



The Complex Transfer Pricing Landscape: A 2019 update.

Transnational Taxation Network

4th March 2019

Sowmya Varadharajan
IC Advisors

TRANSFER PRICING ENVIRONMENT: RISING RISK

- Global action against MNC Tax Avoidance: **BEPS**
 - Increased cooperation between authorities focusing on auditing the entire value chain and transaction
- Reputational Risk: UK Parliamentary Scrutiny, US & Australia Senate Hearings:



PHOTO: Tony Cudmore (R) and Phil Edmonds (L) both addressed the Senate inquiry into Tax Avoidance at Parliament in Melbourne. (AAP: Julian Smith)

Apple CEO says his company is a patriotic American company and complies with the law - and the spirit of the law - on tax



▲ Apple CEO Tim Cook waits in the audience before appearing at a Senate homeland security and governmental affairs investigations subcommittee hearing. Photograph: Jason Reed/Reuters

- Senior executives made accountable for taxation policies:
 - US Sarbanes Oxley
 - Responsibility and declaration for ensuring and certifying that appropriate tax accounting arrangements have been established and maintained.

Nike tax rulings under EU Commission scrutiny

January 11, 2019 Europe, European Commission, Featured News, The Netherlands, Transfer Pricing

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By *Dr. Patricia Lampreave*, EU tax and state aid expert, Professor, Instituto de Estudios Bursátiles, Madrid

A few weeks after the European Commission issued its highly controversial [final decision about Gibraltar's tax system](#), the same service opened, on 10 January, an in-depth investigation to examine whether five tax rulings granted by the Dutch tax authorities to two Nike group companies based in the Netherlands (Nike European Operations Netherlands BV and Converse Netherlands BV) between 2006 and 2015 gave the company an unfair advantage over its competitors, potentially in breach of EU State aid rules.

Netflix's UK tax affairs under scrutiny

HMRC is looking at Netflix's tax affairs in the UK, according to the company, which employs 14 people in its London division

The streaming company said its UK accounts are currently "under examination" by tax authorities, according to documents filed to US regulators seen by the Times.

It is believed that HMRC could be investigating the transfer pricing deal between the UK subsidiary Netflix Services UK Limited and its Dutch parent company.

The company declared €1.27m in profits last year, with a subscriber base of nine million. Users pay £5.99 for a basic package every month, and £9.99 for a premium service. Even if all users subscribed to the lowest membership, this would translate to £54m every month, or £647m a year.

Coca Cola Denies the Charges on Transfer Pricing

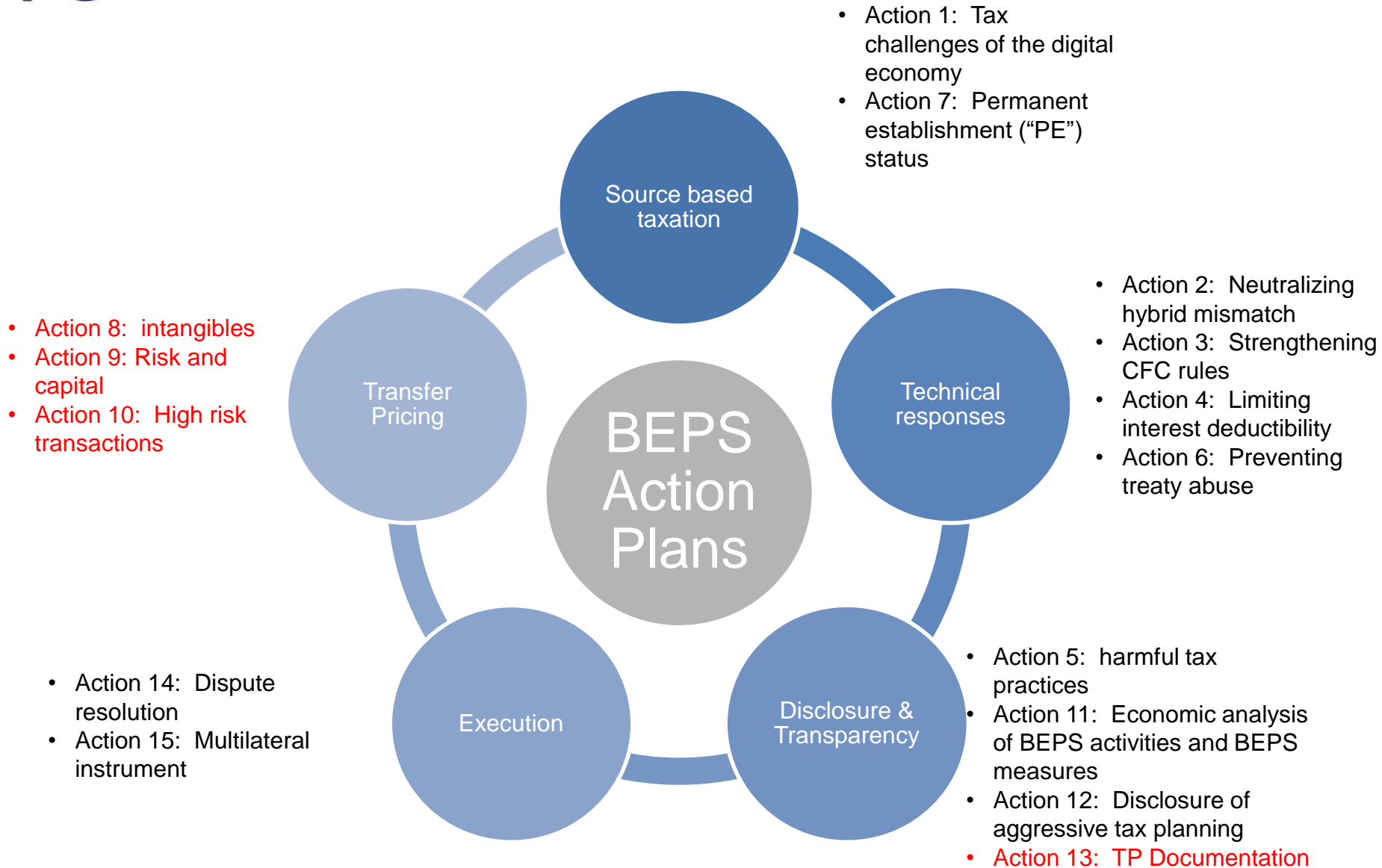
VietNamNet Bridge – Affirming that Coca Cola Vietnam is not guilty of the charges on illegal transfer pricing, Irial Finan, Vice President of Coca Cola global, said the drink manufacturer does not have to pay the corporate income tax just because it still has not made profit. This was for the first time Coca Cola raised its official voice about the charges on the transfer pricing.

The Vice President might foresee what awaits him in Vietnam during his visit to the market. Local newspapers these days continuously stir up the public with the news and reports about Coca Cola, which has been suspected of making the transfer pricing and has not paid any dong in the corporate income tax over its last 20 years of operation.

As anticipated, the first question raised to the Vice President who attended a press meeting during his visit to Vietnam was, why Coca Cola still decided to pour \$300 million in capital into Vietnam, though the drink manufacturer still has not made profit over the last 20 years.

- [illegible]

THE 15 BEPS ACTION PLANS



- Action Plan 8 – 10: Aligning transfer pricing outcomes with value creation
 - Expanded definition and application of the arm's length principle
 - Guidance on commodity transactions
 - Further work on transactional profit split
 - Guidance on intangibles
 - Low value-adding intra-group services
 - Cost contribution arrangements
- Key themes
 - Accurate delineation of the actual transaction is fundamental: contracts need to be reviewed against conduct.
 - Contracts alone do not attract profits
 - Legal ownership alone does not create entitlement to profits
 - Provision of funding alone: no more than a risk-free financial return
 - Differences between anticipated and actual profits are allocated depending on assumption of risk/ functions that warrant a profit share.
 - Groupness and synergetic benefits can be dealt with through the arm's length principle
 - Information asymmetry and lack of transparency are addressed

Deloitte Survey

- 91% of the respondents expect that BEPS related transfer pricing reported requirements will substantially increase compliance burden
- 38% agree that the C-Suite and/ or Board of Directors have changed their views on tax planning since the start of the “Responsible Tax” debate.
- 59% agree that their organisation has developed additional corporate policies and procedures in response to the increased scrutiny related to corporate taxation.
 - Up 5% since 2017
- 86% believe tax structures are under greater scrutiny
- 66% said their business has changed the way they conduct tax planning for cross-border transactions as a result of legislative changes or proposals arising from the BEPS project.
 - Up 16% from 2017
- 85% are concerned that the tax authorities will increase tax audit assessments as a result of the BEPS
- 21% agree that most tax administrations will interpret the proposed changes to the Transfer Pricing Guidelines in a consistent manner
 - Up 2% from 2017
- 80% expect **public** country-by-country reporting in the next few years (currently they are reporting certain financial data to tax authorities)

ACTION PLAN 13: TRANSFER PRICING DOCUMENTATION

3-Tier Documentation

Masterfile

- Objective: Risk assessment
- Approach: provides an overview of the multinational group and business

Local file

- Objective: appropriate considerations in setting transfer prices
- Approach: provides additional detail on the operations and transactions relevant to that jurisdiction

CbCR

- Objective: Prioritization of audit issues
- Approach: provides summary of data by jurisdiction including revenue, income, taxes and indicators of economic activity

- What is contemporaneous documentation and is it needed?
- Time frame for preparing documentation
- Materiality
- Retention of documentation
- Frequency of updates
- Language in which documentation should be prepared
- Penalty regime
- Confidentiality
- Regional / local benchmarking
- Implementation practices and deadlines

GLOBAL IMPLEMENTATION OF ACTION PLAN 13

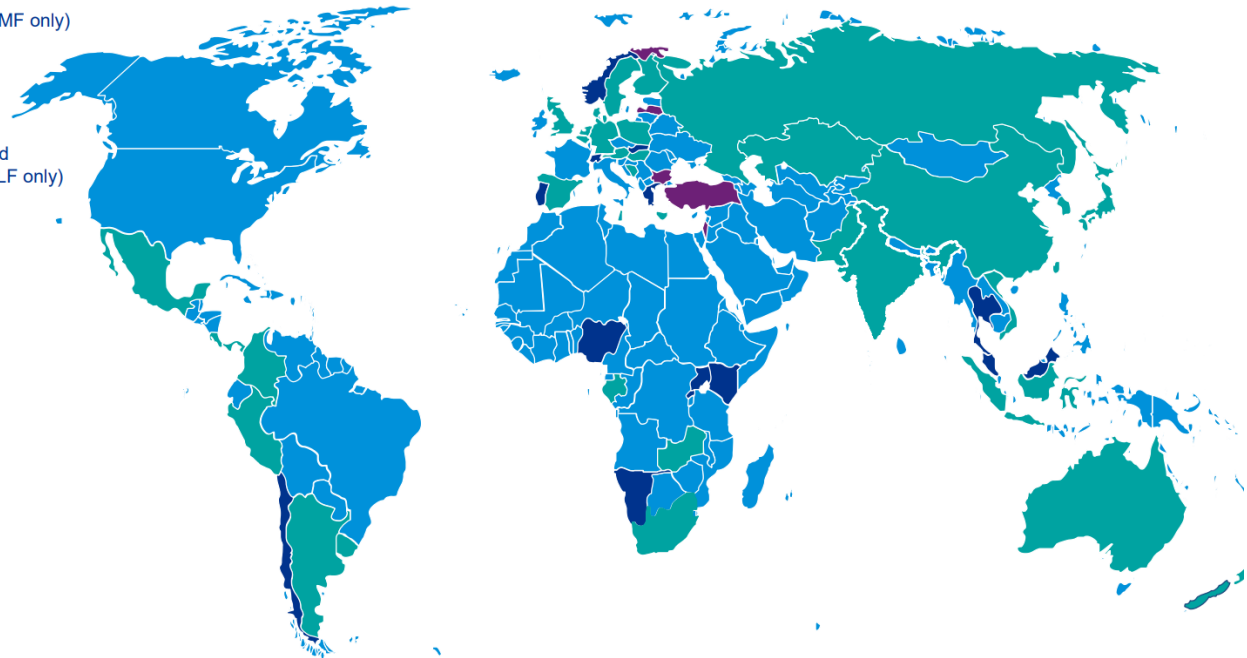
Master File / Local File: Country implementation summary

- Argentina (MF only)
- Australia
- Austria
- Belgium
- Bosnia and Herzegovina (Federation of Bosnia and Herzegovina)
- China
- Colombia
- Costa Rica
- Curacao
- Denmark
- Finland
- France
- Gabon
- Germany
- Hong Kong
- Hungary
- India (MF only)
- Indonesia
- Japan
- Kazakhstan
- Latvia
- Liechtenstein
- Lithuania
- Malaysia
- Mexico
- Netherlands
- New Zealand
- Pakistan
- Panama
- Peru
- Poland
- Russia
- South Africa
- South Korea
- Spain
- Sweden
- Taiwan
- United Kingdom
- Uruguay (MF only)

- Vietnam
- Zambia
- Bulgaria
- Israel
- Turkey
- Chile (LF only)
- Greece
- Isle of Man
- Kenya
- Malaysia (MF only)
- Namibia
- Nigeria
- Norway
- Rwanda
- Slovakia
- Switzerland
- Thailand (LF only)
- Uganda

Key: ■ Implemented ■ draft bills ■ Intentions to Implement ■ No Development

Total Count: 41 Countries 3 Countries 13 Countries



read.kpmg.us/global-tax-reform

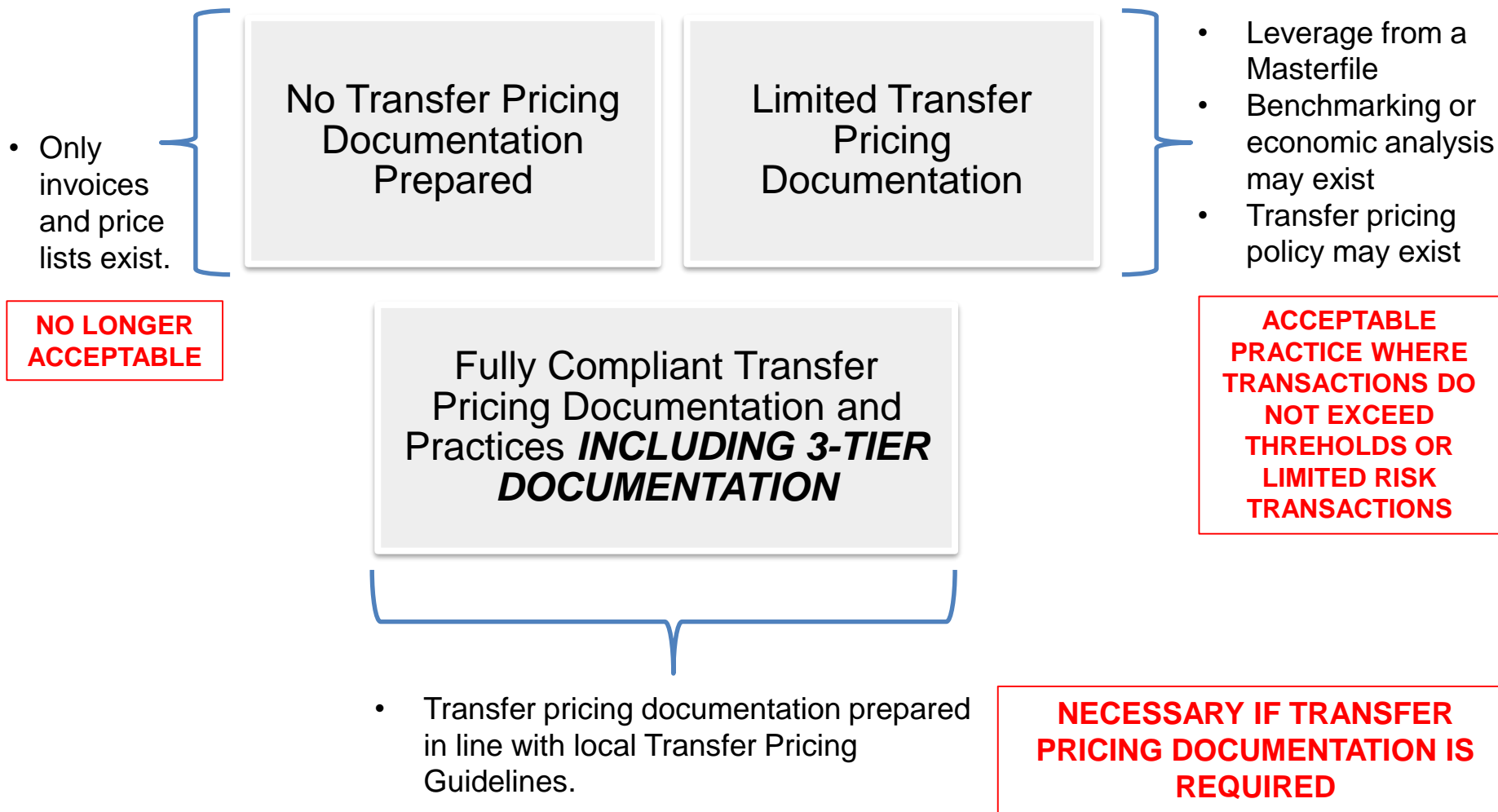
REGIONAL IMPLEMENTATION OF ACTION PLAN 13

Country	TP guidelines issued	Action Plan 13 implementation	Overall TP risks
Australia	1997 / 2013	MF/ LF/ CbCR implemented	High
China	2009	MF/ LF/ CbCR implemented	High
Hong Kong	2010	MF/ LF/ CbCR implemented	Medium
Indonesia	2010	MF/ LF/ CbCR implemented	High
India	2001	MF/ LF/ CbCR implemented	High
Japan	2001	MF/ LF/ CbCR implemented	Medium – High
Korea	1996	MF/ LF/ CbCR implemented	Medium – High
Malaysia	2003 / 2012	MF/ LF/ CbCR implemented	Medium – High
Pakistan	2017	MF/ LF/ CbCR implemented	Low – Medium
Philippines	2013		Low – Medium
Singapore	2006 / 2015	MF/ LF/ CbCR implemented	Medium – High
Taiwan	2004	MF/ LF/ CbCR implemented	Medium – High
Thailand	2002	MF/ LF/ CbCR implemented	Medium
Vietnam	2005	MF/ LF/ CbCR implemented	Medium - High

Cambodia – introduced TP Documentation but not MF/ LF legislation. Myanmar has not but increase in scrutiny.

- Difficulty in providing required information
 - Transaction by transaction analysis requires segmented P&L
- Testing of TP policies instead of actual results
- Queries shortly after deadline for contemporaneous documentation, for current years and prior years
- Difficulty in reconciling related party transaction results reported in statutory accounts
- Legal agreements often not in place
 - Tax authorities increasingly requesting for intercompany agreements
 - Do contractual arrangements and business reality tie?
- Auditors increasingly interested in reviewing TP documentation and results before signing off on statutory accounts
- Many taxpayers still do not comply with transfer pricing documentation requirements
- Processes may need to be changed to support preparation of TP documentation

TAXPAYER'S APPROACH TO DOCUMENTATION



TOPICAL ISSUES IN TRANSFER PRICING: INTANGIBLES

- Legal ownership alone: no right ultimately to retain the returns from exploitation of intangibles
- Funding often coincides with the taking of certain financial risks – provided by funder needs to exercise control
- Financial risk is separate from development risk
- A funder which only assumes funding risk does not perform functions relating to the intangible: risk adjusted rate of financial return on funding
- A funder that does not control financial risk: no more than a risk-free financial return.

- Characteristics of the Digital Economy
 - Agile
 - Global
 - Highly dependent on human talent
- Is the Arm's Length Principle obsolete?
 - Digital economy companies are a single global entity
 - Not a cluster of separate companies trading together
- Profits should be taxed where value is created
 - Participation and engagement of users is an important aspect of value creation for certain digital business models and that the international corporate tax framework should reflect the value of user participation.
- Public Consultation Document: ADDRESSING THE TAX CHALLENGES OF THE DIGITALISATION OF THE ECONOMY
 - Comments by 6 March 2019

TOPICAL ISSUES IN TRANSFER PRICING: INTERCOMPANY FINANCING

- Commentary to Article 9 of the OECD MTC notes that Article 9 is relevant “*not only in determining whether the rate of interest provided for in a loan contract is an arm’s length rate, but also whether a prima facie loan can be regarded as a loan or should be regarded as some other kind of payment, in particular a contribution to equity capital.*”
 - Accurate delineation of the transaction as it may relate to the capital structure of an entity within a Group
- Provided guidance on transfer pricing considerations for:
 - Treasury, intragroup loans, cash pool, hedging, financial guarantees, captive insurance

TRANSFER PRICING TRENDS

Increased regulation

- Scope of reporting of related party transactions
- Multiple transfer pricing documentation requirements
- More countries requiring provisions made in respect of uncertain tax positions

Increased enforcement action

- Increase in number and severity of transfer pricing reviews and audits
- Continued pressure to collect revenue through transfer pricing adjustments

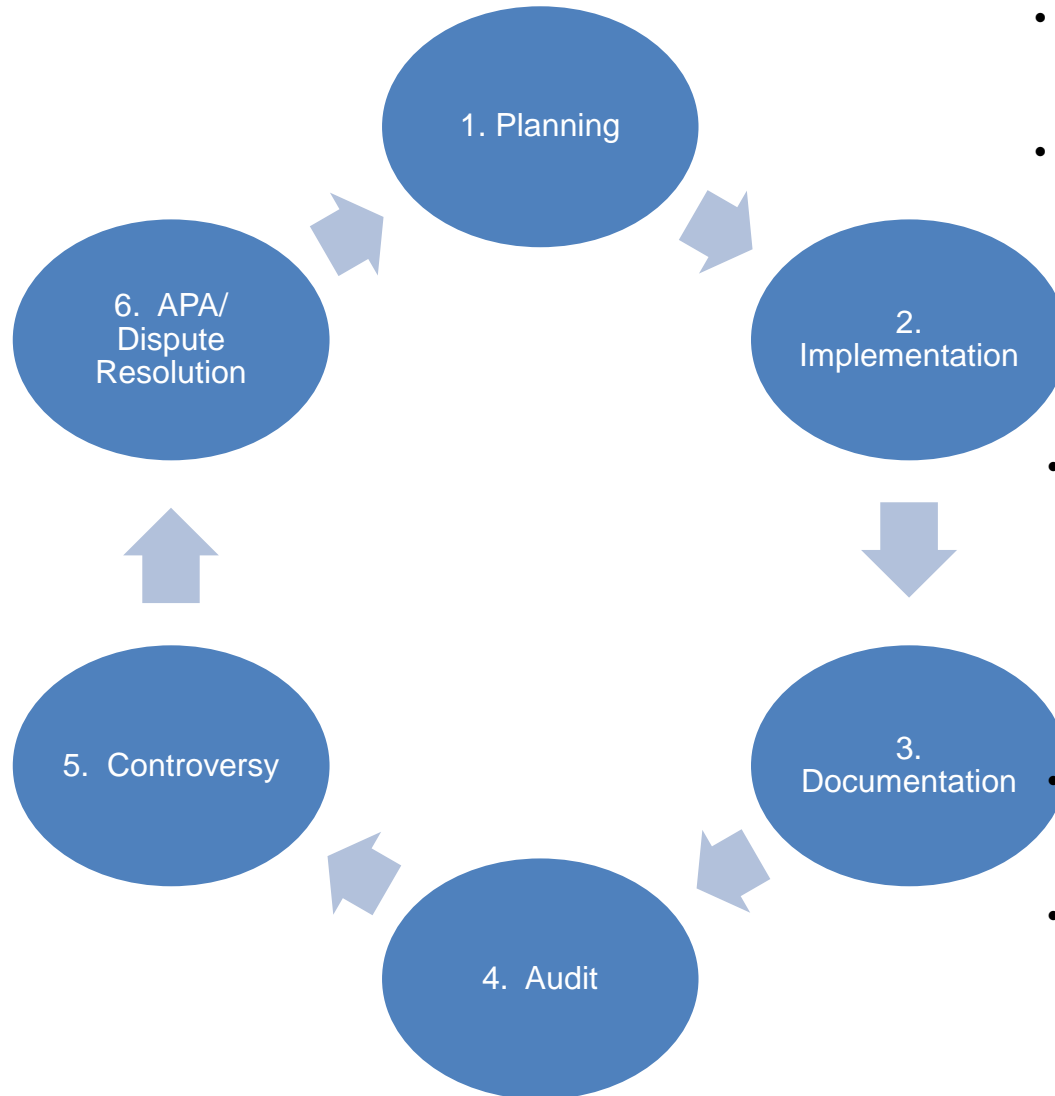
Increased in transfer pricing disputes

- Increase in number and size of transfer pricing adjustments
- Double taxation more prevalent to erode competitive advantage
- High costs of having to deal with multiple transfer pricing audits
- Greater uncertainty and therefore difficulty in managing overall tax charge

Primary challenges for multinationals

- Early identification of issues
- Unclear implementation of transfer pricing rules
- Compliance with expanding transfer pricing regulations
- Management of multiple transfer pricing and tax audits

CONCLUDING COMMENTS: TRANSFER PRICING LIFE CYCLE



- Ensure and monitor setting of prices carefully.
- Maintain support through analysis of market trends / external benchmarks.

- Where are the exposures to avoid double taxation?
- Minimise penalties

- Maintain contemporaneous annual transfer pricing documentation to meet transfer pricing compliance.
- Support cases of insufficient profits / fall in profits / losses.
- Document defence in case of losses/insufficient profits/fall in profits.



THANK YOU!

Sowmya Varadharajan

Director

IC Advisors

sowmya@icadvisorsasia.com

+65 9233 6584