.

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NOTES

[1] Part 2 of the Belgian Local File requires a list of all cross-border intercompany transactions, together with the transfer pricing method applied. Part 2 of the Local File should be filed for accounting years starting on or after January 1, 2017, while Parts 1 and 3 of the Local File should be filed for accounting years starting on or after January 1, 2016.

[2] Article 444 of the BITC 92 and Article 226 of the BITC 92 Royal Decree.

[3] OECD, Base Erosion and Profit Shifting Project *Making Dispute Resolution More Effective – MAP Peer Review Report, Belgium (Stage 2)* – paragraph 190; *see* *http://www.oecd.org/fr/belgique/making-dispute-resolution-more-effective-map-peer-review-report-belgium-stage-2-734c25f4-en.htm*.

[4] *Id*. at paragraph 203.

[5] Dienst Voorafgaande Beslissingen in Fiscale Zaken - Jaarverslag 2018. *See also*Dienst Voorafgaande Beslissingen in Fiscale Zaken - Jaarverslag 2017.

Brazil

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

The Brazilian transfer pricing system was established by Federal Law n. 9,430/96 and is generally regulated by Normative Instruction n. 1,312/12 (IN 1,312/12), which was modified in January 2019 by Normative Instruction n. 1,870/19 (IN 1,870/19) to both clarify some of the Brazilian transfer pricing regulations and to change specific aspects of the system.

The new regulation defines "commodity" for purposes of the mandatory application of the methods PCI (imports) and PECEX (exports) as, the product listed in Annex I of IN 1,870/19 and either commercialized in at least one of the public markets listed in Annex II or that has its price fixed by a public institution listed in Annex II.

The new regulation clarifies that the accepted margin of divergence of 5% is calculated between the weighted average parameter price (*preço parâmetro médio ponderado*) and the weighted average price (*preço praticado médio ponderado*), the "parameter" being the price to which the actual price must be compared.

On imports, the new regulation establishes two criteria for the period of calculation of the parameter price. The first concerns the year used to calculate the parameter price; in the PIC method (similar to CUP) and CPL (similar to cost plus), the parameter price takes into account operations carried out in the same calendar year in which the controlled operation occurred.

In PRL (similar to the resale price method), the parameter price should consider the calendar year in which the controlled operation impacts the Brazilian importer, i.e., when there is a write-off in inventories to achieve the result.

The second criterion would be the inclusion of the excess cost (portion exceeding the parameter price) of the import operation in the calculation basis of the corporate taxes (IRPJ/CSLL). According to IN 1,870/19, the inclusion must occur in the calendar year in which the item was accounted for, by disposal or write-off of any title. This provision applies not only to PRL but also to PIC and CPL (different from the first modification).

The new regulation also clarifies that under the PIC method, it is possible to use transactions between third parties and companies of the same group as the Brazilian company.

The new regulation also provides further clarifications on the PRL method regarding the calculation of both the parameter price and the actual price of the transaction. The calculation of the actual price of the transaction must: (i) include the freight and the insurance when contracted under the related Incoterm and (ii) consider the opening stock less the closing stock, and all operations carried out in the period.

Regarding the calculation of the parameter price for the PRL method, the new regulation sets forth that regardless of the destination market of the products imported by the Brazilian company, the comparable price will be the price of the operations carried out by the importer with unrelated parties only in the internal market.

As a final remark on the modifications by IN 1,870/19 regarding the clarification on the calculation of the profit margin under the PRL method, the former legislation was unclear on whether the profit margin should be calculated on the net revenue excluding unconditional discounts and taxes and contributions on the sales and commission fees, or excluding the unconditional discounts only. The new legislation establishes that the profit margin must be calculated on the net revenue (excluding unconditional discounts and taxes and contributions on the sales and commission fees).

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

Brazil has not adopted the OECD guidance on Local File and Master File. Therefore, we have not faced specific difficulties on the standard transfer pricing documentation requirements in 2019.

The Brazilian Tax Authorities have increased the control on the ultimate beneficiary ownership disclosure, under the adoption of CbCR, through Normative Instruction 1,681/2016. The guidelines for the fulfillment of *Declaração País-a-País* (Brazilian CbCR under domestic legislation) were released in 2017. Furthermore, the country has started the exchange of information, beginning with the calendar year 2016 reports.

In 2019, the Brazilian Internal Revenue cancelled tax assessments on transfer pricing that, after disregarding the method used by the taxpayer, the Internal Revenue had not provided notice to the taxpayer to present a new calculation with an alternative method.

This is a special provision under article 20-A of Law 9,430/96, in force since 2012.

Despite not being directly related to transfer pricing, polemics have been raised by the recent approach of the Brazilian Internal Revenue with regard to the regularization of assets program, which was held in 2016 and 2017 under Laws 13,254/2016 and 13,428/2017. While at the time of the disclosure program (providing amnesty for residents holding non-declared assets abroad), the text of the law was clear on requiring the statement of the declarant about the licit origin of the assets. However, during 2019, the tax authorities issued individual assessments asking for proof of the contents of such statements, meaning the lawfulness of the assets' origins. In practice, such notices invert the burden of proof, which belongs to the Brazilian Internal Revenue per the original text of the amnesty regulations.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

In November 2018, the Brazilian Internal Revenue updated the regulations on the Mutual Agreement Procedure through Normative Instruction n. 1,846/18. While considering the new regulation to be an update and an improvement to the structure of the existing rules, the Brazilian Internal Revenue highlights the following features of the new text:

- Clarifies the mandatory attachment of the MAP request presented to the authorities of the other Contracting State.
- Clarifies the mandatory notification to the Brazilian Internal Revenue about any changes that occurred during the procedure that may impact it, such as decisions or new regulations issued by the other Contracting State.
- Clarifies the mandatory attachment of proof of any claim submitted to the authorities of Brazil or the other Contracting State and the respective decision of the authorities.
- The possibility of the resident of the other Contracting State to present the MAP in Brazil (such possibility previously existing in practice only under the treaty with Argentina).

The new regulation aims to incorporate better practices in the Brazilian procedure. The Brazilian treaty network is still limited (33 in force treaties, plus the recent treaties signed with Switzerland and Uruguay that are not yet in force), and disputes involving treaty interpretation through MAP are restricted to only one case, according to the OECD statistics for 2018 (the OECD has not released updated statistics for 2019 yet).

According to –the OECD statistics, Brazil has concluded only one MAP case by resolution. Another case has been concluded through a withdrawal by the taxpayer. The information on the matters involved in these two cases was not released yet.

In addition to the enforcement of new regulations to internally enhance the access to MAP, Brazil amended the existing tax treaty with Sweden (amending Article 25 in 2019) and concluded new treaties with Switzerland (see Article 25 concluded in 2018) and with Uruguay (see Article 27 concluded in 2019). These latter two treaties are not yet in force. These changes are in the context of the minimum standards of the OECD BEPS Action 14 recommendations, in order to increase transparency of the MAP process in Brazil.

- One of the commitments made by countries as part of the BEPS project was to resolve treaty disputes in a timely, effective, and efficient manner. Have you noticed a change in the timeliness of a typical MAP case?

It is not possible to affirm whether the amendment of existing tax treaties (in line with the Action 14 minimum standard) and the issuance of new internal regulations has increased the time efficiency of the MAP process in Brazil.

New Brazilian regulations on MAP were released on November 29, 2018, but the OECD and the Brazilian Internal Revenue have not released statistics for MAP resolution for cases initiated after December 31, 2018 or for cases concluded in 2019 (whenever initiated).

As of November 2019, Brazil has had only two MAP cases resolved, one through the taxpayer's withdrawal and the other by an agreement to eliminate double taxation. According to the OECD, Brazil took approximately 12 months from Milestone 1 to the end (i.e., from the date of position paper to the closing (before the implementation of the agreements)).[1]

- Many countries have enhanced their MAP procedures in response to the BEPS initiative. To date, have you noticed a change in the number of MAP cases initiated in your country, or an increased willingness by taxpayers to consider MAP?

According to the OECD statistics, Brazil had an inventory of 11 cases as of January 1, 2018. Since 2018, nine cases have been started, with two being closed. Therefore, in a comparison of before and after January 1, 2018, it is possible to say that the willingness to consider MAP has increased. However, at the moment, the same cannot be said in relation to 2019, due to the lack of updated statistics. A final disclaimer on the OECD statistics is that they do not differentiate between cases initiated in Brazil or in the other Contracting State.

The increase in transparency of the MAP process in Brazil is likely to increase the taxpayer's willingness to seek the procedure. One of the measures under the new regulations in Brazil binds the MAP resolutions to decisions taken under domestic law procedures, like the administrative procedure for tax notices. This means that the taxpayer may argue its claim to the administrative court in a parallel procedure, but the Internal Revenue Service must apply the decision of the administrative court when deciding a MAP on the same issue.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

Administrative Proceeding 10508.720642/2017-28

This judgment took place on October 15, 2019 and involved a dispute of approximately BRL 1.5 billion by Suzano Papel e Celulose S/A. The decision was released on November 6, 2019 on the Taxpayers' Council (CARF) website.

The PECEX method is mandatory for transactions involving commodities, or goods and rights subject to "daily average quotation of goods or rights subject to public prices on *internationally recognized commodity and futures exchanges*." Normative Instruction 1,312/12 establishes that commodities are:

- The products listed in Annex I of the same Normative Instruction and whose price is fixed by public sectorial institutions listed in Annex III or
- Any product which is negotiated by future commodity exchanges listed in Annex II.

The transaction in this case involved liquid paper and cellulose, neither of which are listed in Annex I, and the argument of

[1] These terms were extracted from the MAP Statistics Reporting Framework.

the tax authorities was that an institution related to the University of Sao Paulo had published the price for these products.

Regarding the method, while Suzano applied the lesser of the PvEX (similar to CUP) and CAP (similar to cost plus, with a fixed profit margin of 15%) methods, Brazilian Internal Revenue tried to enforce the use of PECEX based on the price set up by the independent institute.

According to the judgment, the PECEX is restricted to commodities, while commodities must present "(. . .) daily quotation, homogeneity, (and) be traded in futures market." In conclusion, tax authorities may not exceed the limits of the legislation that precisely define what a commodity is for transfer pricing purposes.

The Brazilian Internal Revenue is likely to appeal to CARF's Superior Chamber of Appeals, CARF's ultimate trier of judgment.

A similar position had been adopted earlier. Consultation Ruling (*Solução de Consulta*) COSIT n. 310/2014 took the stance that the mandatory application of PECEX presupposes that the good or right be listed in Annex I, while it also must be traded on an institution listed by Annex II.

The relevant tax events occurred before the new regulation by IN 1,870/19 which, as mentioned above, establishes that products that are not listed in Annex I of the regulation are not commodities despite the fact that they are quoted in a public exchange.

Consultation Ruling (Solução de Consulta) COSIT 276/2019 – characterization of cost-sharing agreement

Even though Brazilian legislation does not directly apply the OECD Transfer Pricing Guidelines (TPG), the Brazilian Tax Authorities often justify their positions based on the OECD definitions. In this Consultation Ruling, the Brazilian Internal Revenue analyzed paragraphs 8.3 and 8.14 of the TPG to answer the taxpayer's inquiry on the characterization of what was in its view a cost-sharing agreement but, per the final assessment of the Brazilian Internal Revenue, was instead an intra-group service provision.

The main point which can be extracted from paragraph 30 of the Ruling was the "lack of the characteristic element of the cost-sharing agreement" that would be the "mutual benefit between the participating companies that are part of the contract."

A remarkable point was that the cost of the employees of the technological intelligence department (and presumably of the engineers involved in the project as well) was allocated *directly* to the Brazilian subsidiary (the integrant that benefits from the SAP being set up at that moment). As a result, the Brazilian tax authorities did not find any benefit to the U.S. company (the intra-group service "provider") to the extent that the "mutual benefit" was not present as would be expected in a typical cost-sharing agreement.

In the same vein, the lack of profit from the transaction would not suffice to circumvent the identification of a service provision, which was one of the main arguments by the taxpayer. The mere refund of the costs does not automatically lead to the characterization of a cost-sharing agreement.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

Although Brazil has not yet joined the OECD, it is expected to do so within the next few years. A main topic to be addressed by the Brazilian legislature is transfer pricing. Brazil and the OECD released a joint statement about the Brazilian transfer pricing context, in fulfillment of the OECD-Brazil Joint Transfer Pricing Project launched in February 2018. The outcome of the project highlighted the differences between Brazilian legislation and the OECD Guidelines.

The aim was to find gaps and divergences with the OECD approach ("gap analysis") and test the effectiveness of the existing rules and practices in view of the policy objectives of Transfer Pricing (TP) rules ("assessment of effectiveness").

For each chapter of the OECD Guidelines, the analysis considers whether the main elements, concepts, and objectives of the guidance are reflected in the Brazilian transfer pricing framework. These 30 issues can be characterized as divergences or gaps (areas left unaddressed) in the Brazilian transfer pricing rules.

The "assessment of effectiveness" subsequently tested the issues identified against the policy objectives of transfer pricing rules, which are: (i) ensuring the tax base in each jurisdiction and avoiding double taxation (prevention of BEPS risks and double taxation) and (ii) other objectives such as ease of tax administration, ease of tax compliance, and tax certainty from a domestic and international perspective.

The assessment also revealed an absence of special considerations for more complex transactions (intangibles, intra-group services, business restructurings, among others). Brazil should agree on issuing special regulations for such specific types of transactions, in order to comply with the OECD standards.

Tax certainty is generally provided from a domestic perspective, not an international one. Significant tax uncertainty results from the misalignment of the rules with the OECD transfer pricing standard, given that out of the 30 issues identified, only three instances led to positive outcomes regarding tax certainty from an international perspective.

Regarding the ease of tax administration and tax compliance, the report highlights as key points the absence of comprehensive comparability (FAR – function/assets/risks analysis), the freedom of selection of method, and the fixed margins approach, among others.

With reference to the complexity of the system, the report comments on the item-per-item approach of the Brazilian legislation, the strict standard of comparability, and documentation.

As a final assessment, the report concludes that unintended aspects of certain TP rules negatively affect the ability of the country to attract trade and investment. At the opposite end, the system has the ability to bring simplicity and practicality to the process of performing a transfer pricing analysis. However, in some cases, this may undermine the primary objectives of TP rules, leading to potential double taxation and BEPS risks.

The Project aims to deliver an outcome and a proposal for an approach to align the Brazilian system with the OECD Guidelines, which may involve a gradual or an immediate alignment. Finally, the absence of advanced pricing agreements and corresponding adjustments (Art. 9.2 of the OECD Model Treaty) in Brazilian tax treaties, and the country's relatively recent experience with dispute resolution are also likely to be a focus of attention for the years to come.

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Canada

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

2019 Federal Budget

On March 19, 2019, the Canadian government released the 2019 federal budget. Amongst the various proposed tax measures were two proposals concerning the relationship between the transfer pricing rules in Part XVI.1 and other provisions of the Income Tax Act (ITA):[1]

i. Order of Application of the Transfer Pricing Rules

ii. Applicable Reassessment Period

These transfer pricing amendments to the ITA were included in the draft legislation released by the Department of Finance on July 30, 2019 (Draft Legislation).

i. Order of Application of the Transfer Pricing Rules

The Canadian government proposes to amend the ITA to clarify that the transfer pricing rules in Part XVI.1 (section 247) of the ITA have priority of application over other provision in the ITA. The federal budget noted that this may have various implications, including the calculation of transfer pricing penalties imposed. It was also stated that the current exception to the application of the transfer pricing rules pertaining to Canadian resident corporations with amounts owing from controlled foreign affiliates, or guarantees of amounts owed by controlled foreign affiliates, will continue to apply. The ordering rule will apply for taxation periods that begin on or after March 19, 2019.

This proposed ordering rule has caused numerous concerns in the tax community, as raised by the Joint Committee on Taxation of The Canadian Bar Association and Chartered Professional Accountants of Canada in their letters to the Department of Finance in May and November 2019. The Joint Committee provided comments on these draft transfer pricing amendments, and urged the Department of Finance to provide further explanatory notes, should the current drafting be maintained.

Generally speaking, there is a shared view by the Canadian tax community that the proposed ordering rule is inconsistent with the policy of the existing rules and could lead to additional interpretive uncertainty, confusion, and administrative burden for the Canada Revenue Agency (CRA) and taxpayers. The proposed ordering rule means that ITA section 247 would likely override provisions of the ITA that historically provided a form of safe harbor, including for example:

- The thin capitalization provision under ITA subsection 18(4), which restricts the deductibility of interest paid or payable by certain Canadian corporations resident in a taxation year on debts owing to specified non-residents to the extent that such debts exceed a 1.5:1 debt-to-equity ratio of the Canadian corporation resident. By applying a transfer pricing test first, for certain taxpayers it might be concluded that a lower debt-to-equity ratio would be required to ensure that the conditions of the borrowings are consistent with arm's length requirements. However, the 1.5:1 ratio would still represent a maximum permissible level of leverage for all taxpayers.
- Provisions requiring income inclusion at prescribed rates in respect of certain loans and advances.

It is also likely that transfer pricing penalties will apply to a broader range of adjustments than would have been the case to date.

ii. Applicable Reassessment Period

The Canadian government proposes to amend the ITA to provide that the definition of "transaction" used in the transfer pricing rules could also be used for the purposes of the extended reassessment period relating to transactions involving a taxpayer and a non-resident with whom the taxpayer does not deal at arm's length. This will apply to taxpayers for a taxation year where the normal reassessment period ends on or after March 19, 2019.

The MLI

In addition to the above-noted proposed legislative changes, on August 29, 2019, Canada ratified the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the "MLI"). The implementing legislation is contained in 2019 Statutes of Canada, c. 12. The MLI will enter into effect for Canada's Covered Tax Agreements with many countries as early as January 1, 2020 – (i) for withholding tax starting January 1, 2020, and (ii) for all other taxes, including tax on capital gains, for taxation years beginning on or after June 1, 2020.

The authors believe that from a Canadian transfer pricing perspective, the most relevant provision introduced is the Principal Purpose Test (PPT), which is essentially an anti-tax treaty abuse provision. If one of the principal purposes of transactions or arrangements is to obtain benefits under a bilateral tax treaty, these benefits will be denied. It gives tax authorities the basis to challenge the purpose of making payments to offshore entities. Therefore, it is crucial that multinational entities revisit their corporate structures in light of the PPT to evaluate whether there is sufficient substance in the offshore entities receiving payments, and ensuring that there is documentation to support the business purpose of the transactions.

It should be noted that the MLI will not affect Canada's tax treaties with the United States, which has not signed the MLI, or Germany and Switzerland, with which Canada has announced bilateral treaty negotiation.

Transfer Pricing Examinations/Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

Canada has a long-standing transfer pricing documentation provision in subsection 247(4) of the ITA, which was introduced for taxation periods beginning after 1997. Since the introduction of this provision, the CRA has issued further guidance in Transfer Pricing Memorandum 09 (TPM-09) to elaborate on the reasonable efforts requirements for taxpayers when determining and using arm's length transfer prices under section 247. Failure to have appropriate transfer pricing documentation would result in the taxpayer being deemed not to have made reasonable efforts and will result in a transfer pricing penalty if a transfer pricing adjustment (exceeding the defined threshold[2]) is made by the CRA.

Therefore, the focus in Canada has always been making reasonable efforts to satisfy the six documentation elements required under paragraph 247(4)(a) of the ITA. It is the authors' view that the bar has been raised with respect to satisfying the reasonable efforts requirements, and that the CRA has adopted more of an outcome-based approach in determining the application of the transfer pricing penalty provision. Specifically, where the CRA has made a significant transfer pricing adjustment, the transfer pricing penalty (10% of the adjustment) is frequently applied, even if the taxpayer has complied with the documentation requirements of subsection 247(4). In the past, it was commonly believed that penalties would only be applied if a taxpayer did not comply with all of the documentation requirements. It would appear that there is now a requirement for a higher level of precision – apparently, the current view of the CRA is that if a large transfer pricing adjustment is made, the taxpayer must not have made a "reasonable effort" to determine an arm's length price.

Further, the CRA considers the 2017 edition of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* ("2017 OECD Guidelines") to be applicable even to pre-2017 taxation years. Additionally, ongoing OECD releases are important to consider in Canada, such as the *Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles*, which is now incorporated as an annex to Chapter VI of the 2017 OECD Guidelines. It is apparent that the CRA auditors rely on BEPS-related concepts, such as emphasis on substance,[3] real economic activity, and the ability of parties to control and manage the pertinent risks, while downplaying the significance of contractual risk-bearing and legal ownership of capital and assets. The authors have also observed the CRA's increased tendency to reject one-sided methods, while focusing on joint decision-making, local value-adding contributions to intangibles, and similar factors which justify higher returns to Canadian taxpayers.

Consequently, in order to formulate robust arguments in transfer pricing audits, the CRA has a tendency to issue extensive information requests (often going beyond what might be considered to be available to the Canadian taxpayer). Common foreign information sought by the CRA includes information on the group's global supply chain and profitability throughout the supply chain.

The CRA adopts a risk-based audit selection method. Before the introduction of country-by-country (CbC) reporting into Canadian legislation in 2018, the CRA already had a number of informative tools to assist them with risk-assessing tax filings and selecting taxpayers of interest for transfer pricing audit. Some of the common tools used include foreign reporting tax filing forms – T106 "Information Return of Non-Arm's Length Transactions with Non-Residents" and T1134 "Information Return Relating To Controlled and Not-Controlled Foreign Affiliates." Further, the CRA routinely issues transfer pricing audit letters to taxpayers to request their contemporaneous transfer pricing documentation. The CRA's review of the documentation is typically followed by several rounds of information requests, and often functional interviews are conducted by the CRA.

The CRA's transfer pricing audit coverage is very broad. Audited companies can range from large multinational enterprises to small and medium-sized enterprises, across all industries, public and private alike.

Given that the CbC reporting requirement is only effective for years commencing after 2015, and the fact that it takes time for the CRA to select cases for audit (e.g., many CRA audits currently under way involve years predating 2016), it is too early to comment on whether CbC reporting would have any impact on the volume and types of transfer pricing audits in Canada. However, it certainly provides another useful tool to gain transparency and insights into multinational enterprises during the CRA's risk assessments and audit case selection.

In the authors' experience, the recent primary areas of focus by the CRA during transfer pricing audits are:

- hybrid or similar financing structures;
- captive insurance companies;
- disposition of intangible property to offshore entities;
- characterization of transactions;
- relative allocation of income across the global value chain;
- sales and marketing roles remunerated on a cost plus basis;
- low substance/tax jurisdiction ownership of valuable intangibles with a Canadian tested party contributing to DEMPE

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

Canada has a well-established MAP program and an extensive tax treaty network, having signed its first tax treaty with the United States back in 1942. The official guidance on MAP was published by the CRA in 1971, which has been revised to arrive at today's Information Circular 71-17R5, Guidance on Competent Authority Assistance Under Canada's Tax Conventions, published in 2005.

The CRA's Competent Authority Service Division has continued to strive to improve the quality and timeliness of the services to taxpayers, especially after the release of BEPS Action 14, where members of the BEPS Inclusive Framework were committed to implementing a minimum standard to ensure that they resolve treaty-related disputes in a timely, effective, and efficient manner.

It is interesting to see that the average time to close a transfer pricing case actually increased during the three-year period 2016-2018 (approximately 27 months in 2016, 33 months in 2017, and 42 months in 2018).[4] This trend can be caused by many reasons, as the timeliness is highly dependent on the complexity of the case, as well as the Competent Authority in the foreign jurisdiction that the CRA was dealing with.

In terms of transfer pricing case volume, Canada experienced a material year-on-year reduction in cases (-19% for 2017/2018 and -23% for 2016/2017).[5] The volume of transfer pricing cases started during the year remained similar (73 in 2017 and 75 in 2018), with a slight drop in transfer pricing cases closed during the year (114 in 2017 and 102 in 2018).[6]

Based on the CRA's historical statistics (2013-2017), amongst the negotiable MAP cases completed, more than 70% of the cases were Canadian-initiated and less than 30% cases were foreign-initiated.[7] In the authors' view, this is indicative of the relatively high scope of audit coverage achieved by the CRA. Where multinational enterprises experience a CRA-initiated transfer pricing adjustment in Canada, MAP is a common mechanism to resolve or eliminate any resulting double taxation.

The MAP process is generally effective where the foreign jurisdiction has a well-established and experienced Competent Authority program. However, it may be relatively less effective and more time consuming, depending on the level of sophistication and resources at the foreign Competent Authority. It could also get complicated, given the CRA's expectation of obtaining a high volume of information in order to understand the foreign-initiated transfer pricing adjustment and eventually formulate its position on the case for MAP negotiation.

However, the authors believe that the mandatory binding arbitration provision introduced in the OECD MLI may improve the efficiency on the resolution of MAP cases for Canada's treaty partners that have signed and ratified the MLI.

Given that the CRA MAP program is already effective in most cases and has been made available to taxpayers for many years, it is difficult to tell whether the BEPS initiatives have increased taxpayers' willingness to adopt this dispute resolution mechanism.

It should be noted that cases between Canada and its main trading partner, the United States, are subject to a mandatory binding arbitration provision that already exists in the tax treaty between the two countries.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

The most recent prominent transfer pricing case in Canada is *Cameco Corporation (Cameco) v. the CRA*, where the Tax Court of Canada ruled in favor of the taxpayer on September 26, 2018. The CRA appealed this decision to the Federal Court of Appeal on October 26, 2018. The tax community will be closely watching for the decision of the Court of Appeal.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

In 2020, the authors anticipate that the current global focus on taxation and the digitalized economy, with the recent release of OECD Inclusive Framework discussion papers on Pillar 1 (revision of existing profit allocation and nexus rules) and Pillar 2 (global anti-base erosion), will be considered by Canada's Department of Finance.

On October 21, 2019, Canada had its federal election, and the Liberal Party regained power as the ruling party, but with a minority government. During the election campaign, the Liberal Party indicated its intention to introduce a new Digital Services Tax (DST) in Canada, and to introduce legislation to ensure that non-resident service providers are required to charge and collect Goods and Services Tax (GST) in connection with the provision of services where such services, if provided by a Canadian resident, would be subject to the GST. The DST proposal would introduce a new 3% tax on the income of businesses in certain sectors of the digital economy, similar to the one announced by the French government. The DST would apply on targeted advertising services and digital intermediation services, but only on businesses with worldwide revenues of at least CAD 1 billion and Canadian revenues of more than CAD 40 million.

In the authors' view, should the measures under Pillar 1 be endorsed and applied by Canada, the proposed DST would be made redundant, given the broader coverage of Pillar 1 in global profit allocation. As well, given that the main objective of DST is to target large technology multinational enterprises (with many of them being U.S.-headquartered), considering the French experience on DST, the authors believe that it remains to be seen how the unique trading relationship between Canada and the United States will be reflected. Certain U.S. internet trade groups have already voiced objections to the Canadian DST to the U.S. government.

In addition to the DST, during the election campaign the Liberal Party also indicated an intention to implement other tax measures, including anti-hybrid provisions and interest expense restrictions, which were inspired by Actions 2 and 4 of the OECD BEPS project.

It should be noted that as there is currently a minority government, the ruling party will require support from other parties or independent members of Parliament to pass any tax legislation.

In light of the foregoing, the authors forecast that the Canadian transfer pricing landscape in 2020 will continue to be very active.

Given the heightened transfer pricing audit activities by the CRA, it is important for multinational enterprises to periodically reflect on whether their transfer pricing outcome aligns with the accurate delineation of transactions. From a Canadian compliance standpoint, it is essential to make reasonable efforts to determine arm's length prices and to prepare robust transfer pricing documentation in order to mitigate the risk of transfer pricing penalties in Canada.

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NOTES

[1] RSC 1985, c. 1, (5th supp.); *see https://www.budget.gc.ca/2019/docs/plan/budget-2019-en.pdf*, accessed on November 13, 2019.

[2] Under subsection 247(3) of the ITA, a taxpayer is liable for a transfer pricing penalty equal to 10% of the transfer pricing adjustment if the net transfer pricing adjustment for the year exceeds the lesser of: (a) CAD 5 million or (b) 10% of the taxpayer's gross revenue for the year. The penalty applies whether or not the adjustment results in taxable income for the year.

[3] The CRA would appear to view "substance" to exist only in the case of physical activity performed by employees – in other words, under such an interpretation, substance cannot be created through

outsourcing of activities pursuant to service contracts. Based on Canadian jurisprudence, it is not clear if this view is sustainable.

[4] *See https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm*, accessed on November 13, 2019.

[5] *Id*.

[6] *Id*.

[7] *See https://www.canada.ca/content/dam/cra-arc/serv-info/tax/non-res/map/mp_rprt_2017-en.pdf*, accessed on November 13, 2019.

China

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

There were no new transfer pricing legislation or regulations introduced in China in 2019.

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

China introduced the three-tier documentation regulations in 2016 through the State Taxation Administration's (STA) Public Announcement on the Enhancement of the Reporting of Related Party Transactions and Administration of Contemporaneous Documentation [2016] No. 42 ("Announcement 42"). The local file documentation requirements under Announcement 42 are more onerous than the requirements under the OECD Guidelines (2017), including the requirement to include value chain analysis, financial statements of all relevant related parties, analysis on location specific advantages, amongst others, in the local file.

These requirements can sometimes be challenging for taxpayers to meet. The question is how taxpayers choose to meet these requirements - whether they choose to meet the minimum requirement threshold or to be fully compliant. It is a balance for taxpayers to decide but taxpayers must take cognizance that the Chinese tax authorities do conduct checks and assessments on the quality of the transfer pricing documentation submitted by taxpayers.

The in-charge tax authorities will grade a local file against the requirements and if the grading points fall below a certain level, taxpayers will be requested to provide justification for the non-compliance and/or to resubmit the transfer pricing documentation. In Beijing, the in-charge tax officials of one locality will exchange the transfer pricing documentation with the in-charge tax officials of other localities to assess the compliance of the documentation with the regulations. This is done to remove any bias of the in-charge tax official when reviewing the local files of the entities under their care. As a result, the cross-checking exercise will directly and indirectly increase the threshold of compliance and quality of submission. In fact, this cross-checking has led to informal audits that typically focus on taxpayers who's achieved margins fall below the median of the results established by the comparable searches documented in the local files. Testing of taxpayers' multiple year results have also been rejected and adjustment demands are made on an individual year basis.

In addition to preparing adequate transfer pricing documentation, some taxpayers are also faced with further supervision of their transfer pricing arrangements and are required to submit additional data beyond that required in the transfer pricing documentation disclosures. Ten provinces and cities have rolled out a profit monitoring mechanism on large multinational taxpayers or taxpayers deemed to have complex related party transactions (e.g., licensing transactions) in each of the provinces and cities. The mechanism was first introduced by the Jiangsu tax bureau in April 2018 and to date, nine other cities and provinces have followed suit, including Beijing, Shanghai, Guangzhou, Shenzhen, Dalian, Hubei, Sichuan, Ningbo and Inner Mongolia.

The profit monitoring mechanism taps into big data analysis for the tax authorities to carry out risk assessments, so that more targeted administrative action can be taken against taxpayers. The mechanism involves extensive qualitative and quantitative information collection to enable the authorities to gain a deeper understanding of the overall operations of the MNE group. The taxpayers are then ranked according to their risk levels against a series of criteria including the complexity of the intercompany transactions, the taxpayer compliance level with respect to reporting and disclosure of intercompany transactions, as well as the attitude of taxpayers in response to queries from tax authorities.

The information required by the tax authorities to run the profit monitoring mechanism includes the annual contemporaneous transfer pricing documentation, the annual tax returns, exchanged country-by-country (CbC) reports, securities analysts' reports, as well as information obtained from other sources such as through structured and regular cross-government department data exchanges. Selected taxpayers have also reported that they received requests from provincial and city tax bureaus to provide data in certain formats (e.g., specific digital formats) that can be readily input into the tax authorities' systems to run the required analyses. The requests from the authorities also require taxpayers to provide detailed segmented information that often date back to ten years, which is the inquiry window for transfer pricing investigations. Such detailed requests are certainly a significant compliance burden for taxpayers to meet.

The extensive information requests to feed into the profit monitoring mechanism may prove challenging for many taxpayers. The challenges can be exacerbated for those taxpayers with multi-faceted supply chains, and for those whose IT systems cannot readily satisfy the authorities' request for data that could date as far back as ten years. Taxpayers will need to invest in compliance systems and resources to ensure that, going forward, they can keep pace with these ever-increasing demands of providing quality data that supports taxpayer transfer pricing arrangements.

There has not been any direct CbC report-related audit in China to date. However, the authors anticipate that the STA will soon launch CbC report-related enquiries. The STA has various risk analysis tools at its disposal. Coupled with the OECD-developed risk assessment tool, known as the tax risk evaluation and assessment tool (TREAT), that is made available to the tax authorities of the OECD Inclusive Framework, the STA will be able to identify important indicators of potential tax risks.

Notwithstanding the above, in the latest development experienced by the authors, the Jiangsu tax authorities have begun to send notices to some taxpayers to inform them that they should examine their transfer pricing positions, and where necessary, voluntarily perform profit adjustments. This latest development is seen as the Jiangsu tax bureau acting on the output of analyses carried out through the profit monitoring mechanism.

The notices are framed in such a way that they do not compel taxpayers to perform any action, but should they choose to, taxpayers should at a minimum evaluate and justify if their existing transfer pricing positions are correct and supportable. The notices include the reasons the Jiangsu tax bureau believes the taxpayer's positions pose transfer pricing risks and link these reasons to the facts and circumstances of the taxpayer. Examples include:

(1) high proportion of related party transactions with abnormal profit margins;

(2) profit margin of the entity is inconsistent with the group;

(3) low profitability in comparison with industry peers;

(4) low profitability against comparable companies.

While it is too early to conclude how the Jiangsu tax bureau will act on the responses of the taxpayers, the authors' experience points towards the expectation that some form of adjustment will be required. The attitude of taxpayers in responding to such notices is particularly relevant, given there is a criterion under the profit monitoring mechanism to identify taxpayers who are not cooperative and these taxpayers may then be placed under formal transfer pricing audits.

The long-standing focus of the Chinese tax authorities is on non-trade related party transactions. This was the case for 2019 as well.

The Chinese tax authorities have been treating intercompany cross-border service fee and royalty payments as high-risk transactions. The authorities make a point of reviewing transactions of these types even where the profit margin left in China remains high even after taking the tax deduction for these payments. Further, the Chinese tax authorities pay attention to taxpayers exploiting the Chinese market and having a largely domestic supply chain as they argue that there is no need for support from overseas related parties for largely domestic based businesses.

A few examples of recent efforts of the Chinese tax authorities performing reviews on non-trade payments made in 2017 and 2018 include:

(1) The Shenzhen tax authority's anti-avoidance branch, established in 2018 after the merger of the local and state tax bureaus, initiated preliminary information and data collection on more than 300 enterprises with large outbound non-trade payments.

(2) The Beijing tax authorities increased their efforts on conducting reviews of outbound payments.

(3) The Tianjin Port Free Trade Zone tax bureau issued review notices to companies that have significant outbound payments.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

Post BEPS, tax authorities around the world, including China, have increased the resources in their MAP teams in an effort to accelerate their negotiations and conclusion of MAP cases. The authors are also aware that the STA and competent authorities have been prioritizing discussions on MAP cases during competent authority meetings.

The increase in the efficiency with regard to the resolution of MAP cases can be seen in a MAP case completed by the Chinese and Indian tax authorities in late 2018. The case involved permanent establishment attribution of profits asserted by the Indian authorities. The MAP case resolution took only one round of negotiations and four months from application to the conclusion of the case. The swift agreement was a first for both tax authorities. It provides a good example of the willingness of the competent authorities to swiftly resolve tax disputes.

In line with the positive changes to the resources of the MAP teams at the STA level, the authors are also observing that taxpayers are more willing to engage with the tax authorities to resolve double taxation that may have been incurred.

Statistics published by the OECD under an agreed reporting framework show that there has been an increase in the number of transfer pricing related MAP cases in China that were started and concluded between 2016 and 2018. The OECD statistics divide the reporting of MAP cases into cases that were started before 1 January 2016 and cases that started as from 1 January 2016 to provide a clearer indication of the MAP negotiation progress before and after the finalization of the BEPS Action papers in October 2015.

The table below shows the changes in the MAP inventory of transfer pricing related cases in China between 2016 and 2018.[1]

As can be seen from the table, there have been significant efforts by the STA to drive more cases towards conclusion over the last three years. There were 60 concluded cases in 2016 alone, although the number of concluded cases dropped to 16 in 2017 but picked up to 39 cases in 2018. The closing inventory shows a downward trend from 74 cases at the end of 2016 to 59 outstanding cases at the end of 2019.

In terms of the average time required to close transfer pricing related MAP cases, the 2018 statistics show that the STA took 46.89 months to close cases that started before 1 January 2016, and 17.76 months to close cases that started from 1 January 2016. These averages are in fact higher than the averages reported for 2017. It was reported that, in 2017, China took 31.86 months to close transfer pricing cases initiated before 1 January 2016 and 3.51 months to close cases initiated as from 1 January 2016. The increase in the average time can be explained by the fact that the STA has been focusing on backlog cases to clear the inventory of cases started before 1 January 2016. The statistics show a positive trend where the closing inventory of 53 cases in 2016 was reduced to 22 cases in 2018. It should be noted that not all cases closed result in a total elimination of double taxation as some cases were concluded with

		Start Inventory	Cases Started	Cases Closed	End Inventory
2016	Before 1 Jan 2016	113	0	60	53
	As of 1 Jan 2016	0	21	0	21
	Total	***113***	***21***	***60***	***74***
2017	Before 1 Jan 2016	53	0	14	39
	As of 1 Jan 2016	22	25	2	45
	Total	***75***	***25***	***16***	***84***
2018	Before 1 Jan 2016	41	0	19	22
	As of 1 Jan 2016	44	13	20	37
	Total	***85***	***13***	***39***	***59***

partial resolution of double taxation and some were closed without agreement between the competent authorities.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

China does not have a developed litigation system for tax and transfer pricing cases. There were no transfer pricing court cases in 2019.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

Heading into 2020, the authors expect that more taxpayers will receive notices (issued by tax authorities that have implemented the profit monitoring mechanism) that inform taxpayers to perform self-assessments and ultimately tax adjustments, where necessary. Given detailed reasons are included in those notices that are targeted at the taxpayers' circumstances, the authors believe that taxpayers will have to tread more carefully when responding to the tax authorities so as not to jeopardize their positions when it comes to transfer pricing self-adjustments.

Further, we will also see relentless effort by the tax authorities inquiring into non-trade payments. The focus will not only be on outbound non-trade payments, but there will also be increased attention given to Chinese outbound enterprises not charging non-trade transactions to their overseas subsidiaries. Based on the authors' experience, Chinese outbound companies generally do not charge out the costs they incur for supporting the wider group, e.g., finance, IT, and legal costs. And if they do, the charges can be quite arbitrary.

For cross border disputes that need to be resolved through the MAP and APA processes, the increased resources and attention at the STA level, coupled with its proactiveness in resolving MAP as a matter of priority, will certainly help taxpayers achieve tax certainty at a much faster pace than previously achieved. The OECD stage 1 peer review of China's MAP process was launched at the end of 2018 and the results were recently released. Any recommendations from the peer review paper that the STA considers implementing will certainly contribute to the further enhancement of China's international dispute resolution mechanisms.

Finally, following the release of consultation paper issued by the OECD in October 2019 entitled "Secretariat Proposal for a 'Unified Approach' under Pillar One" on the taxation of digitalized economy, the authors highly anticipate that there will be intense deliberations among Chinese policy makers. To date, China has not publicly provided any position or comments on the proposed 'Unified Approach' however, China is an active participant of the OECD Inclusive Framework Steering Group as well as at the Working Party meetings. The 'Unified Approach' proposal is complicated, and the authors' best guess is that China's response to the proposal will be dependent on other countries reaching an understanding on the scope and implementation of the 'Unified Approach'. China has an important stake in the Pillar One proposal considering China is home to several leading enterprises with highly digitalized business models with global reach. There is no doubt that China will be keen to avoid a situation where unilateral measures around the world would target these Chinese-based businesses.

As with other global businesses, Chinese multinational enterprises will be particularly hopeful that the OECD Inclusive Framework strives to achieve a full consensus on all aspects of the proposal before the final paper is published. Rules to avoid double taxation and rules to prevent and/or resolve conflicts are instrumental to make the new framework effective.

Adding to the complication on the deliberation of Pillar One proposals is the careful consideration by China of the OECD proposal under Pillar Two concerning global anti-base erosion (GloBE) issued in November 2019. It is worth noting that, even if GloBE is solely agreed upon as 'best practices', rather than as a 'minimum standard' which all OECD Inclusive Framework jurisdictions must adopt, many countries may still be motivated to adopt it. If a country does not adopt the GloBE rules, and thus does not subject locally headquartered multinational enterprises (MNEs) to the income inclusion rule, this leaves these MNEs open to the imposition of source country taxation under the subject to tax or undertaxed payments rules. As such, countries, including China, may be induced to 'protect' their MNEs by adopting the Pillar Two proposal.

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[1] There are some slight differences between opening and closing inventories, as disclosed in the OECD statistics.

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Germany

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

Overall, 2019 did not see significant new German transfer pricing legislation or regulations, although some of the case rulings described in the answer to Question 4 (below) will have some impact in practice. It should also be noted that the relatively quiet year of 2019 followed a rather eventful 2018 when new guidance on "deviations from the arm's length principle in specific restructuring situations"[1] was issued (in December 2018), following the ruling by the European Court of Justice on Hornbach.

Two developments in 2019 are noteworthy. First, on November 9, 2019 the federal government adopted the draft law on the introduction of DAC6, which introduces a notification requirement for cross-border tax planning, according to which credit institutions, tax advisors, lawyers, auditors, or taxpayers will be obliged to notify the Federal Central Tax Office (*Bundeszentralamt für Steuern*) of certain cross-border tax planning models.[2] While the German Federal Parliament has not yet passed this legislative proposal, it is generally expected to be implemented in early 2020.

Second, on November 7, 2019, Parliament passed the Research Allowance Act (*Forschungszulagengesetz -For ForFZulG*), which introduces a tax allowance for R&D. The new tax incentive for R&D relates to the relevant personnel expenses and requires the fulfillment of five criteria specified in the annex to the law: It must be innovative, creative, uncertain in terms of the end result, systematic, and transferable and/or reproducible. This law could have a significant effect on German subsidiaries engaged in R&D activities.

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

German tax authorities have focused on strengthening their overall transfer pricing audit capabilities based on the post-BEPS context. Notably, at the federal level, tax authorities have invested heavily in developing tools to analyze CbC reports to identify "risk areas" (i.e., taxpayers and transactions that they would like to scrutinize in more detail.) They now have Excel-based tools that allow them to identify outliers, which will lead to notable changes in the transfer pricing results, as more risk areas are identified. The analysis is based on several simultaneous approaches, including: i) comparison of different countries within a CbC filing, ii) comparison of different years filings for a taxpayer, and iii) industry-specific key metrics.

At the state level, the focus and intensity of transfer pricing audits vary strongly depending on the state. The overall trend is to focus more attention on perceived abuse structures and to apply "DEMPE" concepts, although there is a certain debate around whether this OECD concept is actually applicable since it has not yet been implemented in German law. Nevertheless, in practice, German authorities tend to use substantially similar arguments, since the German regulations have been historically focused on substance.

Most multinational taxpayers are starting to feel the increased scrutiny on transfer pricing issues. Challenges regarding the application of transfer pricing methods and the classification of various entities is increasing in many cases, including those where there is no dedicated tax planning.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

Due to the extremely high number of transfer pricing audits in Germany and the frequent imposition of adjustments, the number of MAP cases in Germany has historically been rather high, and the German competent authority is struggling with the number of open cases.

Consequently, there were no significant changes concerning the duration of a typical MAP case in Germany in 2019. The number of MAPs is relatively stable, at a high level. At the end of 2018, the inventory of open MAP cases was approximately 1,200 cases, of which only half were initiated in 2018. Roughly 600 cases were closed in the same year, (i.e., there was no material change in total open cases). Measured by the number of MAP cases, Germany is clearly the world champion.[3]

The duration of MAP procedures, especially for transfer pricing cases, has soared. For cases started before 2016, the duration has risen to 49-52 months in 2018 (up from 39-41 months in 2017).

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

Several important decisions were rendered by the highest German tax court[4] in 2019. Most importantly, on February 27, 2019, it rendered three decisions on cases regarding the application of the arm's length principle.[5] The cases involved intercompany loans, their pricing, and the ability to take deductions for write-downs of non-performing loans to group companies. However, the rulings have the potential to affect other transfer pricing topics as well.

Before the new rulings, the court had held that the fact that a loan is secured could be a comparability factor in determining the interest on a loan (i.e., that a secured loan would generally have a lower associated interest rate than an unsecured loan); however, the court generally held that whether a taxpayer had structured its loan as secured or unsecured was not subject to an arm's length test and would, therefore, be considered an external "given" factor in the transfer pricing analysis. This has now changed, as the court held that a write-down on an unsecured loan would not be deductible, since the fact that the loan was not secured in the first place was not arm's length behavior.

This is notable since the court's ruling considered the overall *structure* (not just the pricing) to be a deviation from the arm's length principle. Thus, the case can have further-reaching consequences. Taxpayers should be prepared to document that not just the pricing, but also other conditions are arm's length. In effect, this establishes a two-step analysis. In the first step, it should be tested whether the terms and conditions would have been agreed between third parties, and in a second step, it should be analyzed whether given the terms and conditions, the pricing was at arm's length.

Overall, this decision is part of a wider trend toward "substance over form" rulings, where certain structures that are considered unsubstantiated in the first place are called into question.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

Beyond the implementation of DAC6, few new German transfer pricing laws are currently expected in 2020.

Practitioners are still awaiting regulatory guidelines on the arm's length principle that would formalize the BEPS implications into German law. Although not yet published, it is commonly believed that they would set important standards in the foreseeable future on various transfer pricing models and therefore, could mark a turning point in some areas. However, it should be noted that due to personnel changes at the Ministry of Finance, as well as an expected increased workload related to Pillar I and Pillar II of the OECD's work on the digital economy, there is some doubt as to whether, or when such guidelines will be published.

Concerning the tax audit practice, transfer pricing audits will further intensify in 2020 with a focus on intangibles. Beyond this, Germany is still seeking to establish a European consensus on the treatment of the digital economy. However, there is some political uncertainty as to whether the current coalition will remain stable in 2020, or if an early election might be called, which could change Germany's stance, especially with regard to the digital economy.

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[1] Wirtschaftliche Gründe, die den Abschluss eines Geschäfts unter nicht "fremdüblichen Bedingungen" rechtfertigen - EuGH-Urteil vom 31. Mai 2018 in der Rechtssache C-382/16.

[2] Gesetz zur Einführung einer Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen; *https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze_Gesetzesvorhaben/Abteilungen/Abteilung_IV/19_Legislaturperiode/Gesetze_Verordnungen/G-Mitteilung-grenzueberschreitende-Steuergestaltungen/0-Gesetz.html*

[3] *https://www.oecd.org/tax/dispute/2018-map-statistics-germany.pdf*

[4] *Bundesfinanzhof* (BFH).

[5] BFH case 27.02.2019 I R 73/16.

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Hong Kong

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

Further to the enactment of the Inland Revenue (Amendment) (No. 6) Ordinance 2018 on 13 July 2018 ("TP Legislation"), the Hong Kong Inland Revenue Department ("HK IRD") released the Departmental Interpretation and Practice Notes ("DIPNs") on transfer pricing practices on 19 July 2019 (collectively the "TP Regulations"). There are in total three DIPNs published on the respective areas of TP documentation, application of TP rules, and attribution of profits to permanent establishments ("PE"s) in Hong Kong.

Under the Hong Kong TP Regulations, Hong Kong constituent entities ("CE") are mandated to prepare (and may need to submit) TP documentation (i.e., Country-by-Country Report ["CbCR"], Master File, and Local File) starting from Year of Assessment ("YOA") 2018/19. Depending on the financial year-ends of the Hong Kong CE and the multinational enterprise group ("Reportable Group") and whether certain thresholds are met, the Hong Kong CE may need to prepare the Master File and Local File or submit a CbCR to the HK IRD by the end of 2019 (CbCR notification requirements also kicked in during 2019).

Hong Kong CEs with accounting periods beginning on or after 1 April 2018 are the first batch of entities which need to prepare the Master File and Local File, while Reportable Groups with accounting periods beginning on or after 1 January 2018 are the first batch of Reportable Groups which need to file a CbCR with the HK IRD.

Another major game changer to the Hong Kong TP landscape is the application of Section 50AAK of the TP Legislation, which took effect from 1 April 2019. Section 50AAK of the TP Legislation requires the income or loss of a non-Hong Kong resident person attributable to the person's PE in Hong Kong to be determined as if the PE were a distinct and separate enterprise. To comply with 50AAK, PEs of Reportable Groups in Hong Kong need to analyze their required capital structure as if they are standalone Hong Kong incorporated entities. Furthermore, the PEs need to construct a hypothesized tax balance sheet and profit and loss statement purely for a capital attribution exercise and in accordance with the separate enterprise principle as set out in Section 50AAK.

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

With the enactment of the Hong Kong TP Legislation on 13 July 2018 and the arm's length principle, effective from 1 April 2018, we expect an increase in the number of TP examinations or audits referring to the arm's length principle. However, based on our observations so far, we have not seen a marked increase in the number of TP examinations or audits in 2019. One of the possible reasons may be the lack of historical data available to tax examiners for identifying non-arm's length transactions and related issues.

Due to the lack of formal TP regulations in the past, tax audits in Hong Kong were typically driven by profit tax issues, such as attribution of profits between on- and offshore operations, the taxability of income, the deductibility of expenses, etc., while the HK IRD handled non-arm's length related party transactions generally from a tax avoidance perspective. In the absence of historical data and the fact that the first batch of TP documentation (i.e., CbCR, Master File, and Local File) will not officially be made available to the HK IRD until 31 December 2019, it may be difficult for the HK IRD to identify potential candidates for TP examination or audit at this point in time.

A noticeable exception to this is with regards to the asset management industry. Having started several years ago, the HK IRD continues to consistently conduct audits of an extensive number of fund managers (e.g., private equity and hedge funds). In particular, cost plus arrangements are being consistently rejected by the HK IRD in favor of management fee profit splits to override present pricing arrangements or to verify the results of applied transfer pricing policies. As evidence of this, the HK IRD issued Departmental Interpretation and Practice Notes No. 51 ("DIPN 51") in June 2016, which makes clear that the HK IRD expects a Hong Kong investment manager or advisor to be adequately compensated and to receive an arm's length return for the services that it performs. It goes on to comment that fees calculated "based on a cost-plus formula are not likely to have been determined on the arm's length basis." We expect audit activity in the asset management industry to continue, given the HK IRD's focus on this industry.

Overall, we anticipate the HK IRD will be more proactive in issuing TP examinations and audits in the future across all industries once they have gathered sufficient data and experience in identifying non-arm's length transactions. As announced in public forums, we also understand the HK IRD is building up its resources in the field audit and investigations unit.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

The HK IRD has been honoring its commitments under the double tax agreements ("DTA's) and has been processing taxpayers' corresponding adjustment ("CA") or MAP requests within a relatively reasonable timeframe.

In the event an overseas competent tax authority imposes a TP adjustment on a related party transaction, a Reportable Group may seek tax relief through CA or MAP. Taxpayers generally prefer CA over MAP, as it is relatively faster than MAP to obtain tax relief from the HK IRD. However, if the HK IRD disagrees on the TP adjustment imposed by the foreign competent tax authority, causing economic double taxation, the MAP becomes the next sought after channel by taxpayers where the HK IRD and the relevant tax authority negotiate to resolve disputes over double taxation.

Based on our observations, one of the factors that hinders CA or MAP applications is a dispute in the application of TP principles or the amount of TP adjustment imposed by the competent tax authority. Hong Kong is traditionally viewed as a low-tax and business-friendly jurisdiction, and related party transactions that go through entities in Hong Kong are common targets for TP audits by overseas tax authorities. It is not uncommon for taxpayers to agree on TP adjustments that are in favor of the foreign tax jurisdictions in exchange for earlier audit settlements. Subsequently, taxpayers try to obtain tax relief from the HK IRD via CA. Under these circumstances, the favorable terms offered to the competent tax authority are often challenged by the HK IRD, which may delay the application process and may result in rejection or incomplete double tax relief.

While we do not see significant changes in Hong Kong in terms of the number of MAP applications or the timeliness of a typical MAP case in 2019 (in the short term), this may change in the long run as taxpayers take advantage of enhanced MAP around the globe.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

As YOA 2018/19 is the first applicable year for taxpayers to prepare TP documentation, we are not seeing an increase in the number of TP audits or litigation resulting from the new TP Regulations. However, we anticipate seeing more TP audits or litigation in the future, as the HK IRD collects more data and starts building up experience in identifying non-arm's length transactions.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

With the enactment of the TP legislation and the first batch of Master Files, Local Files, and CbCRs being made available to the HK IRD by the end of 2019, it is anticipated that the HK IRD will build their database using the information received and use big data to facilitate their identification of non-arm's length transactions.

We expect the HK IRD to start issuing tax queries on related party transactions in the latter part of 2020, with headquarters cost allocations, interest-free lending arrangements, and income from intellectual property accrued to non-Hong Kong resident associates being possible targets for TP audit. In the past, the HK IRD had only disallowed the tax deduction for costs associated with these activities, as there was no legal mechanism for the HK IRD to impose an arm's length margin on these transactions. With the enactment of the TP Legislation, the HK IRD can now impose an arm's length margin on these transactions in Hong Kong, thus making these transactions vulnerable TP audit targets for the HK IRD in 2020.

On a related matter, with the discussions on the Organisation for Economic Co-operation and Development's "BEPS 2.0" in full swing, which is expected to significantly alter the international business landscape, we expect the HK IRD to take a "wait and see" approach and observe the actions taken by other major economies before introducing any mandatory measures in Hong Kong.

In light of the above, Hong Kong entities should take an in-depth and concerted look into their related party transactions in order to determine whether there is sufficient substance and documentation to support their arm's length nature. If not, gaps in the pricing policies should be reviewed and rectified as soon as possible.

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India

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

Legislation: The Finance Act for 2019 was announced in July after the electoral mandate was given to the Ruling Party. As expected, not many policy changes were announced by the Government with respect to transfer pricing ("TP") regulations. However, a few clarifications with respect to BEPS-related compliance and procedural aspects on the effect of Advance Pricing Arrangement's (APA) finalized by the Tax Officers were announced in the Budget.

The following sections, provide a brief outline of these advancements and their impact on taxpayers.

Secondary adjustment: The legislation on secondary adjustment was introduced in fiscal year 2017 *vide* Section 92CE of the Act and is applicable to Indian taxpayers who are subject to a primary adjustment exceeding INR 10 million (i.e. approximately USD 142,850), during or after financial year 2016-17. The legislation also lays down various scenarios (listed below) of primary adjustment leading to a secondary adjustment, which itself is vast and seeks to include as many cases as possible**:**

(i) *suo-moto* adjustment by the taxpayer in its return of income;

(ii) primary adjustment proposed by the revenue authorities and thereafter accepted by the Indian taxpayer;

(iii) resolution under an APA or mutual agreement procedure ("MAP"); and

(iv) application of prescribed safe harbors.

Unlike practices followed by most countries on this issue, the legislation on secondary adjustment in India is far more rigorous as it treats the additional taxable income arising from primary adjustments as a "deemed advance" rather than a "deemed dividend," the latter being the treatment typically adopted in other countries with applicable laws.

In view of the characterization of the additional taxable amount as a deemed advance, revenue authorities sought to perennially impute interest at a prescribed rate on the primary adjustment until such amount is repatriated by the overseas Associated Enterprise ("AE") to the Indian entity.

In relation to the time period for cash repatriation to India and computation of notional interest under the secondary adjustment rule, the Central Board of Direct Taxes ("CBDT") has issued revised rules. Further, the CBDT has issued a rule that permits a taxpayer to pay additional tax in lieu of repatriating the adjustment amount to India. The aforesaid amendments are summarized below:

a. Cash repatriation on conclusion of APA

The amendment provides that when an APA is concluded after the due date of the filing of the return of income of the relevant previous year (read as fiscal year) for which the transfer pricing adjustment is made, the cash repatriation would be required to occur within ninety days from the end of the month in which the APA agreement is signed.

If the transfer pricing adjustment relates to the year for which the due date of the return of income has not expired at the time of signing the APA agreement, the cash repatriation for that year will be required to occur within ninety days from the due date of the filing of the return of income for that year.

b. Cash repatriation on resolution under MAP

If a transfer pricing adjustment is determined based on resolution under MAP, the cash repatriation must occur within ninety days from the notice of demand issued by the assessing officer (tax officer), after giving effect to the MAP resolution.

Previously, there were anomalies around computational aspects of the secondary adjustment provisions, particularly, at the conclusion of an APA and resolution under MAP.

c. Clarification on the start date for computation of 90 days

Previously, there was ambiguity on the date from which the notional interest under a secondary adjustment should be computed, i.e., whether the notional interest should be computed from the ninety-first day after the expiry of the period allowed for cash repatriation or from the due date of cash repatriation.

The CBDT has clarified that the notional interest will be computed from the due date of cash repatriation and not from the ninety-first day, in case the taxpayer defaults in repatriating the full or partial amount even after the expiration of the ninety-day window for cash repatriation.

d. Option to pay additional tax in lieu of repatriation of amount to India

Additionally, as per the recent amendment, if the excess money or part thereof has not been repatriated in time, the taxpayer would have the option to pay additional income tax at the rate of 18% on such excess money or part thereof in addition to the existing requirement of the calculation of interest until the date of payment of this additional tax. The additional tax is further increased by a surcharge of 12%.

Further, it has been clarified that the tax so paid shall be the final payment of tax and no credit shall be allowed in respect of the amount of tax so paid and no deduction shall be allowed in respect of the amount on which such tax has been paid. Also, if the Taxpayer has paid the additional income tax, there would be no requirement to make a secondary adjustment or compute interest from the date of payment of such tax.

This amendment seems to be a welcome move, and it seeks to simplify the application of the provisions related to secondary adjustment by further providing an option to the taxpayers to pay additional tax (which is a one-time levy) when it is impracticable or impermissible to repatriate the excess money. However, at the same time, given the high additional tax plus the applicable surcharge, taxpayers should evaluate whether such option should be exercised.

BEPS-related compliance: The year 2017 had witnessed the release of draft and final rules relating to the CbC report, master file and local file requirements in India. The Indian rules primarily replicate the international guidance laid down by the OECD under Action Plan 13 on this topic. The content and criteria for maintaining CbC reports, master file, and local files are aligned with the schedules of Action Plan 13.

While the rules were aligned to Action Plan 13, there was a certain amount of ambiguity with respect to the "accounting year" for the alternate reporting entity (resident in India) for the purpose of filing the CbC report ("CBCR"). This led to speculation over the due date for compliance by the Indian reporting entity. The Government clarified that the "accounting year" for the Indian alternate reporting entity would be the same as followed by the ultimate parent entity.

Apart from the aforesaid, there were certain developments/ discussions on issues around international tax and transfer pricing which may be worth mentioning here:

- *Draft guidelines on PE profit attribution:* On 18th April 2019, the CBDT issued a recommendatory report on attribution of profits to permanent establishments ("PEs") and invited comments from various stake-holders within thirty days of such date of release. It is pertinent to note that the aforesaid recommendatory report was prepared by a Committee appointed by the CBDT for the said purposes.

The Committee recommended that the arm's length principle not to be applied under transfer pricing rules for the attribution of profits to PEs; and instead suggested that a formulary approach should be adopted for such attribution, by applying the global operational profit margin of a foreign enterprise to the revenue derived from India, as further adjusted with reference to certain weightages relating to various factors, e.g., assets, employees, wages, etc. Accordingly, the above-referred recommendatory report subscribes for a departure or moving away from the arm's length concept for attribution of profits to a PE.

There appears to be significant resistance from the global fraternity around the fundamental aspect of the discarding by the Committee of the arm's length principle under transfer pricing rules for the purpose of attribution of profits to PEs under the tax treaties signed by India with various countries ("Indian model tax treaties"). In this regard, numerous representations, by the relevant stakeholders and Tax Practitioners, have been made to the CBDT requesting guidelines for the attribution of profits to PEs in a manner that is in line with the texture and fabric of the Indian model tax treaties. The fundamental purpose of such representations is to bring to the attention of CBDT that adoption of a global formulary approach for attribution of profits to PEs is not proper.

It would be worthwhile to discuss and deliberate more upon this issue once the Committee issues the final guidelines. If the recommendations are adopted in the current form, it would have certain far reaching implications for multinational enterprises ("MNEs") having issues around PEs in India. As of now, there has been no further movement towards issuance of revised guidelines with respect to the above-mentioned PE attribution rules and it might not see the light of day unless supported by a change in Indian model tax treaties.

- *E-assessments/audits:* The Central Government, in its endeavor to eliminate face-to-face interaction between taxpayers and Tax Officers ("TO"), has established the E-assessment Scheme, 2019 (scheme), which entered into force from October 08, 2019. The scheme attempts to almost eliminate human interface and lays down a detailed step-by-step procedure for e-assessments. The Government has taken a step towards achieving its objective of faceless, speedy, hassle-free, and fair conduct of assessment proceedings. The scheme discusses the setting up of e-assessment centres, various units (assessment, verification, technical, etc.) and lays down a procedure to carry out assessments seamlessly.

The genesis of the e-assessment initiative can be traced back to 2015, wherein a pilot project was introduced to conduct assessment proceedings with respect to income tax returns through an 'email-based assessment' and later taxpayers in seven metro cities in India were provided an option to avail the same.

Subsequently, the "Income Tax Business Application" (ITBA, or e-filing portal) was developed as an integrated platform to conduct various tax proceedings electronically. Under this process, the tax officers are required to communicate through emails and through the taxpayer's account on the e-filing portal. Upon receipt of communication from the tax department, a taxpayer is required to submit the response, along with required attachments, by uploading the same on the e-filing portal. The taxpayer's response is viewed by the tax officer electronically on the ITBA and any further information is also sought through the ITBA platform, including communication through emails.

The newly launched e-assessment scheme is an enhanced version of the ITBA wherein personal interaction with the Income Tax officers will be eliminated. There now may be situations in which a taxpayer registered in the Capital Region of New Delhi is audited by a Tax Officer located in Mumbai.

In order to streamline the process, various e-assessment centres have been formed that would also be supported by the specialist cells of the Tax Department. The various e-assessment centres formed are as follows:

o National e-assessment centre
o Regional e-assessment centre
o Assessment units
o Verification units
o Technical units
o Review units

The National centre would be the focal point of communication and would facilitate the procedure in a centralized manner. The National centre would be responsible for issuing notices to the taxpayers and also receiving responses.

The Regional centres have been set up at eight major Indian cities and would work along with the National centre to process the tax audit procedure and would have specialized units to carry out such activities.

The Assessment units would function under the National and the Regional centres and will review the tax return, identify issues, seek information or clarification from taxpayers on identified issues, analyze the information furnished by the taxpayer, etc. Based on the assessment of information received from the taxpayers, the unit would frame the draft assessment order and share the same with the National centre for its review and communication with the taxpayer.

Verification units will monitor the conduct of e-assessment by the assessment unit. Their function will include enquiry, cross verification, examination of books of accounts, examination of witnesses and recording of statements, and such other functions as may be required for the purposes of verification.

Technical units would support the assessment units with assistance on various tax positions. This would include any assistance or advice on legal, accounting, forensic, information technology, valuation, transfer pricing, data analytics, management or any other technical matter which may be required under this scheme.

The Review units would assist the National centre in carrying out any review of the draft assessment order submitted by the assessment units. They would also check the mathematical accuracy of the order and also would review the documents basis which the order has been drafted.

Any discussions with the taxpayer would be through video conference calls thereby eliminating human interaction.

The e-assessment procedure is a significant move and a paradigm shift from the traditional manner in which the tax audits have occurred in India. It is a welcome move and has found favor with taxpayers and it is expected that it would help reduce litigation at the first level and would provide taxpayers an independent and transparent assessment process.

Transfer Pricing Examinations/Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

India's active participation in the G20 initiative and adoption of the BEPS Actions 8-10 and Action 13 demonstrates its commitment to the guidelines and information requirements forming part of the BEPS Actions. This said, some of the concepts ascribed in Actions 8-10 are not new to India's audit topography and are merely an enforcement of what tax officers have adopted in past audits (especially audits conducted during the hyperactive phase from 2008 to 2013).

The above-referred BEPS concepts were introduced in India in 2017 for compliance related to fiscal year 2016-17. The compliance measures were in relation to mandatory submissions of the Master file (by constituent entities) and CBCR (in case there is failure of information exchange mechanism). While the first rounds of transfer pricing audits have just begun for years in which BEPS related filings were made to the tax authorities, some of the concepts and questionnaires used by the Indian tax authorities at the time of the audits include the following:

- *Substance over form:* In the last few years, there has been an increased focus on the concept of economic substance over legal form. The adage *substance over form* has been widely applied in principle, while scrutinizing transactions relating to intangibles; intragroup services; management fees; permanent establishments; financing transactions; cost contribution arrangements; etc. In fact, rules defining concepts of tax evasion, tax avoidance, and tax mitigation under the general anti-avoidance provisions are based on the underlying principle of *substance over form*.
- *Guidelines relating to financing transactions:* The recent audits have scrutinized financing transactions relating to intercompany loans; guarantees; cash pooling; etc. Some of the guiding principles around treatment of loans as quasi-equity, economic analysis methodology for interest and guarantee rates (LIBOR or local currency denominated); categorizing guarantees as implicit and explicit guarantees, by questioning the intent of letters of comfort; impact of credit ratings on guarantees rates; evaluating the role and involvement of participating parties in a cash pooling arrangement.

- *Evaluation of intangibles using DEMPE analysis*: The pre-BEPS era, especially the time period between 2007 and 2014, witnessed aggressive audits relating to pay-outs made by Indian inbound companies for the use of trade intangibles. The use of such intangibles was typically compensated by way of a fixed or variable royalty payment, fixed technical fees, or technical support services (based on usage).

Around this time, the focus of Indian tax authorities was divided to deal with the issue on marketing intangibles. The takeaway from international tax courts in the case of GlaxoSmithKline ("GSK") marked the beginning of this matter in India. However, tax courts in India were unable to distinguish the facts of the GSK case, which was applicable to a distributor model. The emanating principles have been squarely applied to Indian companies incurring any form of AMP (advertisement, marketing and promotion) expenses. Tax authorities have inadvertently applied such a rationale to all forms of licensees, namely (a) distributor, whether normal or limited risk; (b) licensed manufacturer, whether entrepreneurial or limited risk under a non-integrated principal structure; or (c) entrepreneurial buy-sell company, thus disregarding their characterisation.

Indian tax authorities have been applying the concept of DEMPE to identify and evaluate intangibles long before the Actions 8-10 report was released. As part of these audits, Indian tax authorities assert that the Indian entity is engaged in developing, enhancing, and marketing of brands that are legally owned and protected by the overseas entities. In doing so, Indian tax authorities have been using the AMP expense as a ratio to evaluate the need for verifying the DEMPE functions.

- *Significant people function ("SPF"):* This concept has been applied by tax authorities during audits to determine the SPF performed by various participating entities in the supply chain. Based on the results of such analysis, tax authorities may prove that the tested party's (assuming the Indian entity) compensation is not commensurate to its legal or functional form. Depending on the specific facts of the case, the Indian tax authorities may apply the profit split method or any other appropriate method to re-determine the arm's length compensation.

- *Benefit test analysis*: In situations where Indian taxpayers made inter-company transfers overseas to their related parties on account of management cross-charges and royalties, the Indian tax authorities stressed the point of providing back-up documents to justify the "benefit test". Since the regulations are not descriptive of the quantity or volume of the documents to be submitted, it becomes subjective on the part of both the taxpayer and the tax authorities as to how much documentation would be enough.

The next few years will be interesting for transfer pricing audits, as tax authorities will have access and exposure to global data in the post-BEPS period. The choice of audits by risk-based criteria, the introduction of e-assessment centres, and the increased focus of the tax authorities on qualitative issues could lead to more stringent audits compared to previous years. In such a situation, the secret to effective dispute resolution will be successful transfer pricing planning backed up by bilateral dispute resolution.

Mutual Agreement Procedures (MAP).

Describe key features or developments in the MAP process in your country.

India has a wide network of tax treaties with more than 94 tax treaties currently in effect. All of the treaties provide for a Mutual Agreement Procedure (MAP) for the resolution of conflicts concerning transfer pricing disputes and also with respect to the understanding and implementation of the terms of the tax treaties. Before dwelling on the various aspects of MAP, it is pertinent to note that the MAP regime, over the past few years, has benefitted the Indian economy through resolution of complex issues and hopefully it augurs well for the future as well.

Action 14 (Minimum Standard) of the OECD identities the following key areas of an effective dispute resolution mechanism:

- preventing disputes;
- availability and access to MAP;
- resolution of MAP cases;
- implementation of MAP agreements.

It is observed that India is not fully compliant with the above Minimum Standards and hence amendments need to be made to the various tax treaties. In a view to streamline bilateral dispute resolution and to minimize issues arising from interpretation of tax treaties, India signed the Multilateral Instruments (MLI) through which certain articles of the tax treaties would be amended/modified.

In 2016, the OECD issued peer review documents on which a MAP peer review and monitoring process was initiated. A detailed review process involving taxpayers and member country representatives was conducted by the OECD which then released in October 2019 its sixth batch (Stage 1) MAP peer review reports (including India) relating to the outcome of peer monitoring of the implementation of the BEPS minimum standard.[1]

The India report captures the recent developments and India's position with respect to the BEPS recommendations under Action 14. The report is structured to address the different components of the minimum standard which cover India's responses and other policy level considerations for the four parameters.

- **Preventing disputes:** With respect to prevention of disputes, it is observed that since Indian regulations have a bilateral APA program (along with a rollback mechanism) in place, India meets the minimum standard with respect to the prevention of disputes.

A review of the tax treaties also illustrate cases where the treaty does not cover a provision which is based on the full equivalent of Article 25(3) of the OECD Model Tax Convention (MTC). India has responded that while there are no constraints to reach an agreement on treaties where the provision is not there, after the signing of the MLI, all such tax treaties would be modified to include the language equivalent of Article 25(3) of the OECD MTC.

- **Availability and access to MAP:** With respect to the second parameter, it has been observed that India meets some of the requirements of the minimum standard. The key observations of the peer group and the responses made by India are as follows:

Access to MAP and domestic remedies: India's position with respect to agreed MAPs and their impact on domestic disputes has always been clear. In cases where domestic disputes have been finalized in the domestic tax courts, India would not deviate from the decisions but will be open to discussions around seeking correlative relief at the level of the treaty partner.

MAP access to transfer pricing cases: Having withdrawn the reservations to Article 25 of the OECD MTC, India has now granted access to MAP in even those treaties where Article 9(2) was absent. This is expected to be streamlined once the MLI is finalized.

MAP to be initiated only after receipt of final assessment order: India has responded to the observations made by the peer group that the MAP discussions would now be initiated only after the receipt of the final assessment order and not after the receipt of the draft assessment order. This will significantly reduce the time and effort of the Competent Authorities as the tax demand in the draft order is not finalized.

MAP access to cases involving advance tax rulings: India has a separate forum to deal with issues on advance tax rulings. Orders passed by such judicial authority can be further challenged in the State Courts and Apex Courts, and India has made its position clear that with respect to such rulings, MAP access would not be granted.

MAP access where no double taxation issue arises: India's view on the issue is that MAP access would only be provided in those cases which result in double taxation. In cases where the dispute is in relation to or the taxation is in relation to contravention of treaty, no MAP access would be granted.

MAP access for fiscally transparent entities: India's position is that no MAP access would be provided for fiscally transparent entities. India is of the view that granting MAP access to such entities will require amendments to the tax treaty and is of the view that the said aspect is outside the purview of Action 14.

MAP in the case of audit settlements: In case the disputes are resolved by the Income Tax Settlement Commission ("ITSC"), no MAP access would be granted by India.

Bilateral notification/consultation or submission of application to either party of the treaty network: The Indian MAP program does not include submission of the MAP application to either party of the treaty nor does it provide for any consultation or notification process.

India has informed through responses that it intends to introduce a bilateral notification process in specific cases.

- **Resolution and implementation of MAP cases:** As per the responses received from the peer group, India meets most of the requirements under Action 14 with respect to the resolution of MAP cases.

Reporting of MAP statistics: India has a long pendency of MAP applications with other treaty partners. It was also observed during the review that India reached out to several treaty partners to reconcile the statistics of pre-2015 cases. India also mentioned that the Competent Authorities ("CA") monitor their MAP inventories to keep a track of the cases and the time taken to resolve them.

India's MAP cases have increased over the years. It was observed by the peer team that the Competent Authority team is not adequately staffed to resolve the case within the 24-month timeline. As per the data provided by India, the MAP statistics stand as follows. [2]

It was also reported that for pre-2016 cases India required 36.88 months to close attribution/allocation cases and 101.25 months to close other cases.

Further, it was reported that post 2015 cases, India, on an average required 7.81 months to close attribution/allocation cases and 3.59 months to close other cases.

With respect to the implementation of MAP procedures, the observation from the peer group was that no issues have sur-

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Type of case	Opening inventory 1st January 2016	Cases Started	Cases Closed	End Inventory 31 December 2017	Average time to close cases (in months)
Attribution/allocation cases	594	199	147	646	34.31
Other cases	101	22	6	117	68.7
Total	695	221	153	763	35.66

faced, and India has complied with the Minimum Standard as per Action 14 of the OCED.

The above statistics clearly demonstrate that MAP is a sought after option for taxpayers to resolve disputes involving double taxation. India also has an active APA program, and that too has been largely successful. A combination of MAP and APA can lead to resolution/certainty for taxpayers for up to 12 years: 5 years for advance APAs, 4 years of rollback *plus* 3 additional years of MAP (in case the time limit has not expired).

The domestic litigation route is lengthy and often time consuming. Average time to achieve finality on transfer pricing disputes in India is close to 12 years (from issuance of transfer pricing order by Transfer Pricing Officer (TPO) to finality by Supreme Court). The MAP mechanism provides an effective and timely resolution (especially for post 2015 cases) against such long drawn litigation, and taxpayers have been willing to consider MAP as a dispute resolution tool.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

The impact of a changing global and domestic tax landscape coupled with a relatively mature Indian transfer pricing regime is evident in some of the recent rulings adjudicated by the Indian tax courts. Before we mention the rulings, it is worthwhile to note that post proper implementation of dispute resolution mechanism viz. APA and MAP, domestic litigation has declined. Since the APA and MAP regime are working well, the overall intensity of litigation has decreased whereby the approach is to move from a litigious country to one that resolves and settles tax disputes in a pragmatic manner. With regard to the reduction in the quantum and intensity of litigation on complex issues, we have reproduced the following relevant extract from the APA Annual Report 2018-19 (released[3] in November 2019):

> *Since assessments and litigation in India happen on an annual basis, if we presume that 50% of these cases would have faced transfer pricing adjustments, then the APA Programme has already ended about 890 litigations that would have otherwise clogged the ITATs and courts in India.*
>
> *Complex transfer pricing issues, which were prone to long drawn litigation, are being increasingly resolved through APAs. The resolutions have been to the satisfaction of both taxpayers and the Government. While taxpayers have managed to get certainty over transfer pricing issues for five or nine years (depending upon whether rollback provisions are applicable to an Agreement), the Government has been able to divert resources away from the audit and litigation processes to more productive work.*

Given the above, it is worthwhile to take note that the nature of diverse rulings covering complex issues have decreased significantly, but we have attempted to identify some critical rulings that merit some interest which are detailed below.

Hyundai Motor India Limited v/s ACIT LTU-2, Chennai Tribunal

Background: Hyundai Motor India Limited ("HMIL") is engaged in the business of manufacture and sale of passenger cars within and outside India. HMIL had paid royalty to its parent company, on its domestic sales (5%) and exports (8%), towards the use of technology and the tradename "Hyundai". In the transfer pricing document, the royalty transaction was aggregated along with all other international transactions and benchmarked using the Transactional Net Margin Method ("TNMM").

Ruling of ITAT: During the course of assessment proceedings, the Transfer Pricing Officer ("TPO") held that the royalty payment made by the taxpayer was excessive and made an ad hoc disallowance of 10% of the royalty. HMIL filed its objection before the Dispute Resolution Panel ("DRP"). After hearing the arguments of the taxpayer, the DRP called for a remand report from the TPO with a specific direction to adopt the comparable uncontrolled price (CUP) method to benchmark the royalty transaction. The TPO was unable to identify comparable agreements and asked HMIL to conduct a search and submit the same.

HMIL submitted a search conducted on the RoyaltyStat database, but the TPO in the final order selected only a few agreements to be comparable to HMIL. The arm's length royalty rate determined by the TPO was 5%. Accordingly, the TPO proposed that that royalty paid on exports (8%) was excessive and not at arm's length.

The ITAT, while passing the order in favor of HMIL held that the DRP was not justified in changing the method from TNMM to CUP. The ITAT also determined the royalty rate to be 4.7% as compared to the HMIL's effective payment of 3.64% and held the royalty payment to be at arm's length.

Author's Comments: This is a significant ruling in respect of payment of royalties wherein the Tribunal has adopted a distinctive approach in determining the arm's length price (ALP) of the transaction. This is an important ruling on a different premise wherein average rate prevailing in the automotive sector based on a study of comparable licenses conducted by an independent consultant has been considered as the ALP for the purpose of benchmarking the royalty transaction. Considering the reluctance on part of the Indian tax authorities to accept separate royalty benchmarking conducted using foreign databases viz., RoyaltyStat, adopting publicly available industry average rates as CUP for benchmarking royalty is a welcome approach by the ITAT.

Principal Commissioner of Income Tax versus J.P. Morgan Services India Pvt. Ltd. (ITA No. 4 of 2017 with ITA No. 170 of 2017)

Background: JP Morgan Services India P Ltd., a subsidiary of a US-headquartered company ("the Company"), rendered ITeS services to its associated enterprises (AEs), which are primarily US-based companies. The Company also earned marginal revenue (approximately 4%) from AEs which were non-US. The overall margin earned by the Company for rendering ITeS services was 12.28%.

Ruling of ITAT: During the course of assessment proceedings, the TPO while determining the arm's length price of the international transactions between the Company and its AEs, did not distinguish between the two transactions (i.e., the U.S. and the non-US transactions), and applied a profit mark-up of 21.58%. Aggrieved by the adjustment made by Indian Authorities, the U.S. AE initiated a MAP with the U.S. Internal Revenue Service (IRS) to avoid double taxation. The two competent authorities, in the due course of time, negotiated and arrived at the profit mark-up of 14.38% for U.S.-based international transactions.

Pursuant to the above MAP resolution, the Company appealed before the ITAT to apply the above arm's length price, as agreed in the MAP, to the remaining 4% of the non-U.S. based transactions, as well. The primary contention was that there was no distinction in the nature of services for the U.S. and the non-U.S. transactions. Also, the lower authorities had not made any distinction between the U.S. and non-U.S. based international transactions.

The ITAT, ruling in favor of the Company applied the mark-up agreed in the MAP to the non-U.S. transactions as well since the lower authorities had also not differentiated between the geographies while making the transfer pricing adjustment.

The Indian Revenue Authorities filed an appeal before the High Court challenging the ITAT ruling. The High Court dismissed the Revenue's appeal and observed that the ruling of the ITAT was on the basis of due consideration of the facts. Also, since the lower authorities had not differentiated between the geographies, the High Court did not find any merit to in the Revenue's arguments.

The High Court also observed that the Company had also concluded a bilateral APA with the U.S. for its covered international transactions, wherein it was specifically agreed that the outcome agreed under MAP for the appellant's international transactions with the AE in the U.S. would apply to the appellant's transactions with non-U.S. AEs as well.

Given the facts, the High Court dismissed the Revenue's Appeal.

Author's Comments: We have often seen in the past that the taxpayers have leveraged the favorable MAP/APA resolutions to resolve long-pending domestic disputes. While the MAP/APA resolutions are private agreements between the government and the taxpayers, they have been quoted by the taxpayers in domestic tax courts for years that are not covered under such bilateral resolutions. This created a concern within the Revenue Department on the mechanical application of the APA and MAP resolutions to the pending disputes before the appellate authorities. Subsequently, the government started including certain clauses in APAs restricting the APA to only the covered period and covered transactions.

While this State Court ruling highlights the fact that if there is similarity between the circumstances and the nature of transactions, APA and MAP results can provide persuasive value before the courts. However, this cannot be applied as a rule of thumb and has to be fact specific and must be appropriately substantiated before the appellate authorities.

CAE Flight Training (India) Pvt. Ltd., [ITA No. 2006/Bang/2017, IT (TP) A Nos. 63 & 84/Bang/2015, 599, 2060 & 2178/Bang/2016 & C.O. Nos. 83/Bang/2017 & 09/Bang/2018]

Background: CAE Flight Training (India) Pvt. Ltd. (the "Company"), paid interest at the rate of 15% upon issue of CCDs to its three associated enterprises ("AEs"), namely, Flight Training Mauritius, Emirates Dubai and CAE Hungary during Assessment Years 2009-10 to 2013-14.

Ruling of ITAT: During the course of assessment proceedings, the TPO observed that the Company had a skewed debt-equity ratio and hence no third-party lender would be willing to loan funds to the Indian Company. Since the thin capitalization regulations were not prescribed in India at that time, the TPO relied upon the U.K. thin capitalization regulations and held that the said debt would be reclassified as equity and disallowed the entire interest payment.

The TPO also relied upon the special bench ruling in the case of Ashima Syntex wherein it was held that convertible debentures are an instrument to raise capital and hence would be treated as equity. The TPO further relied upon the Reserve Bank of India ("RBI") policy of 2007 wherein the RBI stated that only fully and mandatorily convertible debentures should be considered as Foreign Direct Investment ("FDI"). All other preference shares and debentures are to be considered as debt and hence governed by the External Commercial Borrowing ("ECB") rules.

The ITAT while adjudicating on multiple years observed that the U.K. thin capitalization regulations cannot be applied as they relates to a law of a different country. The ITAT further negated the Revenue's reliance on the case of Ashima Syntax as the issue in that case was regarding the allowance of expenses incurred on the issue of compulsorily convertible debentures (CCDs). The ITAT ruled that the facts of this case are, therefore, different from the case of Ashima Syntax.

On the RBI policy 2007, the ITAT observed that the RBI policy is governed by what will be future repayment obligation in convertible foreign currency. It was observed by the ITAT that since the CCDs do not have any repayment obligation, the same was considered by RBI as equity. The ITAT further added that such definition of the term convertible debentures cannot be applied in other contexts such as allowance of interest on such debentures during pre-conversion period or regarding payment of dividend on such convertible debentures during pre-conversion period or regarding granting of voting rights to the holders of such convertible debentures before the date of conversion. Thus, the ITAT held that the treatment of CCDs given by RBI for the purposes of the FDI policy, cannot be applied to every aspect of CCD and a dividend will not be paid on CCDs before its conversion.

The ITAT further observed that since no voting rights are granted until the time of conversion, the interest is liable to be paid and should be allowed as a deductible expenditure.

Author's Comments: The issue of recharacterizing debt as equity with respect to CCDs has been a perennial transfer pricing issue. The ITAT further distinguished the case from the ITAT special bench order in the case of Ashima Syntax and set the principles straight on the CCDs' interest payments, considering CCDs to be debt and not equity. This ruling, though issued by the ITAT, appears to have an impact on similar transfer pricing cases pending at various authorities.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

The overall economic, financial and regulatory reforms in India are on an upward trend since the electoral mandate was given to the Ruling Party. Taxpayers have witnessed a host of changes and amendments in the tax laws that were introduced with a view to provide impetus to the economy.

The effects of the Goods and Services Tax ("GST"), one of the biggest tax reforms for Indian business since independence, is yet to be witnessed and will only become known in the years to come. There are talks that the new Direct Tax Code may finally see the light of the day while many of its proposed changes have already been introduced by the Government over the years.

The Government is very focused on strengthening tax compliance and tax transparency and has taken many measures towards achieving this goal. Procedural changes in the compliance norms and ease of tax filing forms are some of the measures the Government has taken.

Year 2020 will also see Revenue Authorities having a first look at the CBCR and Master file compliance through the audit procedure and it will be interesting to see how such information will be used by tax officers, particularly in respect of risk assessment procedures.

Given the increased focus of Revenue Authorities on 'qualitative' audits, there is a need for multinational companies to validate supply chain models and pricing policies for any mismatches between the point of value creation and transfer pricing outcomes.

India is also expected to receive some landmark judgments by the Supreme Court on pertinent issues relating to marketing intangibles and admissibility of transfer pricing cases dealing with comparability before the higher courts.

Next year, India will also see the MLI provisions coming into effect, which will lead to sweeping revisions in a number of tax treaties in terms of the inclusion of the limitation of benefits, principle purpose test, lowering of threshold for dependent agent PE, curtailment of the PE exemption list, anti-fragmentation rules, etc.

Furthermore, global tax developments by way of the BEPS project and tax reforms in developed countries such as the U.S., U.K. and France around digitization of business are bound to result in further international tax developments. In 2019, the OECD released the public consultation document on a "unified approach" for dealing with the nuances of digital taxation, which has been a topic of debate. While there are many unanswered questions which emanate from the public consultation paper, the OECD should take a balanced view to address the concerns of the stakeholders.

These revisions shall beckon a paradigm shift in the interpretation and application of existing international tax and transfer pricing jurisprudence in India.

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[1] OECD (2019), Making Dispute Resolution More Effective – MAP Peer Review Report, India (Stage 1): Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, *https://doi.org/10.1787/c66636e8-en*.

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Ireland

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

For 2018, the applicable primary Irish transfer pricing legislation is contained in Part 35A of the Taxes Consolidation Act 1997 ("TCA 1997") (the "TP Legislation"). Currently, the TP Legislation provides that the 2010 OECD Transfer Pricing Guidelines apply for evaluating whether the arm's length price for arrangements subject to the Irish Transfer Pricing rules.

In 2018 the Irish Minister for Finance committed to a comprehensive review of Ireland's transfer pricing provisions. As part of the review, the Department of Finance published a Feedback Statement on Ireland's Transfer Pricing rules in response to submissions made under the public consultation in 2019. The Feedback Statement set out proposed legislative changes to take effect from the beginning of 2020. The proposed changes have now been published in draft legislation[1] (the "Draft TP Legislation") which will take effect on 1 January 2020 and will change the current Irish transfer pricing landscape. The new Part 35A to be introduced by way of the Draft TP Legislation updates the existing transfer pricing rules and extends their scope and application.

The key proposed changes to the current Irish legislative provisions rules that are due to be implemented are as follows:

- The transfer pricing rules will extend the application of the arm's length principal to non-trading transactions, save for certain Irish-to-Irish non-trading transactions;
- Grandfathering provisions that existed for transactions agreed before 1 July 2010 will be removed;
- The transfer pricing rules will begin to apply to capital transactions where the market value of the asset exceeds €25 million;
- The transfer pricing legislation will expressly permit the recharacterisation of transactions where parties acting at arm's length would not have entered into such arrangements;
- The application of the transfer pricing legislation will be based on the substance of an arrangement where the substance is inconsistent with the form of the arrangement;
- The transfer pricing legislation will incorporate by reference the 2017 OECD Transfer Pricing Guidelines, the OECD Guidance issued in 2018 on Hard-to-Value Intangibles and the OECD Guidance issued in 2018 on the Transactional Profit Split Method (up until this point Irish legislation only referred to the 2010 OECD Transfer Pricing Guidelines);
- The documentation requirements will be updated so that master files and local files will have to be prepared (subject to certain financial thresholds) and an express timeline for the preparation of supporting documentation will be included in the legislation;
- New penalty provisions which provide for a €25,000 penalty if a request by Irish Revenue for supporting transfer pricing documentation is not satisfied (daily penalties can also be applied);
- The rules also provide that taxpayers who make a reasonable effort to comply with the transfer pricing rules can be protected from corporation tax penalties in the event of a transfer pricing adjustment; and
- The transfer pricing rules will apply to medium-sized enterprises in respect of transactions where the consideration payable exceeds €1 million. It should be noted that the commencement of this provision will be subject to a Ministerial Order being passed before taking effect.

The updated transfer pricing rules will apply for chargeable periods commencing on or after 1 January 2020 and, in respect of claims for capital allowances, where the related capital expenditure is incurred on or after 1 January 2020. In sum, it is evident from the Draft TP Legislation that the Irish transfer pricing landscape will be more expansive and will impose increased compliance obligations on a broader range of taxpayers.

Separately, the introduction of Irish controlled foreign company ("CFC") legislation, which applies from 1 January 2019, involves the following transfer pricing principles:

- No CFC charge arises where the arrangements concerned are already subject to Irish transfer pricing rules; and
- The attribution of any income to be taxed under CFC legislation must be done on an arm's length basis having regard to transfer pricing principles.

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

Documentation

Transfer pricing documentation obligations are a key feature of the Irish transfer pricing compliance

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process, as the provision of documentation is the precursor to all transfer pricing examinations and audits.

Irish taxpayers are not currently obliged to submit transfer pricing documentation unless specifically requested by Irish Revenue. Taxpayers are, however, obliged to retain and have available for inspection sufficient documentation and records to demonstrate the taxpayer's compliance with the transfer pricing rules. Until the recently announced changes, Irish Revenue took a more flexible approach to documentation stating in their applicable guidance that the form and manner that the documentation takes "will be dictated by the facts and circumstances of the transactions" and recognizes that the cost involved in preparing the documentation should be "commensurate with the risk involved."[2] Records must be prepared in a timely manner and must demonstrate that the taxpayer's relevant income has been computed in accordance with the transfer pricing rules. Such records must be retained for a period of at least six years after the completion of the relevant transaction to which they relate. As noted above, enhanced documentation compliance provisions will apply from 1 January 2020, which will link the documentation standard to the Master File/Local File concept provided for in OECD guidance.

Irish Revenue have also implemented a practical approach to Irish Country-by-Country ("CbC") reporting rules, which apply to MNE Groups with consolidated group revenue of €750 million or more in the immediately preceding fiscal year. The rules, which apply for accounting periods commencing on or after 1 January 2016, are set out in s891H TCA 1997, and the Taxes (Country-by-Country Reporting) Regulations 2015. Irish Revenue have published guidance on CbC reporting, which proposes a pragmatic approach be taken by companies as in Irish Revenue's view, companies are best placed to decide the approach to some of these interpretative issues and that from Irish Revenue's perspective, the key is that the approach taken is reasonable, practical and consistent.

Transfer pricing compliance monitoring

The compliance monitoring program in Ireland is becoming increasingly active and robust. The program comprises of transfer pricing audits/examinations and transfer pricing compliance reviews ("TPCR").

- Transfer pricing audits and examinations

Irish Revenue established a dedicated transfer pricing audit team in the Large Cases Division in 2015. As is the case with many tax authorities, Irish Revenue have been growing their transfer pricing audit team and, as a result, we have seen increasing activity in this space with the number of examinations and audits on the rise annually. The Transfer Pricing Unit usually initiate a compliance intervention known as an "aspect query." Such examinations are conducted in compliance with the Code of Practice for Revenue Audits and other Compliance Interventions.

Irish Revenue can raise an assessment for additional corporation tax within four years of the end of the chargeable period within which the corporation tax return is filed (unless fraud or negligence is asserted). Taxpayers have the opportunity to engage with Irish Revenue throughout the audit process to support the policies and positions taken. Where Irish Revenue disagree with the taxpayer's position, an assessment to tax may be raised. Where the taxpayer disagrees with the tax assessment raised, it can pursue a dispute resolution process through both the domestic appeals process as well as the MAP process where a relevant Double Taxation Agreement ("DTA") applies.

Given the broad range of powers that Irish Revenue have to request information to assist their enquiries and assess the functions, assets and risks borne by the parties to an arrangement, Revenue investigations often result in a large volume of documentation relating to the taxpayer's general business activities being provided to Irish Revenue, including information obtained through functional interviews. The provision of this documentation and information can raise issues in relation to data protection, privilege, confidentiality, etc., of which taxpayers should be cognizant.

- Transfer Pricing Compliance Review

In addition to the transfer pricing audit regime (which is the most prevalent form of compliance monitoring), a TPCR is a self-review (that can be carried out by the company/group) of its compliance with Part 35A TCA 1997 and the application of the arm's length principle. Companies are selected for TPCR by way of request from Irish Revenue and are asked to provide details in relation to their relevant arrangements and supporting transfer pricing documentation. The outcome from a TPCR is that Irish Revenue can either: i) confirm that no further enquiries will be made for the period concerned or ii) identify issues for further consideration within the TPCR process or (iii) escalate an issue to an audit.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

Mutual Agreement Procedure ("MAP") is a means through which competent authorities consult to resolve disputes regarding the application of double taxation conventions. The process aims to negotiate an arm's length position that is acceptable to both tax authorities involved to seek to avoid double taxation for taxpayers.

Irish Revenue (the Irish Competent Authority) endeavor to resolve such cases by mutual agreement with the competent authority of the other contracting state. MAP cases can be submitted to the Irish Competent Authority for both domestic and foreign based adjustments. Generally, Ireland's DTAs state that taxpayers must approach the competent authority of their country of residence to request MAP assistance. A MAP request should be filed with the Irish Competent Authority within the timing outlined in the relevant DTA. In general, Ireland's DTAs follow Article 25 of the OECD Model Tax Convention and provide that a request for MAP assistance be submitted within three years from the first notification of the action potentially resulting in double taxation. Irish Revenue consider the date on which the taxpayer receives the first tax assessment notice that results in double taxation as being the beginning of the three-year period. However, there can be cases where Revenue will maintain that Ireland's domestic time limits apply where time limits are not covered by the relevant DTA.

A taxpayer can request MAP assistance from the Irish Competent Authority in situations where a decision has been rendered by an Irish court or the Appeal Commissioners. However, the Competent Authority cannot derogate in the MAP process from a decision of the Appeal Commissioners or the highest court in which the matter is heard. Under Irish domestic legislation, it is important to note that there is no suspension of tax collection during the MAP process. However, tax collection may be suspended where, separately, the taxpayer has appealed against an assessment and has paid the undisputed amount of tax.

In June 2017, Ireland was one of a number of countries that signed the Multilateral Instrument ("MLI") as part of the OECD BEPS project. One of the provisions of the MLI allows taxpayers to approach the competent authority of either jurisdiction to request MAP assistance under a DTA. The MLI entered into effect (in respect of taxes other than withholding taxes) for taxable periods beginning on or after 1 November 2019. The new rule will only apply, however, in treaties where Ireland's treaty partner has also adopted the provision and ratified the MLI. The relevant treaties are currently: Australia, Austria, France, Israel, Japan, Lithuania, Malta, New Zealand, Poland, Serbia, Singapore, Slovak Republic, Slovenia, Sweden and UK. Where both countries have elected to apply the new rule, taxpayers will be able to approach the competent authority of either treaty partner jurisdiction in order to request MAP assistance. Taxpayers will need to consult the relevant DTA and the relevant MLI provisions (following ratification by both treaty partners) when making a MAP request.

According to figures published by Irish Revenue,[3] 12 MAPs were completed in 2018, with there being 58 MAPs ongoing as of 31 December 2018. The significant uptake of the process by taxpayers is evident from the figures, and it is expected that this figure will increase in the coming years due to BEPS and increased audit activity. In terms of timing of the MAP process, while the Irish Competent Authority is endeavoring to process MAPs in a timely manner (particularly in light of BEPS Action 14), given the number of stages involved in the process and the level of engagement required, it generally takes two to three years for a MAP process to conclude. While taxpayers are generally open to considering MAP, the lengthy timeframe for conclusion is viewed as a deterrent.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

No case on transfer pricing has yet been decided by the Irish courts.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

As noted above, the Draft TP Legislation is due to enter into force from 1 January 2020, which will significantly change the current landscape, in particular in terms of taxpayer compliance. Due to the increased scope of the transfer pricing rules, we expect that transfer pricing will be on the radar of an increasing number of taxpayers who may not yet have had to focus on transfer pricing. The extension of the application of the arm's length principle to non-trading transactions and also to arrangements involving medium sized companies will also considerably increase the application of transfer pricing in Ireland. We expect that transfer pricing will continue to be an area of focus of Irish Revenue, with an increasing number of aspect queries and audits. As taxpayers will try to ensure certainty around their transfer pricing obligations, we would envisage that there will be a marked increase in the number of taxpayers seeking to enter into APAs and MAP in the coming years. We also expect that some transfer pricing cases will begin to be processed through the Irish appeals system, starting with the Tax Appeal Commission.

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NOTES

[1] The Finance Bill 2019 – due to be signed into law by the end of December 2019.

[2] Revenue Tax and Duty Manual – Part 35a-01-02 (Document last updated August 2017).

[3] Annual Report 2018 – Revenue Commissioners, page 6.

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Israel

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

During 2019, the Israeli Tax Authorities ("ITA") issued some significant transfer pricing circulars, including circulars dealing with the following subjects:

- Digital economy companies;
- FAR (functions, assets, risks);
- TP methods; and
- Profitability issues.

The BEPS's master file and CbC legislation are still in a 'stand by' position, as the political situation in Israel is complicated, with the third national election in less than a year scheduled for March 2020. Nevertheless, as most Israeli companies are required to submit a master file for their subsidiaries (since the master file requirement is already part of the legislation in many countries), this subject is an ongoing concern of many multinational companies in Israel.

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

In 2019, Israel incurred a substantial increase in transfer pricing audits. These audits included the following types of issues:

- All "substantial" companies (i.e., companies that attracted the ITA's attention due to a significant volume of activity and many related parties) were audited;
- Penalties (fines) were imposed with regard to demand guarantees;
- The ITA was willing to move to a court procedure, faster than before;
- Valuations, value-added tax (VAT), and customs issues were included in transfer pricing audits;
- Finance expense issues (e.g., gross, net, dividends);
- Manufacturing abroad issues (e.g., pricing, sale of activity);
- Recently acquired start-ups, including questions regarding:
  - o intellectual property (IP),
  - o restructuring,
  - o cost plus model (including ESOP or employee stock ownership plans), and
  - o VAT;
- Secondary adjustments;
- Cost plus vs. profit split;
- Distributor vs. marketing services; and
- Non-settled intercompany accounts.

The CbC legislation has not yet been approved in Israel due to the current political situation, although only a few companies in Israel meet the CbC filing threshold. There has however, been a significant push for companies to apply for income tax rulings.

In 2019, Israeli tax authorities' primary areas of focus during tax audits were:

- Intangibles (i.e., digital transactions);
- Permanent establishments);
- Restructurings;
- DEMPE functions (i.e., development, enhancement, maintenance, protection, and exploitation) with respect to intangibles.

As quoted from an annual tax conference in Israel:

"Intangibles (IP) are now the most important category in the universe. . .until 1980 tangibles were about 80% of the company value, where the residual were intangibles. 30 years after, it is the opposite."[1]

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

There were no significant development regarding MAP in Israel during the year 2019.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

In December 2019, a district court rendered a judgment that could have dramatic implications on M&A transactions involving Israeli target companies. The judgment concludes that matters pertaining to "business model changes" in Israeli target companies acquired by foreign entities are transfer pricing matters and no presumption should be drawn whereby in every "business model change" case, there is a sale of functions, assets or risks (FARs). The judgment is in direct contrast with the practice of ITA, including the practice as reflected in circulars the ITA published on this issue and its position in audits of Israeli target companies acquired by non-Israeli entities, as well as in court hearings.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

As was discussed with the ITA in a recent panel, the following are the main issues and tips from the ITA with regard to 2020:

- Taxpayers should expect a continued increase in transfer pricing audits;
- The master file and CbC reporting rules will most likely enter into force;
- Transfer pricing documentation should be goal-oriented and DEMPE-focused;
- Transfer pricing documentation should be prepared in advance of transfer pricing audits in Israel, as well as audits worldwide;
- Taxpayers should recognize weaknesses in their transfer pricing positions in advance of tax authority inquiries;
- Taxpayers should expect significant developments with respect to rulings and MAPs; and
- Taxpayers should expect enactment of mandatory disclosure requirements (in line with BEPS action 12).

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[1] John P. Ogier, *Intellectual property, finance and economic development*, WIPO Magazine (Feb. 2016), *https://www.wipo.int/wipo_magazine/en/2016/01/article_0002.html*

Italy

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

In recent years, the Italian transfer pricing legislation has been substantially amended. Among the most important amendments is Law Decree 24 April 2017, No. 50 (converted, with amendments, by Law No. 96 of 21 June 2017) ("**Law Decree**"), which was enacted to align the Italian transfer pricing legislation [Article 110(7) Consolidated Income Tax Act, hereinafter "CTA"] with international standards. In particular, while the criterion previously used by Article 110(7) was the "normal value", now the rule specifically refers to the "arm's length" value.

Following the amendment to Article 110(7) CTA, the Ministry of Economy and Finance published a Ministerial Decree setting out general guidance for the application of the arm's length principle, which was signed and released on May 14, 2018 ("**Ministerial Decree**").

With particular reference to the Ministerial Decree, during 2019, it was expected that the Revenue Agency would publish interpretative documents on some of the issues addressed in the above-mentioned document. However, no circulars have been published to date.

For the sake of completeness, it should be noted that in 2019 certain new developments came into play that do not directly relate to transfer pricing but do have a direct impact on transfer pricing. For example, the implementation of International Financial Reporting Standard 16 related to lease accounting ("**IFRS 16**"). Under IFRS 16, the accounting of costs relating to operational leases will significantly change the profit and loss account of tenants. Thus, the new standard will also significantly affect the balance sheets, income statements and financial ratios such as EBITDA and EBIT. This will impact transfer pricing especially in the initial period where the comparison with the results of comparable companies will include past periods in which the IFRS 16 principles were not applicable.

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

One of the areas in which the Revenue Agency has primarily focused its audits in 2019 relates to the activity carried out in the source market by the group's subsidiaries. The following audit trends can be identified in this respect:

- *Analysis of operating expenses*. In recent audits on Italian subsidiaries responsible for distribution activities, an analysis is often done at the level of operating expenses, to determine if they exceed "routine costs." When the level of expenses crosses the line of routine expenditures (normally determined based on the comparables) into non-routine development expenditures, then economic ownership (generally in the form of marketing intangibles) is asserted by the tax authorities. Alternatively, auditors sometimes simply disregard the deductibility of costs that exceed routine expenses, or make adjustments – often based in cost plus – to remunerate the non-routine marketing functions.
- *Value of IP licensed by the group to the Italian local entity*. In some audits, the Revenue Agency claimed that intellectual property (IP) licensed by foreign entities to the Italian subsidiary was of limited value; in particular in cases where the Italian subsidiary managed the sales process in total autonomy and, because of its sales network, it would independently enhance its presence in the Italian market, regardless of the use of the IP (e.g., brands).
- *Valorization of certain local activities*. The auditors sometimes considered as economically significant the following activities performed by the Italian subsidiary in connection with intangibles: managing customer relationships, localization of products/advertisements, or marketing surveys including collection of local data. When a local subsidiary performs any of the above functions, the costs incurred should not be merely reimbursed to the local entity without any profit element. If a local entity carrying out such core functions also controls the strategic operational decisions regarding its activities, it should be entitled to more than a routine, low cost-plus remuneration for its performance and control of the functions. Similarly, tax authorities frequently adopted the criteria of "fragmentation" of functions within the group to allege that local entities apparently carrying out routine functions were

instead "entrepreneurs" when the fragmentation effect is neutralized.

- *Choice of profit level indicator*. A number of multinational enterprises often engage their Italian subsidiary as sales and marketing support service providers and remunerate this activity on the basis of a cost-based TNMM or a cost-plus method. In audits, the Revenue Agency examines whether a cost-based net profit margin indicator appropriately reflects the value of the functions or whether the arm's length remuneration should instead be based on a sales-related indicator.

Another area of attention by auditors is that of financial transactions. A continuing trend in audits is the analysis of the real nature of cash pooling arrangements. In fact, the Italian tax authorities sometimes argue that contributions to the cash pool were effectively long-term loans. In this respect, experience has shown that, if stable balances are kept for a long period of time similar to long-term loans or deposit transactions (for which higher interest payments are normally due), tax inspectors may try to re-characterize cash pool structures.

Tax authorities have also focused intensely on intragroup services. Depending on the origin of a service, tax authorities may inquire as to whether a charge had to be made, whether a charge was allowed, or whether a charge was sufficient from an arm's length perspective.

One of the most important discussion points in a tax audit concerning intragroup services is the question of whether the services were rendered to the benefit of the service recipient (benefits test). Generally, it is not sufficient to just provide the costs of the service provider and a general description of the services rendered. Tax authorities generally require the taxpayer to provide examples of the services being rendered specifically for the Italian subsidiary. A second question to consider is whether the services can be regarded as shareholder costs.

BEPS

Having outlined audit trends, we now address the effects of BEPS on the tax authorities' approach. A first aspect is the tax authorities' expectations for adequate transfer pricing documentation and supporting data in a post-BEPS era. In this respect, it should be considered that the structure of transfer pricing documentation in Italy must follow a rigid format, i.e., all paragraphs have to be maintained and completed in table format. The structure largely resembles that in the BEPS Action 13 final report. However, although the information required by Italian regulations and by the BEPS report is similar, to date there has been no update of the provision governing the structure of the Italian transfer pricing documentation.[1] Therefore, the auditors continue to follow the domestic regulations and expect that transfer pricing documentation prepared by the taxpayer will contain the information indicated therein.

The other aspect of the BEPS project that has a potential impact on audits is the increased transparency (i.e., an increase in the number or types of audit inquiries in response to an increase in data available to tax authorities). To date, the increased amount of information and tools available have not yet had a strong impact on audits. The reason for this can be found in the Circular letter of August 8, 2019 of the Revenue Agency.[2] In this document, the Revenue Agency stresses the need to equip itself with operational tools to manage these flows of data adequately and efficiently. In order to allow the effective use of the data by the officers, "INDACO" has been developed, i.e., a repository in which all the data exchanged automatically converge. The Circular letter specifies that specific software connecting INDACO with business intelligence applications and the repository are being developed in order to enhance the use of data from the exchange of information. The Circular letter however, concludes that data from CbCR and rulings will also be used for the purposes of a risk analysis carried out at the central level and aimed at identifying companies to be subject to control or to be included in compliance projects, with reference to the subject of transfer prices and intragroup transactions.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

An analysis of the current trend of MAP procedures in Italy should start from the official data presented by the OECD and the EU Joint Transfer Pricing Forum (JTPF) for 2018.

With regard to the MAP process under the Arbitration Convention 90/436 / EEC (data provided by the JTPF), it can be noted that MAPs are a tool widely used by taxpayers in Italy, in fact the number of cases under discussion is the highest among all member countries. There were 487 cases at the end of 2018, in line with the previous year. However, more than half of these proceedings (273 cases) were inactive (171 out of 273 cases were suspended because an appeal to the Tax Court was pending at the same time as the MAP). It should be noted that there were no procedures in the arbitration phase activated by Italy (although 36 cases are reported to be sent to arbitration).

As regards the statistics published by the OECD on transfer pricing cases, in 2018, 196 new MAP cases were activated in Italy (Italy ranks sixth out of 89 countries for the number of activated MAP cases). The number of MAP cases concluded during the year are 90. At the end of 2018, the inventory had 501 cases, compared with 395 at the beginning of the year. The average duration of the procedure in Italy is equal to 29.4 months (while the duration for cases started from January 1, 2016 is equal to 14.34 months).

For 2019, we expect the trend to be in line with 2018. In fact, on the taxpayer's side, we have recently experienced an increasing preference to rely upon MAPs.

Regarding the trend of tax authorities, we note that the Italian Competent Authority has recently acquired a strong experience in the management of the MAP process and strengthened relations, especially with some of the foreign competent authorities (for example the main EU countries and the US). This allows the management of the MAP process to be streamlined. We are in fact seeing increasing progress on the MAP process. It may therefore be predicted that future statistics will show an improvement in the number of cases resolved.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

Some of the primary transfer pricing decisions issued in 2019 are analyzed below.

- *Provincial Tax Court of Milan, No. 49, dated January 11, 2019*. The court affirmed the position that, for the purposes of a transfer pricing benchmarking activity, if the profit level indicator falls within the interquartile range, it must be concluded that the transfer pricing policy applied complies with the arm's length principle and that it is not appropriate to perform adjustments to the median when the PLI falls within the interquartile range.
- *Regional Tax Court of Lombardy, No. 714, dated February 15, 2019*. The Revenue Agency had disregarded the transfer pric-

ing method applied by the taxpayer and had moved to the application of the TNMM without providing any reason for disregarding the method applied by the taxpayer. Referring to Article 4(6) of the Ministerial Decree, the court held that where an enterprise has used a method that complies with the general principles on transfer pricing, the tax audit made by the auditors must be based on the same method applied by the enterprise.

- *Regional Tax Court of Lombardy, No. 1155, dated March 12, 2019*. The Revenue Agency had disregarded the deductibility of certain costs arising from a cost sharing arrangement (CSA). The court stated that: (i) the fact that costs are based on forecasts does not affect their deductibility; (ii) the actual performance of the service is the decisive factor, even in the absence of a written intercompany agreement; and (iii) the use of the service from which the cost derives is sufficient to demonstrate that the subsidiary benefits from that service.

- *Regional Tax Court of Lombardy, No. 1598, dated April 9, 2019*. The Revenue Agency had disregarded the royalty paid by the Italian subsidiary to the parent company because the underlying contract provided that the former had to carry out the activity of development of the local market. The court, while agreeing that despite the activity being carried out by the subsidiary a royalty was still due, stated that in the B2B business the trademark has no significant value.

- *Regional Tax Court of Lazio, No. 5261, dated September 24, 2019*. The court held that the TNMM is a residual method and is subordinate to the RPM (and other traditional methods) due to its rather approximate nature.

- *Regional Tax Court of Lombardy, No. 3404, dated September 4, 2019*. The court held that it is not appropriate to exclude from the set of comparables the companies with negative margins for several years. In fact, the court opined that this exclusion did not allow a reliable comparison as it was based on the erroneous presumption that a company cannot suffer losses in the conduct of its business. This is even more true considering the crisis of the business in which the company operated.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

The Revenue Agency is currently in the process of drafting circulars on issues addressed in the Ministerial Decree, e.g., transfer pricing documentation.

Furthermore, we may reasonably expect reactions by the Italian tax authority/legislator to the recent documents issued by the OECD concerning the Programme of Work for Addressing the Tax Challenges of the Digitalisation of the Economy, in particular, with respect to Pillar One.

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[1] Article 8 of the Ministerial Decree, released on May 14, 2018, provides specific information regarding transfer pricing documentation. In particular, Article 8 grants the Director of the Revenue Agency the power to update the regulations on the requirements under which the transfer pricing documentation prepared by the taxpayer is deemed to be appropriate for verifying compliance of the transfer prices with the arm's length principle (and thus valid for penalty protection purposes). According to Article 8, such regulations will be issued "in line with international best practices." An implicit reference is made to the BEPS Action 13 guidelines, aimed at enhancing transparency for tax administrations by requiring multinational enterprises to provide both high-level information regarding their global business operations and transfer pricing policies, as well as detailed information concerning their intercompany transactions. The above provisions, together with the future regulations to be issued by the Revenue Agency, are expected to considerably reduce the uncertainties connected to the evaluation of the appropriateness of the documentation for purposes of the penalty protection regime.

[2] Circolare n. 19 del 8/08/2019 Indirizzi operativi e linee guida sulla prevenzione e contrasto dell'evasione fiscale e sull'attività relativa alla consulenza, al contenzioso e alla tutela del credito erariale.

Japan

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Cosmos International Management

Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

In June 2019, Japan's transfer pricing regulations were revised (previously proposed in December 2018). The revisions primarily relate to intangible assets transactions. All the revisions below will be effective from the fiscal year beginning on or after April 1, 2020.

(1) Revisions related to intangible assets

(a) Clarification of intangible assets subject to transfer pricing taxation

Intangible assets are redefined as "patent rights, utility model rights and other assets (excluding financial assets such as cash, deposits, securities, and accounts receivable), and compensation should be paid for the transfer or loan of such assets at a price between non-related entities under normal conditions."

(b) Adoption of the Discount Cash Flow Method as a new transfer pricing method ("TPM")

Following the recommendation in the BEPS (Base Erosion and Profit Shifting) Action 8-10 Final Report, the Discount Cash Flow ("DCF") Method is added as a new TPM for intangible assets transactions where comparable transactions cannot be identified.

The revised regulations state that because the DCF Method uses uncertain factors, such as the forecasted profit, if multiple TPMs including the DCF Method are equally available as potentially being the most appropriate TPM, a TPM other than the DCF Method should be selected for calculating the arm's length prices of intangible transactions.

The revised regulations also state that in applying the DCF Method, the following preconditions for calculating the arm's length price need to be verifiable and reasonable:

1. Forecasted profit: whether the amount of forecasted profit is calculated based on the information, such as reliable business plans.

2. Growth rate: whether a reasonable growth rate incorporating the future potential of the business related to the foreign-related transactions and the degree of relevant industry's market growth is used for calculating the amount of forecasted profit.

3. Discount rate: whether a discount rate, such as expected rate of return, weighted average cost of capital,[1] etc., is reasonably used in line with the individual circumstances, such as facts related to the foreign-related transactions, calculation details of forecasted profit amount, and business risks related to the foreign-related transactions (including risk of fluctuation of forecasted profit amount).

4. Forecast period: whether the period for which profits are expected to be generated is appropriately determined, such as in consideration of the legal protection period for the intangible assets and the degree of change in technical environment.

5. Forecast of effective corporate tax rate: whether the amount of the forecasted profit is calculated taking into account the expected effective corporate tax rate; for example, whether the amortization method of the intangible asset and the depreciation period are appropriate, and whether the reduction effect of corporate tax due to the amortization of the intangible asset is calculated properly.

(c) Introduction of price adjustment measures for transactions involving Specified Intangible Assets

Regarding the Specified Intangible Assets transactions, if in each year the actual result calculated by the tax authorities using the reasonable TPM differs by more than 20% from the original forecast (i.e., actual receipt of more than 120% of the original receipt based on the forecasts, or actual payment of less than 80% of the original payment based on the forecasts), the tax authorities will have the right to make transfer pricing adjustments for the difference by deeming the actual result as arm's length.

Specified Intangible Assets are the intangible assets that meet all of the following three requirements:

1. The assets have unique characteristics and are used for generating high added value,

2. The arm's length price of the assets is calculated based on the amount of forecasted profit, etc., and

3. Forecasts of the figures that are preconditions of calculating the arm's length price of the assets are recognized to be uncertain.

The Specified Intangible Assets are equivalent to HTVI (hard-to-value intangible assets) as defined in the OECD BEPS Action 8-10 Final Report. By the adoption of this approach of using the actual (ex post) price of the intangibles as arm's length over the originally anticipated (ex ante) price, Japan can be considered to have adopted the commensurate-with-income ("CWI") approach that has been adopted in the United States since 1986.

The CWI approach may be applied not only to the transfer of intangibles, such as buy-in of existing intangibles related to cost sharing agreements, but also to the licensing transactions of HTVI. Many Japanese-based multinational enterprises ("MNEs") are charging a fixed percentage of royalties (e.g., 3% of sales) to their non-Japanese manufacturing subsidiaries for the use of manufacturing know-how without chang-

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ing the rate, even if the subsidiaries earn much more profit than originally expected. In such a case, it is likely that the tax authorities would insist taxpayers adjust royalties upward using this CWI approach.

(2) Extension of the statute of limitations on transfer pricing taxation

The statute of limitations for corporate tax adjustments under the transfer pricing regulations is extended by one year from the current 6 years to 7 years.

The fact that the statute of limitations for transfer pricing cases will be 7 years, which is the same as fraud cases, indicates that transfer pricing enforcement is one of the top priority issues for the Japanese tax authorities to prevent profit shifting overseas.

(3) Revision for the adjustment of differences – adoption of interquartile range

In cases that apply the TPM using profit margin (such as TNMM), if the necessary adjustment cannot be made on the difference that is not significant but is difficult to be quantitatively adjusted, and if the number of comparable transactions is four or more, the median of the interquartile range will be used for the adjustment. As long as the tested transaction's result is within the interquartile range of comparable transactions, no adjustment will be made.

Japan was one of the countries that preferred the use of full range of a small number of more strictly comparable transactions but, faced with the difficulty of finding such strictly comparable transactions, Japan finally allowed the use of interquartile range as the more practical measure.

Transfer Pricing Examinations/Audits.
Describe key features or developments in the transfer pricing examination/audit process in your country.

On November 8, 2019, the National Tax Agency ("NTA") announced the "Summary of Corporate Tax Examination Results for the Fiscal Year ("FY") 2018 (from July 2018 to June 2019)." It shows that the number of transfer pricing adjustment cases in FY 2018 was 257, up 44% from the previous fiscal year's 178. On the other hand, the total amount of adjusted income in FY 2018 decreased by 16%, from JPY 43.5 billion (USD 395 million) in FY 2017 to JPY 36.5 billion (USD 332 million). The average amount of adjusted income per case sharply decreased by 42% from FY 2017's JPY 244 million (USD 2.2 million) to JPY 142 million (USD 1.3 million).

The above figures, especially the large number of adjusted cases and very small (and even smaller than before) average adjusted amount clearly indicate that the tax authorities are widely conducting transfer pricing examinations, but the focus is now on medium and small companies, or smaller intercompany transactions within large MNE groups. Actually, in the past, transfer pricing tax examinations were conducted separately from general corporate tax examinations by Transfer Pricing Divisions of Regional Taxation Bureaus ("RTBs"). But now many transfer pricing examinations are conducted as a part of general corporate tax examinations by divisions of the general corporate tax examiners at RTBs and local tax offices for small corporations, while the Transfer Pricing Divisions of RTBs now focus on large and complicated transfer pricing cases.

According to a remark by a senior international officer at the Tokyo Regional Taxation Bureau ("TRTB") in May 2019, the main areas of focus in recent transfer pricing examinations are: (i) sharing of software development costs and (ii) royalty rates of intangible transactions. For (i), there are many cases where Japanese parent companies fail to charge a fair share of the development costs of the software to overseas subsidiaries using the software. For (ii), many companies do not change the royalty rates for a long time, even though the functions and risks of the parent company and subsidiaries change over time. For example, if a part of the research and development functions moved from a U.S. parent company to its Japanese subsidiary three years ago but the Japanese subsidiary continues to pay a 5% royalty under the licensing agreement, the tax authorities are likely to adjust the royalty rate downward for the past three fiscal years, arguing that the licensing agreement should be reviewed to reflect the lower value provided by the U.S. parent company.

So far this year, there have been very few disclosed transfer pricing adjustment cases, and the biggest one may be Google Japan's case that was reported in January 2019. The TRTB alleged that a Japanese affiliate of Alphabet Inc. ("Google Japan") shifted most of its advertising revenues earned in Japan to its Singapore affiliate. It was also reported that the TRTB ordered Google Japan to adjust its taxable income upward by JPY 3.5 billion (USD 32 million), and that Google Japan paid approximately JPY 1 billion (USD 9 million) in additional taxes, including penalties.

The tax authorities have begun to utilize the recently-implemented three-tiered documentation system and have requested taxpayers to submit a Local File (and equivalent documentation for taxpayers with related-party transactions less than the annual transactional threshold amount for Local File of JPY 300 million (USD 2.7 million) for intangible transactions and JPY 5 billion (USD 45 million) for all other transactions). Tax examiners also frequently argue that taxpayers should prepare additional information including segmented financial statements of the parent company and/or its counterparty subsidiary to accurately reflect the financial results of the related-party transaction(s).

The NTA is also gathering Country-by-Country Reports ("CbCR") and Master Files from large MNEs and through the automatic information exchange, so they must be analyzing MNEs' transfer pricing risks more extensively. However, there is an informal rumor that they might not use the information from the CbCR and Master File directly for tax adjustments, at least for a few more years.

Mutual Agreement Procedures (MAP).
Describe key features or developments in the MAP process in your country.

According to the FY 2018 MAP Report announced by the NTA on November 6, 2019, the number of MAP applications increased from 206 in FY 2017 to 219 in FY 2018. In detail, while the number of MAP applications for Advance Pricing Arrangement ("APA") decreased from 166 to 163, the number of MAP applications for resolving double taxation (mainly transfer pricing tax adjustments) increased from 40 to 56. Even though the MAP for APA is still dominant, the MAP for resolving double taxation is on the rise, which may indicate taxpayers' increased willingness to consider MAP as a tool to resolve double taxation.

On the other hand, the number of processed MAP cases also increased from 166 (FY 2017) to 187 (FY 2018), but this is due to the increase in MAP for APA from 122 to 146. The number of processed MAP cases for resolving double taxation decreased from 44 to 41. In addition, the average processing time for MAP increased in FY 2018 for both MAP for APA (increased by 3.8

months to 34.5 months) and MAP for resolving double taxation (increased by 5.0 months to 32.7 months). The figures indicate that MAP for resolving double taxation cases struggle to increase the number of processed cases. Even though the commitment has been made by countries (as part of the BEPS project) to resolve treaty disputes in a timely, effective, and efficient manner, it may not have been currently reflected in MAP cases involving Japan. Considering that the major counterparties of MAP cases for resolving double taxation are currently Asian countries, such as China and Indonesia, which are known for their non-cooperative attitude on MAP, the penetration of the BEPS commitment for these countries and the realization of an efficient MAP process may take additional time.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

In Japan, there are no official statistics on the number or the amount of transfer pricing cases litigated.

Also, there have been no disclosed transfer pricing cases decided in the courts so far in 2019.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

Although the above-mentioned transfer pricing regulations will be effective from 2020, actual tax examinations on the intangible related-party transactions applying the revised rules, such as the DCF Method or CWI approach, will be seen after corporate tax returns for FY 2020 are filed in 2021.

Therefore, in 2020 MNEs should review their intangible transactions and prepare for the coming tax examinations by, for example, considering the possible applications of the DCF Method, reviewing HTVI transactions and, if necessary, changing (or preparing to change) intercompany royalty rates, etc.

An additional important issue in 2020 is digital taxation. On October 9, 2019, the OECD announced the "Public Consultation Document Secretariat Proposal for a 'Unified Approach' under Pillar One." Even though it is just a proposal by the OECD's administration staff, and has not gained consensus from member countries, it is certainly a basis for future discussion. The proposal includes not only the residual profit split approach but also the formulary apportionment approach, which has been regarded as opposing the currently-used arm's length approach. Moreover, the proposal would be applied to not only digital service providers but also other traditional MNEs involved in consumer-facing businesses. Although this proposal will not be finalized as is, many Japanese MNEs, especially those involved in consumer-facing businesses (including automobile giants, such as Toyota Motor) might be affected, and they must be greatly concerned about the future development of the global digital taxation discussions.

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NOTES

[1] The regulations define the weighted average cost of capital as the cost of capital determined by the weighted average of the cost of shareholders' equity and interest-bearing debt. The cost of shareholders' equity refers to the expected yield that shareholders seek from the corporation, and the interest-bearing debt cost refers to the cost of borrowing funds by the corporation.

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Korea

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

The year 2019 has been a year of business as usual.

New rules and regulations enacted in December of 2018 took effect for taxable years beginning on and after January 1, 2019. In an effort to close loopholes and address unclear rules and regulations, the new law clarified the Law for Coordination of International Tax Affairs (LCITA), its presidential decree (PD), and ministerial decrees (MD) with regard to certain specific areas.

The LCITA now allows the tax authorities to apply new arm's length principle rules to related party transactions. When related party transactions seriously lack commercial rationality, based on the LCITA Article 5, PD 4.5, and PD 4.6, the National Tax Service (NTS) can: (a) disregard the nature and characteristics of the related party transactions in question; (b) reconstruct alternative transactions that would have otherwise been arm's length; and (c) derive arm's length prices or profits. This is a significant development because previously such an attempt by the NTS would have been challenged

The LCITA also broadens and clarifies the definition of intangibles, primarily reflecting what is stated in paragraph 6.6 (page 249) of the 2017 OECD TP Guidelines:

[T]he word 'intangible' is intended to address something which is not a physical or financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances.

Before the 2018 amendment, the definition was more expansive. For example, intangibles under the preceding LCITA specifically included patents, utility model rights, designs, trademarks, service marks, copyrights, and rights associated with intangible assets, such as designs, models, and know-how, that are used as is or commonly transferred by means of licenses or contractual agreements. Under the new LCITA PDs 6.3 and 14.2.1, intangible assets include not only the specifically stated intangible assets under the old rule (i.e., before the amendment); but also intangible assets that fit the general descriptions in paragraph 6.6; as well as specific intangibles, such as trade secrets, customer information, tradenames, brands, rights under contracts and government licenses, and goodwill. The author's view is that the tax authorities want to make sure that taxpayers describe as accurately as possible the use of all non-physical or non-financial assets, especially in the case of business restructurings, so that they are accurately described and compensated appropriately. During 2019, taxpayers' cases involving business restructurings have been under the scrutiny of tax authorities as audit and examination candidates.

Through Presidential Decree 6.3, the LCITA also introduced for the first time the following transfer pricing methods for intangibles: the comparable uncontrolled price (CUP) method, the profit split method, and methods using valuation concepts and models. Previously, there were no specific transfer pricing rules and methods for intangible assets in the LCITA. According to LCITA PD 6.3, priority is given to the CUP method and the profit split method. When the priority methods are not applicable or cannot be reliably applied, valuation tools can be used. The LCITA makes two principles clear. First, related parties performing functions of development, enhancement, maintenance, protection, and exploitation of intangibles (i.e., DEMPE functions) must be compensated according to the arm's length principle. Second, excessive compensation shall not be paid to related parties that only have legal ownership of the intangibles in question, without performing the above-mentioned intangible related functions.

Another first-time rule for intangibles relates to hard-to-value intangibles (HTVI). The new LCITA PD 6.3 incorporates the recommendations regarding HTVI in the 2017 OECD TP Guidelines. The author expects the LCITA will continue to introduce specific rules and regulations to deal with intangibles-related issues, as the tax authorities continue their efforts to understand concepts, issues, actual cases, and relevant information in the areas of intangibles and business restructurings and to incorporate them into the NTS Tax Information System (NTIS).

Also, important amendments in the Framework Act of National Taxes (FANT) were made with respect to the statute of limitations on offshore and cross-border transactions. The FANT Article 26.2 extends the statute of limitations from seven years to 10 years in the case of no tax return for offshore transactions. In the case of an underreported tax return for offshore transactions, the statute is extended from five years to seven years. The FANT Article 26.2 also added a new clause regarding the extension of the statute of limitations in the case of an information exchange with foreign tax authorities. When an information exchange request is made to foreign tax authorities regarding cross-border transactions while the statute of limitation is still valid, the statute of limitations is extended for one year from the date on which the requested information is received, with the condition that the total extension period cannot exceed three years from the date of such request. In the context of transfer pricing, with the longer statute of limitations, the tax authorities can now not only have more time for examination but also secure more taxpayer information.

Transfer Pricing Examinations/Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

During 2019, transfer pricing examinations primarily focused on the following types of transactions: (1) related party transactions lacking economic substance and commercial rationality; and (2) related party transactions involving a business restructuring. For example, the tax authorities targeted cross-border online IT service provider cases where related parties in Korea acted as dependent agents for a foreign related party, i.e., a foreign related party enters into a services agreement with, and provides IT services to, third parties in Korea while its related parties in Korea act in substance as dependent agents. This type of permanent establishment issue is not new to the tax authorities, but the tax authorities have increased their focus on these cases based on a notion that taxpayers have become much more intelligent, using digital platforms to avoid PE status.

Other target areas for transfer pricing examinations in 2019 include taxpayers making payments (e.g., paying royalties) to entities in treaty countries subject to no withholding taxes, especially after a business restructuring. The NTS has been investing significant budget and resources in the NTS Tax Information System (NTIS) to ensure tax examiners/auditors are up to speed with regard to any new information on taxpayers engaging in various types of business restructurings. As 2019 is the fourth year since the post-BEPS documentation rules were in effect (i.e., effective for taxable years beginning on and after January 1, 2016), and with more post-BEPS documentation information being exchanged with foreign tax authorities, as well as analyzed and accumulated in the NTIS, it seems reasonable to expect that the tax authorities will be well prepared to identify issues in more complex transactions and to handle them in a more efficient manner.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

Two amendments were made to MAP-related clauses: LCITA Article 27 and PD 39. First, according to amended LCITA Article 27, the NTS will disclose information about concluded MAPs, especially the contents of the concluded MAPs involving the application and interpretation of tax treaties. The amendment applies to MAPs concluded on and after January 1, 2019. Second, according to amended LCITA PD 39, the competent authority will notify a taxpayer of whether the MAP application will be accepted within three months from the date on which it receives a MAP application. Before this amendment, the LCITA was silent about the timeframe for taxpayers to be notified of the acceptance of their MAP applications.

The NTS MAP division is responsible for handling MAPs and APAs under the International Taxation Bureau (ITB), and monitors and evaluates measures that are implemented in accordance with BEPS actions 5 and 14. Currently, there are four divisions under the ITB, including the MAP division. The NTS added five specialists to the MAP division in 2018 which was a significant increase from 15 to 20 people. The MAP division currently consists of: a division chief, division deputy chief and five subdivision leaders, and 13 specialists. There are five subdivisions with three specialists each: U.S. division, China division, Japan division, U.K. division, and the withholding matters division. The five subdivisions are equally important, and cases are distributed as evenly as possible among them. Cases involving countries other than the primary country assigned to each subdivision are allocated to each subdivision. Previously, the APA team, not a division, handled MAPs, in addition to APAs. Now the name has changed to the MAP division. APAs are still a primary area of focus, with Japan and the U.S. leading in the number of cases applied and concluded. The NTS has issued an APA annual report every year since 2007. MAP statistics and related information are not available in the APA report, although several ongoing and concluded APAs originated from MAP cases. Korea MAP statistics are included in the OECD MAP statistics. Based on the OECD MAP statistics for 2018, Korea began with an inventory of 130 and ended with an inventory of 133 with 41 new cases opened and 38 cases closed in 2018. Over the 2016-2018 period, it appears the MAP inventory involving both transfer pricing cases and all other cases has not changed significantly.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

The Ministry of Finance and Economy and the NTS clearly understand that many trade and treaty partners have been working on enhancing their MAP process in response to the BEPS initiative. To date, it appears that there has been no significant change in the number of MAP cases initiated in Korea compared to previous years, although official information for 2019 is not yet available. As previously mentioned (with regards to the new MAP information disclosure rule for concluded MAPs and the three-month notification rule regarding the acceptance of MAP applications), the MOFE and the NTS will continue to work towards increased transparency of information and timeliness of communication with taxpayers.

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Mexico

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

In October 2019, the Mexican Congress enacted various tax changes with respect to the income tax; value added tax; excise taxes on tobacco, carbonated beverages, and gasolines; and the indirect tax on certain digital services. The amendments do not contemplate new taxes or tax rate increases, but rather gives the tax authorities greater powers to more effectively combat and penalize aggressive tax practices that erode the country's tax base (base erosion and profit shifting, or "BEPS"). The amendments will enter into force on January 1, 2020, except for reportable schemes that will take effect in 2021.

The most relevant changes that will have a direct impact on transfer pricing include:

i. The anti-artificial avoidance and anti-fragmentation rules for permanent establishments (BEPS Action 7), which consider that a permanent establishment exists in Mexico when the independent agent acts exclusively or almost exclusively on behalf of nonresident related parties, or when a business is fragmented into various operations without a business reason;

ii. A limitation on the deduction of interest (BEPS Action 4), providing that net interest in excess of 30% of the Mexican taxpayer's adjusted taxable profit will not be deductible. This profit ratio is similar to the OECD recommendation, except that the former considers a tax profit ratio while the latter refers to book profit. The nondeductible portion may be carried forward to subsequent years, provided that certain requirements are met;

iii. The no deductibility of payments to related parties that are residents of a preferential tax regime or country, when the recipient uses the payment to make deductible payments to other members of the group or through a structured agreement that is in turn subject to a preferential tax regime. These payments may be deductible when the economic substance and business purpose for the transaction are evidenced;

iv. A rule providing legal certainty for shelter operations between a foreign principal and a Mexican resident shelter company, which for local tax purposes are taxed under the maquila regime and subject to the transfer pricing rules;

v. An obligation to withhold and pay the value added tax on the sale of certain goods and services provided over a digital platform. This regulation applies solely to individuals and entities that use a digital platform to sell their goods or services;

vi. A general anti-abuse rule (BEPS Action 6); and

vii. A reportable tax schemes provision (BEPS Action 12), whereby taxpayers and their tax advisors will be required to report "aggressive" or BEPS schemes, including certain transfer pricing operations, such as business restructurings, intangibles transfers, or transactions involving hard-to-value intangibles.

The enacted tax reform does not contemplate a regime to tax the digital economy (BEPS Action 1). The Mexican Congress has correctly decided to wait for the results of the consultation currently being carried out by the OECD and G-20. In this regard, any proposed tax amendments on the digital economy would have to be raised starting in 2021.

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

At a recent conference, the Mexican transfer pricing authorities expressed their dissatisfaction with respect to the documentation provided by taxpayers under BEPS Action 13. In their opinion, the information included in taxpayers' master file and local file returns is generally insufficient or does not contain the necessary data for a comprehensive transfer pricing risk analysis, as the OECD suggests.

On the other hand, we see that the information requests deriving from an audit are increasingly more precise and specific, allowing the Mexican tax authorities to cross-check and validate data from all tax documents at their disposal, including the new BEPS information returns. With the help of sophisticated transfer pricing risk models, the tax authorities have been perfecting their inspection activity year to year. This can be seen in the number of audits opened and closed and the amounts of the tax deficiencies assessed.

Lastly, there are three primary areas of focus or interest in transfer pricing audits. The first involves the overall transfer pricing results, i.e., whether the enterprise is reporting profits; whether the profits are consistent from year to year; whether the results are consistent with the investments and value contributed; whether the profits are similar to the profits reported by comparable enterprises, the industry, or the multinational group itself; and whether the results are consistent with the taxpayer's taxpaying capacity. The second factor is the type of related party transactions entered into by the taxpayer, with the authorities being more interested in those involving business restructurings, royalty payments, interest payments, and management fees paid to nonresidents. In these cases, the issue is not only whether the transaction is at arm's length, but also the business reason and indispensable nature of the expense for the Mexican taxpayer. The third factor is that recently, the authorities have focused on the issue of advertising expenses and marketing intangibles, aimed primarily at the consumer goods and retail sector. The tax authorities have taken the position of disallowing the deduction of advertising expenses, particularly for companies that also pay royalties, arguing that such an expense corresponds to the trademark owner and is thus not an indispensable expense for the Mexican enterprise, in addition to claiming that the transfer pricing results are not consistent with the taxpayer's investments.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

Mexico is undergoing a period of transition from both a policy and a tax administration standpoint. In 2019, there was significant turnover in the leadership of the principal areas or agencies linked to transfer pricing. The departure of the previous administrators and the arrival of new ones has led to delays in the development and resolution of open MAPs. Starting in 2020, we expect to see a significant advances in the settlement of cases, in line with the commitments made as part of the BEPS project and the OECD peer review.

For this reason, taxpayers increasingly expect to be able to negotiate a MAP in 2020, whether due to the arrival of new tax authority personnel or the increase in transfer pricing audits for 2019 and previous years.

From a legislative standpoint, the only relevant change with respect to MAPs is the inclusion in the Federal Tax Code of a new administrative benefit that allows for the filing of MAP requests without regard to the statutory terms prescribed by local law. This rule will contribute to facilitating the access to MAP procedures, will provide more certainty to taxpayers, and will limit the double taxation issue.

Lastly, Mexico has had a MAP program in place for 20 years. The program is expected to be improved with the execution of the multilateral agreement (MLI),[1] and the recommendations of the 2018 OECD peer review under BEPS Action 14, which in general terms requires Mexico to facilitate taxpayer access to MAPs and reduce resolution times to 24 months. In addition, while mandatory arbitration was not accepted as an alternative mechanism, voluntary arbitration has been implemented for six treaties currently in effect. It is expected that the elimination of double taxation may be an international reality in the future, through the renegotiation of treaties to include mandatory arbitration.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

In recent years, the number of tax audits has increased significantly due to various factors. The inspection program includes an informal type of audit (invitation letter), in which the tax authority sends an invitation to taxpayers to correct their tax situations "voluntarily," without entailing a formal review or being subject to the statutory periods prescribed by local law.

The main focus of recent disputes has been companies reporting recurring losses, companies with advertising and promotion expenses and trademark royalties (marketing intangibles), and companies that are indebted and pay interest to foreign related parties.

With respect to rulings, the Mexican and U.S. tax authorities recently resolved a MAP/bilateral APA relating to royalties for the use of marketing intangibles. This is the longest, most complex, and most relevant case in Mexico's transfer pricing history.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

Under the tax reform enacted in October 2019 and the tax policy implemented by the new federal government, centered on a greater reliance on tax revenues, we expect that 2020 will bring more stringent and aggressive inspection activity by the Mexican authorities, particularly regarding issues involving transfer pricing and international operations.

Taxpayers should focus particular attention on transactions involving issues, such as permanent establishment, debt and related-party interest (BEPS Action 4, recently incorporated into the Mexican Income Tax Law), advertising and promotion expenses (particularly when the taxpayer also pays trademark royalties), companies with book/tax losses over several tax years or minimal profit margins, and business restructurings. Taxpayers should also take into account the new tax amendments applicable starting in 2020 including permanent establishment anti-fragmentation rules; the inclusion of structured agreements; the new limit for fixed-rate interest; the new requirements to disallow the deduction of payments to related parties residing in preferential tax regimes; the foreign entities and legal figures that are fiscally transparent shall be taxed in terms of the Mexican Income Tax Law; rules regarding controlled foreign entities; the new anti-abuse/business reason rules where tax authorities' power to inquire about business reasons and to recharacterize operations during the course of formal audits.; and the new rules for joint liability between the taxpayer and its directors, managers, members, or shareholders, among others. This further empowers the authorities to disregard or disprove changes made by the taxpayer. Also, the new reportable schemes applicable to companies and advisors will require them to report schemes that involve various transfer pricing operations, which will now be known by the tax authorities.

Therefore, we also anticipate a greater number of disputes between taxpayers and tax authorities and a higher number of MAP requests to settle disputes or bilateral advance pricing agreements (BAPAs) as a prevention mechanism, accordingly. We trust that the tax authorities will have a better track record in the settlement of these procedures next year.

In summary, transfer pricing will continue to be a topic of utmost relevance and interest for the tax authorities and taxpayers alike during 2020.

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NOTES

[1] The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) is pending enactment by the Mexican Congress.

Netherlands

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

In 2018, the amendments to the Organisation for Economic Co-operation and Development's (OECD's) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 (OECD Guidelines) as a result of the G20/OECD's Base Erosion and Profit Shifting (BEPS) plan were incorporated in a new transfer pricing decree. On May 11, 2018, the Dutch State Secretary of Finance (the Finance Secretary) published a new transfer pricing decree that also took into account specific developments in Dutch case law. By means of this decree, the Finance Secretary provided information regarding the position of the Dutch tax administration with respect to the application of the arm's length principle and OECD Guidelines in the Netherlands.

The decree provided a further interpretation of the arm's length principle where the OECD Guidelines leave room for interpretation or where there is ambiguity. Following the publication of this decree, the Dutch tax authorities have continued their trend towards adopting a very economic approach to transfer pricing with an emphasis on actual people functions. It is expected that through the remainder of 2019 and also in 2020, this approach will be very relevant in cases involving transfers of intellectual property, business restructurings, and also financing arrangements.

The most relevant change in 2019 entailed the change to the long-established Dutch ruling practice for obtaining advance certainty.

On June 28, 2019, the Dutch State Secretary of Finance published the final decree on the Dutch tax ruling practice pertaining to tax rulings relating to cross-border structures. The decree entered into force on July 1, 2019.

In relation to changes in the international tax landscape, the State Secretary announced an update of the tax ruling practice in 2018. These updates are covered in the June 28, 2019 decree, and support the Dutch government's aim to: (i) strengthen the tax ruling practice and (ii) continue to provide advance certainty to companies that have the required substance in the Netherlands. In addition, the State Secretary recently announced other initiatives, including the appointment of a committee of experts that will focus on the fair taxation of multinational enterprises. The updates in the decree are focused on the content of rulings, the ruling application process, and transparency.

The most important changes entail, on the one hand, the importance of having sufficient economic nexus and inherent business purpose in order to qualify for advance certainty, and on the other hand, more disclosure around the actual content of a ruling through a published summary. In the second half of 2019, these changes resulted in less applications of unilateral rulings, and it is expected that this trend towards a reduction in unilateral advance certainty will continue. There is a general decline in opting for unilateral certainty in favor of bilateral or multilateral certainty.

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

There is a distinct increase in transfer pricing examinations in the Netherlands and there is more controversy around various transfer pricing topics. There are a variety of different reasons that contribute to this increase. First of all, the Dutch tax authorities have made significant investments in more (transfer pricing) resources and they have not only expanded their teams through internal recruitment but also by hiring experienced resources with corporate or advisory backgrounds. Secondly, the Dutch tax authorities have also refined their interpretations and approaches to a variety of transfer pricing topics. This pertains, for example, to more in-depth knowledge of certain industries that have entailed different expectations around expected returns for certain routine activities. Also, the approach towards transfer pricing valuations triggers much more controversy as compared to historic examinations. The availability of more data and access to CbC filings has also triggered more in-depth questions and more inherent scrutiny. The Dutch approach towards transfer pricing documentation has not fundamentally changed but upon examinations there is more emphasis on additional evidence to demonstrate that the company's policies and business behavior is indeed consistent with what has been documented in the BEPS compliant transfer pricing documentation. Questions or audits are triggered increasingly through a multisided perspective, whereby perceived misalignment between (functional) contributions and underlying profit potential is the key trigger point. Also, concerns around possible misalignment between people functions and risk control are often key features of tax authority queries.

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Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

The Netherlands has historically been focused on ensuring access to an effective dispute resolution process with a strong track record in bilateral APAs, multilateral APAs, and MAPs. Similar to other countries, the Netherlands is also more focused now on the average duration of competent authority proceedings to see whether the average duration can be shortened. At the same time, it is important to recognize that the number of competent authority procedures continues to increase and unfortunately, the trend towards more divergent positions continues to increase as well. This trend towards more divergent positions is arguably attributable to the complexity and interpretation aspects around transfer pricing, but there is also a global trend towards more opportunistic positions taken by tax authorities globally which has increased the risk of double taxation. Against this backdrop, there is also an increase in cases that are not being resolved and therefore terminated early, which contributes to managing the average case duration but does not necessarily increase the success rate.

It is helpful that under the Dutch process there is room for early engagement around competent authority procedures, which helps taxpayers in assessing their options early in the process.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

It is expected that for 2020 and beyond there will be more transfer pricing scrutiny and more audit activity, effectively triggering more adjustments. Although the possible changes around BEPS 2.0 will most likely not trigger any regulatory changes in 2020, it will certainly influence perceptions and positions in relation to transfer pricing. Arguably, this may not be that significant in the Netherlands but for many Dutch companies, it may trigger differing positions in the countries where they conduct their business. Therefore, the exposure to double taxation will likely increase, especially in a time when most companies are experiencing changes to their operating and business models as part of their digitalization journey.

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New Zealand

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

New Zealand has enacted no new transfer pricing legislation during 2019, although minor amendments to the Income Tax Act 2007 have been passed. This was done as part of a wider tax Bill, removing the ambiguity of some provisions included in the Base Erosion and Profit Shifting Act 2018 ("BEPS Act").

Whilst the New Zealand BEPS Act is generally effective for income years commencing on or after July 1, 2018, the various amendments thereunder requiring application of OECD principles may be operative from July 1, 2018.[1] Thus, New Zealand taxpayers continued to adjust to the new legislative regime in 2019. Notably, new legislative provisions addressing the adjustment of finance transactions for benchmarking purposes; permanent establishments; and potential hybrid structures in the wake of the BEPS Act have already, or will shortly impact the compliance activities of many multinational companies (both inbound and outbound) in New Zealand. Moreover, the BEPS Act has extended the application of the transfer pricing rules to apply to arrangements between a New Zealand company and a member of a non-resident owning body that has at least 50% of the ownership interests in the company; thus, a broader range of transactions and taxpayers will likely become subject to the transfer pricing laws.

As previously discussed in this publication, the BEPS Act introduced new section GC 6(1B) into the Income Tax Act 2007, which provides express reference to the OECD Transfer Pricing Guidelines ("OECD Guidelines"), including the OECD's BEPS Actions. In this regard, the New Zealand transfer pricing regime continues to be affected by developments at the OECD level.

While not yet legislated, the Inland Revenue ("IR") launched a consultation in June 2019, seeking public feedback on New Zealand's approach to a digital services tax. The tax could either be deferred until an OECD solution is reached, or New Zealand could join a growing list of countries taking unilateral, preemptive action. The discussion paper *Options for Taxing the Digital Economy* was prompted by the government's concern that even if OECD consensus on digital services taxation matters is reached, realistically, it could be five or more years until enactment of legislation. As such, the discussion paper proposes a digital services tax at a 3% tax rate on New Zealand turnover for a given multinational corporation. The digital services tax would only be applied to companies which meet two threshold tests: global turnover exceeding EUR 750 million and New Zealand-attributable turnover exceeding NZD 3.5 million. However, given the OECD's more recent BEPS 2.0 developments and timeline, progress in respect of a New Zealand digital services tax is likely to slow, if not pause.

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

Even after the BEPS Act, there is still no explicit statutory requirement in New Zealand to prepare and maintain transfer pricing documentation, but the IR has always strongly recommended that taxpayers prepare and retain documentation to support how their transfer price was determined and why it is consistent with the arm's length principle. Further, the transfer pricing law as amended by the BEPS Act requires the selection and application of the most appropriate transfer pricing method in order to evidence the arm's length nature of the conditions of the accurately delineated controlled transaction(s); accordingly, it is unclear how taxpayers could comply with the law without transfer pricing documentation.

The amended transfer pricing provisions relating to arm's length conditions and accurate delineation will likely necessitate expanded qualitative and quantitative analyses in transfer pricing documentation for New Zealand taxpayers. For inbound multinationals, in particular, it is anticipated that there will be increased emphasis on and expectation of the preparation of contemporaneous transfer pricing documentation, leading to many multinationals seeking transfer pricing advice and analyses, whereas previously they may have regarded such controlled transactions as de minimis.

The year 2019 also yielded two new compliance forms developed by the IR. First, the IR commenced the issuance of wholesaler/distributor information requests to foreign-owned New Zealand entities, issued on the basis of taxpayers' responses to the annual International Questionnaire form. The information request aims to assess whether the New Zealand entity's transfer pricing is in line with the arm's length principle. The IR has also indicated that the information provided in the new wholesaler/distributor information requests will assist in the design of future simplification measures. The following information is generally requested:

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- A description of the principal activities of the group, including main product types;
- An indication of the customer category in which direct sales are predominantly made – i.e., direct to customers, sales to sub-distributors, sales to manufacturers, etc.;
- An indication of the extent of "ancillary" service activities provided in connection with the main product types distributed, such as training, installation, maintenance, etc. In this regard, we presume the IR will consider whether the New Zealand taxpayer has been sufficiently rewarded for distribution and related services undertaken.
- A summary of the New Zealand entity's financial accounting results during the covered period;
- The value of sales and marketing expenses during the covered period; and
- Information in relation to transactions by the New Zealand group with non-resident associated persons, including the value of sales and purchases of goods, and if transactions occur with specific countries (i.e., Hong Kong, Ireland, Luxembourg, the Netherlands, Singapore, or Switzerland).

The IR also introduced a new BEPS-related disclosure form, to be completed and filed alongside the tax return for income years beginning on or after July 1, 2018. There are three parts to this disclosure: (i) hybrid and branch mismatches, (ii) thin capitalization group information, and (iii) special transfer pricing rules relating to financial transactions.

In November 2019, the IR updated its key areas of focus for large MNE entities[2] (i.e., domestically-owned groups with at least NZD 80 million in annual turnover and foreign-owned groups with at least NZD 30 million in New Zealand turnover):

- unexplained tax losses returned by foreign-owned groups;
- loans in excess of NZD 10 million principal and guarantee fees;
- payment of unsustainable levels of royalties and/or service charges;
- material associated party transactions with no or low tax jurisdictions, including the use of offshore hubs for marketing, logistics, and procurement services;
- appropriate booking of income arising from e-commerce transactions;
- supply chain restructures involving the shifting of any major functions, assets, or risks away from New Zealand; and
- any unusual arrangements or outcomes that may be identified in controlled foreign company disclosures.

For the most part, however, the IR continues to conduct review and audit activity with the levels of expectation and transparency that taxpayers have become accustomed to in recent years. However, significantly, for income years beginning on or after July 1, 2018, the burden of proof with respect to transfer pricing matters now rests with the taxpayer.

The BEPS Act also gave the Commissioner of the IR wide powers under section 17 of the Tax Administration Act 1997 to obtain information or books and documents necessary or relevant to the administration and enforcement of any of the taxing statutes, including information held by any member of a large multinational group, either within or outside New Zealand. Similarly, the BEPS Act expanded provisions regarding penalties that the Commissioner may now impose on the taxpayer for failure to provide information and for members of large multinational groups failing to cooperate with the IR, with a civil penalty up to NZD 100,000 (section 139AB) applicable to both situations.

As the IR has limited transfer pricing resources, its Compliance Program focuses resources where the greatest perceived risks to the tax base exists, with a particular focus on inbound foreign-owned wholesale distributors, the most common foreign-owned MNE structure in New Zealand, as well as on inbound financial transactions.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

As yet, we have not noticed material changes in respect of New Zealand's MAP processes or the IR's administration thereof.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

There were no transfer pricing cases decided in New Zealand in 2019. It remains that New Zealand does not have any decided case law specific to the transfer pricing laws. Taxpayers and the IR typically settle transfer pricing disputes before they reach litigation. APAs are one means of resolving transfer pricing issues before the transactions occur and are generally promoted by the IR. The IR tends to align its transfer pricing laws and practices with Australia. In Australia, the September 2019 Federal Court decision in respect of *Glencore Investment Pty Ltd v. Commissioner of Taxation of the Commonwealth of Australia* [2019] FCA 1432 (hereinafter referred to as the "*Glencore* decision") was significant. The court found that the Commissioner of the Australian Tax Office had misapplied the provisions of Australia's transfer pricing legislation contained in Division 13 and Subdivision 815-A of the Income Tax Assessment Act.

The *Glencore* decision is beneficial to taxpayers at large, setting clear restrictions on the ability of the Commissioner to recast the actual transaction and substitute alternate contractual terms. Controlled transactions must be assessed under an arm's length analysis in the form and substance in which they were agreed, as opposed to an alternate reconstruction that may be informed with the benefit of hindsight. While not strictly applicable to New Zealand taxpayers, the decision (if upheld under appeal) should have persuasive precedential value to taxpayers in New Zealand.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

New Zealand is unlikely to introduce or implement new transfer pricing legislation in 2020, and is also unlikely to see any significant transfer pricing litigation resolved.

The transfer pricing landscape in New Zealand in 2020 is likely to be increasingly impacted by the IR's use of data-driven reviews and audit activity as a result of new IR systems, international revenue authority cooperation and information sharing, CbC reporting, questionnaire and tax return disclosures, etc. in the wake of the OECD's BEPS project and the New Zealand BEPS Act.

In addition, the BEPS 2.0 project concerning the reallocation of profits to market jurisdictions and the revised nexus concepts associated with permanent establishments may have a significant effect on the decision-making of taxpayers, as well as the IR's compliance activities in 2020 and subsequent years. Whether the OECD adopts proposals akin to a digital tax on large multinationals, or opts for more wholesale changes to the international taxation framework remains to be resolved.

Given the OECD's more recent BEPS 2.0 developments and timeline, progress in respect of a New Zealand digital services tax is likely to be deferred, if not paused entirely, until mid-late 2020.

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NOTES

[1] The Inland Revenue's *Policy and Strategy, Special Report on Base Erosion and Profit Shifting – Transfer Pricing Rules*, issued in April 2019, states: "This means transfer pricing positions taken on or after 1 July 2018 must be analyzed in a way that is consistent with the July 2017 version of the OECD transfer pricing guidelines. The July 2017 version of OECD guidelines, or later updates to the guidelines may also be relevant for analyzing tax positions taken before 1 July 2018 to the extent that they are not inconsistent with New Zealand's domestic law at that time (in sections GC 6 to GC 14)."

[2] *https://www.classic.ird.govt.nz/international/business/transfer-pricing/transfer-pricing/enforcement/transfer-pricing-enforcement-programme.html*

Portugal

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

As per the Portuguese legal framework, 2019 was particularly interesting with regard to legislative changes or updates affecting transfer pricing.

Several tax-relevant decrees were approved in 2019, namely the following:

- Ministerial Order n 35/2019, of 28th January, which introduces relevant changes to the Annual Tax and Accounting Return ("IES");
- Law n. 119/2019, of 19th September, which amends several Portuguese Tax Codes (particularly the Corporate Income Tax Code, where transfer pricing rules are included); and
- Law n. 120/2019, of 19th September, which establishes dispute settlement mechanisms involving the competent authorities of Portugal and other member states of the European Union.

Ministerial Order n 35/2019, of 28th January

In Portugal, all corporate taxpayers must disclose on a yearly basis whether they have entered into transactions with related parties by filing the IES by the 15th day of the seventh month following the end of the tax period to which it relates.

The Ministerial Order n 35/2019, of 28th January, introduced some changes to the IES for this purpose, with reference to the tax periods starting on or after 1 January 2019. Briefly, some of the important changes include the following:

- Related party transaction disclosure should include transactions conducted with individuals (and not only transactions with corporate entities or permanent establishments);
- Aggregation of information regarding transactions with resident entities and non-resident entities (formerly presented separately in different appendices). The "new IES" will only include one appendix that covers transactions with both resident and non-resident entities;
- More details about the covered transactions, including the nature of the transaction, counterparty, amount, and transfer pricing method selected for the determination of the intragroup pricing (including an indication of whether this method changed compared to the previous year);
- Indication of any guarantee and/or collateral that was conceded or obtained with related party entities; and
- Indication of any changes in the taxpayer's business model during the fiscal year.

Law n 119/2019, of 19th September

The Law n 120/2019, of 19th September, approved by the Portuguese Parliament, amended Portugal's almost 20-year-old transfer pricing and penalties regimes (i.e., Articles 63, 130, and 138 of the Corporate Income Tax Code and Article 117 of the General Taxation Infringement Law), and entered into force as of October 1, 2019.

This new law has had a special impact on the transfer pricing rules in force and has significantly affected the following issues:

- Intragroup transactions,
- Transfer pricing methods,
- Transfer pricing documentation,
- Advance pricing agreements, and
- Penalties.

a) *Intragroup transactions*

Regarding intragroup transactions, the new law reiterates that the terms and conditions of all commercial or financial transactions carried out between related parties (both resident and non-resident) must be in line with the arm's length principle. Examples of these transactions include:

- Business restructurings,
- Renegotiations or terminations of intragroup agreements,
- Sales or transfers of assets,
- Transfers of rights to intangibles, and
- Compensation for loss of profits or damages.

b) *Transfer pricing methods*

No hierarchy will apply for selecting a transfer pricing method. Taxpayers may adopt methods other than those set out in the current transfer pricing rules for transactions with unique characteristics, or where there is a lack of information about comparable transactions between unrelated parties.

c) *Transfer pricing documentation*

"Large taxpayers" will be required to prepare and submit transfer pricing documentation to the Portuguese tax authorities by the 15th day of the seventh month after the tax year-end.

"Large taxpayers" include, among others, entities that:

- Have registered an overall tax amount of over EUR 20 million; or
- Are holding companies with a total income of over EUR 200 million; or
- Have registered an annual turnover of over EUR 200 million; or

- Are under the supervision of the Central Bank of Portugal, Securities Market Commission, and Insurance Supervisory Authority, with a turnover of over EUR 200 million.

d) *Advanced pricing agreements (APAs)*

Advance pricing agreements (unilateral or bilateral) will be valid for up to four years instead of the current three years.

Additionally, the terms and conditions of an APA may be exchanged with other countries under Portugal's tax cooperation agreements.

e) *Penalties*

The current penalty that applies to failures to timely submit transfer pricing documentation and the Country-by-Country (CbC) report (i.e., EUR 1,000 to EUR 20,000 for legal entities and EUR 500 to EUR 10,000 for individuals required to prepare transfer pricing documentation, plus 5% for each day that the failure continues) will be extended to also include failures to timely submit the CbC notification form ("Modelo 54").

Law n 120/2019, of 19th September

This law transposes into the Portuguese legal order the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute settlement mechanisms in the European Union.

Specifically, this law establishes the rules on dispute settlement mechanisms involving Portugal and other member states of the European Union resulting from the interpretation and application of international agreements and conventions providing for the elimination of double taxation of income and, where applicable, property.

The approval of this law represents an important step towards the harmonization of tax legislation in the context of the European Union, thus promoting equal access to dispute settlement mechanisms for both Portuguese taxpayers and other taxpayers with whose countries Portugal establishes agreements to avoid double taxation.

Transfer Pricing Examinations/Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

The transfer pricing documentation rules in Portugal are intended to follow the most recent developments advocated by the international community, particularly the OECD, in order to comply with the latest global tax policy.

Therefore, although the three-tiered approach presented in BEPS Action 13 has not yet been completely implemented in Portugal (only the CbC reporting requirement has been implemented), the requirements for the preparation of transfer pricing documentation currently in the Portuguese transfer pricing legislation includes information that is provided in the OECD Master File and Local File guidance.

As such, the methodology for preparing transfer pricing documentation in Portugal is broadly in line with the improved requirements in a post-BEPS era, except for certain specificities of Portuguese documentation rules.

Thus, in general, there have been no major challenges in meeting tax authorities' requirements or expectations when carrying out transfer pricing documentation and supporting data.

We have noticed the Portugal Tax Authority (PTA's) increasing awareness of the BEPS project, in particular, with regards to the importance given to economic or business substance and the rationale behind a given intragroup transaction.

The PTA has been investing and focusing on training its external tax inspection and audit teams specializing in Corporate Income Tax in order to enable these teams to identify potential target situations related to transfer pricing.

Among the tax audits performed in recent years, it has been noticed that the PTA has been placing an increasing focus on the following audit targets or situations:

- Existence of intragroup accounting balances that are not traceable to corresponding intragroup transactions,
- Business restructurings,
- Limited Risk Distributors' business structures,
- Entities with uninterrupted negative results, and
- Identification of VAT records of an entity without a subsidiary established in Portugal (to identify the existence of potential permanent establishment issues).

It is important to highlight that the application of BEPS concepts during tax audits is a recent development in Portugal. The majority of tax audits for the 2016 tax period began only in 2019, and therefore it is expected that the use of BEPS concepts in the context of fiscal audits will tend to intensify in the coming years.

In the last few years, the PTA has been more proactive in carrying out taxpayer examinations or audits focused on transfer pricing issues, primarily triggering the following issues:

- Intercompany financing,
- Intangible assets, and
- Limited risk distributors.

With regard to intercompany financing, not only has the PTA been assessing the arm's length compliance of such transactions (e.g., shareholder loans, cash pooling, and intragroup loans, among others), it has also been giving more relevance to long-term intragroup balances that could be characterized as intercompany finance transactions. In such cases, the PTA examines the economic substance of the operation in order to recharacterize it (if applicable) into a given nature of financing transaction and then conducts a benchmarking analysis to determine the appropriate arm's length remuneration that should be considered in the year(s) covered by the tax audit.

Regarding intangible assets, the PTA has been giving more relevance to the economic rationale behind intragroup intangible asset transactions, particularly when there are brand portfolios involved. Situations involving the sale or transfer of trademarks between related entities are under heavy focus during a tax audit in order to assess whether these transactions are economically reasonable and if an independent entity under the same economic circumstances would enter into a similar transaction.

Moreover, entities that belong to a multinational group and that are identified as limited risk distributors have also been triggering the PTA's attention in particular to assess the existence of any inappropriate transfer pricing business model or intragroup transaction remuneration.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

From a Portuguese perspective, some changes have been noticed regarding PTA's action on MAP cases to assure that treaty disputes are concluded in a timely, effective, and efficient manner.

As reported by the OECD, the average time needed to resolve MAP cases has been significantly reduced when comparing cases submitted prior to 2016 with cases submitted after January 2016.

For transfer pricing MAP cases started before January 2016, the average time required from the date of MAP application to

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the PTA until its completion is estimated to be approximately 49 months. Contrarily, for transfer pricing MAP cases started after January 2016, the average time has been reduced to approximately 9 months.

As per our experience, there is an increased willingness by taxpayers to initiate MAP cases to resolve double taxation issues.

Indeed, there has been a growth in the clarifications provided regarding the procedure underlying the MAP, as well as in additional and specific support provided in this regard.

Based on the OECD report on this issue, it appears that transfer pricing MAP cases have increased, with approximately 30 cases reported since January 2016 (prior to this period only 10 requests had been submitted to the PTA).

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

With regard to litigation involving transfer pricing cases in Portugal, there has been an increase in the number of cases submitted to the courts, with the vast majority of questions being referred to the Arbitration Court, due to the simplicity of the procedural requirements, the quickness of the decision-making process, as well as the specialization of the arbitrators, when compared with the Judicial Courts.

The cases that have been presented to litigation in recent years are mostly related to financial transactions, purchase and sale of commodities or products, purchase and sale of shares, transactions related to the sale of intangible assets, and transactions involving intragroup services.

During 2019, the Court's rulings on transfer pricing cases were primarily related to distribution agreements, financial transactions, and the sale of shares between related party entities.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

Considering the new transfer pricing documentation requirements in Portugal, as previously mentioned, further action by the PTA on transfer pricing is expected, as it will have in its possession a broad set of information, mostly from CbC reports and transfer pricing documentation submissions, which are compulsory for large taxpayers from 2019.

In light of the significant changes that occurred in 2019, it is also expected in the forthcoming years that a full review will occur of the Portuguese Ministerial Order n 1446-C/2001, of 21st December, which is part of the transfer pricing rules alongside the Portuguese CIT Code. The revision of the Ministerial Order will probably occur in order to standardize the transfer pricing rules in Portugal (following the recent changes and updates), as well as to align the existing local rules and practices with the most recent international guidelines on this matter.

For the coming years, it is also expected that the number of MAP cases will increase due to the uncertainty in international taxation in a post-BEPS scenario, thus confirming the trend that has been occurring over the past year.

Finally, it is important to recognize the challenges related to the digital economy, as addressed in BEPS Action 1. Given the inherent complexity of this issue, and considering the steps taken by the Portuguese Parliament with the submission of a Draft Law in February 2019, for consultation and discussion on the implementation of a specific tax for digital services (which closely follows the *Digital Tax Package* initiative of the European Commission for the interim targeted solution), we believe that in the medium to long term the PTA will be aware of the advances made by the international community in order to adopt the best approaches at a domestic level.

However, it should be noted that Portugal faces several challenges regarding the development and implementation of an effective taxation of the digitalized economy, primarily due to the fact that there is still no political consensus on the strategy to follow with respect to the topic.

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Russia

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

Change in the range of controlled transactions

The range of transactions classified as "controlled" decreased from January 1, 2019 as a result of amendments to the Tax Code made by a law issued in July 2018. This is expected to prompt more focused control by the Russian tax authorities over the pricing of intra-group transactions.

Domestic transactions

Under the amendments, domestic intra-group transactions are largely exempted from transfer pricing (TP) control unless certain criteria are met, such as where counterparties in a transaction are subject to a different taxation regime (tax rates) and turnover from transactions exceeds RUB 1 billion (approximately USD 16 million).

Prior to this change, the range of domestic transactions subject to TP control was significantly broader, since the turnover threshold was generally the only applicable criterion (i.e., RUB 1 billion or another relevant threshold depending on the type of transaction).

Cross-border transactions

Starting from 2019, a unified income threshold (RUB 60 million or approximately USD 1 million) applies to related-party cross-border transactions for the purposes of recognition as "controlled" under the TP rules, compared to previous periods when no income threshold existed for cross-border transactions between related parties.

What do these changes mean for Russian taxpayers?

In formal terms, the changes outlined above mean that a taxpayer is not obliged to observe Russian TP requirements in relation to transactions falling outside the scope of TP control, i.e., taxpayers are not required to prepare TP documentation and submit annual notifications of transactions to the tax authorities.

On a practical level, however, the legislative changes have more complex and ambiguous implications for Russian taxpayers.

Prior to 2019, only the Federal Tax Service ("FTS") was ultimately responsible for auditing pricing in controlled transactions. Ordinary tax offices were not involved in this process and had no formal authority to question transfer prices in controlled transactions during the course of ordinary tax audits (i.e., field/desk audits). Now, in cases where the annual turnover between the parties to such transactions does not exceed the established threshold, the tax authorities may check pricing outside the scope of TP audits, i.e., when conducting field/desk tax audits. When doing so, a local tax office has legitimate grounds to challenge the arm's length nature of transfer prices in related-party transactions using TP methods and with reference to the so-called "unjustified tax benefit" concept. This also applies to domestic transactions that are now outside the formal scope of TP control. Moreover, potential tax exposure arising from such audits could cover not only profits tax but indirect taxes (e.g., VAT) as well.[1] This is supported by relevant tax case law.

At the same time, related-party transactions that remain under formal TP control are subjected to more rigorous and thorough pre-audit risk assessments by tax offices and the FTS, which are designed in combination with the application of the "unjustified tax benefit" concept to the increased amount of transactions that are now out of TP control to combat base erosion and profit shifting abroad and within Russia.

Outside the TP audit framework, the taxpayer does not have the penalty protection (i.e., protection from the 40% penalty of additional tax charged as a result of a TP violation) provided by TP documentation. Self-initiated corresponding TP adjustments intended to balance transfer prices and accordingly, the financial results derived by the parties to a transaction, are no longer available for transactions between related parties which fall out of TP control under the new rules. Since this is more applicable to controlled transactions between two Russian related entities, corresponding TP adjustments are effectively not feasible for cross-border transactions (except for the application of TP adjustments via a bilateral advance pricing agreement, which have recently become possible).

Nevertheless, although TP documentation is not obligatory when undergoing a general tax audit in which TP methods are applied, the availability of a documented TP methodology and sound business reasoning for pricing in material transactions (whether in the form of TP documentation, a "defense file," or otherwise) would certainly enable a company to have a more constructive and reasoned dialogue with the tax authorities in the context of discussions about unjustified tax benefits or other challenges from the tax authorities.

Bilateral Advance Pricing Arrangements (BAPA)

In May 2018, the Russian Ministry of Finance published the Procedure for the conclusion of multilateral, i.e. bilateral, advance pricing agreements ("BAPA") in relation to cross-border transactions (in which at least one counterparty is a tax resident of a

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foreign tax treaty partner country). The Procedure entered into force in June 2018.

The Procedure allows only the largest taxpayers[2] to apply for a BAPA and specifies the FTS as the competent authority for the mutual agreement procedure and for information exchange. The stamp duty for the filing of a BAPA application is RUB 2 million (approximately USD 31,000). The BAPA enters into effect starting from January 1 of the year the application is submitted or, if requested, the year following the date of signing, and is valid for up to three years, extendable by two more years.

The Procedure also sets out the stages of the BAPA process, in which the first step is a preliminary discussion with the FTS to make a reasoned assessment of the grounds for concluding a BAPA and the prospects for mutual agreement between the competent authorities and implementation in the Russian Federation. This stage is generally informal. The results of the preliminary discussion are not binding on the taxpayer or on the FTS. Whatever the outcome of the preliminary discussion, the taxpayer may still apply to the FTS for an APA.

The Procedure is mainly designed to enhance the transparency and predictability of the taxation of cross-border transactions, preventing controversy, eliminating double taxation, and ensuring the fair distribution of the tax base among Russia and other states. Some questions remain open, such as whether the arm's length standard will be set by reference to the Tax Code or the OECD TP Guidelines (which may be a preferred scenario enabling some consensus).

Previously, there was no formal procedure established under Russian law for entering into a BAPA in relation to cross-border transactions with the involvement of foreign tax authorities, making it impossible to utilize such an agreement. By introducing the Procedure and now discussing BAPA opportunities with Russian taxpayers, the FTS is demonstrating significant openness to discussing approaches and methodology and finding joint solutions.

In practical terms, the BAPA may be regarded as a tool for managing policies, approaches, and outcomes in the TP context for transactions of a controversial nature, such as IP-related transactions, for MNEs with complex operating models (procurement, service, and R&D centers), for the telecommunications/technology industry, etc. Specifically, the tool might be attractive for MNEs that have an intra-group culture of obtaining tax rulings.

What should a company do before initiating a BAPA?

– The transaction for which a bilateral (multilateral) APA is considered as a means of reconciling the TP methodology should be thoroughly analyzed.

– The practical chances of success should be assessed.

– The possibility of preliminary discussions with the FTS should be considered.

Transfer Pricing Examinations/Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

The implementation of BEPS Action 13, whereby Russia introduced three-tier TP documentation, is still having a major impact on the development of the Russian TP system.

Qualifying MNEs must prepare a local file (from 2018), a master file (for financial years starting in 2017 or later), a CbCR (for financial years starting in 2017 or later, with optional filing for 2016), and a CbC notification.

According to public sources, the first exchange of CbC reports has already taken place, and the FTS refers to data presented in CbC reports when conducting risk assessments in terms of financial data related to Russia compared to similar jurisdictions within the group. In addition, the FTS has mentioned that it intends to request and analyze master files (primarily when pre-audit risks are identified in intra-group transactions involving Russia). Local differences in the content of the master files compared to those of the OECD should be considered and incorporated before submission (in the Russian language).

Since Action 13 has not been in effect in Russia for long, there is not yet a sufficient body of practice from which to identify the challenges most commonly encountered in meeting tax authorities' expectations for adequate TP documentation and supporting data. Nevertheless, as far as local files are concerned, practical experience shows that the tax authorities request data/documentation to support every statement in the local file when carrying out TP audits.

Not all countries have activated the automatic exchange of CbC reports with Russia (e.g., the U.S., where many parent companies have filed CbC reports). If the parent company filed a CbC report in a country with which automatic exchange has not been activated, there is a possibility that the Russian tax authorities will request a CbC report from the Russian taxpayer. There is no time limit established in the law for the submission of a requested CbC report in cases where the automatic exchange has not been activated with the country concerned (a three-month period is stipulated in other situations).

Recently, however, the FTS has started to require Russian taxpayers in the scenario described above (i.e., where the parent is located in a country with which automatic exchange has not been activated, such as the U.S., Canada, Turkey, Qatar, and the U.A.E.) to submit CbC reports within three months of receipt of the request. Given local differences in CbC reporting requirements and XML schemas, a CbC report submitted by a UPE (ultimate parent company) or an SPE (surrogate parent company) would normally need to be adapted to Russian requirements, as well as being converted into the required format before submission.

Recent tax audit cases show that there is effective cooperation between tax authorities in terms of mutual administrative assistance in tax matters and indicate a greater reliance by the Russian tax authorities on audit evidence obtained as a result of the automatic exchange of information with other tax authorities. In our view, the BEPS project initiatives, including CbC reports, the automatic exchange of financial account information under the Common Reporting Standard (CRS), and the spontaneous exchange of information between tax authorities in different jurisdictions, have greatly increased the transparency of the tax positions of multinationals for the Russian tax authorities and access to information during tax audits.

We have also observed a trend towards tax authorities carrying out pre-audit tax risk analysis and fact-finding prior to initiating formal audits or making inquiries to the taxpayer, including analysis of information received from foreign tax authorities. During 2019, data received through the automatic exchange of financial account information under CRS and responses to numerous pre-audit requests were used by tax authorities for analytics and the identification of "red flags" in terms of base erosion and profit shifting.

It is clear that the Russian tax authorities have an active interest in all BEPS related initiatives. There have also been cases where Russian tax offices initiated simultaneous tax audits.

Finally, the FTS is succeeding in digitalizing the tax administration process in general, and is on track to develop an infrastructure that makes significant use of technology for tax control procedures and allows the introduction of measures to address global challenges relating to the taxation of the digital economy. For instance, the FTS has launched a unique and innovative system of VAT refund controls (which has become a driver of tax collection in general); representatives of the FTS have expressed general support for the BEPS 2.0 initiative at various public events, etc.

To date, TP audits have been largely focused on cross-border commodity transactions, transactions involving low-tax jurisdictions, and particularly Russian exports of natural resources (such as oil, fertilizers, and grain) through foreign trading structures.

At the same time, although the key focus is on Russian exporters, there have also been first-time TP audits and pre-litigation disputes involving Russian subsidiaries of foreign multinational enterprises, demonstrating an increasing interest in non-commodity transactions.

Risk-based audit approaches for TP purposes are focused on areas with the highest TP risk, where common “red flags” indicated by the tax authorities include:

– Losses;

– Significant amounts of intra-group service fees without business rationale and substantial documentary support;

– A significant proportion of intra-group charges within the total operating costs of the Russian company;

– Substantial royalty payments in cases where the gross margin is much higher than the operating margin;

– Conspicuous changes in the tax base and deviations from industry-wide benchmarks

– Significant differences between resale prices and transfer prices in commodity transactions, or non-application of an external CUP in relation to products for which public quotations/prices are available

As far as case law is concerned, there is a clear trend toward an increased focus on substance, whereby the business rationale for a transaction is analyzed at its core and the behaviors of the parties are assessed for consistency with those expected between third parties in comparable circumstances. We see a tendency for the Russian tax authorities to take a closer look to determine whether a company’s activities and functions added value to the business and whether it is reasonable for that company to be compensated.

For instance, the tax authorities thoroughly analyze the reasonableness of expenses of a Russian entity in a limited risk distributor (“LRD”) structure to determine the expenses not characteristic of a limited risk profile and calculate the ratio of intra-group service and interest expenses to overall operating costs, with a view to identifying disguised dividends. At the same time, the tax authorities have also been applying, among other things, the OECD concept of the benefits test in relation to intra-group transactions, questioning the economic value and justification of services received for deductibility purposes, as well as challenging cost bases and cost allocation approaches for pricing in such transactions.

Notably, the final decisions in TP cases are driven less by TP methodology than by the General Anti-Avoidance Rule (“GAAR”) or the “unjustified tax benefit” concept, in which the Russian authorities are more experienced.

It is therefore expected that the tax authorities will continue to focus primarily on analyzing the operating models of multinational groups, including through detailed examination of the functional profiles of entities involved in the supply chain. In the case of transactions falling outside the scope of transfer pricing control, the tax authorities will tend to apply TP regulations and concepts (including the benefits test) through the GAAR mechanism in identifying unjustified tax benefits.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

All Russian double tax treaties contain mutual agreement procedure (“MAP”) provisions. Prior to 2019, however, there was no formal guidance on the utilization of MAP under tax treaties. Relevant MAP provisions were introduced in the Russian Tax Code in 2019 and will enter into force from January 2020; however, there are still no detailed guidelines on using the MAP procedures. The competent authority responsible for MAP in Russia is the Ministry of Finance.

In view of the absence of formal guidance, MAP applications in Russia have been few and far between, requiring substantial time and effort. Given the legislative changes at the Tax Code level and the undertakings by members of the OECD/G20 Inclusive Framework on BEPS (including Russia) to facilitate and speed up/support the MAP process, we are seeing increased interest among taxpayers in initiating a MAP. The Tax Code changes ultimately give taxpayers new options, particularly when it comes to settling tax disputes relating to cross-border transactions, including as a potential substitute for litigation.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

The actual number of TP audits and pre-litigation disputes that were initiated is much higher than the number of court cases known from open public sources. According to official statistics, the total number of TP audits is approximately 50 and only four TP cases were handled by the courts, all four of which were lost by the taxpayer.

Below, we briefly discuss three public TP court cases involving PJSC Uralkali, PJSC Togliattiazot, and Torgovy Dom RIF LLC (“TD RIF”), which reveal specific features of the tax authorities’ approach to the application of the CUP method. All three cases related to export transactions of commodities for which price quotations were published by information agencies (chemicals, fertilizers, and grains).

– The first important message from the analysis of the cases is that even where there may be no grounds for the parties to the transactions to be deemed related based on the formal criteria included in the Russian Tax Code, the tax authorities may successfully demonstrate the relatedness of the parties in court by using information obtained at the fact-finding stage (*PJSC Togliattiazot* and *TD RIF*). In the cases concerned, the tax authorities gathered information from international databases, foreign trade registers, official requests to the foreign competent bodies, e-mail correspondence, and other sources. In the case of *TD RIF*, the relatedness of the parties was also demonstrated through information relating to the ultimate beneficial owner of the group (an individual), sourced inter alia from media publications.

– Secondly, an analysis of the fact-finding and arguments put forth in court cases shows that the tax authorities also carefully analyze functions and the entire supply chain, as well as the value contributed by each participant (particularly foreign trading entities) in evaluating transactions according to the substance over form doctrine.

– In addition, the tax authorities successfully challenged the taxpayer’s choice of the TNMM method (in the *PJSC Uralkali* and *OJSC Togliattiazot* cases) and applied the CUP method. The tax authorities rejected the TNMM by demonstrating that its

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use was inappropriate, primarily due to deficiencies in the comparability analysis and the lack of information on the calculation of the profit margins of the distributors identified as the tested parties.

– In the case of *TD RIF* (grains), the taxpayer did not prepare TP documentation supporting the pricing mechanism in the controlled transactions, which allowed the tax authorities to apply the priority CUP method without having to present arguments opposing the taxpayer's position. Also, the absence of TP documentation resulted in additional penalties for the taxpayer (under the Russian Tax Code, the existence of TP documentation protects the taxpayer from the 40% TP penalties).

– In all the cases, the CUP method was applied based on price information for the goods concerned published by information agencies.[3] In the *TD RIF* case, the internal CUP was also applied using the information on comparable transactions involving exports to independent parties.

– In the *TD RIF* case, the tax authorities also made a markdown adjustment to published prices to reflect a fair profit mark-up for the trader (the trader's margin). This adjustment indicates the tax authorities' acceptance that the trader, as a distributing entity contributing to the value chain, should receive a fair remuneration for functions performed/risks borne.

– The TP adjustments in these cases resulted in the following additional profits tax assessments: approximately RUB 1.2 billion (USD 19 million) for PJSC Togliattiazot, approximately RUB 980 million (USD 15 million) for PJSC Uralkali, and approximately RUB 84 million (USD 1.3 million) for TD RIF.

The key takeaways from the discussed public TP court cases are as follows:

- Overall, export transactions, especially supplies of commodities through a foreign affiliated trader, remain an important part of Russia's TP agenda. The cases described above demonstrate that the Russian tax authorities follow detailed and rigorous procedures in applying the CUP method. They also take a thorough approach to collecting information, particularly in relation to foreign trading entities, with a view to testing substance at the level of foreign group traders and the actual functional profiles of the parties involved. The tax authorities also successfully use available information to prove that companies are related, even when formal criteria of relatedness are not met.
- Common weaknesses identified by the tax authorities in relation to intra-group export transactions include deficiencies in the comparability analysis where the TNMM is applied and the selection of the most appropriate TP method. On the other hand, the absence of TP documentation for potential related-party transactions has led to additional penalties for taxpayers and the application of CUP without the need to provide arguments against the taxpayer's position.

At the same time, the tax authorities also currently pay close scrutiny to Russian inbound businesses as well, challenging losses of local subsidiaries and investigating all the functional and operational aspects of limited risk structures to detect any non-routine functions that should be appropriately compensated in line with the functional profile claimed by the group concerned.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

Legislative changes effective from 2020

Large-scale amendments to the Tax Code will enter into force on January 1, 2020, including the following major changes to tax legislation in relation to transfer pricing:

- The introduction in the Tax Code of provisions governing the application of the mutual agreement procedure, which is provided for in the majority of Russia's tax treaties as a means of settling disputes concerning the application of treaties.
- The introduction of a specialized functional analysis for transactions involving intangibles that takes account of DEMPE functions and risks (i.e., development, enhancement, maintenance, protection and exploitation of intangibles) and additional comparability criteria for intangibles.

Mutual Agreement Procedures (MAP)

MAP regulation at the Tax Code level is effectively limited to a number of reference clauses to the effect that the conduct of mutual agreement procedures is governed by the provisions of the relevant double taxation treaty. The procedure and conditions for submitting a MAP application are to be determined by the Ministry of Finance of the Russian Federation.

DEMPE analysis

The amendments introduce specific functions and risks that must be considered in conducting a functional analysis of parties to controlled transactions involving intangible assets (known in global practice as DEMPE functions and related risks).

The amendments also lay down the characteristics of intangible assets that must be taken into account in assessing the comparability of transactions involving such assets (exclusivity, conditions of legal protection, useful life, etc.).

In practice, the analysis of transactions involving intangible assets often raises doubts and controversy. The OECD BEPS guidance accordingly devotes considerable attention to transfer pricing issues related to transactions involving intangible assets, providing key definitions and setting out detailed guidance on analyzing such transactions.

The Russian tax authorities have already said that the testing of transactions involving intangible assets (i.e., royalty payments and other license transactions) should not be limited to the CUP analysis of comparable license agreements sourced from various databases, whose comparability may be questioned by the tax office, and that profit-based methods, including the analysis of post-royalty returns, are regarded as more appropriate. The introduction of the DEMPE analysis into Russian TP practice is therefore likely to increase the risks triggered for a company by having license transactions in its pool of intra-group payments and indicates that a detailed, all-encompassing functional analysis and accurate selection of a TP method (or combination of methods) are essential. In this context, the selection of the TP method should be strongly guided by the relationship between pricing and functions and related business effects (profit allocation), as this nexus is more complex than "soulless" benchmarking. This is especially pertinent for limited risk structures that use intangibles, which already come under close scrutiny from the Russian tax authorities in general, and with regard to IP use in particular.

BEPS 2.0 project – Russian developments

In September 2019, a draft federal law "On the Federal Budget for 2020 and the Planning Period 2021-2022" was submitted to the State Duma. As an appendix to the draft law, the Russian Ministry of Finance published the "Main Objectives of Fiscal, Tax and Customs Tariff Policy for 2020 and the Planning Period 2021-2022."

In the Main Objectives, the Ministry of Finance proposes developing the current tax law regarding the taxation of companies in the digital sector so that such companies pay taxes in the jurisdictions in which their customers (end users) are located. This is consistent with current international initiatives under Action 1 of the BEPS 2.0 project, "Addressing the Tax Challenges of the Digital Economy."

In addition, the Ministry of Finance proposes developing new rules on profit allocation in jurisdictions where marketing IP is used.

Thus, legislative changes emanating from BEPS 2.0 are also anticipated in upcoming periods, which may significantly impact the TP landscape not only for companies in the digital industry (i.e., the telecom sector) with complex business models involving various IP and profit allocation issues, but for all customer-facing industries and structures where marketing intangibles make a difference from a business perspective (e.g., retail).

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Overall, the following major trends in the Russian TP space are anticipated:

- an increased focus on substance, whereby the business rationale behind a transaction is analyzed at its core and the behaviors of the parties are assessed for consistency with those of third parties in comparable circumstances;
- increased complexity of TP audits, with focus shifting away from commodities to other goods, intra-group services (including financial transactions), royalties, and imports of goods, as well as an increased focus on inbound businesses (especially if they have losses in Russia);
- a comprehensive TP analysis focused on substance and value creation, including in-depth analysis of functions and the appropriateness of compensations in limited risk structures; and
- an increased number of BAPAs and a potential increase in the use of MAP.

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NOTES

[1] Under the general rules, there is a very narrow range of situations in which VAT may be imposed as a result of a TP audit.

[2] An entity must meet certain criteria defined in the law (e.g., financial thresholds, being part of an MNE, etc.) to be categorized as one of the largest taxpayers.

[3] Argus Media and Fertecon (chemicals, fertilizers), Platts (grain), and the Institute for Agricultural Market Studies (IKAR).

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Singapore

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

There have been no new transfer pricing guidelines issued since the Transfer Pricing Guidelines (Fifth Edition) were issued on February 23, 2018.

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

The Transfer Pricing legislation and the Transfer Pricing Guidelines (Fifth Edition), together with the Transfer Pricing Rules, set forth the transfer pricing requirements in Singapore.

Where transfer pricing adjustments are made in relation to the year of assessment 2019 or any subsequent year of assessment, a surcharge of 5% of the adjustment applies. It should be noted that this is a surcharge of the adjustment made, and not of the tax in respect thereof.

The Inland Revenue Authority of Singapore recently conducted a seminar on their findings of transfer pricing documentation submitted, which provided further transfer pricing documentation guidance to taxpayers.

There has been a migration of businesses to Singapore, and one area of focus from an audit perspective is the valuation of assets (such as intellectual property) that are transferred to Singapore.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

The Singapore competent authority has been increasingly involved in MAP cases and, as a BEPS Associate, Singapore is committed to resolving tax treaty disputes.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

While questions on related party transactions and transfer pricing issues may be raised by the Singapore Inland Revenue, litigation is not a common next step.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

There have been no revised or refreshed transfer pricing guidelines issued since the Transfer Pricing Guidelines (Fifth Edition) were issued on February 23, 2018. It is possible that a new edition may be issued in early 2020.

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United Kingdom

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

By 2018, the UK's transfer pricing legislation had been updated to reflect the revisions to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (***TP Guidelines***) made under the OECD/G20 Base Erosion and Profit Shifting Project (***BEPS Project***), since when no further changes to the transfer pricing rules have been implemented.

The UK transfer pricing landscape is nevertheless impacted by legislation introduced or drafted in 2019 with a broader remit than pure transfer pricing.

Diverted Profits Tax

Although held by HMRC to be outside the scope of double tax treaties, as not "substantially similar" to corporation tax, the Diverted Profits Tax (***DPT***), introduced in Part 3 of Finance Act 2015, is seen as complimentary to the transfer pricing regime and has materially increased the revenues relating to intragroup pricing collected by HMRC since its introduction.[1]

Schedule 6 of Finance Act 2019 has amended the DPT rules, extending HMRC's time to issue a preliminary charging notice.[2] It has also introduced an amendment, retrospective to accounting periods beginning on or after 1 April 2015, such that taxpayers are not chargeable to both corporation tax and DPT on the same profit.[3] The Finance Act has also extended the review period in which HMRC can review the charging notice to 15 months, from a previous 12 months.[4]

The Finance Act also inserts new sections 101A and 101B Finance Act 2015, reflecting the UK's inclination to facilitate settlement of transfer pricing issues by allowing companies to amend returns once a charging notice has been issued, at any time during the first 12 months of their review period.[5]

International Tax Enforcement

Notwithstanding the UK's promised, but as yet undelivered, departure from the European Union, the UK has drafted Regulations to implement the EU's Directive 2018/822 (Directive on Administrative Cooperation or ***DAC 6***), which entered into force on 25 May 2018.[6] This is designed to provide tax administrations with early information about new schemes which could be used to avoid or evade tax, allowing timely compliance action to be taken, and perhaps, like DPT, to encourage behavioral change in MNE Groups through the knowledge that contrived arrangements will be subject to enhanced scrutiny. Together with the draft Regulations, HMRC issued a consultation document on 22 July 2019, aimed at clarifying its intended approach for businesses. The government's consultation closed on 11 October 2019, and the government is currently analyzing the feedback received.

From 1 July 2020, the Regulations will require promoters, intermediaries and taxpayers to report details of certain types of cross-border arrangements to HMRC, where those arrangements meet certain hallmarks or criteria. HMRC will share information received in these reports with other EU member states, who will in turn share reports they receive with HMRC.[7]

For an arrangement to be reportable it must satisfy one of five hallmarks, including one relating to transfer pricing. The specific hallmark relating to transfer pricing includes the use of unilateral safe harbors, the transfer of hard-to-value-intangible assets when no reliable comparables exist, and cross-border transfers of functions, risks and/or assets, where projected annual earnings of the transferor over three years is less than 50% of the projected earnings had the transfer not been made. The Regulations confirm that the transfer pricing hallmark relates only to arrangements that are contrary to the TP Guidelines.[8]

Digital Services Tax

The UK government has proposed unilateral measures to address what it perceives as under-taxation of certain digital companies, which will cut across established transfer pricing rules based on the arm's length principle to introduce a source-based tax on revenues. On 11 July 2019, it introduced draft legislation for a new Digital Services Tax (***DST***).[9] The draft legislation includes the following features:

- The tax will be applied by reference to specific digital business activities, which the government considers to derive significant value from users;
- The business activities within scope will be the provision of a social media platform, search engine or online marketplace;[10]
- The tax will apply to the revenues generated by these taxable business activities, where those revenues are linked to the participation of a UK user base;
- A UK user is defined as an individual who "is normally in the United Kingdom" or otherwise a person who "is established in the United Kingdom";[11]
- A business will only be subject to the Digital Services Tax if it:
  - generates more than £500 million in global annual revenues from in-scope business activities;

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- generates more than £25 million in annual revenues from in-scope business activities linked to the participation of UK users;[12]

- Businesses will not have to pay tax on their first £25 million of UK taxable revenues;
- Where one party to an online marketplace transaction is a UK user, all revenues will be treated as from the UK, unless another user is in another country with its own equivalent of the DST, in which case the UK revenue will be reduced to 50% ;[13]
- The tax will include a "safe harbor" which will allow businesses to elect to make an alternative calculation of their DST liability, and will be of value to those with very low profit margins;[14]
- The tax will be deductible against UK corporation tax under existing principles, but it will not be creditable.[15]

DST is forecast by HMRC to raise £275 million in 2020/21, rising to £440 million in 2023/24.[16] However, like other countries' enacted or proposed unilateral digital services taxes, the measure has provoked ire in the US. The progress of the legislation has already been delayed through the tying up of parliamentary procedure in maneuvers over Brexit and the recent general election, and the possibilities for its further progression in 2020 are considered in more depth below.

Transfer Pricing Examinations/Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

Documentation

No additional transfer pricing documentation requirements have been introduced in the UK since the incorporation of a Country-by-Country (***CbC***) reporting requirement, subsequent to the recommendations of the BEPS Action 13 Report.[17] Whilst the UK implementing legislation requires a CbC report, which is intended to support risk assessment processes, it does not require a master file or a local file to be filed alongside.[18] Although the incorporation in 2018 of the 2017 TP Guidelines within the UK's definition of "the transfer pricing guidelines" under s164(4) of TIOPA includes the new Chapter V describing master file, local file and the CbC report, HMRC's view is that this does not introduce a requirement to prepare master file and local file transfer pricing documentation for accounting periods beginning on or after 1 April 2018. Nevertheless, where the revised TP Guidelines imply an increase in documentation requirements, e.g. in analysing the DEMPE functions in cases involving intangibles, particularly hard-to-value intangibles, it is to be expected that HMRC will require a corresponding level of documentation.[19]

Transparency

The UK adopted CbC reporting from 1 January 2016: MNE Groups subject to the rules had to file a first annual CbC report for the year ended 31 December 2016 by 31 December 2017, and these reports were to be exchanged between relevant tax administrations by 30 June 2018. For many groups, therefore, HMRC will by now be in possession of two years of CbC reports. HMRC has said that it will use the CbC report within the risk assessment process for cross-border transactions, principally between members of the multinational group.[20]

The UK has in recent years kept abreast of changes in international best practice and EU law with respect to the exchange of cross-border tax rulings and APAs.[21] In response to the guidance contained in the OECD's 2015 BEPS Action 5 report on the best practice for exchange of tax rulings and APAs, the UK implemented the recommendations with effect from 1 April 2016 (IEIM510500).

The UK also exchanges tax information with the other EU Member States under EU Directive 2011/16/EU on Administrative Cooperation in the field of taxation (***the DAC***). As from 1 January 2017, it became mandatory automatically to exchange information about advance cross-border rulings and APAs.

HMRC has stated that as a result of these measures it expects to see a significant increase in the number of rulings being sent to it by other tax authorities.[22] However, HMRC has not published updated statistics since July 2018 that might shine a light on the impact that increased transparency has had on the number or type of inquiry made in the UK.

On 10 January 2019, HMRC launched a new Profit Diversion Compliance Facility (PDCF), intended for use by MNE Groups that have applied transfer pricing arrangements that are potentially targeted by DPT but are not currently under investigation. HMRC's introduction to the facility explicitly links DPT with transfer pricing not in accordance with the TP Guidelines. Groups whose transfer pricing is out of step with the TP Guidelines are invited to register for the facility and to update their transfer pricing policies without investigation by HMRC if a full and accurate disclosure is made.

Primary areas of focus

HMRC has stated that tackling profit diversion is a priority and that it is conducting extensive research and data analysis and has invested in new teams of investigators. It has made clear that investigations into profit diversion are usually resolved by agreeing transfer pricing adjustments. HMRC states that it:

> *has identified a number of MNEs in a variety of business sectors which could be diverting profits, and expects to identify more. We are planning a programme of investigation of the arrangements of these MNEs involving HMRC staff in our Large Business and Mid-sized Business directorates, and in appropriate cases our Fraud Investigation Service.If DPT applies, these MNEs face a potential DPT charge and, depending on the cause of any inaccuracies or failures to notify, penalties civil or criminal investigations, as appropriate.*[23]

Any MNE Groups that have moved or plan to move functions, assets or risks out of the UK to the remaining EU Member States in anticipation of Brexit can expect serious scrutiny from HMRC if such Brexit-planning results in a material reduction of profit potential in the UK.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

The legal framework for MAP in the UK and associated guidance remains unchanged from 2018.[24] Editorial note: Link to be added.

HMRC has not yet released statistics for the 2018/19 tax year, but the OECD has disclosed the UK's MAP statistics for 2018.[25]

Timeliness

The length of time to resolve transfer pricing MAP cases seems to be drifting up. If we examine the OECD's breakdown of statistics on the average time needed to close MAP cases in the UK, it is hardly surprising that the average time needed to close old transfer pricing MAP cases, those started before 1 January 2016, increased, from 38.67 months for the 39 cases closed in 2017 to 46.00 months for the 39 cases closed in 2018. Similarly, it is to be expected that of new transfer pricing MAP cases, those started after 1 January 2016, the average time to close the case will go up: the 28 closed in 2017 took an average

6.34 months from start to end, while the 50 closed in 2018 took an average 14.98 months. Nevertheless, overall the statistics suggest that the average time to resolve all transfer pricing MAP cases has gone up in the last year, from 25.15 months in 2017 to 28.57 months in 2018.[26]

Number of cases

Of 251 new MAP cases started in 2018, 80 related to transfer pricing. During the same period 274 MAP cases were closed, of which 89 related to transfer pricing. This suggests a slowing down in the number of new transfer pricing MAP cases, but an improvement in resolution over 2017, when 110 new transfer pricing MAP cases were taken on, but only 67 were resolved, per OECD statistics.[27] This reduction in new transfer pricing MAP cases confounds expectations that more MAP cases might have been admitted following the HMRC guidance issued in 2018 supporting more effective dispute resolution through better access to MAP.[28]

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

The frequency of transfer pricing case law is relatively limited in the UK, and 2019 has seen no cases of note.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

The issue that has dominated British politics throughout 2019, the UK's tortured departure from the EU, is unlikely to see any lessening of intensity until Brexit is achieved in some form, though the Conservative victory in December's general election has removed the doubt that had formed in some people's minds that Brexit would ever happen at all. This will inevitably impact directly upon the UK's relationship with EU Directives and indirectly upon the UK's DST proposals. Although steps are in hand that will enable the UK to introduce the DST from 1 April 2020, the new tax could yet be hostage to the US trade negotiations attendant upon the UK's departure from the EU.

The paralysis that the UK Parliament brought upon itself, as MPs sought to frustrate the minority Conservative government's delivery of Brexit by 31 October 2019, demanded resolution through a general election. Such a general election, held on 12 December 2019, was finally agreed in October 2019, as a consequence of which the Finance Bill 2019-20, containing the draft DST legislation, could not be passed in the last parliamentary session. A Finance Bill typically follows a Budget, which is not now expected before January 2020. The election of a Conservative government with a large majority of 80 MPs, and the elimination from Parliament of the most ardently pro-Remain MPs, has ended the stalemate over Brexit and secured the path to departure from the EU on 31 January 2020.

Although introduced by a Conservative government, DST has already been identified as a hindrance to the Conservatives if they wish to demonstrate the benefits of freedom from the EU's constraints by striking a new trade deal with the US. The former Chancellor responsible for proposing the DST, Phillip Hammond, was of a very different political hue to the current Conservative leadership, being vehemently in favor of the UK's remaining in the EU and seeking no silver lining to Brexit. The new Conservative leadership, by contrast, would value the benefit of a US trade deal to offset the loss of benefits from the EU, but such a possibility risks being derailed by the DST. The US has already threatened retaliation against France for its digital services tax, introduced in 2019. Given that the UK's DST is expected to bring in a mere £400 million a year by 2022, small fry by comparison with total corporation tax liabilities of £55.2 billion in 2017/18,[29] US retaliation, through trade tariffs, could render that relatively small gain unattractive. Nonetheless, Conservative leader Boris Johnson announced on 3 December 2019 that his party would push ahead with introducing the DST in April 2020 if returned to power in the general election.[30]

Much will depend on the outcome of the OECD's mandate to deliver a method for the taxation of the digitalizing economy. If some version of the OECD Secretariat's Unified Approach is approved by the 135 members of the Inclusive Framework at the end of January 2020, it is conceivable that the UK DST will be put on hold by the new Conservative government in advance of its proposed implementation, pending introduction of an international solution.

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NOTES

[1] HMRC (10 January 2019) Profit Diversion Compliance Facility Guidance, 1.1.
[2] Schedule 6 FA 2019, Para.9.
[3] *Id.*, Para.10.
[4] *Id.*, Para.11.
[5] *Id.*, Para. 12.
[6] The International Tax Enforcement (Disclosable Arrangements) Regulations 2019 (*Draft*).
[7] HM Revenue & Customs (22 July 2019), *International Tax Enforcement: disclosable arrangements*, 1.8.
[8] The International Tax Enforcement (Disclosable Arrangements) Regulations 2019, 12(1)(d) *(Draft)*.
[9] HM Revenue & Customs (11 July 2019), *Introduction of the new Digital Services Tax*.
[10] Draft Finance Bill 2019-20 (11 July 2019), Digital services tax, s.4.
[11] *Id.*, s.5.
[12] *Id.*, s.7.
[13] *Id.*, s.11.
[14] *Id.*, s.9.
[15] Digital Services Tax Draft Guidance (11 July 2019), DSTXXXX: Interaction with Corporation tax.
[16] HM Revenue & Customs (11 July 2019), *Introduction of the new Digital Services Tax*.
[17] The Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) Regulations 2016, as amended by The Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) (Amendment) Regulations 2017.
[18] HM Revenue & Customs, International Exchange of Information Manual (IEIM) 300033.
[19] *See*, *e.g.*, HM Revenue & Customs, International Manual 440176.
[20] IEIM 300034.
[21] IEIM 510200.
[22] IEIM 510020.
[23] HMRC (10 January 2019), Profit Diversion Compliance Facility Guidance, 1.4.
[24] *See* Transfer Pricing Forum (BNA), A Year in Review, 2018.
[25] The statistics can be viewed at *https://www.oecd.org/tax/dispute/2018-map-statistics-united-kingdom.pdf*.
[26] These figures correlate with HMRC's statistics for 2017/18, which show an increase in average time to resolve cases from 24.4 months in 2016/17 to 27.5 months in 2017/18: *https://www.gov.uk/*

government/publications/transfer-pricing-and-diverted-profits-tax-statistics-to-2017-to-2018.

[27] The statistics can be viewed at *http://www.oecd.org/tax/dispute/2017-MAP-Statistics-United-Kingdom.pdf*. HMRC's statistics differ from the OECD, as the OECD's information is for the calendar year, whereas HMRC's disclosure is for the tax year (103 transfer pricing MAP cases admitted in 2017/18 and 71 resolved).

[28] HMRC Statement of Practice 1 (2018).

[29] HMRC (24 September 2019), Annual UK Corporation Tax Statistics.

[30] The Times (4 December 2019), *We'll force tech giants to pay more tax, says PM. Johnson's levy plans risk trade row with Trump*.

United States

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Legislation. Describe new legislation or regulations that have impacted the transfer pricing landscape in your country.

Throughout 2019, the Internal Revenue Service ("IRS") issued over 50 guidance items to implement the provisions enacted under the Tax Cuts and Jobs Act of 2017 ("TCJA"). Items specifically relevant to international provisions spanned more than 25 sections of the U.S. International Revenue Code ("IRC"). The most recent of these items issued—and one with significant impact for transfer pricing—includes the final regulations relating to the implementation of the base erosion and anti-abuse tax ("BEAT"). These regulations will have significant impact on how U.S. multinationals transact and, thus, have been a significant area of focus for multinational taxpayers and for international tax and transfer pricing practitioners alike.

BEAT

The IRS and the U.S. Department of the Treasury ("Treasury") issued the final regulations relating to the implementation of BEAT under Section 59A on December 2, 2019. The final regulations, which clock in at over 300 pages total, affect large corporate taxpayers that make payments to foreign related parties. Taxpayers and tax practitioners were just beginning to digest the details of these final regulations at the time of writing.

BEAT is designed to prevent taxpayers from reducing their U.S. tax liability through payments to foreign related parties. BEAT applies regardless of whether the intercompany payments are priced consistent with the arm's-length principle, and BEAT liabilities generally increase as the dollar value of payments to related parties increases. As a result, taxpayers are considering changes to their transfer pricing policies. This comes as no surprise to the IRS and Treasury, which "recognize that in response to these final regulations. . .business may alter the way they transact with related versus unrelated parties. They may make changes to financial arrangements, supply chain arrangements, or the locations of business activity, each in ways that increase or reduce the volume of payments made to a foreign affiliate that qualify as base erosion payments."[1]

The final regulations do not provide broad exemptions for certain payments as had been hoped by taxpayers. For example, the final regulations do not contain additional provisions to allow netting or the blanket exclusion of pass-through payments, most common in global dealing operations or when taxpayers employ the profit split method to determine and implement intercompany prices. Based on initial reviews of the final regulations, foreign headquartered companies with U.S. subsidiaries, companies with offshore IP holding companies, and U.S. entities with significant intercompany debt payments are most likely to be affected by the regulations.

Section 385 Intercompany Debt Documentation Rules

On October 31, 2019, the IRS and Treasury announced the removal of the Section 1.385-2 regulations setting forth the documentation requirements that must be satisfied for various intercompany instruments to be treated as indebtedness for U.S. tax purposes. The documentation requirements were set to go into effect January 1, 2019 and would have required taxpayers to provide documentation demonstrating a valid debtor-creditor relationship and the reasonable expectation of repayment during the life of the instrument for certain related party debt instruments where the U.S. entity was acting as the borrower. The IRS has suggested that the passage of the TCJA, specifically the revised 163(j) provision, which caps interest expense deductibility for federal tax purposes, limited the benefits of minimum documentation requirements.

Transfer Pricing Examinations/ Audits. Describe key features or developments in the transfer pricing examination/audit process in your country.

While our clients worked hard to compile the data to comply with the additional BEPS-related reporting requirements, such as CbyC data, they have generally not yet seen a change in the typical audit requests from the IRS. In the U.S., many of our clients are in audit periods that still predate the BEPS requirements. Additionally, taxpayers and the IRS have had to respond to the Tax Cuts and Jobs Act of 2017, for which regulations are still being drafted, and which has taken up a lot of time and attention.

In current audits, we notice that a perception around the availability of data on the part of the IRS persists. IRS exam agents will repeatedly ask for very specific data and express disbelief that the taxpayer may not have the specific information requested.

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Likewise, we have several clients undergoing intense audits related to services allocations and in particular the inclusion of certain allocated expenses, such as SAP charges. In some cases, the length of the audit has led the taxpayer to consider an APA or other MAP tools to resolve the issue.

Mutual Agreement Procedures (MAP). Describe key features or developments in the MAP process in your country.

We have not seen significant challenges surface to the point where the MAP process has been pursued in direct response to BEPS-related challenges per se. However, we anticipate increased usage of this option due to the consensus to achieve dispute resolution as a result of the BEPS project. Perhaps the most applicable features or developments to the MAP process are related to the use of advance pricing agreements (APA). According to the IRS's Advance Pricing and Mutual Agreement (APMA) Program statistical data,[2] there were 203 APA applications filed in 2018, which is double the number filed in 2017. Of those applications, 161 were bilateral, 25 were unilateral, and 7 were multilateral. Further, there were 107 APAs executed in 2018, with 458 pending as of December 31, 2018. These executed APAs are primarily in the manufacturing and wholesale/retail trade market, as those two industries made up approximately 78 percent of the total executed APAs for 2018.

While data is not yet available for the 2019 calendar year, it is anticipated that this trend of increasing applications for APAs will continue for the foreseeable future. We also observe that taxpayers have continued to use MAPs/APAs as a strategy to resolve ongoing audits. Taxpayers are using APAs to resolve disputes where competent authority is not effective or available.

It should be noted that the recent statistics regarding annual APAs are likely not reflective of any direct response to the BEPS guidance, as U.S. APA cases generally take a considerable amount of time to complete. For 2018, the median time required to complete an APA increased to 40.2 months from 33.8 months in 2017.

Cases and Rulings. Describe recent transfer pricing cases or rulings, including any changes in the volume or types of transfer pricing cases litigated or subject to rulings.

In 2019, the United States saw several rulings that impacted the transfer pricing landscape. Intangible assets continued to be a primary focus in transfer pricing cases, particularly definitional and valuation issues associated with these assets. In addition, cases related to cost sharing arrangements (CSAs) and advance pricing agreements (APAs) were addressed during 2019. The following section highlights four major cases and summarizes the rulings and/or provides an update on major developments.

Altera Corporation v. Commissioner[3]

Case summary:

Altera Corporation's ("Altera") transfer pricing case continued in 2019 with a new opinion from the Ninth Circuit in the appeal of the 2015 decision by the U.S. Tax Court in *Altera Corp. v. Commissioner.* This new opinion overturned the decision by the U.S. Tax Court and upheld the validity of the Treasury regulation that requires stock-based compensation costs to be shared in a cost-sharing arrangement.

As background, Altera had been in a qualified cost-sharing arrangement ("QCSA") with a foreign subsidiary since 1997. In 2003, Altera amended its original agreement to comply with the amended cost sharing regulations and further amended the agreement in 2005 after the *Xilinx* opinion was issued. This amendment in 2005 suspended the sharing of stock-based compensation ("SBC") costs in shared intangible development cost ("IDC") pools unless and until a court upholds the validity of the amendments to the cost sharing regulations made by Treasury in 2003. The IRS issued two notices of deficiency to Altera, applying the revised cost sharing regulations that explicitly required the inclusion of SBCs in IDC pools for QCSAs (referred to as the "2003 CSA SBC Regulations"). Altera challenged the IRS in court on the basis that the 2003 amended cost sharing regulation itself was inconsistent with the arm's length standard based on the decision in the *Xilinx* case and on the basis that the Treasury had not followed appropriate rulemaking procedure in issuing the 2003 amendment to the cost sharing regulations.

In July 2015, the U.S. Tax Court issued an opinion that sided with Altera, which found the 2003 amendment to the cost sharing regulations requiring inclusion of SBC costs in IDC pools to be arbitrary and capricious, and held the regulation to be invalid.

Upon appeal, the Ninth Circuit issued an opinion in July 2018 that reversed the Tax Court's decision, thereby holding that the 2003 CSA SBC Regulations were valid. Just two weeks later, the Ninth Circuit Court of Appeals withdrew its opinion and eleven months after that on June 7, 2019, the Ninth Circuit issued a new opinion in the appeal, which again overturned the findings of the U.S. Tax Court. The Ninth Circuit's opinion on appeal supported Treasury's interpretation of Congressional intent around the application of commensurate with income ("CWI") and its consistency with the arm's length standard, particularly in situations involving transfers of high-profit intangibles (like CSAs).

Following this decision, Altera filed a petition seeking an *en banc* rehearing of the case, which was ultimately rejected, but not without dissent. It is uncertain if Altera will pursue the legal battle and bring the case to the Supreme Court.

Amazon.com, Inc. v. Commissioner[4]

Case summary:

On August 16, 2019, the U.S. Court of Appeals for the Ninth Circuit affirmed the U.S. Tax Court's 2017 decision in *Amazon.com, Inc. v. Commissioner*[5] regarding Amazon's valuation of intellectual property transferred from the U.S. to Luxembourg in connection with Amazon's 2005-2006 business restructuring. The Tax Court case concerns a 2005 cost sharing agreement under which Amazon.com, Inc. and its domestic subsidiaries transferred to a Luxembourg subsidiary ("Amazon Lux") the non-U.S. rights to IP (developed in the U.S.) that were required to operate Amazon's European website business. The IRS proposed a significant income adjustment of $2.2 billion, purporting that Amazon's valuation of the CSA platform contribution payment (i.e., the payment for the pre-existing intangibles) was deeply flawed.

The very definition of intangible property was under dispute in the case. Amazon and the IRS employed fundamentally different approaches for valuing Amazon's pre-existing intangibles. Amazon isolated and valued only the discrete items of intellectual property that were transferred to Amazon Lux under the CSA, including website technology, customer lists, and trademarks. The IRS valued Amazon's buy-in using an income method that effectively valued the entire European business, necessarily including more nebulous contributions such as goodwill, going concern value, workforce in place, "growth options," and value stemming from Amazon's culture of innovation (collectively referred to as "residual business assets").

The Tax Court's decision rejected the IRS's valuation approach and ruled that the cost sharing buy-in payments made by Amazon Lux subsidiary in exchange for Amazon's transfer of non-U.S. intangible property should not include compensation for transferred residual business assets. Said differently, the Tax Court rejected the IRS's approach for valuing Amazon's pre-existing intangibles because it included many items of value that were not considered to meet the definition of intangibles at the time of the transaction, and therefore did not require compensation, under the applicable cost sharing regulations.

While a major win for Amazon, this decision has only limited relevance for other taxpayers that may be in similar situations. The Ninth Circuit opinion in the appeal made a sharp distinction between the landscape at the time of Amazon's CSA and subsequent changes by stating in a footnote, "If this case were governed by the 2009 regulations or by the 2017 statutory amendment, there is no doubt the Commissioner's position would be correct."[6] However, because the footnote was not essential to the holding of the case, it is not binding on any future decisions.

Eaton Corporation v. Commissioner[7]

Case summary:

On July 26, 2017, the U.S. Tax Court issued a memorandum, *Eaton Corporation and Subsidiaries v. Commissioner of Internal Revenue, T.C. Memo 2017-147*, concluding that the cancellation by the IRS of the advance pricing agreements ("APAs") was an abuse of discretion. Eaton Corporation ("Eaton") and the IRS entered into two unilateral APAs covering Eaton's tax years from 2001 through 2005 ("APA I") and 2006 through 2010 ("APA II"). On December 16, 2011, the IRS notified Eaton that APA I and APA II would be cancelled effective January 1, 2005 and January 2006, respectively, indicating in its letter that the cancellations were based on failure related to critical filing errors, such as assumptions, timeliness, and lack of good faith compliance.

As a result of cancelling APA I and APA II, the IRS determined that, under IRC section 482, transfer pricing adjustments were necessary and that, if IRC section 482 adjustments were not sustained, it had determined that Eaton transferred intangible property, and such value transferred is taxable under IRC section 367(d) for tax year 2006. In response, Eaton filed a petition with the Tax Court, arguing that it did not omit or misrepresent any material fact and that the errors were related to data and computations and did not affect the validity of the transfer pricing method.

The U.S. Tax Court concluded that data and computational errors Eaton made were immaterial and not deliberate and that, therefore, the cancellation of the APAs was arbitrary and unreasonable. Irrespective of this ruling, the IRS determined that section 482 adjustments were necessary to reflect an arm's length result for certain Eaton intercompany transactions for the tax years 2005 and 2006. These adjustments included several 40 percent penalties pursuant to I.R.C. sec. 6662(h). Eaton maintained that there were no adjustments needed as the APAs were still in effect. On October 26, 2019, the U.S. Tax Court held in favor of Eaton.

Medtronic, Inc. v. Commissioner

Case Summary:

The *Medtronic* case is scheduled to head back to court in April 2020 and involves a $1.4 billion transfer pricing adjustment proposed by the IRS, associated with the value of intellectual property (IP) Medtronic licensed to an offshore affiliate in association with restructuring undertaken to address the end of certain tax benefits under Section 936. The specific transactions at issue focused on intercompany transactions between Medtronic's U.S. affiliates and the Puerto Rican branch (Medtronic Puerto Rico Operations Co ("MPROC")) of a Swiss subsidiary related to the manufacture and sale of neurological stimulators and cardiac rhythm management product lines for the U.S. market.

In the original Tax Court case and again in appeals, the IRS argued that Medtronic's CUT-based IP transfer pricing approach yielded allocations of income that were inconsistent with arm's length pricing: allocating too much income to MPROC. The IRS instead implemented a CPM-based pricing approach (with MPROC as the tested party), yielding $1.4 billion in transfer pricing adjustments related to the subject transactions. In June 2016, U.S. Tax Court Judge Kathleen Kerrigan partly rejected the IRS's position and found the IRS had erred in its characterization of the relationship between Medtronic and MPROC. While Judge Kerrigan's decision ultimately deviated from both Medtronic's and the IRS's pricing methods, it did rely on a CUT approach using the same license agreement between Medtronic and a competitor (the "Pacesetter" agreement) that formed the basis of the taxpayer's method. The CUT method nonetheless yielded different results in the Tax Court's opinion than under the taxpayer's application due to different adjustments made by the Tax Court.

The IRS appealed the judgment to the U.S. Court of Appeals for the Eighth Circuit, which found that the U.S. Tax Court had not undertaken an appropriate comparability analysis for the Pacesetter agreement. As such, the case was vacated and remanded back to the Tax Court for further factual development on specific matters, which are intended to better allow evaluation of both the Pacesetter agreement under the CUT method as well as the determination of the best method (i.e., the CUT or the CPM approach employed by the IRS).

Despite several losses in recent transfer pricing cases, the IRS will continue to pursue high profile transfer pricing cases. The IRS Commissioner, Charles Rettig said in November 2019 that the IRS will continue "poking" on transfer pricing because he feels that more scrutiny leads to greater compliance.

What Can We Expect in 2020? Please describe anticipated transfer pricing developments or issues that we should be aware of as we enter 2020.

In 2020, U.S. taxpayers and practitioners will continue to deal with final regulations related to the transfer pricing related aspects of TCJA, such as BEAT, global intangible low-taxed income ("GILTI"), and foreign-derived intangible income ("FDII"). These regulations have the potential to significantly influence how taxpayers structure their international operations and transactions. Assessing tax structuring and supply chain alternatives to develop optimal tax strategies against the evolving regulatory landscape will continue to be a top priority for U.S. taxpayers.

Another major upcoming event that may impact transfer pricing is the U.S. presidential election. If a Democrat is elected, there may be an effort to rollback certain provisions of the TCJA. If the incumbent remains in office, there may be additional movement to a more taxpayer-friendly regime.

Recently, the OECD issued guidance related to the taxation of the digital economy, and we expect the IRS to respond to the OECD's paper imminently.

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NOTES

[1] Base Erosion and Anti-Abuse Tax, 84 Fed. Reg. 67,008 (Dec. 6, 2019) (to be codified at 26 C.F.R. pt. 1).

[2] Information in this response unless otherwise specified is sourced from the IRS's *Announcement and Report Concerning Advance Pricing Agreements* dated March 22, 2019, accessible via: *https://www.irs.gov/businesses/corporations/annual-apa-statutory-reports*.

[3] The following section was sourced from: (1) *https://mnetax.com/us-ninth-circuit-rejects-request-for-hearing-in-key-transfer-pricing-case-36880*, (2) *https://www.duffandphelps.com/insights/publications/transfer-pricing/ninth-circuit-appellate-court-overturns-tax-court-altera-case*, and (3) *https://tpcases.com/us-vs-altera-corp-june-2019-us-court-of-appeal-16-70496-and-70497/*.

[4] The following section was sourced from: (1) *https://www.duffandphelps.com/insights/publications/transfer-pricing/transfer-pricing-times-august-2019/us-court-appeals-issues-opinion-amazon-case*, and (2) *https://tpcases.com/us-vs-amazon-august-2019/*.

[5] No. 17-72922 (9th Cir. 2019).

[6] *Id.* at 6.

[7] The following section was sourced from: (1) *https://tpcases.com/us-vs-eaton-oct-2019-united-states-tax-court-docket-no-5576-12/*, and (2) *https://www.duffandphelps.com/insights/publications/transfer-pricing/transfer-pricing-times-august-2017-issue*.

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Andrew Cousins is an international tax practitioner in the Duff & Phelps Transfer Pricing practice, with more than 20 years of cross-border experience in private practice, industry and in government. He brings a comprehensive regulatory, commercial and advisory perspective to the fields of transfer pricing and business restructuring, with a focus on practical implementation. Before joining Duff & Phelps Andrew was Deputy Comptroller of Taxes in the Jersey tax authority, acting as competent authority for all of Jersey's international tax agreements. He also served as Jersey's delegate to the Global Forum on Transparency and Exchange of Information for Tax Purposes, as well as representing Jersey at the OECD's Global Forums for Transfer Pricing and for Tax Treaties. Andrew spent eight years in industry as a global head of transfer pricing, and has led the transfer pricing practice in two FTSE 100 FMCG multinationals.

Andrew is a graduate of Oxford University and is a fellow of the Institute of Chartered Accountants in England and Wales. He qualified as a chartered accountant at Deloitte before focusing on transfer pricing at Ernst & Young, where he was a member of its Tax Effective Supply Chain Management team.

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Patrick McColgan is a managing director in Duff & Phelps' Atlanta office and part of the transfer pricing team. He has a strong focus on assisting growth companies with their global transfer pricing needs through the design of defensible and pragmatic solutions. Patrick has more than 11 years of transfer pricing experience and has worked across several industries, including automotive, chemical, consumer products, medical products, pharmaceutical, software, internet, and manufacturing.

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Mayra Lucas Mas has been an advisor at the Centre for Tax Policy and Administration, Tax Treaty, Transfer Pricing and Financial Transactions Division of the OECD since June 2008. She is responsible for chairing bilateral and multilateral transfer pricing events at OECD for the development of the OECD Transfer Pricing Guidelines, for the update of OECD Transfer Pricing Country Developments and for OECD accession review in the field of Transfer Pricing. She also provides technical assistance to non-OECD economies. In the past she has worked as a senior consultant for the transfer pricing group of a leading accounting firm and in the Taxation and Customs Union unit of the European Commission.

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Rahul has over 22 years of experience in handling taxation & regulatory matters in India. He specializes in transfer pricing, particularly inbound & outbound planning assignments, and advises on profit/cash repatriation planning, value chain transformation or supply chain management projects, profit attribution to permanent establishments, etc. Rahul independently handles litigation for top companies at the level of the Income Tax Tribunals. At least 50 of the cases independently argued by Rahul have been reported in leading tax journals of India. Some of the major wins of Rahul before the Tax Tribunals in transfer pricing matters have set precedents, both in India and globally.

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Rahul is a longtime Member of the Bloomberg Tax Transfer Pricing Forum Advisory Board. He has been a visiting faculty of the National Law School teaching classes on transfer pricing & international tax treaties.

Rahul was the Country Reporter on the topic, "Non Discrimination in international tax matters", for the IFA Congress held in Brussels in 2008. Rahul was invited by the OECD to speak in the 2012 Paris roundtable conference on developing countries' perspective on APAs.

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Dirk van Stappen is a partner with KPMG and leads KPMG's transfer pricing practice in Belgium. He joined KPMG in 1988 and has over 28 years of experience in advising multinational companies on corporate tax (both domestic and international) and transfer pricing issues. He leads KPMG's transfer pricing practice in Belgium. Furthermore, Dirk is a former member of the EU Joint Transfer Pricing Forum (2002-2015).

Since 1996, Dirk has been a visiting professor at the University of Antwerp (Faculty Applied Economics, UA) teaching Tax to Master students. He has been named in *International Tax Review*'s "World Tax –The comprehensive guide to the world's leading tax firms," *Euromoney*'s (Legal Media Group) "Guide to the World's Leading Transfer Pricing Advisers," and *Euromoney*'s "Guide to the World's Leading Tax Advisers."

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Stean Hainsworth is the Director of Transfer Pricing at Duff & Phelps based in Australia and has over 20 years of legal and tax experience, specializing in transfer pricing. Previously he was a director of an international transfer pricing firm, the transfer pricing leader for Asia at a global advisory firm, and a senior transfer pricing specialist for a Big Four firm in New Zealand, Canada, and Australia.

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Alexandra Dolezel is a tax director at BDO Austria GmbH in Vienna, Austria. She has over 22 years of experience and specializes in international taxation and transfer pricing. Her expertise includes the conceptual design of international tax structures and business models, defense in tax audits, litigation, and mutual agreement procedures, as well as the optimization of value chains from a transfer pricing point of view. In addition, she is a lecturer on European Union tax law and comparative tax law at FH Campus Wien, the largest university in Austria. Previously, she was Head of Corporate Taxes for Borealis AG, where she had overall responsibility for group corporate tax, including matters affecting tax risk management, transfer pricing, and international structures. Alexandra received her education at the Vienna University of Economics and Business Administration, and she is also a member of the Austrian Chamber of Accountants.

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Yves de Groote has an LL.M from King's College London, MSc. HUB; he joined KPMG in 2004 and has over 10 years of experience in advising multinational organizations on transfer pricing issues. He has been involved in and conducted various tax planning and transfer pricing assignments, ranging from the preparation of European and global transfer pricing documentation (including functional and economic analyses and comparables searches) and domestic and international transfer pricing audit defense to the negotiation of (uni-, bi-, and multilateral) rulings and advance pricing arrangements (APAs).

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Cheng Chi
Transfer Pricing Partner, KPMG China

Based in Shanghai, Cheng Chi is the Partner-in-Charge of KPMG's Global Transfer Pricing Services for China and Hong Kong S.A.R. Mr. Chi has led many transfer pricing and tax efficient supply chain projects in Asia and Europe, involving advance pricing arrangement negotiations, cost contribution arrangements, Pan-Asia documentation, controversy resolution, global procurement structuring, and headquarters services recharges for clients in the industrial market, including automobile, chemical, and machinery industries, as well as the consumer market, logistic, communication, electronics, and financial services industries.

In addition to lecturing at many national and local training events organized by the Chinese tax authorities, Mr. Chi has provided technical advice on a number of recent transfer pricing legislative initiatives in China. A frequent speaker on transfer pricing and other matters, his analyses are regularly featured in tax and transfer pricing publications around the world (i.e., *International Tax Review*). Mr. Chi has been recommended as a leading transfer pricing advisor in China by the Legal Media Group.

Mr. Chi started his transfer pricing career in Europe with another leading accounting firm, covering many of Europe's major jurisdictions while based in Amsterdam until returning to China in 2004.

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Arne Møllin Ottosen is the Head of Kromann Reumert's tax law group. He specializes in contentious tax, including transfer pricing, tax litigation, and business taxation advisory work. Arne is the author of numerous Danish and international articles on tax and company law. Arne is listed in the *International Tax Review*, *European Legal 500*, and *Chambers*. He holds a law degree from Aarhus University (cand.jur. 1993) and an LL.M. from King's College, University of London (1999).

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Julien Monsenego specializes in international taxation, tax treatment of M&A, and restructurings. He assists French and foreign companies in their international investments, as well as in the course of their tax audits and litigations. He particularly focuses on Life Science and R&D-intensive industries. He has extended the practice of transfer pricing and has intervened for French and non-French groups in setting up intra-group flows, IP companies, and business restructurings.

Julien Monsenego previously worked at Gowling WLG, Olswang, Arthur Andersen International, Ernst & Young, Coudert Brothers, and Dechert LLP. He is a member of the Paris Bar.

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Guillaume Madelpuech holds an MBA from the ESSEC Business School and an MSc in Economics from the Paris Dauphine University. He is a principal within NERA Economic Consulting in Paris. He is an economist with 10 years of experience in transfer pricing, including in particular intangible valuation, business restructuring, transfer pricing policy design, and litigation. Guillaume has conducted a number of transfer pricing projects for multinationals in a wide range of industries, including high-tech, consumer goods, automotive, luxury goods, financial services, health care, real estate, media and entertainment, and energy. He is a regular contributor to the OECD and a frequent contributor to journals and trade publications. Prior to joining NERA, Guillaume was an economist with EY in both Paris and in New York City in the transfer pricing and valuation groups.

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During more than 25 years advising international corporations and leading law firms on transfer pricing issues, Alexander Voegele has specialized in the development of innovative economic structures for transfer pricing strategies and for the defense of major international transfer pricing cases. He has led hundreds of large transfer pricing projects and defense cases for a variety of clients in a range of industries. Prior to joining NERA, Alexander was a partner at PriceWaterhouse and KPMG, where he was in charge of their German transfer pricing practices.

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Philip de Homont specializes in complicated transfer pricing audits and the valuation of intellectual property for international corporations and law firms. He has defended major transfer pricing cases throughout Europe and the Americas in a wide range of industries from consumer goods to financial services.

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In his personal capacity, Rahul has handled several APAs in India, involving clients from across industries and also covering complex transactions, e.g., industrial franchise fees/variable royalties under non-integrated principal structures; contract R&D service provider model; distribution models, with related marketing intangible issues; financial transactions; and profit split models for royalties. He has been consistently rated as one of the leading transfer pricing professionals and tax litigators in the world by *Euromoney* and *International Tax Review* since 2010.

Rahul has been a visiting member of the faculty of the National Law School in the subject of transfer pricing and international tax treaties and the country reporter on the topic "Non Discrimination in international tax matters" for the IFA Congress held in Brussels in 2008. He was invited by the OECD to speak in the 2012 Paris roundtable conference on developing countries' perspective on APAs.

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Catherine O'Meara is a partner in the tax department at Matheson. Catherine has over ten years' experience advising multinational corporations doing business in Ireland on Irish corporate tax. Catherine has a particular interest in transfer pricing, competent authority matters, and business restructurings and also has extensive experience in structuring inward investment projects, mergers and acquisitions, and corporate reorganizations. Catherine's clients include many of the leading multinational corporations established in Ireland, primarily in the pharmaceutical, healthcare, ICT, and consumer brand sectors. Catherine has published articles in leading tax journals. She is a co-author on the Ireland section of the Bloomberg BNA Transfer Pricing Forum and a co-author of the Ireland chapter of the International Fiscal Association Cahiers on Cross Border Business Restructuring.

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Israel

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Yariv Ben-Dov is the founding partner of YBD Transfer Pricing Services – a member of the TPA Global network. Prior to that, he was Head of Transfer Pricing at Lion Orlitzky & Co. – Moore Stephens Israel. He is an expert in drafting and defending transfer pricing studies and intercompany agreements, with over 15 years of experience. Yariv counsels both multinational conglomerates and small start-ups on their transfer pricing matters, including multinationals which have no activity in Israel. Before working at HFN, Yariv was a co-founder of Bar-Zvi & Ben-Dov, a boutique law firm specializing in transfer pricing and high-tech and, before that, Yariv served as the Head of the Transfer Pricing Unit at Teva Pharmaceuticals. Yariv has published articles on the subject of transfer pricing and has been asked to keynote as an expert in transfer pricing at several conventions in Israel, Europe, and the U.S. Yariv is a member of Transfer Pricing Associates, the world's largest network of independent transfer pricing experts; the Israeli Bar Tax Committee; and the Board of the Israeli-LATAM Chamber of Commerce. Yariv is also a Board member of the Arthur Rubinstein Music Society and the head of the Society's NYC branch. Yariv provides counsel (pro bono) to the Israeli Navy Association. Yariv speaks Hebrew, English, French, and Italian and has often advised global clients in their local language.

Italy

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Marco Valdonio is a partner in the Transfer Pricing team of Maisto e Associati. Marco has been with Maisto e Associati since 2000 after working for another tax law firm. He headed the London office from 2002 to 2004 and has been a partner in the firm since 2011. He has received numerous awards as an adviser and has frequently been ranked as a leading tax professional. Marco's areas of expertise include transfer pricing, tax controversies and settlements, mergers and acquisitions, financial instruments, and international taxation.

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Aurelio Massimiano is a partner in the Transfer Pricing team of Maisto e Associati. Aurelio has been with Maisto e Associati since 2005, after having worked for the International Tax Office of the Italian Revenue Agency and, prior to that, for a Big 4 accounting firm. He is the permanent assistant to Professor Guglielmo Maisto at the EU Joint Transfer Pricing Forum. Aurelio holds an LL.M. from the University of Leiden in the Netherlands in International Taxation. He has received numerous awards as a transfer pricing adviser, and his areas of expertise are international taxation and transfer pricing.

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Mirko Severi is a senior associate in the Transfer Pricing team of Maisto e Associati. Mirko has been with Maisto e Associati since 2011. He has obtained a Master in Tax Law and has completed the Executive Program in Transfer Pricing (EPTP) at the Université de Lausanne (Switzerland). His areas of expertise include international taxation and transfer pricing.

Japan

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Takuma Mimura is the managing director of Cosmos International Management, a transfer pricing boutique consulting firm in Japan. He has more than 14 years of transfer pricing experience, including 6 years at Deloitte Touche Tohmatsu (both Tokyo and New York) and international banking experience prior to transfer pricing. He has worked extensively on transfer pricing issues worldwide and is especially experienced in Japan, U.S., and China TP matters. He has also worked with a broad range of clients in manufacturing, financial services, and telecommunications and has assisted many taxpayers in negotiations with the Japanese tax authorities on transfer pricing audit examinations. Takuma has authored articles for professional journals, including BNA's *Transfer Pricing Report* and *Monthly International Taxation of Japan*, and is a frequent speaker on transfer pricing topics.

Korea

Dr. Tae Hyung Kim
Transfer Pricing, Korea

Dr. Tae Hyung Kim is a former senior partner and national leader of the Global Transfer Pricing Group at Deloitte Korea. Over more than 14 years, Dr. Kim has represented multinational corporations in various industries in transfer pricing audit defense, advance pricing agreement negotiations, mutual agreement procedures, and planning and documentation studies.

Prior to his previous position, Dr. Kim headed the national transfer pricing practice at other Big Four firm in Korea and the Law and Economics Consulting Group in Korea. Before specializing in transfer pricing, Dr. Kim was a research fellow for the Korea Institute for International Economic Policy (KIEP). During his tenure at the KIEP, he advised the Ministry of Finance and Economy, the Ministry of Commerce, Industry, and Energy and the Ministry of Foreign Affairs in the area of international trade and investment policies.

Dr. Kim's recent publications appear in IBFD's *International Transfer Pricing Journal*, Bloomberg Tax's *Transfer Pricing Reports*, and Euromoney's *Transfer Pricing Reviews*. His economics publications also appear in *Canadian Journal of Economics* and *Review of International Economics*.

He holds a Ph.D. in economics from the University of Washington and is a graduate of Advanced Management Programs of both Harvard Business School and Seoul National University.

Luxembourg

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Peter Moons is a partner in the tax practice of Loyens & Loeff Luxembourg since 2004, with a focus on corporate tax advice for multinationals and funds and, in particular, private equity funds, their initiators, and their investors. Before joining the Luxembourg office in 2004, he practiced in the Rotterdam and Frankfurt offices of Loyens & Loeff, specializing in real estate funds and cross-border tax structuring. Peter is also active in the Loyens & Loeff German and Eastern European desks and heads the Luxembourg transfer pricing team. Peter is a member of the Luxembourg Bar, the International Fiscal Association (IFA), and the tax committee of the Luxembourg Private Equity and Venture Capital Association. Peter is the author of the *Tax Management Portfo-*

lio, Business Operations in Luxembourg, published by Bloomberg Tax. He received a Business economics and tax law degree from Erasmus University in Rotterdam in 1996 and a Tax law degree from University of Cologne in 1997.

Mexico

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Principal-Director of the Latin American Transfer Pricing Practice, Baker McKenzie, Mexico City

Moises Curiel is a member of Baker McKenzie's transfer pricing practice group. He is recognized by *International Tax Review* as one of Mexico's top tax advisers and has served as the Transfer Pricing Audits and Resolutions administrator of Mexico's Ministry of Finance and Public Credit for seven years. Mr. Curiel helped prepare and implement various tax transfer pricing rules in Mexico, including the Income Tax Law, the Omnibus Tax Ruling, and the Federal Tax Code. He also led the Advance Pricing Agreements Program in Mexico, where he negotiated over 300 unilateral agreements and 34 bilateral agreements. His impressive track record also includes proposing amendments to legislation on various matters for Latin American countries and representing Mexico before the OECD for the transfer pricing party (WP6).

The Netherlands

Danny Oosterhoff
Partner, Ernst & Young Belastingadviseurs LLP, Amsterdam, Netherlands

Danny Oosterhoff is a partner at Ernst & Young Belastingadviseurs LLP. He has specialized in transfer pricing services since 1996 and has worked both in the Netherlands and the United States. He has worked with many multinational enterprises in the broader field of transfer pricing planning, including risk and controversy management. His experience covers a wide range of industries, including the chemicals, pharmaceutical, high-tech and technology, consumer products, media, and telecommunication sectors. He has been involved in a significant number of advance pricing agreements, both on a unilateral and multilateral level and has been involved in many mutual agreement procedures with many different countries across the European, Asian, and American continents. He has also effectively used APAs and rollback mechanisms to resolve transfer pricing disputes.

He works with many companies on transfer pricing risk management to assist in defining the overall transfer pricing policy, the corporate transfer pricing function, and associated processes for ensuring sustainable and manageable transfer pricing models. Danny has also worked with many international companies on the transfer pricing aspects of acquisitions and divestitures. For many multinational enterprises, he has assisted in the field of due diligence and post-merger integration of transfer pricing policies, establishing arm's length financing conditions, and integration of operating models.

Danny regularly speaks at forums and events about transfer pricing, business restructuring, and international developments in taxation, including BEPS and state aid. He holds a degree in tax law from the University of Tilburg.

New Zealand

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Leslie Prescott-Haar is the managing director of TP EQuilibrium | AustralAsia LP ("TPEQ") (formerly, Ceteris New Zealand). TPEQ provides transfer pricing services in Australia and New Zealand across an extensive range of industries, transactions, and engagements, including APAs; independent second opinions and expert advice; tax authority reviews, investigations, and audit defense; global, regional, and country-specific documentation. Leslie has over 22 years of specialized transfer pricing experience based in the APac Region (Sydney and Auckland) and an additional 10 years of corporate taxation experience in Big Four accounting firm practices, specializing in mergers, acquisitions, bankruptcies, and reorganizations based in the United States (New York City and Chicago). Prior to forming TPEQ, Leslie commenced the transfer pricing practice of Ernst & Young New Zealand, where she served as the National Leader for a number of years. Leslie frequently provides "thought leadership" contributions to various international publications and associations.

Stefan Sunde
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Stefan Sunde is a senior analyst at TPEQ. He joined TPEQ in 2013 in a university internship role, and since then has worked on major projects for most of the practice's major client base and all industries, and has managed some more recent projects. Stefan completed his tertiary studies in 2014 and has since worked for the firm in a full-time capacity.

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Sophie Day is a senior analyst at TPEQ. She has several years of transfer pricing experience since joining TPEQ in July 2015, working across various industries and projects for TPEQ's client base. Sophie completed her tertiary studies in 2016 and has since worked for the firm in a full-time capacity.

Portugal

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Patrícia Matos is currently an associate partner in Deloitte's Lisbon office in the transfer pricing department.

Patrícia has a business degree and is a chartered accountant. She started her professional career in Arthur Andersen (Arthur Andersen, S.A., presently Deloitte & Touche, as result of an effective association of both firms since April 2002) in 1997 and was promoted to Associate Partner in 2008.

Patrícia has extensive experience in tax planning, due diligence, and tax compliance for Portuguese and multinational companies. In 2002, she began working exclusively in transfer pricing. She advises clients in several aspects of transfer pricing, ranging from tax audits to comprehensive transfer pricing planning, structuring of intercompany transactions, and defensive documentation.

Her experience spans a wide range of industries, including communications, technology, media, financial services, automotive, consumer goods, tourism, and pharmaceuticals.

Patrícia has been a speaker at several seminars and conferences on tax, economic, and transfer pricing issues.

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Evgenia Veter joined the Transfer Pricing Group of Ernst & Young as a partner in March 2011, coming from another major accounting firm. She has extensive experience in providing advisory services to Russian and international companies on various areas of taxation and conducting business in Russia, structuring investments, and coordinating approaches to tax planning. Since 2007 Evgenia has been focusing on transfer pricing. She has led transfer pricing planning and documentation projects for multinational and Russian clients in various industry sectors, including structuring of entry/exit strategies of clients from the transfer pricing perspective, adaptation of global transfer pricing policies to Russian requirements, business restructuring, development of sustainable transfer pricing methodologies, etc. Evgenia specializes in serving companies working in retail, consumer products and life science industries.

Singapore

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An economist with 16 years of experience in transfer pricing consulting and academia, Michael Nixon's experience includes transfer pricing and business restructuring projects in the U.K., Germany, the Netherlands and Singapore, where he has been based for the last six years. He has advised multinationals across various industries throughout the planning, compliance, and audit cycle. His practice is focused on transfer pricing controversy, intellectual property valuations, and business restructuring. He is a member of the Singapore transfer pricing consultation group with the Inland Revenue Authority of Singapore (IRAS) and has undertaken training for the IRAS Tax Academy. He also consults with Singaporean academic institutions on transfer pricing and business restructuring matters. Mr. Nixon has a Bachelor of Arts Economics degree from Nottingham Trent University and a Master of Science Economics (with distinction) from the University of London. He is a member of the Chartered Institute of Taxation in the U.K. and the Society of Financial Advisors in the U.K.

Spain

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Ms. Trapé joined KPMG in 2007 and has worked on numerous transfer pricing projects, including transfer pricing policy design, documentation work, and APA negotiations, as well as audit defense and recourse in transfer pricing cases and international taxation. Her work has spanned the financial, consumer products, energy, and pharmaceutical sectors.

Prior to joining KPMG, Montserrat Trapé worked at the Spanish Revenue Service. As Co-Director of International taxation, she was responsible for negotiating several multilateral and bilateral APAs and judicial defense of TP assessments, as well as actively participating in the new transfer pricing legislation. Ms. Trapé was also Vice-Chair of the European Union Joint Transfer Pricing Forum for four years. During this period, the JTPF worked on recommendations for the effective implementation of the Arbitration Convention, on a transfer pricing model documentation to simplify documentation compliance requirements, and on a report on best practices for the APA within Europe.

Montserrat Trapé is also a visiting professor at ESADE Instituto de Estudios Fiscales, where she has conducted several training courses for Spanish & Latin American Tax Authorities in Madrid. She is a frequent public speaker and contributor to articles and books on transfer pricing, dispute resolution mechanisms, and international taxation issues.

Ms. Trapé has been included in the list of 2009 and 2010 "Best lawyers" in Spain.

Switzerland

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Benjamin is a Partner in the Transfer Pricing and Value Chain Transformation Team in Zurich, Switzerland. Benjamin is leading the Transfer Pricing and Value Chain Transformation practice within PwC's Tax & Legal Services in Switzerland. His experience includes advising multinational companies on structuring of global value chains, development of global core documentation, migration of intangible property, establishing global trademark royalty schemes and the development of franchising and service fee concepts. Benjamin Koch has substantial experience assisting companies in preventing tax audits and managing international tax controversies through the proactive use of Advance Pricing Arrangements (APAs), tax rulings and Mutual Agreement Procedures (MAPs). Furthermore, Benjamin Koch is PwC's Territory Leader for Tax Controversy and Dispute Resolution and represents PwC Switzerland in the technical working groups of the Swiss Corporate Tax Reform III.

United Kingdom

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Andrew Cousins is an international tax practitioner in the Duff & Phelps Transfer Pricing practice, with more than 20 years of cross-border experience in private practice, industry and in government. He brings a comprehensive regulatory, commercial and advisory perspective to the fields of transfer pricing and business restructuring, with a focus on practical implementation. Before joining Duff & Phelps Andrew was Deputy Comptroller of Taxes in the Jersey tax authority, acting as competent authority for all of Jersey's international tax agreements. He also served as Jersey's delegate to the Global Forum on Transparency and Exchange of Information for Tax Purposes, as well as representing Jersey at the OECD's Global Forums for Transfer Pricing and for Tax Treaties. Andrew spent eight years in industry as a global head of transfer pricing, and has led the transfer pricing practice in two FTSE 100 FMCG multinationals.

Andrew is a graduate of Oxford University and is a fellow of the Institute of Chartered Accountants in England and Wales. He qualified as a chartered accountant at Deloitte before focusing on transfer pricing at Ernst & Young, where he was a member of its Tax Effective Supply Chain Management team.

United States

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Patrick McColgan is a managing director in Duff & Phelps' Atlanta office and part of the transfer pricing team. He has a strong focus on assisting growth companies with their global transfer pricing needs through the design of defensible and pragmatic solutions. Patrick has more than 11 years of transfer pricing experience and has worked across several industries, including automotive, chemical, consumer products, medical products, pharmaceutical, software, internet, and manufacturing.

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Country Contributors

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Cristian Rosso Alba heads the tax law practice of Rosso Alba, Francia & Asociados. He has a well-recognized expertise in tax law, with particular emphasis on domestic and international tax matters. Mr. Rosso Alba has served as professor of Tax Law at the Pontifical Catholic University of Argentina; visiting professor at the University of Buenos Aires, School of Economics; professor of Tax Law at Austral University; and professor of postgraduate courses at the Torcuato Di Tella University. Additionally, he has been a regular lecturer in the United States and speaker in domestic and international tax conferences and is the author of more than 80 articles appearing in specialized publications. Cristian Rosso Alba holds an LL.M. from Harvard Law School and a Certificate in International Taxation jointly from Harvard Law School and the J.F. Kennedy School of Government at Harvard, a Masters in Taxation from Buenos Aires University School of Economics, and the degree of Abogado from the University of Buenos Aires Law School. He is a member of the American Bar Association (ABA), the Canadian Tax Foundation, and the Advisory Board of the Argentine Chamber of Commerce. He has been recommended as one of the "Leaders in their Field" (Tax – Argentina) by *Chambers Latin America*.

Australia

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Stean Hainsworth is the Director of Transfer Pricing at Duff & Phelps based in Australia and has over 20 years of legal and tax experience, specializing in transfer pricing. Previously he was a director of an international transfer pricing firm, the transfer pricing leader for Asia at a global advisory firm, and a senior transfer pricing specialist for a Big Four firm in New Zealand, Canada, and Australia.

Austria

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Alexandra Dolezel is a tax director at BDO Austria GmbH in Vienna, Austria. She has over 22 years of experience and specializes in international taxation and transfer pricing. Her expertise includes the conceptual design of international tax structures and business models, defense in tax audits, litigation and mutual agreement procedures, as well as the optimization of value chains from a transfer pricing point of view. In addition, she is a lecturer on European Union tax law and comparative tax law at FH Campus Wien, the largest university in Austria. Prior to joining BDO, Alexandra was a tax director at PricewaterhouseCoopers, where she specialized in transfer pricing, international tax structuring and value chain transformation, and mergers and acquisitions. Prior to that, she was Head of Corporate Taxes for Borealis AG, where she had overall responsibility for group corporate tax, including matters affecting tax risk management, transfer pricing, and international structures. Alexandra received her education at the Vienna University of Economics and Business Administration, and she is also a member of the Austrian Chamber of Accountants.

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Tanja Roschitz is a senior associate at BDO Austria GmbH in Vienna, Austria. Prior to joining BDO, Tanja worked on the transfer pricing team at PricewaterhouseCoopers in Vienna, as well as in Rotterdam, where she gained extensive experience in the development and implementation of transfer pricing policies and the preparation of transfer pricing documentation.

Belgium

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Dirk van Stappen is a partner with KPMG and leads KPMG's transfer pricing practice in Belgium. He joined KPMG in 1988 and has over 28 years of experience in advising multinational companies on corporate tax (both domestic and international) and transfer pricing issues. He leads KPMG's transfer pricing practice in Belgium. Furthermore, Dirk is a former member of the EU Joint Transfer Pricing Forum (2002–2015).

Since 1996, Dirk has been a visiting professor at the University of Antwerp (Faculty Applied Economics, UA) teaching Tax to Master's students. He has been named in *International Tax Review*'s "World Tax –The comprehensive guide to the world's leading tax firms, *Euromoney*'s (Legal Media Group) "Guide to the World's Leading Transfer Pricing Advisers," and *Euromoney*'s "Guide to the World's Leading Tax Advisers."

He is a certified tax adviser and member of the Belgian Institute for Accountants and Tax Advisers and of the International Fiscal Association.

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Yves de Groote has an LL.M from King's College London, MSc. HUB; he joined KPMG in 2004 and has over 10 years of experience in advising multinational organizations on transfer pricing issues. He has been involved in and conducted various tax planning and transfer pricing assignments, ranging from the preparation of European and global transfer pricing documentation (including functional and economic analyses and comparables searches) and domestic and international transfer pricing audit defense to the negotiation of (uni-, bi-, and multilateral) rulings and advance pricing arrangements (APAs).

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Dries Van Renterghem is a supervising senior advisor at KPMG Belgium. He obtained a master's degree in Business Engineering: Finance and a master's degree in Taxation. He is part of the Transfer Pricing Desk and the Innovation Desk in Belgium.

Brazil

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Jerry Levers de Abreu is a Partner at TozziniFreire Advogados, Sao Paulo. A specialist in tax law, Jerry has over 18 years of experience in tax consulting and administrative litigation. He counsels both domestic and foreign clients, with an emphasis on indirect taxes and taxation in the automotive, information technology, telecommunications, intellectual property, food, and cosmetics sectors. Prior to building his tax practice at TozziniFreire, Jerry worked as a tax manager in global audit and consulting companies. He is recognized as an Indirect Tax Leader by the *International Tax Review* and recommended by *The Legal 500* and *Best Lawyers*. Jerry's education includes a law degree from Universidade São Francisco and a specialized degree in Tax Law from Pontifícia Universidade Católica de São Paulo. He frequently publishes articles on tax law in major national publications.

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William Cyrelli is a tax lawyer at TozziniFreire Advogados in Sao Paulo. He obtained a Master's degree (LL.M.) in International Tax Law at the International Tax Center at Leiden University in the Netherlands. William also holds a degree from the Pontifícia Universidade Católica do Rio Grande do Sul and a postgraduate degree in Tax Law from the same institution.

Canada

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Richard Garland is a partner in the Toronto office of Deloitte. He is a Chartered Professional Accountant and has over 25 years of accounting experience focused in the area of corporate international taxation. Richard has assisted clients in all aspects of international taxation, with particular emphasis on tax treaty issues, cross-border financing structures, and transfer pricing. Over the past several years, Richard's work has been focused in the area of transfer pricing, and he has been repeatedly been recognized in *Euromoney*'s guide to leading transfer pricing practitioners.

Fiona Gan
Senior Manager, Deloitte LLP, London

Fiona Gan is a senior manager in the Vancouver, Canada office of Deloitte LLP. She has more than 10 years of experience assisting clients with the development and implementation of transfer pricing policies, as well as transfer pricing dispute prevention (e.g., APAs) and resolution (e.g., audit defense, MAP). In addition to working in Canada, Fiona has gained exposure to various transfer pricing regimes through working in Hong Kong and the U.K. Her clients range from small private owner-managed companies to large public multinational corporations across multiple industries, including technology, consumer products, and financial services. She is a Certified Public Accountant of the State of New Hampshire and a member of the AICPA.

China

Cheng Chi
Transfer Pricing Partner, KPMG China

Cheng Chi is a transfer pricing partner at KPMG China and a member of the Steering Committee of the Global Transfer Pricing Services Practice of KPMG's global network. Mr. Chi has led many transfer pricing and tax efficient supply chain projects in Asia and Europe, involving advance pricing arrangement negotiations, cost contribution arrangements, Pan-Asia documentation, controversy resolution, global procurement structuring, and headquarters services recharges for clients in the industrial market including automobile, chemical, and machinery industries, as well as the consumer market, logistic, communication, electronics, and financial services industries. In addition to lecturing at many national and local training events organized by the Chinese tax authorities, Mr. Chi has provided technical advice on a number of recent transfer pricing legislative initiatives in China. A frequent speaker on transfer pricing and other matters, his analyses are regularly featured in tax and transfer pricing publications around the world (i.e., *International Tax Review*). Mr. Chi has been recommended as a leading transfer pricing advisor in China by the Legal Media Group. Mr. Chi started his transfer pricing career in Europe with another leading accounting firm, covering many of Europe's major jurisdictions while based in Amsterdam until returning to China in 2004.

Choon Beng Teoh
Director, KPMG China

Choon Beng Teoh is a director at KPMG China. Choon Beng has experience in multi-jurisdictional planning studies, dispute resolution, value chain analysis, and restructuring of operating models, as well as leading and managing global transfer pricing documentation projects. His client portfolio includes top-tier multinational companies across a variety of industries, including the pharmaceutical, retail, and IT industries. He also occasionally co-authors articles on China-related transfer pricing topics for publications.

Choon Beng graduated with a law degree from the London School of Economics and is a chartered accountant with the Institute of Chartered Accountants in England and Wales. Prior to joining KPMG China, Choon Beng practiced in another leading accounting firm in London in the area of international tax and transfer pricing.

Germany

Alexander Voegele
NERA Economic Consulting, Frankfurt

For more than 25 years, Dr. Alexander Voegele has been advising international corporations and leading law firms on transfer pricing issues, specializing in the development of innovative economic structures for transfer pricing strategies and for the defense of major international transfer pricing cases. He has led hundreds of large transfer pricing projects and defense cases for a variety of clients in a range of industries. Prior to joining NERA, Alexander was a partner with PriceWaterhouse and KPMG, where he was in charge of their German transfer pricing practice. He holds a doctorate in Economics and a Masters of Tax and Business

Administration from the University of Mannheim. He is a certified German auditor and tax adviser and is a French Commissaire aux Comptes. He has received numerous awards as a transfer pricing adviser and has frequently been ranked as a leading tax and transfer pricing professional.

Philip de Homont
NERA Economic Consulting, Frankfurt

Philip de Homont is an expert in NERA's global Transfer Pricing practice, where he provides transfer pricing advice to international corporations and law firms. He specializes in the transfer pricing of intellectual property in tax audits and litigation cases, as well as in the digital economy. His recent projects have focused on DEMPE analysis and relocations of functions (*Funktionsverlagerung*), and he has extensive experience in the defense of licensing and valuation arrangements for intangibles. Philip is a frequent speaker at international tax conferences and regularly publishes articles on transfer pricing developments and on defense and planning cases. He authored two chapters on valuation for leading German textbooks on Transfer Pricing and Intellectual Property. He has repeatedly been listed as a "Rising Star" in transfer pricing by *Euromoney*'s Expert Guides.

Hong Kong

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Irene Lee has practiced tax for 11 years, the last 7 specializing in transfer pricing matters involving the financial services sector. She joined KPMG in Hong Kong in 2013 and advises banking, asset management, and insurance clients on transfer pricing policies, documentation, and risk management in the Asia region. She earned a Bachelor of Business Administration (B.B.A.) degree from the Chinese University of Hong Kong and has studied at the University of North Carolina (Chapel Hill).

Jeffrey Wong
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Jeffrey Wong is a senior manager of Global Transfer Pricing Services at KPMG in Hong Kong. He is an experienced financial services transfer pricing advisor and works with clients from the banking, insurance, and asset management sectors. Jeffrey joined KPMG in Hong Kong in 2014 and has been based in Hong Kong for over seven years. He also worked as a transfer pricing specialist in New York for over two years. He holds a Bachelor of Science in Finance and International Business (Magna Cum Laude) from the NYU Stern School of Business.

India

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Rahul K. Mitra is currently a Partner at Dhruva Advisors LLP, India. Prior to joining Dhruva Advisors, he was the National Head of Transfer Pricing & BEPS for KPMG in India and, before then was the National Leader of PwC India's transfer pricing practice between 2010 and 2014. Rahul was a Partner in the tax & regulatory services practice of PwC India between April 1999 and February 2015.

Rahul has over 22 years of experience in handling taxation & regulatory matters in India. He specializes in transfer pricing, particularly inbound & outbound planning assignments, and advises on profit/cash repatriation planning, value chain transformation or supply chain management projects, profit attribution to permanent establishments, etc. Rahul independently handles litigation for top companies at the level of the Income Tax Tribunals. At least 50 of the cases independently argued by Rahul have been reported in leading tax journals of India. Some of the major wins of Rahul before the Tax Tribunals in transfer pricing matters have set precedents, both in India and globally.

Rahul has been consistently rated among the leading transfer pricing professionals & tax litigators in the world, by *Euromoney* and *International Tax Review* since 2010.

Rahul has handled several APAs in India, involving clients from across industries, and also covering complex transactions, e.g. industrial franchise fees/variable royalties under non-integrated principal structures, contract R&D service provider model, distribution models with related marketing intangible issues, financial transactions, profit split models for royalties, etc.

Rahul is a longtime Member of the Bloomberg Tax Transfer Pricing Forum Advisory Board. He has been a visiting faculty of the National Law School teaching classes on transfer pricing & international tax treaties.

Rahul was the Country Reporter on the topic, "Non Discrimination in international tax matters", for the IFA Congress held in Brussels in 2008. Rahul was invited by the OECD to speak in the 2012 Paris roundtable conference on developing countries' perspective on APAs.

Kapil Bhatnagar
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Kapil Bhatnagar is a Principal at Dhruva Advisors LLP. He was Director, Transfer Pricing at PWC before joining Dhruva Advisors LLP.

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Anurag Singhal is a Chartered Accountant (CA) from the Institute of Chartered Accountants of India (ICAI) and a Certified Public Accountant (CPA) from the Colorado State Board of Accountancy, American Institute of Certified Public Accountants (AICPA). He has more than 12 years of rich professional experience in advisory, structuring, and compliance projects in transfer pricing and international tax.

Anurag has extensively worked on planning studies, value chain analysis/business model optimization projects, TP documentation for compliance requirements, audit defense, and litigation. He has worked for numerous MNCs with respect to their Indian as well as global operations. He has extensively served a broad range of international and Indian clients across industries, including automobile, industrial goods, IT, ITES, education, telecommunication, food and beverages, EPC contractors, and event management on various aspects of tax and transfer pricing, including tax planning, compliances, audits, and dispute resolution.

Ireland

Catherine O'Meara
Partner, Matheson, Dublin

Catherine is a partner in the tax department at Matheson. Catherine has over ten years' experience advising multinational corporations doing business in Ireland on Irish corporate tax. Catherine has a particular interest in transfer pricing, competent authority matters, and business restructurings and also has extensive experience in structuring inward investment projects, mergers and acquisitions, and corporate reorganizations. Catherine's clients include many of the leading multinational corporations established in Ireland, primarily in the pharmaceutical, healthcare, ICT, and consumer brand sectors. Catherine has published articles in leading tax journals, is a co-author on the Ireland section of the Bloomberg BNA Transfer Pricing Forum and a co-author of the Ireland chapter of the International Fiscal Association Cahiers on Cross Border Business Restructuring.

Catherine is a Chartered Tax Advisor and a member of the Law Society of Ireland.

Israel

Yariv Ben-Dov
Partner, YBD Transfer Pricing Services - a Member of the TPA Global Network

Yariv Ben-Dov is the founding partner of YBD Transfer Pricing Services – a member of the TPA Global network. Prior to that, he was Head of Transfer Pricing at Lion Orlitzky & Co. – Moore Stephens Israel. He is an expert in drafting and defending transfer pricing studies and intercompany agreements, with over 15 years of experience. Yariv counsels both multinational conglomerates and small start-ups on their transfer pricing matters, including multinationals which have no activity in Israel. Before working at HFN, Yariv was a co-founder of Bar-Zvi & Ben-Dov, a boutique law firm specializing in transfer pricing and high-tech and, before that, Yariv served as the Head of the Transfer Pricing Unit at Teva Pharmaceuticals. Yariv has published articles on the subject of transfer pricing and has been asked to keynote as an expert in transfer pricing at several conventions in Israel, Europe, and the U.S. Yariv is a member of Transfer Pricing Associates, the world's largest network of independent transfer pricing experts; the Israeli Bar Tax Committee; and the Board of the Israeli-LATAM Chamber of Commerce. Yariv is also a Board member of the Arthur Rubinstein Music Society and the head of the Society's NYC branch. Yariv provides counsel (pro bono) to the Israeli Navy Association. Yariv speaks Hebrew, English, French, and Italian and has often advised global clients in their local language.

Italy

Marco Valdonio
Partner, Maisto e Associati, Milan

Marco Valdonio is a partner in the Transfer Pricing team of Maisto e Associati. Marco has been with Maisto e Associati since 2000 after working for another tax law firm. He headed the London office from 2002 to 2004 and has been a partner in the firm since 2011. He has received numerous awards as an adviser and has frequently been ranked as a leading tax professional. Marco's areas of expertise include transfer pricing, tax controversies and settlements, mergers and acquisitions, financial instruments, and international taxation.

Aurelio Massimiano
Partner, Maisto e Associati, Milan

Aurelio Massimiano is a partner in the Transfer Pricing team of Maisto e Associati. Aurelio has been with Maisto e Associati since 2005, after having worked for the International Tax Office of the Italian Revenue Agency and, prior to that, for a Big 4 accounting firm. He is the permanent assistant to Professor Guglielmo Maisto at the EU Joint Transfer Pricing Forum. Aurelio holds an LL.M. from the University of Leiden in the Netherlands in International Taxation. He has received numerous awards as a transfer pricing adviser, and his areas of expertise are international taxation and transfer pricing.

Mirko Severi
Senior Associate, Maisto e Associati, Milan

Mirko Severi is a senior associate in the Transfer Pricing team of Maisto e Associati. Mirko has been with Maisto e Associati since 2011. He has obtained a Master in Tax Law and has completed the Executive Program in Transfer Pricing (EPTP) at the Université de Lausanne (Switzerland). His areas of expertise include international taxation and transfer pricing.

Japan

Takuma Mimura
Managing Director, Cosmos International Management Co., Ltd, Nagoya

Takuma Mimura is the managing director of Cosmos International Management, a transfer pricing boutique consulting firm in Japan. He has more than 14 years of transfer pricing experience, including 6 years at Deloitte Touche Tohmatsu (both Tokyo and New York) and international banking experience prior to transfer pricing. He has worked extensively on transfer pricing issues worldwide and is especially experienced in Japan, U.S., and China TP matters. He has also worked with a broad range of clients in manufacturing, financial services, and telecommunications and has assisted many taxpayers in negotiations with the Japanese tax authorities on transfer pricing audit examinations. Takuma has authored articles for professional journals, including BNA's *Transfer Pricing Report* and *Monthly International Taxation of Japan* and is a frequent speaker on transfer pricing topics.

Korea

Dr. Tae Hyung Kim
Transfer Pricing, Korea

Dr. Tae Hyung Kim is a former senior partner and national leader of the Global Transfer Pricing Group at Deloitte, Korea. Over more than 14 years, Dr. Kim has represented multinational corporations in various industries in transfer pricing audit defense, advance pricing agreement negotiations, mutual agreement procedures, and planning and documentation studies. Prior to his previous position, Dr. Kim headed the national transfer pricing practice at other Big Four firms in Korea and the Law and Economics Consulting Group in Korea. Before specializing in transfer pricing, Dr. Kim was a research fellow for the Korea Institute for International Economic Policy (KIEP). During his tenure at the KIEP, he advised the Ministry of Finance and Economy; the Ministry of Commerce, Industry, and Energy; and the Ministry of Foreign Affairs in the area of international trade and investment policies.

Dr. Kim's recent publications appear in IBFD's *International Transfer Pricing Journal*, BNA Tax Management's *Transfer Pricing Reports*, and Euromoney's *Transfer Pricing Reviews*. His economics publications also appear in *Canadian Journal of Economics* and *Review of International Economics*. He holds a Ph.D. in economics from the University of Washington and is a graduate of Advanced Management Programs from both Harvard Business School and Seoul National University.

Mexico

Moises Curiel Garcia
Transfer Pricing Partner, Baker McKenzie, Mexico City

Moises Curiel heads Baker McKenzie's Latin America Transfer Pricing and Valuation practice in Mexico. He has more than 23 years of experience in transfer pricing and international taxes and, currently, among other aspects of his practice, tax counsel for the maquiladora industry and the Employers' Confederation of the Mexican Republic. He is recognized by *International Tax Review* as one of Mexico's top tax advisers. Mr. Curiel has previously served as the transfer pricing audits and resolutions administrator of Mexico's Ministry of Finance and Public Credit for almost eight years. He helped prepare and implement various transfer pricing rules in Mexico, including the Income Tax Law, the Temporary Tax Ruling and the Federal Tax Code. He also led the country's Advance Pricing Agreements Program and conducted the first transfer pricing audits in Mexico and Latin America. He has represented Mexico before the OECD for the transfer pricing party (WP6). Mr. Curiel's educational certifications include degrees in public accounting from the Universidad ISEC in Mexico City and in taxation from the Universidad Panamericana, as well as certifications from Anahuac University (International Expert Transfer Pricing) and Instituto Mexicano de Contadores Puý'blicos de Meý'xico, A.C. (Tax Specialization Certificate).

Armando Cabrera
Transfer Pricing Partner, Baker McKenzie, Guadalajara

Armando Cabrera is a partner in Baker McKenzie's tax practice group in Guadalajara. He has 10 years of experience in transfer pricing issues. Armando currently coordinates the transfer pricing services for financial and services industries and the financial valuation practice. His practice focuses on transfer pricing documentation for tax compliance; pricing strategies and benchmarking analysis by product, industry, country, and region; defense in litigation; and alternative dispute resolution of any transfer pricing matter in Mexico and Latin America.

The Netherlands

Danny Oosterhoff
Partner, Ernst & Young Belastingadviseurs LLP, Amsterdam, Netherlands

Danny Oosterhoff is a partner at Ernst & Young Belastingadviseurs LLP. He has specialized in transfer pricing services since 1996 and has worked both in the Netherlands and the United States. He has worked with many multinational enterprises in the broader field of transfer pricing planning, including risk and controversy management. His experience covers a wide range of industries, including the chemicals, pharmaceutical, high-tech and technology, consumer products, media, and telecommunication sectors. He has been involved in a significant number of advance pricing agreements, both on a unilateral and multilateral level and has been involved in many mutual agreement procedures with many different countries across the European, Asian, and American continents. He has also effectively used APAs and rollback mechanisms to resolve transfer pricing disputes.

He works with many companies on transfer pricing risk management to assist in defining the overall transfer pricing policy, the corporate transfer pricing function, and associated processes for ensuring sustainable and manageable transfer pricing models. Danny has also worked with many international companies on the transfer pricing aspects of acquisitions and divestitures. For many multinational enterprises, he has assisted in the field of due diligence and post-merger integration of transfer pricing policies, establishing arm's length financing conditions, and integration of operating models.

Danny regularly speaks at forums and events about transfer pricing, business restructuring, and international developments in taxation, including BEPS and state aid. He holds a degree in tax law from the University of Tilburg.

New Zealand

Leslie Prescott-Haar
Managing director, TP EQuilibrium | AustralAsia LP (''TPEQ'')

Leslie Prescott-Haar is the managing director of TP EQuilibrium | AustralAsia LP (TPEQ) (formerly Ceteris New Zealand). TPEQ provides transfer pricing services in Australia and New Zealand across an extensive range of industries, transactions, and engagements, including APAs; independent second opinions and expert advice; tax authority reviews, investigations, and audit defense; global, regional, and country-specific documentation. Leslie has over 22 years of specialized transfer pricing experience based in the APac Region (Sydney and Auckland) and an additional 10 years of corporate taxation experience in Big 4 accounting firm practices, specializing in mergers, acquisitions, bankruptcies, and reorganizations based in the United States (New York City and Chicago). Prior to forming TPEQ, Leslie commenced the transfer pricing practice of Ernst & Young New Zealand, where she served as the National Leader for a number of years. Leslie frequently provides "thought leadership" contributions to various international publications and associations.

Stefan Sunde
Senior Analyst, TPEQ

Stefan Sunde is a senior analyst at TPEQ. He joined TPEQ in 2013 in a university internship role and since then has worked on major projects for most of the practice's major client base and all industries, while managing some of the more recent projects. Stefan completed his tertiary studies in 2014 and has since worked for the firm in a full-time capacity.

Sophie Day
Senior Analyst, TPEQ

Sophie Day is an analyst at TPEQ. She has several years of transfer pricing experience since joining TPEQ in July 2015, working across various industries and projects for TPEQ's client base. Sophie completed her tertiary studies in 2016 and has since worked for the firm in a full-time capacity.

Portugal

Patricia Matos
Associate Partner, Deloitte & Associados SROC, S.A., Lisbon

Patrìcia Matos is currently an Associate Partner in Deloitte's Lisbon office in the transfer pricing department.

Patrìcia has a business degree and is a chartered accountant. She started her professional career in Arthur Andersen (Arthur Andersen, S.A., presently Deloitte & Touche, as result of an effective association of both firms since April 2002) in 1997 and was promoted to Associate Partner in 2008.

Patrìcia has extensive experience in tax planning, due diligence, and tax compliance for Portuguese and multinational companies. In 2002, she began working exclusively in transfer pricing. She advises clients in several aspects of transfer pricing, ranging from tax audits to comprehensive transfer pricing planning, structuring of intercompany transactions, and defensive documentation.

Her experience spans a wide range of industries, including communications, technology, media, financial services, automotive, consumer goods, tourism, and pharmaceuticals.

Patrìcia has been a speaker at several seminars and conferences on tax, economic, and transfer pricing issues.

Henrique Sollari Allegro
Manager, Deloitte & Associados SROC, S.A., Lisbon

Henrique Allegro has over 10 years of international transfer pricing experience, which includes planning, coordinating, and setting up worldwide transfer pricing documentation projects for Portuguese multinational companies. He specializes in advising clients on Business Model Optimization projects (including comprehensive transfer pricing planning, structuring of intercompany transactions, and international business restructurings) and risk assessments, as well as litigation and defensive documentation projects. Henrique works across a wide range of industries in Portugal and Angola, including automotive, pharmaceuticals, real estate and tourism, consumer goods, agri-food, technology and communications, industrial markets, and retail. Henrique holds a degree in Economics from Faculdade de Economia do Porto (Oporto University), and he has been involved as an instructor and a participant of several professional training programs in Portugal (Porto and Lisbon) and Europe (Prague, Amsterdam, London).

Sofia Margarida Jorge
Manager, Deloitte & Associados SROC, S.A., Lisbon

Sofia Jorge is a manager in Deloitte's Lisbon office, where she started her professional career in 2007 as a transfer pricing specialist. She has a law degree from Universidade Nova de Lisboa, with a specialization in tax and economic law. Sofia assists multinational clients operating in a wide range of industries, typically operating in the pulp and paper manufacturing, energy, software and technology, automotive, life sciences, and healthcare industries. Her professional experience includes providing assistance in transfer pricing matters, including documentation, intercompany pricing definition, redesign of transfer pricing systems, and international business restructurings. Sofia has also been regularly involved in transfer pricing controversy and dispute issues, support in tax audits, administrative claims, and negotiation of advanced pricing agreements (APA) with the Portuguese Tax Authorities.

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Russia

Evgenia Veter
Partner, Ernst & Young, Moscow

Evgenia Veter joined the Transfer Pricing Group of Ernst & Young as a partner in March 2011, coming from another major accounting firm. She has extensive experience in providing advisory services to Russian and international companies on various areas of taxation and conducting business in Russia, structuring investments, and coordinating approaches to tax planning. Since 2007 Evgenia has been focusing on transfer pricing. She has led transfer pricing planning and documentation projects for multinational and Russian clients in various industry sectors, including structuring of entry/exit strategies of clients from the transfer pricing perspective, adaptation of global transfer pricing policies to Russian requirements, business restructuring, development of sustainable transfer pricing methodologies, etc. Evgenia specializes in serving companies working in retail, consumer products and life science industries.

Lyusine Satiyan
Partner, Ernst & Young Valuation and Advisory Services LLC, Moscow

Lyusine Satiyan has over 13 years of experience in providing transfer pricing and corporate tax services to large Russian and international corporations. Lyusine leads projects in various transfer pricing and corporate tax areas, including TP and CbCR compliance, review, and optimization of operating models; defense of TP policies in response to an increasing number and magnitude of Russian TP audits, as well as an increasing number of bilateral APA projects and MAPs; internal TP strategy and all elements of an effective TP function responding to best practices; and integration and optimization of new operating models, TP, and indirect tax structuring.

Mirra Tcybulskaia
Manager, Ernst & Young Valuation and Advisory Services LLC, Moscow

Mirra Tcybulskaia is a manager in the Transfer Pricing Group of Ernst & Young in Moscow. Mirra has been with EY since 2015, providing tax advisory services to Russian and international companies in various industry sectors, with a main focus on transfer pricing. She has extensive expertise from participating in complex transfer pricing planning and documentation projects, including operating models restructuring, development of sustainable transfer pricing methodologies, client support during tax audits, and turnkey BEPS Action 13 global documentation package preparation for Russian outbounds. Mirra has participated in projects related to the development of customized digital tools automating TP function. She specializes in serving companies working in the retail, consumer products, and life science industries.

Narine Nersisyan
Senior Consultant, Ernst & Young Valuation and Advisory Services LLC, Moscow

Narine Nersisyan is a senior consultant in the Transfer Pricing Group of Ernst & Young in Moscow and is involved in projects related to transfer pricing compliance and planning. Narine has been providing tax advisory services since 2013. Prior to joining the EY Russia transfer pricing team, she worked at another Big Four firm in Armenia. Narine's expertise includes advisory services in various tax matters, with a focus on the local tax compliance of foreign multinationals, cross-border tax structuring, value-chain transformation, profit attribution to permanent establishments, tax due-diligence, and other matters. She has worked with Armenian lawmakers to develop transfer pricing legislation in Armenia, contributing to the development of local transfer pricing practices. Narine has an MBA from the American University of Armenia and is an ACCA student.

Singapore

Peter Tan
Managing Director, PeterTanConsulting Pte Ltd

Peter Tan is a Barrister from the Inns of Court, London and a tax practitioner with nearly 40 years' experience, beginning his specialism in London, which he continued in Singapore with two of the Big 4 and thereafter with an international law firm and a regional law firm, where he currently is consulting as a Senior Tax Advisor. His experience of tax practice with the Big 4 and also with law firms has enabled Peter to combine his legal background with his tax specialism to provide practical and commercial consulting to corporate clients. Peter has provided strategic advice and guidance to many multinational business groups from the U.S., Europe, and Asia including Japan, Korea, Indonesia, Malaysia, Taiwan, and Thailand.

Peter runs his own tax consultancy firm of which he is the Managing Director and can be reached at petertan@ptanconsulting.com

United Kingdom

Andrew Cousins
Director, Duff & Phelps, London

Andrew Cousins is an international tax practitioner in the Duff & Phelps Transfer Pricing practice, with more than 20 years of cross-border experience in private practice, industry and in government. He brings a comprehensive regulatory, commercial and advisory perspective to the fields of transfer pricing and business restructuring, with a focus on practical implementation. Before joining Duff & Phelps Andrew was Deputy Comptroller of Taxes in the Jersey tax authority, acting as competent authority for all of Jersey's international tax agreements. He also served as Jersey's delegate to the Global Forum on Transparency and Exchange of Information for Tax Purposes, as well as representing Jersey at the OECD's Global Forums for Transfer Pricing and for Tax Treaties. Andrew spent eight years in industry as a global head of transfer pricing, and has led the transfer pricing practice in two FTSE 100 FMCG multinationals.

Andrew is a graduate of Oxford University and is a fellow of the Institute of Chartered Accountants in England and Wales. He qualified as a chartered accountant at Deloitte before focusing on transfer pricing at Ernst & Young, where he was a member of its Tax Effective Supply Chain Management team.

United States

Susan Fickling-Munge
Managing Director, Duff & Phelps LLC, Chicago

Susan Fickling-Munge is a Managing Director and the head of the Midwest Transfer Pricing practice from the Chicago office of Duff & Phelps. She leverages more than 20 years of transfer pricing and valuation experience. Susan has worked closely with global companies in a vast range of industries, assisting them with transfer pricing planning, documentation, and defense.

Susan has worked with numerous clients to help develop tax efficient strategies for intercompany licensing transactions and for transactions involving the sale of intellectual property on an intercompany basis.

Before joining Duff & Phelps, Susan was a vice president of transfer pricing for Charles River Associates, a transfer pricing manager in the international tax division of Arthur Andersen LLP, and a transfer pricing consultant at KPMG LLP.

Susan earned her MBA at the University of Chicago Booth School of Business and her BA from Scripps College. She also studied at the Universidad San Francisco de Quito in Quito, Ecuador.

Ryan Lange
Director, Duff & Phelps LLC, Chicago

Ryan Lange is a director in the Chicago office of Duff & Phelps. Ryan advises clients' senior management teams on a variety of issues related to transfer pricing, economics, and valuation. Throughout his career, Ryan has supported and managed large litigation support projects; prepared U.S., OECD, and Local country transfer pricing documentation; assisted in the design and preparation of economic planning and global policy projects; advised on intellectual property valuation issues; and analyzed complex transfer pricing issues in compliance and controversy contexts.

Ryan has a Bachelor of Business and Administration in Finance, Investment, and Banking and a Bachelor of Business Administration in Real Estate and Urban Economics from the University of Wisconsin-Madison. Ryan also earned a Masters in Business Administration from the Kellstadt Graduate School of Business.

Elizabeth Patrun
Director, Duff & Phelps LLC, Chicago

Elizabeth Patrun is a director in the Chicago office of Duff & Phelps. She is a member of the Transfer Pricing practice, assisting multinational companies in the pricing of their intercompany tangible, intangible, service, and financial transactions. She has considerable experience conducting functional, risk, and economic analyses and providing transfer pricing planning, documentation, defense, and litigation support services. She has consulted with companies in a variety of industries, including the agricultural, financial services, industrial machinery, and oil and gas industries, among others. Elizabeth received her B.A. in Economics from Cornell University, with a minor in Law & Society.

Sarah Stauner
Vice President, Duff & Phelps LLC, Chicago

Sarah Stauner is a vice president in the Chicago office of Duff & Phelps. Her broad experience includes preparation of functional, economic and financial analyses in support of tangible, intangible, financial, and services transactions. Sarah has supported large litigation support projects, prepared U.S., OECD and Master File/Local File documentation, and has experience managing and executing large multinational engagements, including the coordination of cross-collaboration between regions and firms. Sarah currently serves as a Board Member of the Americas Region of the Duff & Phelps Charitable Service Foundation. She graduated Cum Laude from Vanderbilt University in 2014 with a double major in Economics and Spanish Literature & Language.