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# WTS Transfer Pricing Newsletter

## Editorial

Dear Reader,

It is our pleasure to present to you the second edition of our WTS Transfer Pricing newsletter for 2021.

In the latest edition of the WTS Transfer Pricing Newsletter, our colleagues from 16 countries provide an update on recently introduced legislations and cases, specifically the adoption of certain OECD Guidelines. Additionally, developments in the field of transfer pricing, including the implementation of the BEPS project into the laws of the various countries are presented.

### Europe

In **Austria**, the draft of the revised Austrian Transfer Pricing Guidelines 2020 was published. Our Austrian colleagues outline the changes and consequences.

In **France**, after half a century, the status quo of the tax regime regarding intangible assets is changed. Our French colleagues outline some of the principles behind the newly established "Nexus" approach.

In **Germany**, the Federal Ministry of Finance has published the Administrative Principles 2020. These replace the version of 2005 to some extent, but there is a greater emphasis on procedural aspects.

Our colleagues in **Hungary** explain the current focus of the Hungarian tax authority at Hungarian subsidiaries of foreign companies under the aspect of transfer pricing following the COVID-19 crisis.

In **Italy**, new rules came into force regarding the structure, content and submission of the transfer pricing documentation. These changes apply to both the master file and the local file and have significant implications for the taxpayer.

In **the Netherlands**, the Dutch Ministry of Finance has published a draft proposal under which downward adjustments would be limited in order to address transfer pricing mismatches when applying the arm's-length principle.

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The **Polish** tax authority has issued guidance on new documentation requirements for transactions involving tax havens. The article explains to what extent this has a practical effect for taxpayers.

The **UK** government has opened a consultation process on changes regarding the transfer pricing documentation requirements valid in the UK. Our British colleagues explain the proposed changes.

### Further Countries

Our colleagues from **Argentina** provide an overview of the new mandatory disclosure framework for domestic and international tax planning arrangements.

**Brazil** is known for not implementing the OECD Guidelines regarding transfer pricing. Now, new transfer pricing documentation requirements have been announced. This will require a significant effort, even though Brazil is already at a very high level in this respect.

**Chile's** tax court has ruled against the Chilean Tax Administration in a decisive case that could bring profound changes to the local transfer pricing regulatory framework. This case and its impact on taxpayers is outlined by our Chilean colleagues.

In **China**, the State Administration of Taxation has published a consultation paper that shortens the APA process to just three steps, allowing for a significantly faster processing time in order to provide tax certainty.

The article from **Ghana** sheds light on the newly established transfer pricing regulations, capturing some of the BEPS Action Items.

Our colleagues in **India** provide information on the recently introduced regulatory changes concerning both procedural and tax compliance aspects of transfer pricing.

**Senegal** is currently implementing several BEPS action items into local tax laws. Our colleagues explain which actions have been implemented and how these changes will affect companies.

In **Vietnam**, the fiscal authorities have changed the process of APA conclusion in order to implement this instrument practically. The article outlines the key aspects of this development.

Yours sincerely,

WTS Global Transfer Pricing Team

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## Austria

## New Austrian Transfer Pricing Guidelines 2020

**The OECD's work in the Base Erosion and Profit Shifting project (BEPS) resulted in an update of the OECD Transfer Pricing Guidelines 2017. What the resulting necessary fundamental revision of the Austrian Transfer Pricing Guidelines 2010 brings.**

On 4 December 2020, the Austrian Ministry of Finance published the draft of the revised Austrian Transfer Pricing Guidelines (Austrian Guidelines) 2020. The Austrian Guidelines 2020 are an essential interpretative aid for the application of the arm's-length principle in business relationships between associated companies and permanent establishment situations.

### Arm's-length principle

The "arm's-length principle" requires that business relationships between related parties be agreed upon as would be the case in comparable transactions between independent third parties. Otherwise, the tax authorities are entitled to adjust the agreed prices to the arm's-length value and make corresponding profit adjustments.

### The contents at a glance

The former Austrian Guidelines 2010 have been fundamentally revised, but the structure has essentially been retained. In addition to current case law and administrative practice, the Austrian Ministry of Finance information on the Transfer Pricing Documentation Law (VPDG) and the corresponding implementing regulation has also been incorporated. In addition, regulations for companies that are not required to provide documentation under the VPDG as they do not exceed the threshold values have been integrated into the Austrian Guidelines 2020.

Specifically, the changes under the OECD Guidelines 2017 have been taken into account, which were introduced during the Base Erosion and Profit Shifting (BEPS) project. During the BEPS project, the OECD made proposals - specifically in BEPS Actions 8 to 10 - to ensure that taxes are paid where corporate value creation is realised. These proposals were fully incorporated into the 2017 update of the OECD Guidelines. These amendments are now also included in the Austrian Guidelines 2020. The appendix to the Austrian Guidelines 2020 also contains an overview of the responses of the Austrian Ministry of Finance to questions on transfer pricing.

### Structure

The Austrian Guidelines 2020 consist of five parts:
- International Group Structures
- Multilateral permanent establishment structures
- Documentation and reporting requirements
- Transfer pricing audit by tax authorities
- Appendix

The Austrian Guidelines 2020 also devote a large chapter to permanent establishment taxation, with detailed explanations on the attribution of results. The attribution of results

between the parent company and its permanent establishments also follows the arm's-length principle created for legally independent associated companies, but with certain deviations (i.e., "AOA light").

**Key message**

The new Austrian Guidelines 2020 provide assistance in interpreting the arm's-length principle. They are a reference work for practitioners. The update primarily incorporates those changes to the OECD Guidelines that were included in the 2017 update due to BEPS. The final version of the Austrian Guidelines 2020 is to be expected shortly.

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## France

## Self-financing through intangible assets or how to generate significant tax savings

After half a century of status quo, the Finance Act dated 28 December 2018, for 2019, has completely changed the previous tax regime. This new approach called "Nexus" was driven by Action 5 of the OECD's BEPS programme. It is therefore essential for groups owning, managing or developing intellectual property to integrate the new rules both to secure the existing business model and the related transfer pricing policy and to seize new opportunities that may prove very attractive.

From now on, the effective tax rate on the proceeds from the sale, licence or sub-licence of certain eligible assets (patents, copyrighted software, plant utility certificates, patent-backed manufacturing processes, etc.) will be 10% in principle, but the full application of this preferential tax rate can only be obtained if certain conditions are met relating to the research and development expenses and, specifically, to the place where they were incurred (France or abroad) and to the quality of the company that incurred them (third party or related company). Thus, the base of income that can benefit from this preferential tax rate will be potentially degraded by a tax liability ratio (known as the Nexus ratio) depending on R&D expenses.

Nexus, Research Tax Credit, management of royalty flows, transfer pricing policy: IP can be a serious ally in generating cash, which has become a priority for some groups or companies in the context of the pandemic. Some will choose to monetise their assets directly through licensing agreements, for example, or more radically through divestitures; others will prefer to manage their tax rate by taking advantage of the new Nexus approach or even applying for tax credits when possible. However, these opportunities may be counterproductive if the options chosen are the result of silo approaches.

Besides, the well-established royalty flow pattern will have to be challenged to take into account the 2019 Finance Law that has also seriously curtailed the deductibility of royalties paid to a related entity located outside of France and the EU in a state deemed "fiscally harmful by the OECD" (i.e. not "Nexus compliant") if the royalties paid are taxed at an effective rate of less than 25%.

As the OECD has set a deadline of 30 June 2021 for compliance with the Nexus regime, the new rule limiting the deductibility of royalties paid from France to a country that has not

transposed the Nexus approach could therefore quickly give rise to significant issues of challenging the full deductibility of royalties. For example, the United States currently has a regime that is considered fiscally harmful. The bill could be very high, since the deductibility questioned corresponds to a percentage of the royalties paid (product of the difference between the reference rate of 25% and the local effective tax rate and the reference rate of 25%).

Lastly, in an exsanguinated economic context that can lead to receivership procedures, the stakes in terms of intellectual property will prove to be crucial: whether it is a question of the valuation of assets, the "post mortem" survival of registered patents, their continuity, their protection, etc.

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Thanks to the multidisciplinary nature of our teams, it is possible to address the issues through a 360° approach crossing several areas of expertise simultaneously in every business field and sector.

## Germany

## German Federal Ministry of Finance: Administrative Principles 2020 published

On 3 December 2020, the Administrative Principles 2020 were published in a circular of the German Federal Ministry of Finance. Over 25 pages, the Administrative Principles 2020 concretise the views of the tax authorities on the obligations of taxpayers to cooperate regarding the examination of profit allocation between associated companies pursuant to section 90 of the German Fiscal Code ("Abgabenordnung", hereinafter "AO") and on estimates and penalties pursuant to Section 162 AO. The Administrative Principles 2020 partially replace the Administrative Principles Procedure of 12 April 2005 with a focus rather on procedural aspects.

In cross-border cases, the German taxpayer has an increased obligation to cooperate. Specifically, the taxpayer has to clarify the facts of the case, obtain evidence and take precautions to be able to provide evidence. The new Administrative Principles 2020 specify that the taxpayer cannot claim inability to clarify the facts or to submit evidence when the taxpayer could have had the opportunity to do so in structuring the circumstances. According to the Administrative Principles 2020, potentially relevant evidence now explicitly includes "emails, messenger messages or messages by means of other electronic communication media, insofar as these include business content with tax relevance" in addition to, as previously, e.g. expert opinions and statements on transfer prices.

The taxpayer has to demonstrate the arm's-length nature of the transfer prices. According to the Administrative Principles 2020, it is no longer sufficient to justify the adequacy of the transfer pricing method actually applied; it now must be explained why the transfer pricing method chosen is the most appropriate method from the taxpayer's point of view. Furthermore, when applying the hypothetical arm's-length test, an explanation of the underlying assumptions applied as well as a sensitivity analysis on the effects of alternative assumptions on the valuation method is now also considered necessary.

According to the Administrative Principles 2020, the tax authorities are given the right to choose the correct transfer pricing method. If the transfer pricing method chosen by the tax authorities differs from that selected by the taxpayer, the taxpayer must provide the necessary information required by the tax authorities for the application of the transfer pricing method selected by the latter.

The Administrative Principles 2020 now also refer to the most recent version of the OECD Guidelines as of 2017. The official language remains German. Upon the taxpayer's request, the German tax authorities may accept documents in foreign languages, which may have to be translated upon the German tax authority's request.

Traditionally, German tax authorities have preferred a price-setting approach instead of an outcome-testing approach. Therefore, the economic and legal circumstances at the time of the conclusion of the contract or at the time when adjustments would have been made by third parties are decisive for the records. According to the Administrative Principles 2020, data that has subsequently become known may be used, provided that it refers to the time of the conclusion of the contract; it is irrelevant as to whether the contract was concluded in writing, verbally or by implied action.

Furthermore, the new Administrative Principles 2020 include further formal questions concerning transfer pricing documentation: regarding the local file, sample information on functions, assets and risks that may be relevant for the documentation of the facts and circumstances is provided in tabular form. Regarding the master file, clarification on the preparation, on the request for submission as well as on the submission deadline is presented.

If the taxpayer does not fulfil the obligations to cooperate, the tax authorities are allowed to estimate the tax base and to impose penalties pursuant to section 162 AO. This includes instances where the German taxpayer provides no transfer pricing documentation or a transfer pricing documentation that is non-usable. Records are non-usable if they do not enable a third-party expert within a reasonable period of time to determine and verify which facts the taxpayer has realised and whether the arm's-length principle has been met. According to the Administrative Principles 2020, records are deemed to be non-usable, for instance, in the following cases: (i) documentation of facts is missing or inaccurate, (ii) the arm's-length analysis is missing or does not match the function and risk profile, (iii) the arm's-length analysis does not offer a sufficient justification on the comparability of external data or (iv) the application of transfer pricing method chosen is not presented. In case of non-usable records, the taxpayer should be given the opportunity for amendments.

According to the Administrative Principles 2020, the submission of usable records does not exclude income adjustments by the tax authorities. Generally, the tax authorities shall now be allowed to make income adjustments, even in the case of submission of usable records, if the transfer prices applied by the taxpayer are highly unlikely to be at arm's-length and the transfer price determined by the tax authority is at least more likely.

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In general, the new Administrative Principles 2020 contain (i) adjustments to the updated legal situation since 2005, (ii) further information on mainly formal questions concerning transfer pricing documentations and (iii) amendments on procedural aspects. It is also expected that the remaining parts of the Administrative Principles Procedure of 12 April 2005 and the Administrative Principles of 23 February 1983 will be revised soon. Above and beyond the new Administrative Principles 2020, changes on German transfer pricing rules as embodied in section 1 Foreign Tax Act will soon be enacted, which will likely include a legal implementation of DEMPE and intangible values, as well as further amendments to the existing transfer pricing rules.

## Hungary

## Pandemic does not stop TP audits in Hungary

Although the pandemic is not (yet) over and its final accounting and tax effects are uncertain in the long run, the Hungarian tax authority did not stop inspecting Hungarian subsidiaries of the foreign companies from a transfer pricing perspective. Some of the actual tax inspections now relate to the pandemic year of 2020, when business was flourishing for the vast majority of the companies in the first quarter.

One month before the OECD published its guidance on the transfer pricing implications of the COVID-19 pandemic in December 2020, the Hungarian tax authority published a guideline in connection with the TP effects of the pandemic. The gist of the summary is that the Hungarian tax authority generally follows the international trends and is actively participating in working group discussions, but the tax authority also made it clear that every case will be reviewed considering all economic circumstances. Referring to this, companies with limited risk profile cannot simply refer to the pandemic as a major factor in declining profitability.

The aforementioned summary describes similar statements to that published by the OECD. The main points are as follows:

- If there has been a change at the company as a result of the pandemic, this should be detailed in the transfer pricing documentation.
- In contrast to the 2008/2009 crisis, which started from the financial sector and gradually spread to various geographical regions and economic sectors, the impact of the pandemic on the economy appears in a short period of time and in a concentrated way (less chance to find useful data to compare periods).
- Any adjustment(s) made shall be justified and should be traceable.
- The allocation of losses is generally not acceptable. Adverse economic conditions alone do not justify the allocation of losses, it is also necessary to examine the risks and how they are controlled.
- Companies characterised as limited-risk firms based on the functional analysis can therefore be expected to keep on operating with the stable profitability they have had.
- If database filtering is used to support the profitability level of a limited risk company, permanent loss-making comparable companies should continue to be refused.

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- If the vast majority of independent players with the same characteristics in the given sector have been loss-making due to the effects of the pandemic, it is not necessary to exclude loss-making companies from the sample.
- Amendments and submission of APAs has to be planned carefully and taking into account specific features of the pandemic.

The use of professional company databases when applying TNMM will still remain important, also looking at the fact that the Hungarian tax authority has access to these databases although, to date, a mass volume of financial company data reflecting the economic challenges caused by the pandemic is not really available. Lastly, we have to note that the tax authority requests the Master File as well in tax inspections, although not all foreign mother companies are preparing said documents with the details required by the Hungarian tax laws (which are based on EU and OECD rules). A lack of these documents can trigger default penalties up to approximately EUR 6,000. Nevertheless, we also see a trend in which the tax authority focuses more on the determination of the market prices by also using their access to international databases, rather than just making statements about incomplete transfer pricing documentations.

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## Italy

## New Rules on the Transfer Pricing Documentation

*Ten years after the introduction of the Italian Commissioner Decision (the "Decision") on transfer pricing documentation, the Italian Revenue Agency published on 23 November 2020 a new Instruction (no. 360494, the "Instruction") which materially changed the Decision. This contribution examines the new developments thus introduced.*

Starting from fiscal year 2020, multinational groups, in order to benefit from the so-called penalty protection, must comply with the requirements of the Instruction that replaces the provisions introduced in 2010.

It should be noted that transfer pricing documentation is not a compulsory filing under Italian law. However, if it is available in time and consistent with the domestic requirements, the taxpayer is entitled to benefit from the penalty protection provided for by Articles 1(6) and 2(4ter) of Legislative Decree 471/1997. However, the tax authority may **deny the penalty protection,** despite the fact that the structure of the documentation complies with the applicable provisions, if alternatively: the contents are incomplete and do not comply with the Instruction, or the information provided does not correspond, in whole or in part, to the truth.

The Instruction makes the following main changes to the previous framework: 1) structure of appropriate documentation (Master File and Local File); 2) form and deadline; 3) documentation on low value added services.

### Structure of appropriate documentation

The Instruction states that the set of TP documentation must include: (i) a Master File; and (ii) a Local File, whilst introducing a new structure of the respective content. The Master File will become a mandatory document for all Italian taxpayers that want to access the elective

Italian TP penalty protection regime (including subsidiaries of foreign groups, for which, under the previous Decision, no Master File was required). Under the new provision, the compliant documentation has undergone substantial formatting changes, as well as seeing a significant increase in data and information in accordance with the annexes to Chapter V of the OECD Guidelines 2017. The Master File must contain information on the multinational group, including the nature of the global business activities, the general transfer pricing policies and the global allocation of income and economic activities, in order to enable tax administrations to assess the presence of a significant transfer pricing risk. The Local File provides more detailed information on specific intra-group transactions.

### Form and deadlines

The documentation set must be in Italian, whilst the Master File may be in English. Both the Master File and the Local File must be signed by the taxpayer's legal representative or by a delegate by electronic signature with time stamp to be made within the date of submission of the tax return for the relevant tax year. The new timestamp rule will have a relevant operative impact on the timeline for finalising the transfer pricing documentation.

The delivery of the documentation to the Financial Administration is due no later than 20 days from the request.

### Documentation on low value added services

The Instruction includes new specific rules concerning the documentation relating to low value added services, which should contain information concerning the description of intra-group services, service supply contracts, the valuation of operations and the related calculations. Said information should be provided with a specific set of documentation separate from the Master File and Local File.

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## Netherlands

## Proposed limitation to Dutch unilateral downward adjustments

In March 2021, the Dutch Ministry of Finance published an internet consultation on a draft proposal to amend the Dutch codification of the arm's-length principle, the ("Draft Bill"). The Draft Bill, which is intended to enter into force on 01 January 2022, will limit unilateral downward transfer pricing adjustments of the Dutch taxpayer to the extent that the corresponding upward adjustment is not included in the taxable base of the (foreign) related entity. Under the current rules, unilateral downward adjustments of the profit of a Dutch taxpayer do not need to be mirrored by a corresponding adjustment at the level of the counterparty.

### Takeaways

Considering the absence of grandfathering rules, Dutch taxpayers are well advised to review the potential (retro-active) impact of the Draft Bill on existing rulings and/or APAs. In addition, where contractual terms are applied that deviate from the arm's-length principle, Dutch taxpayers will need to closely follow the legislative process of this Draft Bill.

### The Draft Bill

The Draft Bill proposes to only allow downward adjustments to the extent that a corresponding adjustment is included in the taxable basis in the other jurisdiction. This implies that, for instance, deemed deductions that are not (entirely) picked up elsewhere would no longer be (fully) taken into account for Dutch tax purposes. The Draft Bill also applies to situations where the jurisdiction of the other related entity does not levy corporate income tax. However, deemed deductions are not limited where the corresponding income is not effectively taxed as a result of loss compensation rules or where the income is taxed at a rate of 0%.

The Draft Bill will also limit the tax amortisation of assets for which a step-up in basis to the (higher) fair market value was claimed. Like deemed deductions, this rule will kick in to the extent that the fair market value of such assets is not included in the taxable basis in the jurisdiction of the seller. This would have the effect that taxpayers can no longer claim a (full) tax-deductible amortisation on the fair market value of such assets. The proposed measures also limit the tax depreciation of such assets acquired in the five years prior to FY 2022 (i.e. the tax amortisation limitation will effectively have retro-active effect until FY 2017).

### Rebuttal rule

When applying a one-sided transfer pricing method, e.g. the TNMM, the arm's-length profit of a Dutch group company is determined based on an analysis of its functions, risks and assets. The (subsequent) price setting of the (various) intercompany transactions engaged in by the Dutch company is in fact a result of that arm's-length profit. If tax authorities were to correct upwards the arm's-length price of one of the intercompany transactions (i.e. representing additional taxable income for the Dutch company), whereas its arm's-length profit is not challenged, based on the "total profit concept" the Dutch company can currently claim a corresponding downward adjustment (i.e. a correction on the cost side). On balance, the Dutch company would continue to report its arm's-length profit (i.e. although based on higher income and cost).

However, under the Draft Bill, the corresponding downward adjustment cannot be claimed, as it cannot be argued that this adjustment is included in the tax base 'elsewhere'. In addition to that, it is noted that the correction and the corresponding downward adjustment will often only be made multiple years after the end of the relevant FY. Often the "other related entity" will already have filed a tax return for the FY in question. In its current form, the Draft Bill will also be triggered in situations which are clearly not aimed at abusing mismatch situations.

Various commentators to the internet consultation have indicated that, if indeed enacted, Article 8ba of the Dutch Corporate Income Tax Act will need to include a rebuttal rule. Under such rule, Dutch taxpayers will need to have the possibility to argue that Article 8ba Dutch Corporate Income Tax Act does not apply in certain situations because, for example, given the mismatch situation it was not intended, or where the taxpayer's remuneration continues to be at arm's-length.[1]

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1 In the Hornbach-Baumarkt case dated 31 May 2018, ECLI:EU:C:2018:366., the Court of Appeal of the EU conforms that, in case of alleged non-arms'-length conduct, a taxpayer will need to have the possibility to apply a rebuttal rule.

## Poland

## New documentation requirements for transactions with tax havens as of 1 January 2021

### New regulations and guidance

Amendments introduced to transfer pricing regulations on 1 January 2021 expand the documentation requirements for transactions with tax haven-based entities. The objective of these new regulations is to provide measures for combating unfair tax competition using entities located in tax havens.

In respect of direct transactions with tax-haven based entities, documentation should be prepared both for sales and purchases amounting to over PLN 100,000 (until the end of 2020, only purchases qualified).

Furthermore, the regulations impose a documentation obligation for transactions with tax haven-based "beneficial owners", if the value of the transaction exceeds PLN 500,000. In the event that a taxpayer transacts with a counterparty which has any type of settlements with a tax haven-based entity, it is considered that the beneficial owner of the taxpayer's transaction with the counterparty is this tax haven-based entity. This applies both to related and unrelated counterparties.

The new regulations provoked a lot of controversy and concerns amongst taxpayers. In March 2021, the Polish Ministry of Finance released for public consultations its draft guidance specifying how to determine whether the beneficial owner is not a tax haven-based entity. According to the Polish Ministry of Finance, the way to do so is to obtain a statement from the counterparty that it had no settlements with a tax haven-based entity during the taxpayer's fiscal year.

In addition, in transactions with related counterparties, the taxpayer should verify the accuracy of said statement by requesting the given related party's transfer pricing documentation (Local File, Master File), the CbCR or other documents, such as financial statements with statutory auditor's opinion and report, ownership structure, opinion issued by certified accountant, legal counsellor or the tax advisor.

If the taxpayer determines, with due diligence, that its counterparty had no settlements with a tax haven-based entity, it will not be required to prepare a local file for this transaction.

### Taxpayers' reaction

The draft guidance caused a fierce reaction and massive criticism. In the opinion of taxpayers and tax advisers, the only effect of the discussed regulations and guidance will be the imposition of an unreasonable administrative burden. During public consultations, taxpayers, through the Transfer Pricing Forum, industry associations and bilateral commercial chambers, advocated for postponement, suspension or even withdrawal of these new regulations as being pointless and leading to an excessive effort on the taxpayers' side.

### Practical impact

If the interpretation of the law presented in the draft guidelines is sustained in the final paper, taxpayers, after closing their 2021 books, will be obliged to obtain statements from

their counterparties with whom they concluded transactions exceeding PLN 500,000, stating that these counterparties had no settlements with tax haven-based entities during the taxpayer's fiscal year.

Furthermore, Polish members of MNEs will be required to collect additional documents from their related parties, e.g. Local Files and CbCR, to verify these statements.

Other members of capital groups should thus be prepared for such unusual requests from Polish subsidiaries.

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## UK

## UK Consultation on Transfer Pricing Documentation

UK businesses are currently required to keep records needed to deliver correct and complete tax returns. However, HM Revenue & Customs ("HMRC") does not require transfer pricing documentation to be in a specific format. From 23 March to 01 June 2021, HMRC consulted with the public on more specific UK transfer pricing documentation requirements.

### Purpose

The UK government is proposing to introduce transfer pricing documentation requirements in line with the OECD standardised (Master File/Local File) approach. In addition, certain businesses may be required to report details of material intra-group cross-border transactions in an International Dealings Schedule ("IDS").

A key objective of the consultation is to enable the UK government to find the right balance between the benefits and the potential additional burden on UK businesses.

### Proposed changes

The UK government is seeking views on introducing a mandatory requirement for UK entities within CbCR groups to provide HMRC with a copy of a Master File upon request. The UK government's view is that the majority of MNEs within the CbCR regime routinely create a Master File and that providing this to HMRC should not impose a significant additional burden. The consultation also considers whether the Master File requirement should be limited to MNEs within CbCR groups.

The UK government is also seeking views on introducing a requirement for MNEs to keep and produce a Local File upon request. It has been proposed that the Local File requirement would also apply to UK entities within a CbCR group. The UK government's view is that UK entities which already keep sufficient records to demonstrate compliance would not need to keep additional records. However, the information would need to be summarised in a required manner. An additional evidence log could also be required to enable HMRC to distinguish between facts, technical analysis and opinion.

A requirement to file an annual IDS has also been proposed. The IDS would be used to collect data in a standardised format, which would enable HMRC to undertake a more data-driven risk assessment. Types of data and information that could potentially be

reported include, but are not limited to, (i) the nature and the amount of transactions, (ii) details of financial dealings, (iii) payments of a non-financial nature, (iv) restructuring activity and (v) transfer pricing methodologies applied.

The consultation invites comments on topics such as appropriate timelines (e.g. 30 days to produce the Master File and Local File), materiality/de minimis thresholds, potential exemptions, filing requirements and taxpayers' experiences of reporting requirements with other tax authorities. Comments are also invited on the extent to which relevant data and information can be sourced from current accounting/reporting systems, appropriate types of data/information to be requested and the anticipated administrative burden.

### Survey

FTI Consulting conducted a survey in early May 2021 to solicit clients' views before responding to the consultation.

### Conclusion

Whilst the outcome of the consultation is some way off, we believe that it is highly likely that there will be some additional documentation requirements in the UK, although they may not require much more than the documentation that many groups already prepare voluntarily. Some form of an IDS is expected and will be an additional burden for many groups.

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## Argentina

## Mandatory Disclosure Framework and Transfer Pricing

On 20 March 2020, the Argentine Revenue Service enacted General Resolution No. 4838/2020 (the "Resolution"), which sets a mandatory disclosure framework for domestic and international tax planning arrangements aimed at producing a tax advantage or at avoiding a reporting obligation. This disclosure framework was enacted in the context and in accordance with Action 12 of BEPS and other international precedents, such as the UK "Disclosure on tax avoidance schemes" and the US "Office of tax shelter analysis", but with a much larger reporting scope, given that it includes domestic tax planning arrangements and is not limited to "aggressive" tax planning.

For the international arrangements, the mandatory disclosure framework comprises any agreement, scheme, plan or any other action that results in a tax benefit or any other advantage to the taxpayer, which involves Argentina and one or more locations abroad. As regards the concept of "tax benefit or other advantages", this is defined by the Resolution as any reduction in the taxable amount obtained by the taxpayer or any related party, be it directly or indirectly; including the avoidance to comply with a reporting requirement. Therefore, any tax scheme producing a "tax advantage", under the terms of the Resolution, must be reported by the taxpayer and/or his/her tax advisors.

However, the Resolution also provides a list of specific transactions that must be reported as IA under any circumstances, regardless of whether a tax advantage occurred or not. Amongst them, we can find transactions involving non-cooperating jurisdictions or low/null tax jurisdictions, which are also subject to the transfer pricing regulations set forth in

the Income Tax Law. Said law provides that international transactions with counterparts located in these jurisdictions are deemed not to be arm's-length, thus subject to transfer pricing analysis. This is a consequence of operating with counterparts in opaque locations.

The aforementioned situation implies an overlapping between the mandatory disclosure framework, the transfer pricing rules and other regimes and, therefore, a very complex regulatory framework for the taxpayers. Indeed, according to Argentine transfer pricing rules, counterparts domiciled in non-cooperating jurisdictions or low/null tax jurisdictions are deemed affiliated, thus subject to transfer pricing mandatory analysis. Following a number of Argentine Revenue Service investigations in early 2021, it looks like the Argentine Revenue Service is now expecting to have them reportable under the new information registry for tax planning schemes. The topic remains untested due to its novelty, but taxpayers should request advice to respond strategically, for they could otherwise set a complicated compliance standard, which could be hard to keep over time.

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## Brazil

## New 'Local File' Requirements in Brazil

Brazil is widely known for taking a different approach to transfer pricing rules, with Brazilian rules diverging substantially from the OECD Guidelines. This unique approach also extends to transfer pricing documentation requirements.

Out of the three standard documents recommended by the OECD as transfer pricing documentation requirements, Brazil has only effectively implemented the CbCR, in line with BEPS Action 13.

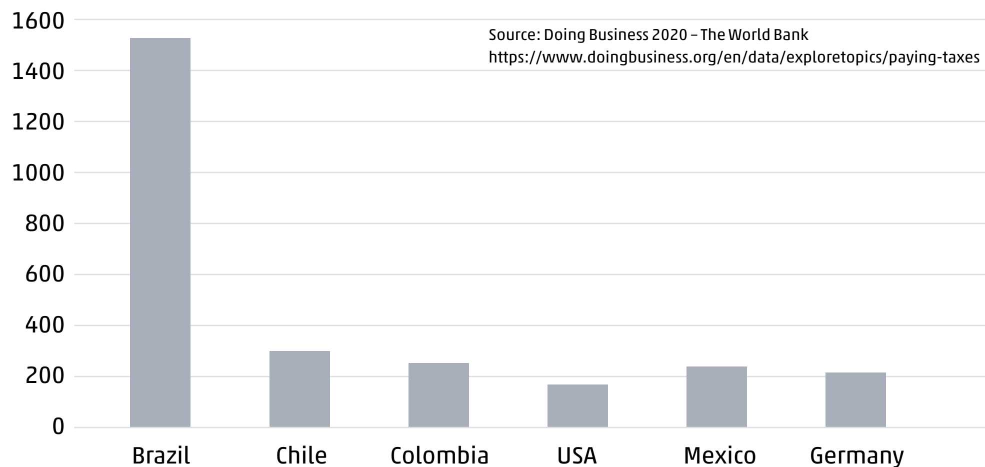
Brazilian taxpayers who are subject to transfer pricing rules are required to fill in certain registers of the Brazilian Electronic Tax Accounting bookkeeping (*Escrituração Contábil Fiscal* – "ECF"), which replaced the traditional corporate income tax return for calendar years 2014 and onwards. These specific registers are considered by some as a simplified Local File.

Although the portion relating to transfer pricing of the ECF is considered as a simplified obligation vis-à-vis the standards established under BEPS Action 13, the ECF is one of the most complex ancillary obligations annually submitted by Brazilian companies, containing detailed accounting information, the Corporate Income Tax calculation, information on Brazilian controlled foreign corporation rules, taxes paid abroad and information requested for Brazilian transfer pricing purposes, amongst others.

Every year, the Brazilian Federal Revenue Service updates the registers and entry fields contained in the ECF and, over the years, several new requirements were imposed to the taxpayer for the compliance with Brazilian transfer pricing rules. For FY 2020, the tax authorities included several additional entry fields in the ECF to be submitted, in principle, until the end of July 2021 (a deadline which will likely be extended due to the COVID-19 pandemic).

The increase in complexity of ancillary obligations is an everlasting concern for the Brazilian taxpayer, who already spends, on average, 1,500 hours to comply with the current ancillary obligations on an annual basis.

**Hours spent to comply with tax obligations**




Specifically, in what refers to transfer pricing information requests in the ECF, a high-level comparison shows that the number of the entry fields required in the ECF have increased significantly over the years and, with the most recent inclusions, the increase was of almost 120% in comparison with the first year of existence of the ECF.

**Information according to brazilian TP documentation requirements**

In the first year (for 2014):
**up to 40 entry fields**

+ 120 % →

Latest update (for 2020):
**up to 90 entry fields**

With respect to the new modifications included for FY 2020, it is important to note that the modifications will mainly affect the legal entities that use the 6th method (commodities) and/or the comparable methods to comply with transfer pricing rules.

| Method | New requirements |
|---|---|
| **6th method** | → Additional details on listing price, date of shipment, description about the criteria used for the calculation of the benchmark price, among others<br>→ New entry fields were created fot the taxpayer to identify the specific adjustments adopted when calculating the benchmark price |
| **Comparable methods** | → Identification of comparables (identical or similar, according to law)<br>→ Additional details on the comparables<br>→ New entry fields were created for the taxpayer to identify the specific adjustments adopted when calculating the benchmark price |

This steady increase of the outflow of information regarding transactions subject to transfer pricing rules requires the taxpayer to be vigilant regarding compliance with the documentation requirements, especially considering that heavy fines may be imposed for submitting the ECF with missing or incorrect information.

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## Chile

## Recent cases on TP – Chile vs Avery Dennison Chile SA (FY 2012)

Continuing the effort to monitor the intercompany operations, on 31 March 2021, the Chilean Tax Court has ruled in favour of Avery Dennison Chile SA in a case that characterises the literalness of the transfer pricing regulatory framework in Chile to date. The Chilean Tax Court found that the Chilean Tax Administration failed to demonstrate that their allegations against marketing operations carried out by the taxpayer during FY 2012 with related parties were not at market value (Assessment No. 210 dated 30 August 2016).

Although there were two main types of operations: purchase of finished products and cash pooling operations, we will focus on the results and implications of the former.

One of the main topics was precisely the period of the audit (FY 2012): Opportunely the taxpayer claimed a misapplication of the former Article 38 of the Tax Law regarding Article 41E, indicating that the observed operations were in the transitional stage[2] of local transfer pricing rules.

This led the taxpayer to indicate as arbitrary an application of the interquartile range, that removes the upper 25% and lower 25% of profitability from the sample of comparable companies, indicating that neither the current legislation nor the former legislation contemplates the obligation to apply some interquartile statistical adjustment over the full range.

Regarding transfer pricing methodology, the taxpayer relied on an analysis of gross margins, indicating that its analysis was consistent with the resale price method (RPM). The Chilean Tax Administration's position was based on an application of the transactional net margin method (TNMM) and there was also some disagreement on the selection of publicly traded distributors to be used as alleged comparable companies (whilst the taxpayer criterion was focused on companies with similar products, the Chilean Tax Administration's criteria for selecting comparable companies emphasises the functions performed by these companies over the marketed product, in addition to considering that the companies included in the comparability have products that are similar in terms of the risks assumed).

On this topic, the taxpayer argued that the RPM was the appropriate approach, as it is the most direct method applicable to the margins observed at gross levels, in addition to concentrating the main intercompany transactions (purchase of finished products for resale, at the cost of sale level). The taxpayer, therefore, argued that the Chilean Tax Administration misused the TNMM, given that what generated a reduction in operating margins is not related to an increase in the acquisition costs of the products that are subsequently resold, but rather to a decrease in the selling prices of those products and the circumstances that led it to make that determination (explained by a market penetration strategy to increase sales in Chile, even with negative profitability, "agreed" with its main offices). The Chilean Tax Court dismissed the alleged "taxpayer business strategies" implied to select the TNMM instead of the RPM, given that that the Chilean Tax Administration could not demonstrate that those strategies were sustained over time.

The Chilean Tax Court also dismissed the Chilean Tax Administration's position regarding the rejected range chosen in the transfer pricing report and arbitrarily decided to apply the interquartile range, even bearing in mind that the use of this range must be examined on a

2 The Chilean Transfer Pricing regulations reform occurred with Law 20.630 dated 27 September 2012 and given that the largest volume of taxpayer operations observed by the Chilean Tax Administration are prior to that date, it could even be considered as a strong argument to invalidate the transfer pricing audit.

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case-by-case basis. The same happened with the adjustment to comparable companies, in which case it could not justify the previous allegations.

As we can see, a blundering strategy of the Chilean Tax Administration, which could not in a timely way justify and support its allegations regarding the selected method by the taxpayer, adjustments to the comparable companies or the opportunity of the interquartile range construction, led the Chilean Tax Court to rule in favour of Avery Dennison Chile, leaving Assessment No. 210 without effect.

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## China

## China releases public consultation paper on simplified unilateral APA procedures

On 19 March 2021, the public was invited to provide comments on a ruling for the simplified procedures of China unilateral APAs. This echoes the Chinese tax authority's annual guideline in early 2021, enabling more tax certainties for taxpayers' cross-border operations. It is a supplementary document to the existing "Chinese State Administration of Taxation Announcement on Improvements to Matters Relating to Administration of Advance Pricing Agreement" (Announcement 2016 No. 64), specifically on the simplified procedures on unilateral APA proposals.

### Simpler APA procedures and shorter processing time

According to the paper, the unilateral APA procedures are cut short into only three steps: application assessment, negotiation and conclusion and execution monitoring. The processing period of a simplified unilateral APA application is reduced to 9 months maximum:

1) The tax authority is required to decide, **within 90 days,** whether the application qualifies for further processing.
2) If it qualifies, the tax authority, **within 6 months,** should examine whether the related-party transaction complies with the arm's-length principle and will negotiate with the taxpayer for APA terms.

The unilateral APA can be concluded and executed if the two parties reach an agreement within the timeframe, or gets abandoned if the negotiation reaches deadlock.

### Applicants for simplified APA procedures

Chinese taxpayers with annual related-party transactions amounting to over RMB 40 million for at least three years can apply for the simplified APA procedures, if any of the following scenarios are met:

1) the taxpayer has submitted the transfer pricing local file (and master file if applicable) for the previous three years to the tax authority at least three months prior to the APA application;
2) the taxpayer has fairly executed APAs in the past ten years;
3) the taxpayer has been audited by the tax authority and achieved a settlement in the past ten years.

### Our observation

The simplified unilateral APA procedures demonstrate the Chinese tax authority's determination to improve the Chinese tax environment, especially during the current economic uncertainty following COVID-19. APAs are favourable to both tax authority and taxpayers, which ease the tax administration workload and grant more certainty in tax. However, due to the complexity of standard APA application procedures and the limitation of tax authority resources, current approved APA cases are far behind taxpayers' needs. Therefore, it is foreseeable that the simplified unilateral APA ruling will guide the qualified applicants to an express channel of APAs, making it a more common approach to managing transfer pricing compliance.

Chinese companies interested in the simplified unilateral APA can now start to study the programme details. The Chinese tax authority will reject the applications when observing defective tax practices, such as late filing or mistakes in the submitted annual related-party transaction forms. Therefore, it is crucial for companies to check and review upfront whether all the required historical documents are available and in good order and to proactively approach the tax authority in charge when the rule is officially announced.

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## Ghana

## Ghana introduces new Transfer Pricing Regulations

### Introduction

The new Transfer Pricing Regulations 2020 (L.I.2412) (the "Regulation") came into effect in November 2020 in Ghana. This Regulation replaces Ghana's first TP Regulation, the Transfer Pricing Regulations of 2012 L.I. 2188. Whilst Ghana is not a member of the OECD, its latest transfer pricing Regulations have captured some of the BEPS initiatives. The new Regulations have been hailed as a game-changer, as they have the potential to boost transfer pricing results in many cases while also forcing multinational companies to perform additional analysis and documentation.

This article focuses on the impact of the implementation of OECD's BEPS Action Plan on Ghana's new transfer pricing regulation.

### Value Creation of Intangible Assets

The latest Transfer Pricing Regulations provide a new criteria in deciding the arm's-length nature of charges and fees for the use of intangible properties, in compliance with BEPS Action Items 8 - 10 Transfer Pricing, Implementation Guidance on Hard-to-Value Intangibles. The Regulations provide principles for DEMPE (development, enhancement, maintenance, protection, and exploitation) research, with the purpose of assisting in the determination of related party-controlled relationships involving intangible assets that are at arm's length.

### Business Restructuring

The new Regulations has a provision for Business Restructuring.

### Country by Country Reporting

The new Regulations require that CbCR be filed for each fiscal year.

### Safe Harbour Rules

The Regulations have safe harbour clauses that exempt related-party transactions from having to keep contemporaneous transfer pricing documents, specifically a Local and a Master register, in circumstances in which Taxpayers are parties to a controlled arrangement worth up to USD 200,000.

### Financing Agreement

According to the new Regulations, the Tax Authorities can adjust interest on inter-company loans or loan fees to represent the amount an independent person would charge for providing the loan or credit facility in a comparable situation, based on transfer pricing regulations. Interest must also be levied on unpaid related-party trade payables after a 12-month period, according to the regulations.

### Transfer Pricing Documentation

Taxpayers who engage in related-party transactions must keep track of and file the following documents with the tax authority by a specific deadline.

- Annual transfer pricing return – due 4 months after the financial year-end.
- CbCR – due 12 months after the financial year-end.

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## India

## Transfer Pricing Update India

### Amendment by Union Budget 2021-22 passed by the Parliament in March 2021

- **Reduction of time limit for completion of assessment**

The time limit for completion of assessment proceedings has been reduced by 3 months. The corporate tax assessment (if the matter is referred for Transfer Pricing assessment) will now be made within 33 months from the end of the fiscal year and the Transfer Pricing assessment will be completed 2 months before the completion of the corporate tax assessment. If no reference is made for the Transfer Pricing assessment, then the time limit for completion of the corporate tax assessment will be 21 months from the end of the fiscal year. This amendment is effective as of 01 April 2021.

- **Rationalisation of provision of Minimum Alternate Tax**

Where there is an increase in the book profit of the taxpayer for a financial year due to income of past year(s) pursuant to secondary adjustment or APA entered by the taxpayer, the taxpayer can make an application to the Assessing Officer for re-computing the book profit and tax payable for the past year(s) and the Assessing Officer would act on the said application within 4 years. This amendment is effective as of 01 April 2021.

### Updates on Master File & CbCR regulations

The Central Board of Direct Taxes has amended the Income Tax Rules relating to Master File & CbCR with effect as of 01 April 2021.

- **Master File**

It is now clarified that the filing of Master File (in Form 3CEAA) can be carried out by any one of the constituent entities of an international group. Earlier, the regulations required that

where there are more than one constituent entities resident in India, the Master File was to be filed by any one of the constituent entities resident in India, designated by the international group. However, there was no clarity whether such an option could be exercised if there existed one or more non-resident constituent entities in India. Now it is provided that, where both resident and non-resident constituent entities exist in India, the Master File compliance can be undertaken by any one of the constituent entities (resident or non-resident).

→ **CbCR**

The consolidated group revenue threshold for applicability of CbCR has been increased to factor the current exchange rates whilst ensuring alignment with the OECD-prescribed threshold of EUR 750 million. Therefore, CbCR would now be applicable for international groups having consolidated group revenue of INR 6400 crores instead of INR 5500 crores earlier.

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## Senegal

## Latest Transfer Pricing tax reform implementing Action 12 of the OECD BEPS project

Since the launch of the BEPS Project in 2012, Senegal has demonstrated its commitment by actively participating in international tax cooperation initiatives as a member of the BEPS Project Inclusive Framework Steering Group.

In Senegal, the reform process in the context of the implementation of measures stemming from the BEPS project accelerated in 2018, with consequent changes introduced in the Senegalese tax code.

These changes consisted of incorporating the recommendations from Actions 4 and 13 into Senegal's general tax code. Thus, the 2018 tax reform focused on the implementation of better practices to limit the deduction of interest expenses on intra-group loans and on the institutionalisation of the transfer pricing statement and the provision of transfer pricing documentation to the Senegalese tax authorities in case of a tax audit.

In concrete terms, the latest Senegalese reform introduced by the law dated 22 December 2020 on the Finance Law for 2021 (new point 9 added to Article 31 of the General Tax Code) results in the institution of a new mandatory reporting regime for banks and financial institutions, insurance and reinsurance companies, as well as all other financial institutions holding accounts. These banking and insurance institutions mentioned above are now obliged to communicate to the tax authorities, according to the terms and conditions set out by regulation, all the information required for the application of the agreements concluded by Senegal allowing for an automatic exchange of information relating to financial accounts on tax matters.

This information specifically concerns income from movable capital, the balances of accounts opened with said organisations, the surrender value of bonds and capitalisation contracts and investments of the same nature of individuals and legal entities concerned, as well as any other income for which information must be communicated in accordance with the aforementioned agreements.

The aforementioned financial institutions and insurance companies must, in addition, transmit electronically to the tax authorities the information relating to the declarable financial accounts collected for the previous financial year, no later than 30 April of the following year.

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Failure to comply with this new reporting obligation is heavily sanctioned with a fine of EUR 7,622 (XOF 5,000,000) per unreported account.

## Vietnam

## The regulations on the Advance Pricing Agreement ("APA") and its modification

The importance of transfer pricing compliance and audits has increased in recent years. APAs are considered an effective mechanism for managing transfer pricing risks and related-party transactions and, especially, managing compliance with the requirements of the tax authorities. This mechanism will bring benefits to taxpayers by reducing risks on transfer pricing handling and avoiding unexpected tax exposures.

An APA will be concluded based on a request of the taxpayer by agreement between the tax authority and the taxpayer for the unilateral APA; or between the tax authority, the taxpayer and the foreign TA(s) for the bilateral or multilateral APA. The APA concerns tax bases and methods of determining taxed prices or taxed prices regarding transactions with related parties.

Based on the Law on Tax Administration 2019 and the guiding Decree No.126/2020/ND-CP ("**Decree 126**"), the APA conclusion process has changed compared with the existing Circular No.201/2013/TT-BTC ("**Circular 201**"). The consultation step is no longer mandatory but remains available. It is meant to convince the General Department of Taxation that the intended APA is beneficial and necessary. It also helps by finding out about the intentions and opinions of the General Department of Taxation before filing the official APA application.

An APA application shall be processed in the following order:
- Consultation before the official submission of the application (not compulsory)
- Official submission of the application
- Evaluation of the APA application
- Discussion and negotiation of the APA
- Conclusion and use of the APA.

The Vietnamese Ministry of Finance is the competent authority for approving APAs. With the bilateral and multilateral APAs, the Vietnamese Ministry of Finance shall consult the Ministry of Foreign Affairs, the Ministry of Justice and relevant agencies and submit it to the Government and the Prime Minister for opinions on the signing of the APA according to the procedures of signing international treaties and agreements.

The Vietnamese Ministry of Finance has proposed to amend the guideline implementing the APA mechanism by a drafted Circular, which will replace existing Circular 201. The modification intention of the drafted Circular includes the following notable points:

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- Reducing the validity period of APAs from 5 down to 3 years.
- Specifying the conditions of the related-party transaction allowed to apply for APA for the taxpayers to consider and apply accordingly.
- Recognising the role of the commercial database as one of the sources for assessment of the APAs, as well as the information of the taxpayers, which is consistent with regulation of Law on Tax Administration 2019, Decree 126 and Circular No.132/2020/NĐ-CP. It takes priority on using commercial databases in the selection of comparative data for comparison, determining the price of related-party transactions under the scope of the APA application.

Negotiating APAs is not common in Vietnam. Therefore, the practical experience is rather limited. However, the fact that the regulations are amended suggests that the tax administration intends to have this instrument implemented.

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## Glossary

| | |
|---|---|
| **APA** | Advance Pricing Agreement |
| **AOA** | Authorized OECD Approach |
| **AO** | German Fiscal Code |
| **Austrian Guidelines** | Austrian Transfer Pricing Guidelines |
| **BEPS** | Base Erosion and Profit Shifting |
| **CbC** | Country by Country |
| **CbCR** | Country by Country Reporting |
| **DEMPE** | Development, Enhancement, Maintenance, Protection and Exploitation |
| **EBIT** | Earnings before Interest and Taxes |
| **ECF** | Escrituração Contábil Fiscal – Brazilian Electronic Tax Accounting bookkeeping |
| **EU** | European Union |
| **FY** | Fiscal Year |
| **HMRC** | UK HM Revenue & Customs |
| **IDS** | International Dealings Schedule |
| **IP** | Intellectual Property |
| **LF** | Local File |
| **MAP** | Mutual Agreement Procedure |
| **MF** | Master File |
| **MNE** | Multinational Enterprise |
| **OECD** | Organization of Economic Cooperation and Development |
| **OECD Guidelines** | OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations |
| **RPM** | Resale Price Method |
| **RFB** | Brazilian Federal Revenue Service |
| **R&D** | Research and Development |
| **SII** | Chile's Internal Revenue Service |
| **TC** | Chilean Tax Court |
| **TNMM** | Transactional Net Margin Method |
| **TP** | Transfer Pricing |
| **VPDG** | Austrian Transfer Pricing Documentation Law |

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