October 2017
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WTS Transfer Pricing Newsletter

Editorial

Dear Reader,

It is our pleasure to present to you the WTS Transfer Pricing Newsletter for October 2017.

With our newsletter, we want to provide you with an update and overview on current developments in the transfer pricing area in eleven selected countries.

In addition, we would like to introduce our new IT tool, the "WTS CbCR-2-XML Converter", which constitutes a perfect solution for our international clients to comply with the requirements of filing the CbC-Report with their competent tax authority. With the "WTS CbCR-2-XML Converter", all technical requirements of the OECD standardised XML Schema can be perfectly fulfilled to ensure the correct data and transmission structure of the compiled and prepared CbC reports for the competent tax authority in the respective country.

If you would like to receive more detailed information, or if you are interested in understanding how the "WTS CbCR-2-XML Converter" can be used by your firm, our global WTS TP team experts will be happy to answer any questions you may have.

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

Yours sincerely,

WTS Global Transfer Pricing Team

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

Austria

Corresponding TP correction: Direct contact between Austrian and German tax authorities

The necessity for corresponding transfer price (TP) corrections in the bilateral context between Austria and Germany is steadily increasing. Based on the strong international economic integration between Austria and Germany, most TP conflicts exist with Germany. If the German tax authority intends to correct the TP, the Austrian taxpayer has the following possibilities:

1. Advance Pricing Agreement (APA) or § 118 BAO Ruling in advance, or
2. at post Joint Audit; direct contact between Austrian and German tax authorities; mutual agreement procedure under double tax treaties or EU Arbitration Convention (in connection with § 48 BAO application); or domestic remedies.

Austrian taxpayers should act promptly if the German tax authorities intend to correct the TP, as a mutual agreement procedure is a time and cost-consuming instrument. Based on the **mutual legal assistance agreement of 4 October 1954, Article 4 (2)** between both countries "in urgent cases" – which is always the case in tax audits – a direct contact between the competent tax authorities of both countries is possible in a mutual agreement procedure. On the Austrian side, the auditor of large-scale undertakings is involved according to an internal tax directive in Austria. Every taxpayer who is confronted with a TP correction in Germany (correction draft of German tax auditor exists) is therefore well-advised, even before the issuance of the formal German decision, to get in contact with his competent Austrian tax authority and/or his tax advisor and to suggest such procedure thereto. In so-called **"bona fide" cases**, the tax authorities will normally follow such a suggestion of the taxpayer. A mutual agreement procedure is, however, necessary in statute of limitation. Such a direct contact between the tax authorities, based on the mutual legal assistance agreement of 1954, is therefore an uncomplicated way to avoid long and complex mutual agreement procedures.

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Brazil

Brazil's Request to Join OECD: Changes to Local Transfer Pricing Rules?

After acting as a Key Partner of the Organisation for Economic Co-operation and Development (OECD) for approximately 10 years and taking part in several bodies, projects (such as the Base Erosion and Profit Shifting – BEPS project) and legal instruments over the years, Brazil presented a formal request to join the OECD on 29 May 2017.

If approved, the accession of Brazil as a member of the OECD could have a significant impact on the Brazilian transfer pricing rules in a few years. Widely known for its complex tax system, Brazil chose to adopt, as of 1997, transfer pricing rules inspired by the OECD Transfer Pricing Guidelines but mostly based on objective criteria.

Although the criteria adopted by Brazil has a relatively straightforward application, most often than not, Brazilian transfer pricing rules do not necessarily result in arm's length prices due to use of predetermined profit margins (which can amount to 40% for certain activities).

In addition to the use of fixed margins, Brazilian transfer pricing rules deviate from the OECD Transfer Pricing Guidelines in the following main aspects:

Concept of associated enterprises	Broad concept – including, for example, companies with the exclusive rights to buy or sell assets, goods, services or rights	Participation in the management, control or capital of an enterprise
Scope of Rules	Applicable to imports and exports of assets, goods, services and rights and transactions involving interest. Does not include, for example, royalty or technical and administrative assistance payments from Brazil and business restructurings.	Applicable to all commercial and/or financial relations between associated enterprises
Method	Taxpayers may, as a rule, choose the most favorable method among the methods provided by Brazilian law (Comparable Uncontrolled Price, Resale Price, Cost Plus)	Most appropriate method to reflect the arm's length priciple

Although it is still uncertain as to whether the OECD will accept Brazil's request to become a member of the organisation, if approved, the accession process could require a substantial change to Brazilian transfer pricing rules.

As evidenced above, the main challenges that Brazil could face to ensure the application of the arm's length principle by Brazilian taxpayers could be the elimination of fixed profit margins under the Cost Plus and the Resale Price methods, the adoption of a comparability analysis, the application of the Transactional Net Margin and the Profit Split methods, the implementation of the master file provided under BEPS Action 13 and the adoption of the corresponding adjustments under Double Tax Treaties, among others.

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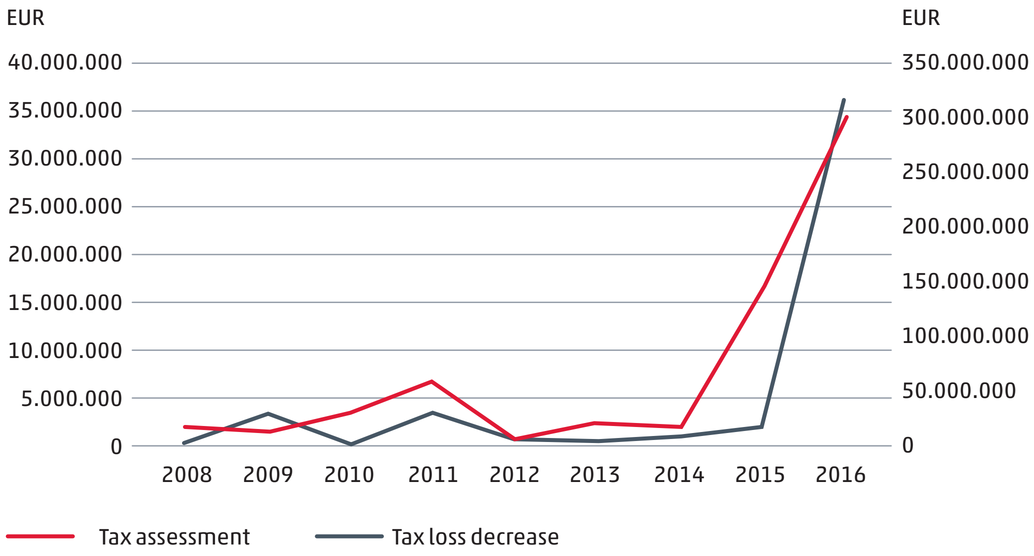
Czech Republic

Increasing number and effectivity of tax controls focused on transfer pricing

In 2014, the Czech tax administration informed that it will focus on transfer pricing during its controls. For these purposes, an obligation has been introduced for some companies executing related transactions to submit a tax return attachment detailing transfer pricing information.

Transfer prices have become a common part of tax controls, which are very often carried out by specialised officials from the so-called specialised control departments or the Specialised Tax Office (in the case of large companies). Transfer prices are therefore currently one of the most significant tax topics for multinational enterprises in the Czech Republic.

To demonstrate the activity of the tax authorities in the field of transfer pricing, it is possible to use the data of the Czech tax administration regarding the controls carried out and the resulting adjustments. From the graph below, it is clear that the amount of tax assessed has increased dramatically.



Areas on which attention is focused during controls are as follows:

- management, marketing and similar services
- licence fees
- financing
- correct profit split with respect to the functional and risk profile
- long-term loss
- transactions with related companies located in a country with a more favourable tax regime

Transfer pricing documentation is not mandatory in the Czech Republic. Tax controls on transfer pricing are therefore controls in which the burden of proof is on the tax authority side. It has to prove that the selected transfer pricing method is contrary to the arm's length principle. The taxpayer can decide on how to defend the pricing of related transactions.

Regardless of the fact that the taxpayer usually has little room to negotiate with the tax authority during the control, the tax authority is required to deal with the facts presented. It cannot refuse them without further explanation. For the taxpayer, it is therefore most appropriate to prepare the documentation in a standard format (Guidance D-334 of the Ministry of Finance provides a recommended documentation structure based on an internationally recognised standard). Another reason for preparing the documentation is the fact that the Czech tax administration has a rather formal approach to controlling transfer pricing.

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Greece

New transfer pricing documentation requirements for Country-by-Country reporting

New Law 4484/2017 implements European Union Guidance 2016/881 amendments to Greek Corporate Income Tax Laws 4170, 4172 & 4174/2013 4378/2016 & 4474/2017. Additional transfer pricing documentation requirements are included, introducing the automatic exchange of Country-by-Country reports, which will be applied for fiscal years after 01 January 2016.

OECD Action Plan 13 describes a standard approach consisting of a Country-by-Country report, Master File and Local File. The latter two were previously introduced in Greek Legislation, so this new draft law confirms that Greece will implement it also.

The report is applicable to Greek tax resident entities, members of a multinational group, with a consolidated group turnover over EUR 750 million in the fiscal year before the fiscal year to which applies. If the parent entity of a multinational group is a Greek tax resident and subject to Country-by-Country reporting requirements, the entity is required to provide a report to the tax authorities within 12 months after the last day of the tax year it refers to.

The report will be exchanged automatically with jurisdictions with which Greece has concluded an information exchange agreement within 15 months after the last day of the tax year it refers to. However, an extension has been given for the first tax year beginning on or after 01 January 2016, so that the reports may be exchanged within 18 months after the last day of the tax year.

A Greek tax resident entity, not being the parent entity of a multinational group, would need to prepare a Country-by-Country report in Greece if the country in which the parent entity is a tax resident has no established reporting obligations or does not have a valid signed agreement regarding automatic exchange of information with Greece on reports, or has failed to comply with the submission of the report.

Regarding the content of the report, the following items are required to be included for each business activity in which the group is active: Revenues, Earnings before income tax, Income tax paid, Income tax accrued, Shared Capital, Accumulated earnings, Number of employees, Tangible assets, Entities Descriptions, Laws incorporated, Business Activities, etc.

The new law provides a template of the Country-by-Country report, whilst providing details regarding the procedures and the requirements associated with the submission of the report and any other issue will be determined by the relevant authorities.

The purpose of the Country-by-Country report is to be able to assess significant transfer pricing risks and other risks related to profit shifting. In addition, the report could serve to assess the risk of whether multinational group members are not complying with the applicable transfer pricing rules and where there may be a need to create economic and statistical analyses.

Finally, the draft law prescribes that a transfer pricing adjustment by the tax authorities may be based on the report.

This provision appears to contradict Article 13 of the BEPS Action 13 Guidance 1, which clearly states that the purpose of the report is to enable tax authorities to perform a risk assessment and not to propose transfer pricing adjustments based on the contents of the report.

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The proposed penalty for non-submitting the report is EUR 10,000. In the case of late submission or submission of inaccurate information, the penalty is EUR 5,000.

Hungary

The implementation of the Country-by-Country Reporting (CbCR)

In 2016, we could only write about the silence regarding the implementation of the OECD BEPS requirements since the Hungarian Ministry of Economy was only planning to apply the directives, such as the Country-by-Country Reporting (CbCR). In the meantime, Hungary – also to fulfil its EU related obligations – has signed a contract regarding Action 13. As a result of obligations deriving from the international agreements/directives, Hungary drafted its national legislation on CbCR. We can now disclose that the CbCR Hungarian legislative implementation has been successfully accepted by the Hungarian Parliament and the regulation came into effect on 31 May 2017.

Transfer pricing in the future in view of the CbCR

Transfer pricing was a hot topic recently in Hungary, so we can expect this close attention in the following years also. The acceptance of the CbCR rules and its implementation opens a new level for the tax authorities in their tax inspections. As with all other affected tax offices around the globe, the Hungarian tax authorities are going to have a broader and more detailed database regarding the transactions between the connected companies, which is going to result in a more effective basis to initiate tax inspections in the future.

The Hungarian CbCR legislation has taken over the reporting information from the international standards. Given that the reporting obligation falls generally on the parent company, Hungarian companies will be less affected by direct reporting obligations towards the Hungarian authorities. Certainly, we expect that the parent companies will request information from their Hungarian subsidiaries on a regular basis.

The obligation might be due for Hungarian subsidiaries also if the following difficult situations arise:

- There is no CbCR requirement in the country where the parent company is located
- There is a valid international agreement in which Hungary and the country where the parent company is based are also members and there is no agreement between the authorities regarding the submission of the CbCR
- There is a technical error in the country where the parent company is located and this failure was reported to the Hungarian authorities

Great news from a CIT perspective

Further improvement has taken place from the Hungarian tax perspective, since the rate of corporate income tax has been decreased to 9% in general. Previously, the lowest rate was

10% on profits up to HUF 500 million (approximately EUR 1.7 million) and a higher rate of 19% was applied for the tax base above the HUF 500 million threshold. From 2017, it is over and the one-digit percentage CIT is valid for every corporation.

Overall, we think that, from a tax perspective, these steps are pointing towards a more effective and investor-friendly future. Given the low corporate income tax rate, tax advisors and company tax managers need to keep an eye on restructurings, for instance, the lower rate might generate intercompany transactions and their pricing might be subject to review in any country by tax officials.

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International

WTS IT tool "WTS CbCR-2-XML Converter"

The Challenge of creating the OECD CbC-XML Schema

Since 01 January 2016, the Base Erosion and Profit Shifting (BEPS) Action Plan has required additional reporting obligations for transfer pricing documentation of Multinational Enterprises (MNEs). In addition to the documentation components of Master and Local File, the Country-by-Country Reporting (CbCR) is a further component (BEPS Action 13).

The CbCR includes an allocation overview of, for instance, revenue, income and taxes by tax jurisdiction (Table 1). Furthermore, a list of all the constituent entities of the MNE – including all main business activities per tax jurisdiction (Table 2) and additional information for further explanation (Table 3).

Due to the recent legal requirements of the OECD with respect to the CbCR, MNEs have to ensure the correct data and transmission structure of the aggregated and prepared CbC reports for the competent authority. The OECD provides a standardised electronic format, the CbC-XML Schema, for the exchange of CbC reports between the jurisdictions. In addition, the OECD published a XML Schema and a User Guide for Tax Administrations and Taxpayers[1].

Analysing and understanding the published User Guide of the OECD requires a wide range of technical and tax knowledge for the correct realisation of the XML Schema.

Therefore, not only an IT specialist with experience in programming is required but also a tax specialist with know-how in transfer pricing. Only the combined knowledge of these two fields allows for the correct creation of the required CbC-XML Schema for the OECD.

In addition to the apparent requirements of table 1-3 of the OECD, the technical guideline contains an increased demand for information. Below are examples of the additional data needed for the correct filling of the tables: currency code (ISO 4217), statement of average exchange rate for the reporting year, country ISO code (ISO 3166), tax identification number for each constituent entity, explicit marking of permanent establishments, stating which language is used (ISO 639-1), etc.

Furthermore, there are extended requirements for the correct transmission to tax authorities: time stamp, unique identifier for each transmission, type of transmission (new creation, correction, deletion) and contact information of the person who transmitted the CbC report.

1 Country-by-Country Reporting XML Schema: User Guide for Tax Administrations and Taxpayers

Our solution – WTS CbCR-2-XML

In order to ensure compliance of the mandatory User Guides of OECD, we have developed the WTS CbCR-2-XML converter. http://www.wts.de/en/content/cbcr-2-xml.php

Our online-tool[2] is fully compliant with the requirements of the OECD User Guides referring to the mandatory XML Schema. The WTS CbCR-2-XML covers all conditions for a transmission of the data from the OECD table 1-3 in the required structure. The existing, already validated CbCR data will be uploaded via standardised CSV[3] into the WTS CbCR-2-XML converter, by entering user data into a web browser. In the next step, the converter transforms the data of the import files into the required electronic XML data format of the OECD. The converted file is then available for export and can be dispatched in the individual transmission-ways and interface due to the national requirements (recently various kinds of transmission are existing – caused by different implementation of the OECD BEPS 13 in the domestic legislation).

The WTS CbCR-2-XML converter is only one part of our CbCR service portfolio. Furthermore, we offer a tool solution for validation, risk analysis and transmission of the CbCR data (WTS CbCRmanager). http://www.wts.de/en/content/cbcmanager.php
In addition to this CbCR standalone solution, we offer an all-in-one tool for the complete transfer pricing process (WTS TPmanager). http://www.wts.de/en/content/tpmanager.php

Additional Services of WTS

In addition to our tool solutions, we offer other different services related to CbCR. We can support our clients with collecting and processing the required CbCR data. Furthermore, we are able to validate the collected data and create individual risk reports based on standardised key performance indicators.

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Japan

Transfer pricing guidebook released in Japan

The Japanese NTA (National Tax Authority) has released a transfer pricing guidebook consisting of 3 parts (June 2017). The guidebook is to support the transfer pricing tax compliance of the Japanese companies as follows:

- The first part of the guidebook describes seven action plans, amongst which two actions may be relevant for foreign subsidiaries in Japan (as of July 2017):
  - To provide verbal responses to specific inquiries by the taxpayers (such as functional analysis, selection of comparative transaction, selection of profit split factor, target profit ratio range, etc.) based on written documents submitted, and
  - To conduct company visits requested by the NTA, so that NTA can carry out consultations and give advice regarding taxpayers' transfer pricing documentation on site.
- The second part of the guidebook describes 18 important practical points in the Japanese transfer pricing audit cases.
- The third part of the guidebook contains 2 samples of local files, one of which is a typical sample of local file made by a foreign subsidiary in Japan

2 WTS does not save any data within using the WTS CbCR-2-XML converter. Data will be deleted after generating the XML file and logout of the user. The WTS CbCR-2-XML converter is hosted on a server by WTS in Germany.

3 Easily to generate by using Excel.

If Japanese companies have either more than JPY 5 billion tangible transactions or more than JPY 0.3 billion intangible transactions with a foreign related party in a preceding fiscal year, a local file must be submitted at the same time with the corporate tax return ("simultaneous documentation"). The first year of the local file is the fiscal year beginning after April 2017 (for most of the foreign companies, fiscal year starting from January 2018).

The transfer pricing guidebook can be downloaded from the following link (Japanese)
http://www.nta.go.jp/kohyo/press/press/2016/kakaku_guide/pdf/ikkatsu.pdf

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Luxembourg

New IP regime as of 2018

On 04 August, the Luxembourg Government submitted its long-awaited bill of law for the introduction of a new tax regime in order to increase intellectual property ("**IP**") developments (the "**Bill of Law**"), in line with the OECD BEPS modified nexus approach, effective as of 2018 and replacing the former IP regime (grandfathering until 30 June 2021).

According to the Bill of Law, **80% of the Adjusted Net Eligible Income was derived from an Eligible Asset qualify for a tax exemption**. Furthermore, such **Eligible Assets are equally exempt from the (0.5%) net wealth tax**.

Eligible Assets include (a) patents, (b) utility models, (c) complementary protection certificates for patents for medicine and plant protection products, (d) extensions of a complementary protection certificate for paediatric medicines, (e) plant variety certificates, (f) orphan drug designations and (g) software protected by national copyrights, provided that such Eligible Assets were constituted, developed or improved after 31 December 2007. The definition of Eligible Assets clearly excludes IP assets with a commercial or marketing nature (e.g. trademarks, tradenames, logos, etc.).

Net Eligible Income: Eligible Income reduced by the Total Costs as well as all costs that are indirectly linked to the Eligible Asset and which are attributable to the same accounting year.

Eligible Income: (a) royalties, (b) income in direct relation with Eligible Assets which are incorporated into the sale price of services or products, (c) income resulting from the sale of an eligible asset and (d) indemnities obtained within the framework of a legal proceeding or of an arbitrage concerning eligible assets.

Total Costs: the sum of (i) the Eligible Costs, (ii) the acquisition costs of an Eligible Asset and (iii) costs of R&D activities carried out in direct relation to the constitution, the development or the improvement of an Eligible Asset which have been outsourced to related parties.

Eligible Costs: the total sum of (as and when they are incurred) (i) expenses (excluding the acquisition costs of the Eligible Asset, interest expenses, financing costs and real estate costs) that have a direct relation with R&D activities aimed directly at the constitution, development or improvement of an Eligible Asset, (ii) expenses incurred by a permanent establishment located in the European Economic Area other than Luxembourg (which is operational at the time the income is derived and does not itself benefit a tax regime similar to the IP tax regime in the country of its establishment) and (iii) costs of R&D outsourced directly or indirectly to third parties.

Adjusted Net Eligible Income qualifying for the 80% tax exemption is determined by multiplying the Net Eligible Income by a ratio equal to (i) the Eligible Costs plus 30% thereof over (ii) the Total Costs.

The Bill of Law provides that the 80% tax exemption is in principle (subject to exceptions) to be applied on the basis of each IP individually.

The Bill of Law provides for measures in cases where an IP that still benefits from the grandfathering rules under the former IP tax regime and equally qualifies under the proposed IP regime. In such cases, the taxpayer will have to choose which regime to apply until 30 June 2021. Any choice made applies irrevocably for the remaining period until 30 June 2021 and applies to all Eligible Assets which are covered by both the former and the newly proposed IP tax regime.

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The Netherlands

Should a construction permanent establishment always realise a profit?

In practice, a construction permanent establishment often operates as a service provider to the foreign head office. The head office acquires, prepares and implements the construction project. The permanent establishment manages and supervises the project locally, having a routine function and limited risk profile. The Dutch tax authorities apply the Authorised OECD Approach ("AOA") when determining the profit of such construction permanent establishment and argue that it should be remunerated based on the cost-plus method, given the routine function and risk profile.

The AOA means that the result attributable to a permanent establishment is the result that would have been earned by the permanent establishment if it were a separate and independent enterprise that would have the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks of the permanent establishment and the head office.

The result of this approach is that even when the total result of the project is a loss, this could still mean that a taxable profit is to be reported by the permanent establishment. Recently, we had a case at hand where the cost-plus method argument was abandoned and a "nil" result was accepted by the Dutch tax authorities.

This is in line with the 2010 Report on the Attribution of Profit to Permanent Establishments, which states that there are circumstances in which providing a service will not give rise to profit for a permanent establishment. For example, the situation may occur that the market value of the intra-group services does not exceed the costs incurred by the service provider (in this case the permanent establishment). This may occur if, for example, the service is not a regular or recurring activity of the service provider, but incidentally is offered. The big difference between a fictional construction permanent establishment that provided a (fictional) service to the head office and a regular permanent establishment providing a service to the head office is the degree of permanence. A construction permanent establishment is, by definition, temporary and the services of such a fictional construction permanent establishment are, by definition, incidental and auxiliary, because the permanent establishment no longer exists at the completion of the service to the head office. As a result, it can be argued that the construction permanent establishment should be assessed differently than a regular permanent establishment in case of an overall loss situation.

Section 7.36 of the 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("TPG") defines an exception for services that are not a regular or recurring activity of the service provider, but are incidentally offered. According to paragraph 7.36 TPG, a MNE Group may determine that the service is granted intra-group (at cost) instead of by third party. In that case, it would not be appropriate to increase the price for the service above what would be determined by the CUP method, only to ensure that the permanent establishment makes a profit. Such a result would be in breach of the arm's length principle, according to the TPG.

We conclude that it is not always appropriate to allocate a profit to a construction permanent establishment that has a routine function and limited risk profile.

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Portugal

Enhancement of tax transparency

Portugal is, individually and as an EU member state, strongly committed to implementing adjustments to its TP regulations following the BEPS initiative. The most recent public report on the Strategic Plan for 2015-2017 to combat fraud and tax evasion issued by the Portuguese tax authorities (PTA) includes several actions regarding transfer pricing matters, including the adoption of practical measures in order to achieve the following goals:

- Enhance the use of advanced pricing agreements, to increase the predictability of the tax treatment of transactions between connected entities;
- Intensify the use of instruments of international co-operation (such as automatic exchange of information mechanisms), to detect cross-border tax fraud and tax evasion;
- Improve the control of national and international financial transactions between related parties, to detect situations of abusive tax planning, tax fraud and tax evasion.

In this context, on 08 August 2017, a final step of the legislative procedure was concluded as the President issued an approval of the transposition into the domestic legislation of Council Directive (EU) 2015/2376 of 08 December 2015, as regards the enhancement of transparency through administrative cooperation in the field of direct taxation, one of the cornerstones of the broader anti-tax avoidance package issued by the EU Commission. This domestic diploma, to be published and enter into force shortly, will bear particular relevance in respect of spontaneous exchange of information to be disclosed by the PTA to other tax authorities in respect of cross-border rulings and advance pricing arrangements sanctioned by the PTA.

Under this regime, the PTA will report to the tax authorities of the EU member states all cross-border rulings and advance pricing arrangements sanctioned which are still in force, by the following deadlines:

- By 01 January 2018, with respect to cross-border rulings and advance pricing arrangements sanctioned between 01 January 2012 and 31 December 2016;
- Until the end of the third month as of the end of the semester during which the cross-border rulings and advance pricing arrangements are sanctioned, with respect to cross-border rulings and advance pricing arrangements sanctioned as from 01 January 2017.

However, we anticipate that, for the time being, this initiative will have a reduced application with respect to advance pricing agreements considering that taxpayers' resort to this mechanism has been very limited so far, despite being available since 2008.

In addition, and also inserted within the tax transparency enhancement initiative, the same Presidential approval served as the final step of a legislative procedure concerning the transposition into the domestic legislation of Council Directive (EU) 2016/881 of 25 May 2016, which foresees further detail to the Country-by-Country report regime – introduced in the Portuguese jurisdiction through the State Budget for 2016.

Under the domestic Country-by-Country reporting regime, which follows closely the Council Directive as well as BEPS Action 13 Final Report, multinational enterprises with an annual turnover of at least EUR 750 million must submit to the PTA a declaration disclosing detailed financial and tax-related information per country (Country-by-Country Reporting) until the end of the year following the one it respects to.

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Romania

Romania introduces Country-by-Country Reporting

Ever since the parliamentary elections in November 2016, the Romanian Government's tax policy has been largely promoted on the idea that large foreign companies under-declare profits they make in Romania. In this context, no one was surprised by Romania being one of the early adopters, on 09 June 2017, of Directive (EU) 2016/881 for the modification of Directive (EU) 2011/16 concerning the mandatory automatic exchange of information in the field of taxation.

Background: The Directive follows the "Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report" released on 05 October 2015 as part of G20/OECD's project on BEPS (Base Erosion and Profit Shifting).

Requirement to file: In short, Romanian ultimate parent entities controlling a Multinational Enterprise (MNE) group will have to file Country-by-Country Reports (CbCR), provided that the consolidated group income exceeds EUR 750 million. Other Romanian entities, part of an MNE group, will have to file CbCR if, for instance, the ultimate parent entity does not have a CbC reporting obligation in its own jurisdiction.

Duty to notify: All Romanian entities forming part of an MNE group are required to inform the Romanian tax authorities if they are required to file CbCR or, if not, to provide information regarding the identity, including tax residency, of the reporting entity.

Content of CbCR: In short, the information to be included in the CbCR of each jurisdiction concerns total income, profit/loss, personnel, profits tax paid/accrued, capital, retained earnings, tangible assets as well as the identity, including tax residency, of all entities in the MNE group.

Penalty regime: Failure to file, late filing or incomplete filing of a CbCR is subject to administrative fines of between EUR 6,000 and EUR 22,000.

Entry into force: The new legislation came into force on 13 June, whilst the first CbCR is due by 31 December 2017.

Author's remark: Putting the Directive to one side for a moment, one cannot overlook the Government's recent side initiative, which was to drop the current 16% tax on profits and replace it with a tax on turnover. Unsurprisingly, such an initiative's declared objective was to pursue foreign companies which, apparently, declared lower profits than local companies. Following the pressure put by media and market players, the side initiative itself was dropped in the meantime, yet a major question remains: does the Romanian Government trust in the effectiveness of the Directive, or will it always feel the need to introduce additional side measures in view of a better tax collection?

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Summary: In the meantime, Romanian ultimate parent entities and, potentially, other Romanian entities forming part of an MNE group should start collecting the information needed to be filed under the newly introduced CbC reporting requirements.

Ukraine

The First Shots in Ukrainian TP Court Practice

Transfer pricing rules were introduced in Ukraine not long ago – from 01 September 2013. However, now we can speak about the first results of TP audits and the first court practice on TP matters.

Court disputes regarding TP rules can be divided into two groups:
1. disputes on procedural issues;
2. disputes on the essence of TP rules.

Procedural disputes on determination of "controlled" transactions

A notable group of "procedural disputes" relates to situations where the tax authority insisted on the recognition as "controlled" transactions with LLPs registered in the United Kingdom by the partners that are residents of "low-tax" jurisdictions, included into the special list of "low-tax" jurisdictions, adopted by the Cabinet of Ministers of Ukraine for TP purposes. Such partnerships are fiscally transparent, meaning that they are not taxable in the UK and due to the fact that the UK was not included into the abovementioned list of "low-tax" jurisdictions, such transactions do not formally trigger TP control in Ukraine. The courts mostly applied formal approaches and took the side of the taxpayers, concluding that the formal criteria for the recognition of transactions as "controlled" were not met in such cases.

At the same time, we now expect that such kinds of disputes will find a new lease of life, due to the recent amendments introduced into the Tax Code, which provide that, in addition to the controlled transactions with legal entities registered at the "low-tax" jurisdictions, from 2017, TP control will cover transactions with special legal forms of entities that do not pay corporate income tax at their tax residence. The List of such legal forms for particular countries has been in force since 04 July 2017. Furthermore, for example, from now on, it is directly provided that transactions with UK LLPs fall under TP control in Ukraine.

The question is whether the courts of cassation will cancel positive appeal decisions for the taxpayers, referring, for example, to the rule of the superiority of the essence over the form of legal relationships.

Another kind of dispute concerns the issue of the numerous wording and re-wording of Article 39 of the Tax Code that laid down TP rules in Ukraine together with the absence of proper transitional provisions.

The existing practice on the essence of the application of TP rules

The most common type of disputes are those over the application of comparative uncontrollable price method. Tax authorities usually pay special attention to exporters of agricultural products, metal products and chemical products. In one case, the tax authority made a tax assessment based on ranges of prices for agricultural products according to the publications, which were recognised as official sources of information in the period 2013-2014. The court, in the first instance and in the appeal instances abolished the assessment, based on the fact that information available in such publications was not sufficient to determine the comparability of transactions.

Existing disputes also indicate that economic analysis shall not result only at the market-based profitability range. No less attention should be paid to the way in which the indicator of the profitability of the controlled transaction is calculated. It is necessary to ensure the logic and transparency of such calculation, as well as the competent statement of all essential aspects of its calculation in TP documentation.

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