

On 20 January 2022, the Organisation for Economic Co-operation and Development ("OECD") publishes the Transfer Pricing Guidelines ("TPG") for Multinational Enterprises and Tax Administrations 2022. In this article, Clive Jie-A-Joen and Rosalie van de Brug discuss the new sections of the TPG 2022.

The OECD's New Transfer Pricing Guidelines (January 2022)

The OECD TPG provides guidance for application of the so-called arm's length principle ("ALP"). The ALP implies that controlled transactions between associated enterprises, i.e., enterprises that are part of the same multinational enterprise ("MNE") group, must take place on the same economic conditions as transactions between independent enterprises. On 20 January 2022, more than four years after the latest publication of the TPG 2017, the OECD will publish the TPG 2022.

The new OECD TPG 2022 includes the revised guidance on the application of the transactional profit split method ("PSM") from June 2018.¹ The PSM is one of the five OECD transfer pricing methods to determine whether conditions of inter-company transactions are in line with the ALP. The PSM is a two-sided method which splits the relevant combined profits of controlled transactions between the associated enterprises involved in the transaction on an economically valid basis. This method is primarily used in complex situations where both enterprises make unique and valuable contributions to the transaction. The revised guidance aims to clarify the answer to the following question: when is the PSM the most appropriate method to use? According to the OECD, the presence of the following elements is relevant:

- Each party makes unique and valuable contributions.
- The business operations are woven so that it is hard to reliably evaluate the contribution of each party separately from each other.
- The parties share the assumption of economically significant risks or both parties individually assume risks that are closely related.
- If reliable comparables are available, it is unlikely that the PSM is the most appropriate method to use.

¹ OECD (2018), *Revised Guidance on the Application of the Transactional Profit Split Method*, OECD: Paris.

Moreover, the revised guidance considers the determination of the profits that need to be split and the appropriate factors that are used to split profits. Finally, examples are included in Annex II to Chapter II of the TPG to show how the PSM can be applied in practice.

Next, the TPG 2022 includes additional guidance addressed to tax administrations on the application of the hard-to-value intangibles (“**HTVI**”) approach which was finalized in June 2018.² The HTVI approach combats base erosion and profit shifting by moving intangibles among different group members that are part of the same MNE. The HTVI approach allows tax administrations to consider *ex post* outcomes as presumptive evidence for the appropriateness of *ex-ante* pricing arrangements. The taxpayer is allowed to disprove this presumptive evidence by showing the reliability of the information supporting the pricing methodology that has been applied during the time that the controlled transaction took place. The guidance assists tax administrations in applying adjustments resulting from the HTVI approach to improve consistency and reduce the possibility of economic double taxation.

Finally, the TPG 2022 contains transfer pricing guidance on intra-group financial transactions which was published in February 2020.³ The guidance aims to determine whether conditions of financial transactions between associated enterprises are in line with the ALP. The guidance comments on:

- The accurate delineation of financial transactions considering the capital structure of an enterprise within an MNE group.
- The effect of group membership on debt capacity and loan pricing.
- Stand-alone credit ratings of single entities of an MNE group.
- The determination of the risk-free and risk-adjusted rates of return.
- Transfer pricing of specific financial transactions such as intra-group loans, cash pooling, captive insurance and guarantees.

² OECD (2018), *Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles*, OECD: Paris.

³ OECD (2020), *Transfer Pricing Guidance on Financial Transactions*, OECD: Paris.

Detailed information on the transfer pricing aspects of financial transactions can be found in articles (in Dutch) published in Maandblad Belasting Beschouwingen ("MBB").⁴

From 20 January 2022, the *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022* can be found in the OECD iLibrary.

⁴ M.I.E. van Herksen, C.S.J. Jie-A-Joen en R.I. van de Brug, 'De nieuwe OESO-richtlijnen voor verrekenprijzaspecten van financiële transacties: deel I', MBB 2020/5-15, p.176-187.
M.I.E. van Herksen, C.S.J. Jie-A-Joen en R.I. van de Brug, 'De nieuwe OESO-richtlijnen voor verrekenprijzaspecten van financiële transacties: deel II', MBB 2020/6-19, p.229-240.