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An Introduction to Research in Transfer Pricing

Max Planck Institute for Tax Law and Public Finance
Working Paper 2023 – 06

March 2023

Max Planck Institute for
Tax Law and Public Finance

Department of Business and Tax Law
Department of Public Economics

http://www.tax.mpg.de

Electronic copy available at: https://ssrn.com/abstract=4389433

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An Introduction to Research in Transfer Pricing

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Aitor Navarro[*]

The overwhelming complexity of transfer pricing within income taxation and the number of available materials generates significant entry barriers for conducting adequate research in this field. The objective of this contribution is to briefly depict the most relevant issues and provide basic bibliographic references for researchers in order to provide a point of departure for approaching the subject and to accentuate the most controversial aspects that merit further discussion.

1. A brief introduction to research in transfer pricing 2
2. The foundations of transfer pricing 5
   2.1. The transfer pricing rationale 5
   2.2. Background on the evolution of transfer pricing regulations at a cross-border level .. 8
   2.3. Transfer pricing sources and their interaction 11
3. The enforcement of transfer pricing 14
   3.1. Material aspects: the determination of an arm's length remuneration 14
      3.1.1. The comparability analysis 14
      3.1.2. Specific issues 20
   3.2. Formal aspects: compliance and dispute resolution 22
4. Final remarks 24

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1. A brief introduction to research in transfer pricing

Transfer pricing is probably the most discussed topic within the international tax law realm. It is difficult to determine a set of rules to which commentators have devoted more attention than transfer pricing based on the arm's length principle within income taxation. Its logic is very easy to formulate. For tax purposes, profits derived from controlled transactions will be adjusted to reflect what independent parties would have agreed under similar circumstances. Yet such a mandate is extremely complex to implement in practice. One of the primary reasons that explains such an interest lies on the wide-reaching effects of a set of rules applying to transactions undertaken by related parties that are adopted in the domestic law of almost every jurisdiction worldwide in a remarkably similar fashion. In fact, the approaches to design transfer pricing rules that taxpayers, tax authorities, courts, scholars, legislators, and international organizations undertake may be easily interchangeable from country to country. This is because the issues to be addressed are the same mainly due to the standardization efforts of international organizations such as the OECD or the UN in international taxation.

Research topics within transfer pricing are manifold. A mere glimpse into them could be formulated through their apparent contradictions: i) the rationale is very easy to state but extremely difficult to concretize in practice; ii) it is a domestic law topic mainly concerning corporate tax but with a robust international and comparative component; iii) standardization is thus significant, but specificities are always present, and the same transfer pricing issue may be dealt with very differently depending on the jurisdiction under assessment, and iv) transfer pricing is often regarded as an anti-abuse device, but it is also a catalyzer for profit shifting. Perhaps these cannot be considered fully as contradictions, but they certainly incite further doubts and issues that enhance the researcher's eagerness to pursue a more comprehensive appraisal. To assist in this process as a primer for research is precisely the aim of this contribution.

By analyzing and categorizing the broad range of existing materials and the different perspectives adopted to address transfer pricing issues, not only useful insights on how to access the relevant sources of information to build up a thorough research undertaking may be found. There is also a guideline to the manifold approaches that could be embraced when conducting research in the field. For instance, from the perspective of the format – and restricting the references to those written in English – contributions may be found in the form of manuals[1],

[1] See *G. Green*, Transfer Pricing Manual (BNA International 2008). *J. Monsenego*, Introduction to Transfer Pricing (Kluwer Law International 2022) and *M. Lang et al*. eds., Fundamentals of Transfer Pricing: General Topics and Specific Transactions (Kluwer Law International 2021).

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monographs[2], commentaries or handbooks[3], contributions in collective books often compiling works exclusively referring to transfer pricing matters[4], or papers published in specialized journals[5]. There are even journals that are entirely devoted to transfer pricing[6]. Notwithstanding, it is also possible to find an overwhelming number of very relevant sources of non-edited materials of which most are available freely on the internet. These include those such as firm-related alerts fully dedicated to this subject[7] or compilations of country reports describing the status of transfer pricing in different jurisdictions[8], among others. Additionally, transfer pricing topics may be addressed from the perspective of specific domestic regulations in a given

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[2] See *L. Eden*, Taxing Multinationals: Transfer Pricing and Corporate Income Taxation in North America (University of Toronto Press 1998), *J. Wittendorff*, Transfer Pricing and the Arm's Length Principle in International Tax Law (Kluwer Law International 2010), *M. Pankiv*, Contemporary Application of the Arm's Length Principle in Transfer Pricing (IBFD 2017) and *J.L. Andrus & R. Collier*, Transfer Pricing and the Arm's Length Principle After BEPS (Oxford University Press 2017).

[3] See C.*H. Lowell et al.*, US International Transfer Pricing (Warren, Gorham & Lamont 1994), *R.M. Hammer*, International Transfer Pricing: OECD Guidelines (Warren, Groham & Lamont 1997), *C. Adams & P. Graham*, Transfer Pricing: A UK Perspective (Butterworths 1999), *M.M. Levey & S.C. Wrappe,* Transfer Pricing: Rules Compliance and Controversy (CCH 2001), *C.H. Lowell & M.R. Martin*, Transfer Pricing Strategies (Warren, Gorham & Lamont 2010), *R. Feinschreiber & M. Kent*, Transfer Pricing Handbook: Guidance on the OECD Regulations (Wiley 2012), *G. Kofler & J. Wittendorff,* Article 9 - Associated Enterprises, in Vogel on Double Taxation Conventions. Volume 1 (E. Reimer & A. Rust eds., Kluwer Law International 2022), *J. Henshall*, Global Transfer Pricing: Principles and Practice (Bloomsbury Professional 2019) and *E. Baistrocchi*, Article 9: Associated Enterprises, in Global Tax Treaty Commentaries (P. Pistone ed., IBFD 2022).

[4] For instance, the transfer pricing subject has been frequently examined in the proceedings of the annual International Fiscal Association Congress and consequently collected in the resulting IFA Cahiers de Droit Fiscal International: Criteria for the Allocation of Items of Income and Expense between Related Companies in Different States Whether or Not Parties to Tax Conventions (1971), Allocation of expenses in international arm's length transactions of related companies (1975), Transfer Pricing in the Absence of Comparable Market Prices (1992), Transfer Pricing and Intangibles (2007), Cross Border Business Restructurings (2011) and The future of transfer pricing (2017). Other relevant examples of collective books devoted to transfer pricing are, e.g., *W. Schön & K. Konrad eds.*, Fundamentals of International Transfer Pricing in Law and Economics (Springer 2012) and *M. Lang, A. Storck & R. Petruzzi eds.*, Transfer Pricing in a Post-BEPS World (Kluwer Law International 2016), *R. Danon et al. eds.*, Applying the Arm's Length Principle to Intra Group Financial Transactions: A Reference Guide (Kluwer Law International 2023).

[5] Virtually all journals devoted to income tax law and/or international tax law issues incorporate contributions referring to transfer pricing matters.

[6] Such as the International Transfer Pricing Journal, edited by the International Bureau of Fiscal Documentation (IBFD), as well as Tax Management Transfer Pricing Report, Tax Planning International Transfer Pricing and Transfer Pricing International Journal, being the three edited by the Bureau of National Affairs (BNA) and Transfer Pricing International, edited by Otto Schmidt.

[7] Such as Deloitte's Global Transfer Pricing Alerts, available at https://www2.deloitte.com/za/en/pages/tax/articles/global-transfer-pricing-alerts.html (all quoted websites were accessed March 9th, 2023), KPMG's TaxNewsFlash – Transfer Pricing at https://home.kpmg/xx/en/home/insights/2015/03/taxnewsflash-transfer-pricing.html or PwC's tax insights from transfer pricing at https://www.pwc.com/gx/en/services/tax/publications/pricing-knowledge-network.html

[8] See for instance the compilation of country profiles provided by the OECD at https://www.oecd.org/ctp/transfer-pricing/transfer-pricing-country-profiles.htm, or that of EY at https://www.ey.com/en_gl/tax-guides/worldwide-transfer-pricing-reference-guide-2020

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jurisdiction, the analysis of international instruments impacting transfer pricing, or the examination of soft law recommendations.

As per the approach to the subject matter, it is possible to find materials ranging from a predominantly theoretical analysis – often dealing with the rationale of the arm's length standard, the aim of transfer pricing rules, or their interaction with constituent principles of tax law – to purely descriptive works. These would focus, for instance, on depicting specific details of the latest transfer pricing decree or circular issued in a specific jurisdiction or commenting on a transfer pricing court case. In this respect, the author's background is often relevant for better ascertaining the content of the work. Contributions may be elaborated by professionals in the private sector, tax officials, scholars, or other specialists with each of them often expressing a different viewpoint on the same subject. The awareness on the specificities of the perspective adopted in each contribution will be help find relevant sources more efficiently and to better assess their content according to the needs of the research project to be undertaken.

In addition, it is important to note that, generally speaking, regardless of the approach of these contributions, the legal system they focus on, or the format in which they are presented, they have an element in common. This is the assumption of the validity of transfer pricing rules based on the arm's length principle. Therefore, these are contributions primarily focused on interpretation matters and, even if some may contain interesting proposals to change specific regulations, they are still bounded by the arm's length concept. Notwithstanding, others proceed beyond such a notion and adopt a tax policy perspective focused on presenting income allocation alternatives other than transfer pricing; these are mainly referred to as formulary apportionment proposals[9]. Although this is one of the classical topics of international tax law and has thus far been widely discussed, it currently has gained momentum due to the OECD Pillar One proposal for the taxation of the digitalized economy[10].

Hereinafter, a brief description of the most important aspects surrounding transfer pricing will be depicted accompanied by remarks on issues that could be of interest for further research work. Therefore, the objective of the next sections is not to exhaust every transfer pricing related matter but to offer the researcher a sufficiently

[9] See *W. Hellerstein*, The Case for Formulary Apportionment, 12 International Transfer Pricing Journal 103 (2005), *R.S. Avi-Yonah, K.A. Clausing & M.C. Durst*, Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split, 9 Florida Tax Review 497 (2009), *J.C. Fleming Jr, R.J. Peroni & S.E. Shay*, Worse than Exemption, 59 Emory Law Journal 79 (2009), *R.S. Avi-Yonah & I. Benshalom*, Formulary Apportionment - Myths and Prospects, 3 World Tax Journal 371 (2011), *Y. Brauner*, Formula Based Transfer Pricing, 42 Intertax 615 (2014). *Devereux et al.*, Taxing Profit in a Global Economy (Oxford University Press 2021).

[10] See *OECD*, Secretariat Proposal for a "Unified Approach" under Pillar One (2019) and *OECD*, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint (2020). See also the multiple drafts and public consultation documents on the final design of the proposal at https://www.oecd.org/tax/planned-stakeholder-input-in-oecd-tax-matters.htm. To date (March 2023), it is almost certain that Pillar One will fail due to the (not so surprising) lack of support of the US in the implementation phase. For an assessment and further literature references, see *A. Navarro*, The Allocation of Taxing Rights under Pillar One of the OECD Proposal, in The Oxford Handbook of International Tax Law (F. Haase & G. Kofler eds. Oxford University Press 2023 forthcoming).

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ample overview and a glimpse into certain problems of interest in order to provide inspiration for further research in the field.

The structure is as follows. Section 2 addresses the foundations of transfer pricing comprising the examination of the transfer pricing rationale and how it fits within tax law normative standards (2.1), insights on the evolution of transfer pricing rules that are paramount for understanding their current configuration (2.2), and the sources of law and soft law in which transfer pricing is embedded (2.3). Section 3 refers to the specifics on the enforcement of transfer pricing rules from both a material perspective through an examination of the methodology to arrive at an arm's length remuneration (3.1) and also from the viewpoint of formal aspects, specifically those concerned with compliance and dispute resolution (3.2). Section 4 concludes.

2. The foundations of transfer pricing

2.1. The transfer pricing rationale

It is important to emphasize that transfer pricing is not a concept that is exclusive to tax law. For instance, in economics, it is quite relevant for understanding the specificities of multinational enterprises (MNEs hereinafter) as economic agents operating in the market in an integrated fashion that exist because transaction costs in the market are higher than internal organization costs[11]. From the perspective of management theory, transfer pricing would help in the decision-making process of groups of enterprises for achieving efficiency improvements in resource allocation among their different units[12]. Additionally, the concept is relevant in corporate law (to protect creditors and minority shareholders' interests), labor law (in cases of profit deviation to justify terminations due to economic circumstances), customs, and accounting law (for valuation purposes, the notion of fair value is a concept much like the arm's length concept)[13].

As anticipated, this contribution will deal with transfer pricing based on the arm's length standard within income taxation matters. To begin the examination, it is relevant to note that some of the most interesting research topics in the field concern

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[11] See *R. Tavares*, Multinational Firm Theory and International Tax Law: Seeking Coherence, 8 World Tax Journal 243 (2016).

[12] See the seminal work by *J. Hirshleifer*, On the Economics of Transfer Pricing, 29 The Journal of Business 172 (1956).

[13] See *J. Wittendorff*, The Arm's Length Principle and Fair Value: Identical Twins Or just Close Relatives?, 18 Tax Notes International 223 (2011), *T. Sarson, A. Boyle & A. Larking*, Transfer Pricing, Management KPIs and Organisational Behaviour: Bringing Operating Models to Life, 13 Transfer Pricing International Journal 4 (2012), *W. Schön*, Transfer Pricing - Business Incentives, International Taxation and Corporate Law, in Fundamentals of International Transfer Pricing in Law and Economics (K. Konrad & W. Schön eds., Springer 2012) and *S. Anderson et al.*, The Interaction of Managerial and Tax Transfer Pricing, 24 Tax Management Transfer Pricing Report, 6 p. (2016).

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its reason for existence and impact on constituent principles of tax law[14]. Specifically, i) the arm's length standard is closely associated with the ideal of distributive justice from both the perspective of the distribution of the tax burden among taxpayers and distribution of tax revenues among the states. To treat related and unrelated taxpayers alike, a mechanism must exist to sufficiently compare their ability to pay, i.e., to be able to use profits as a proxy for the comparison, it is necessary to convert "group monetary units" into "market monetary units"[15]. The arm's length notion would fulfill this need. ii) Additionally, the arm's length standard theoretically serves the purpose of avoiding the existence of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity. Transfer pricing would enhance neutrality by removing these tax considerations from economic decisions[16]. iii) Moreover, since their creation, transfer pricing rules have been linked with an anti-avoidance role aimed at preventing profit shifting through "milking", i.e., transactions conducted with related parties overseas to derive profits out of a jurisdiction[17]. iv) Lastly, the adoption of a uniform set of transfer pricing rules among jurisdictions is useful for eliminating the economic double taxation that results from the adjustments of the taxable base undertaken by the tax authorities of a state[18]. The acknowledgment of the arm's length criterion eases the task of aligning the adjustments made by the involved jurisdictions.

That stated, to offer a comprehensive picture of transfer pricing rules their deficiencies must also be addressed, the most significant being the excessive complexity for their enforcement. As is obvious, a thorough comparability analysis based on the circumstances of the case entails the need to conduct an extremely detailed and extensive analysis of each transaction. Sufficiently accurate comparables must exist in the open market in order to compare both strands and gauge whether a

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[14] See *R.J. Vann*, Reflections on Business Profits and the Arm's-Length Principle, in The Taxation of Business Profits Under Tax Treaties (B. J. Arnold et al. ed., Canadian Tax Foundation 2010), *J.S. Wilkie*, Reflecting on the "Arm's Length Principle": What is the "Principle"? Where Next? in Fundamentals of International Transfer Pricing in Law and Economics (W. Schön & K. Konrad eds., Springer 2012), *I. Benshalom*, Rethinking the Source of the Arm's-Length Transfer Pricing Problem, 32 Virginia Tax Review 425 (2013) and *G. Kofler*, The BEPS Action Plan and Transfer Pricing: The Arm's Length Standard Under Pressure? British Tax Review 646 (2013).

[15] L.*E. Schoueri*, Arm's Length: Beyond the Guidelines of the OECD, 69 Bulletin for International Taxation 690, 691 (2015).

[16] *OECD*, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2022) (TPG hereinafter), par. 1.8. See also Commissioner v. First Security Bank of Utah, 405 US 394 (1972), Sundstrand Corporation and Subsidiaries v. Commissioner of Internal Revenue, 96 TC 226 (1991) and DHL Corporation v. Commissioner, 285 F.3d 120, 1217 (9th Cir. 2002).

[17] See *R.S. Holzman*, Arm's Length Transactions and Section 45, 25 Taxes 389 (1947), *G. Rectenwald*, A Proposed Framework for Resolving the Transfer Pricing Problem: Allocating the Tax Base of Multinational Entities Based on Real Economic Indicators of Benefit and Burden, 22 Duke Journal of Comparative & International Law 425 (2012). See also Asiatic Petroleum Co. (Delaware) Ltd. v. Commissioner, Ltd., 31 BTA. 1152 (2nd Cir. 1935).

[18] See Article 9.2 of the 2017 OECD Model Tax Convention on Income and on Capital (MTC hereinafter), the 2021 United Nations MTC and the 2016 United States MTC, as well as Article 17 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI hereinafter).

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controlled transaction complies with the arm's length principle. Such a level of exhaustiveness poses an excessive compliance burden. Additionally, tax administrations are clearly impacted by the intricacy of transfer pricing, especially developing countries that lack personnel expertise and overall resources to effectively assess the adequate enforcement of these rules[19].

Moreover, transfer pricing also poses substantial tax planning opportunities for those having the means to boldly structure their affairs in a favorable manner. The truth is that the taxpayer is the one preparing the relevant documentation, choosing the information to be disclosed, and enjoying ample freedom to contractually allocate functions, assets, and risks[20]. The taxpayer is responsible for taking the first step which affords a significant advantage on the outcome of the application of these rules. Substantial tax planning opportunities may arise through cost-based remuneration[21]; the stripping of functions, assets, and risks in high tax jurisdictions[22]; leverage on uncertainty in valuation of intangible assets[23]; or the overvaluation of services rendered from a low tax jurisdiction[24], among other options.

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[19] See *M. Kobetsky*, Transfer Pricing Measures and Emerging Developing Economies, 14 Asia Pacific Tax Bulletin 363 (2008), *J.L. Andrus, M.C. Bennett & C. Silberztein*, The Arm's-Length Principle and Developing Economies, 20 Tax Management Transfer Pricing Report 495 (2011) and *A. Navarro*, Simplification in Transfer Pricing: A Plea for the Enactment of Rebuttable Predetermined Margins and Methods within Developing Countries, 22 Florida Tax Review 755 (2018).

[20] See *R.J. Vann*, Taxing International Business Income: Hard-Boiled Wonderland and the End of the World, 2 World Tax Journal 291 (2010) warns about the freedom to contractually assign risk "at the stroke of a pen". See also *Y. Brauner*, An International Tax Regime in Crystallization, 56 Tax Law Review 259 (2003), *Y. Brauner*, Value in the Eye of the Beholder: The Valuation of Intangibles for Transfer Pricing Purposes, 28 Virginia Tax Review 79 (2008), *J.C. Fleming Jr, R.J. Peroni & S.E. Shay*, Worse than Exemption, 59 Emory Law Journal 79 (2009), *I. Benshalom*, Rethinking the Source of the Arm's-Length Transfer Pricing Problem, 32 Virginia Tax Review 425 (2013), *A.H. Rosenzweig*, Defining a Country's "Fair Share" of Taxes, 42 Florida State University Law Review 373 (2015).

[21] For instance, see the proceedings of the European Union Commission against Apple in state aid case SA.38373. See *R.S. Avi-Yonah & G. Mazzoni*, The Apple State Aid Decision: A Wrong Way to Enforce the Benefits Principle? 84 Tax Notes International 387 (2016), *J.C. Fleming*, The Apple State Aid Case: Who has a Dog in the Fight? 85 Tax Notes International 179 (2017) and *R. Mason*, Implications of the Rulings in Starbucks and Fiat for the Apple State Aid Case, 165 Tax Notes 93 (2019).

[22] See Bausch & Lomb, Inc. v. Commissioner, 933 F.2d 1984 (2nd Cir. 1991). See D.J. Frisch & T. Horst, Bausch & Lomb and the White Paper, 43 Tax Notes 725 (1989), *D.J. Jankowski et al.*, The Transfer of Intangible Property After the Bausch & Lomb Decision: An Economic Perspective, 43 Tax Notes 735 (1989) and *M.F. Patton*, The Section 482 White Paper seen through a Contact Lens: An Analysis of Bausch & Lomb V. Commissioner, 18 Tax Management International Journal 451 (1989).

[23] See US IRC sec.482 second sentence, also known as the "commensurate-with-income" (CWI) standard. See also *S.J. Bonney & Stanley G. Sherwood*, White Paper Proposals for Intercompany Intangible Transfers, 15 The International Tax Journal 91 (1989), J.*O. Ungerman*, The White Paper: The Stealth Bomber of the Section 482 Arsenal, 42 Southwestern Law Journal 1107 (1989), *R.J. Birch*, High Profit Intangibles After the White Paper and Bausch and Lomb: Is the Treasury using Opaque Lenses? 2 University of Miami Business Law Journal 105 (1991) and *C.W. Cope*, Limitations on Transfer Price Adjustments Under the Commensurate with Income Standard, 104 The Journal of Taxation 112 (2006).

[24] See TPG Chapter VII: Special Considerations for Intra-Group Services. See also *C. Jie-A-Joen*, Final OECD Guidance on Low-Value Intragroup Services: An Updated Comparison with EU, U.S., Dutch

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Additionally, complexity is exacerbated by the fact that the arm's length principle is based on a fiction and thus does not reflect the economic reality of efficiency gains obtained by MNEs. This is the consequence of the impossibility to determine a sharply defined answer on how to apply transfer pricing rules in certain complex scenarios[25]. Synergy gains derived from passive association and their allocation[26] or the absence of information asymmetries are very difficult to fit within transfer pricing due to the ambiguous delineation of the breadth of these rules[27]. Additionally, the absence of suitable information on comparables often leads to issues on the application of the comparability analysis[28] as does the fact that there are certain controlled transactions that independent parties would never undertake[29], e.g., in the case of loans granted to entities that are practically bankrupted[30]. Nevertheless, the described uncertainty actually fosters the need for further research on the subject as it one of the most interesting topics within transfer pricing to study in depth.

2.2. Background on the evolution of transfer pricing regulations at a cross-border level

The analysis of the evolution of transfer pricing rules based on the arm's length principle is relevant due to several reasons: i) to better understand how consensus built around transfer pricing rules has generated uniformity but also a constant tension due to the limitations this implies from a policy perspective. The OECD has attempted to achieve policy objectives by unreasonably broadening the interpretation

Guidance, 24 Tax Management Transfer Pricing Report (2016) and *J. Wittendorff*, The OECD's Simplified Approach to Pricing Low Value-Adding Services, 77 Tax Notes International 793 (2015).

[25] See M.*E. Granfield*, An Economic Analysis of the Documentation and Financial Implications of the New Section 482 Regulations, 7 Tax Notes International 97 (1993), *H.N. Higinbotham & M.M. Levey*, When Arm's Length isn't really Arm's Length: Issues in Application of the Arm's Length Standard, 26 Intertax 235 (1998), *P. Fris*, Dealing with Arm's Length and Comparability in the Years 2000, 10 International Transfer Pricing Journal 6 (2003), *K. Sadiq*, The Traditional Rationale of the Arm's Length Approach to Transfer Pricing – Should the Separate Accounting Model be Maintained for Modern Multinational Entities?, 7 Journal of Australian Taxation 2, p. 245 (2004), *J.J. Burke*, Re-Thinking First Principles of Transfer Pricing Rules, 30 Virginia Tax Review 3 (2011) and *M. Durst*, The Two Worlds of Transfer Pricing Policymaking, 61 Tax Notes International 6 (2011).

[26] See, for instance, the examples on credit rating at TPG par. 1.184-1.186 and the centralized purchase structure cases described in TPG par. 1.188-1.189. See in Canada, The Queen v. General Capital Canada Inc. FCA 344 (2010) and in Australia, Chevron Australia Holdings Pty Ltd v. Commissioner of Taxation, FCAFC 62 (2017).

[27] See *C.H. Berry, D. F. Bradford & J. R. Hines*, Arm's Length Pricing. some Economic Perspectives, 54 Tax Notes 731 (1992), *A. Bullen*, Arm's Length Transaction Structures: Recognizing and Restructuring Controlled Transactions in Transfer Pricing 305 (IBFD 2011) and *A. Navarro*, The Arm's Length Standard and Tax Justice: Reflections on the Present and the Future of Transfer Pricing, 10 World Tax Journal 351 (2018).

[28] TPG par. 1.13.

[29] TPG par. 1.11.

[30] See the Court of Justice of the European Union (CJEU hereinafter) C-382/16 Hornbach-Baumarkt case, analyzed in *S. Buriak & R. Petruzzi*, Transfer Pricing Rules Under the ECJ's Scrutiny: Green Light for Non-Arm's Length Transactions? 25 International Transfer Pricing Journal 349 (2018).

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of transfer pricing rules to confront sophisticated transfer pricing planning, a fact that generates high dissatisfaction and a potential repudiation of these rules as grounds to allocate taxing rights among jurisdictions; ii) to assess how the evolution of the sophistication of the way of structuring businesses, especially in the context of MNEs, has fostered complexity in this field up to a point in which entry barriers are considerably high[31]; iii) to determine how the comparability analysis – understood as the core of transfer pricing rules – has evolved accordingly; and iv) to grasp future developments towards either the reinforcement of these rules or their neglect.

The origin of the transfer pricing rules may be traced back to the UK[32] and the US[33] where their adoption coincided with the need to raise revenue during the Great War. In this first stage of development, the enforcement of these rules was rather unsettled, and courts tended to focus on whether the transaction was "fair" or "reasonable" which entailed a significant amount of subjective judgement. Therefore, it was very complicated to define distinct boundaries to establish *ex ante* if a controlled transaction was compliant with the arm's length principle.

The next stage of development began with the use of the comparability analysis as a benchmark to arrive to an appropriate transfer price. The abandonment of an analysis based on fairness was progressive, however, the main milestones were the adoption in the US of the 1968 regulations and the *Lufkin* case[34]. The latter determined that reasonableness should be measured in accordance with the outcome of the comparability analysis and not through the use of subjective parameters[35]. Additionally, the US advocated for the internationalization of transfer pricing rules through the OECD after the said 1968 Regulations. The truth is that the arm's length standard was already included in the 1933 League of Nations Draft Model Tax Convention[36], albeit its implementation in domestic law at that time was – leaving aside few exceptions – almost inexistent. The OECD was clearly inspired by US regulations when drafting the 1979 OECD Report on Transfer Pricing and

[31] See *S. Picciotto*, Problems of Transfer Pricing and Possibilities for Simplification, ICTD Working Paper 86 (2018), *A. Turina*, Back to Grass Roots: The Arm's Length Standard, Comparability and Transparency – some Perspectives from the Emerging World, 10 World Tax Journal 295 (2018). *R.S. Collier & N. Riedel*, The OECD/G20 Base Erosion and Profit Shifting Initiative and Developing Countries, 72 Bulletin for International Taxation 704 (2018).

[32] Sec. 31(3) UK Finance Act 1915. All in all, in *R. Dwarkasing*, Associated Enterprises. A Concept Essential for the Application of the Arm's Length Principle and Transfer Pricing (Dwarkasing & Partners 2011) it is pointed out that the arm's length ideal may be traced back to the "undue influence", a concept employed in equity jurisdictions already in the nineteenth century.

[33] Sec. 208, 1917 US War Revenue Act. See *J.S. Seidman*, Seidman's Legislative History of Federal Income Tax Laws 890-891 (Prentice-Hall 1938).

[34] See Lufkin Foundry & Machine Co. v. Commissioner, 468 F.2d 805 (2nd Cir. 1972). See also U.S. Steel Corp. v. Commissioner of Internal Revenue, 617 F.2d 942 (2nd Cir. 1980) where it was pointed out that the arm's length principle "is meant to be an objective standard that does not depend on the absence or presence of any intent on the part of the taxpayer to distort his income".

[35] See *R.S. Avi-Yonah*, The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation, 15 Virginia Tax Review 159 (1995).

[36] Fiscal Committee Draft Convention for the Allocation of Business Income Between States for the Purposes of Taxation (1933). See *H. Hamaekers*, Transfer Pricing and the Arm's Length Principle: History, Present Situation, Future, 16 Skatterett 286 (1998).

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Multinational Enterprises[37]. It is the predecessor of the 1995 Transfer Pricing Guidelines that led the OECD to be the primary catalyzer of the adoption of transfer pricing rules worldwide.

Meanwhile, a new development stage took place in the US in the late 1980s when profit-based methods were admitted for the purposes of the analysis. The comparable profits method (CPM) and the profit split method (PSM) implied a major change in the scope of transfer pricing rules. The pure comparison of transactions based on prices or gross margins was understood to not always be suitable for the complex structures and transactions that MNEs were adopting already at that time. The admissibility of these methods implied a reconsideration of the breadth of the arm's length fiction as the PSM is closer to a formulaic method than to a transactional one. This broad range of possibilities was described by several authors as a continuum[38] that led to the notion that the line that is most likely drawn to separate transfer pricing from formulary apportionment is more indistinguishable than may be initially thought. This relativization was also enhanced with the adoption of retrospective, *ex post* adjustments – what is known as the Commensurate-With-Income (CWI) standard – in the case of transfer or licensing of intangible property in section 482, second sentence, in 1986[39]. These steps were highly criticized by the OECD as being contrary to the arm's length rationale and a breach of consensus[40], albeit they recently admitted to the validity of these types of adjustment in the proceedings of the BEPS Project[41] and the resulting TPG update[42].

The peak of transfer pricing regulations at an international level began with the publication of the 1995 OECD TPG. The OECD acted as a catalyzer by recommending that jurisdictions worldwide adopt the arm's length standard to secure uniformity and consensus[43]. The last chapter in this regard took place with the

[37] *OECD,* Report of the OECD Committee on Fiscal Affairs on Transfer Pricing and Multinational Enterprises (1979).

[38] See *B.J. Arnold & T.E. McDonnell*, Report on the Invitational Conference on Transfer Pricing: The Allocation of Income and Expenses among Countries, 41 Canadian Tax Journal 899 (1993), *R.S. Avi-Yonah*, The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation, 15 Virginia Tax Review 159 (1995), *E.E. Lester*, International Transfer Pricing Rules: Unconventional Wisdom, 2 ILSA Journal of International & Comparative Law 283 (1995) and *Y. Brauner*, Formula Based Transfer Pricing, 42 Intertax 615 (2014).

[39] See *E.C. Lashbrooke*, I.R.C. s. 482 Commensurate with Income Standard for Transfers of Intangibles, 1 DePaul Business Law Journal 173 (1989) and *C.W. Cope*, Limitations on Transfer Price Adjustments Under the Commensurate with Income Standard, 104 The Journal of Taxation 112 (2006).

[40] Criticism was reflected in *OECD*, Tax Aspects of Transfer Pricing within Multinational Enterprises and The United States Proposed Regulations (1993). See also *A. Pichhadze*, The Arm's Length Comparable in Transfer Pricing, 7 World Tax Journal 383 (2015)

[41] *OECD*, Action 8: Hard-To-Value Intangibles (2015). *OECD*, Implementation Guidance on Hard-to-Value Intangibles (2017). *OECD*, Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles (2018).

[42] TPG par. 6.186-6.195. On this topic, see *C.C. Rodríguez Peña*, Compatibility between the OECD's Hard-to-Value Intangibles Methodology and the Arm's Length Standard: what is the Way Forward? 3(8) International Tax Studies (2020).

[43] See TPG Section B.2 Maintaining the arm's length principle as the international consensus.

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update of the TPG in its 2017 and 2022 versions containing all the recommendations formulated in the course of the BEPS Project[44].

2.3. Transfer pricing sources and their interaction

Different layers of sources interact to configure transfer pricing regimes, i.e., regulations at the domestic and cross-border levels as well as the soft law layer that influences the drafting of transfer pricing rules and their interpretation. The first level to be examined is that of domestic law as adjustments will be made in accordance with the specific regulations of each jurisdiction. Domestic transfer pricing rules usually adopt a two-tier approach comprised with i) the enactment of the basic arm's length standard rule – stating the need for controlled transactions to reflect the profit that independent parties would have obtained under identical or very similar conditions – usually contained in a law that is understood as an act approved by the legislative power and ii) regulations and administrative guidelines that will define the enforcement parameters of the rule in detail. That stated, there is not a specific standard by which the content of transfer pricing rules should be enacted in a law or in regulations, and the mix will vary significantly across jurisdictions[45]. In any case, virtually in all jurisdictions worldwide, transfer pricing rules based on the arm's length standard have been adopted as a profit allocation parameter and, thus, the content of the regulations and their enforcement are similar across jurisdictions.

From the perspective of cross-border regulations, the most relevant factor is probably the widespread adoption of clauses similar to Article 9.1 of the OECD MTC that remains identical in the UN and the US Model Tax Conventions. Almost every double tax convention (hereinafter DTC) in force includes this clause and often did even before the adoption of a transfer pricing set of rules at a domestic level. Actually, Article 9.1 OECD MTC was the inspiration that granted such a successful, standardized adoption in almost every country worldwide. Notwithstanding, the aim of this clause remains unclear. In principle, it fulfills the restriction function that characterizes the rules on allocation of taxing rights between the contracting states

[44] See *M. Koomen*, Transfer Pricing in a BEPS Era: Rethinking the Arm's Length Principle – Part I, 22 International Transfer Pricing Journal 152 (2015) and *M. Koomen*, Transfer Pricing in a BEPS Era: Rethinking the Arm's Length Principle – Part II, 22 International Transfer Pricing Journal 230 (2015). See also *A.J. Martín Jiménez*, Value Creation: A Guiding Light for the Interpretation of Tax Treaties?. 74 Bulletin for International Taxation 197 (2020).

[45] For instance, compare the succinct rule present in sec. 482 of the US Internal Revenue Code ("In any case of two or more organizations, trades, or businesses [...] owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses") with the regulations on the subject matter present on the US Treas. Regs. sec. 1.482, counting more than a hundred pages.

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equivalent to those comprised in Articles 6-22 OECD MTC[46]. This means that any adjustment on the profits derived from controlled transactions not in accordance with the arm's length principle would become inapplicable in the DTC context. Yet, the inclusion of a saving clause in Article 1.3 of the 2017 OECD MTC and Article 11 MLI – a clause systematically adopted by the US in its tax treaties[47] – override the restrictive function of Article 9.1. The saving clause allows the residence state to tax their own residents without any limits thus permitting the enforcements of adjustments beyond the arm's length principle without further constraints.

Alternatively, the corresponding adjustment clause present in Article 9.2 OECD MTC as well as the UN and the US MTCs serves the purpose of eliminating economic double taxation. Specifically, it requires an adjustment on the taxable base of the counterpart in order to reduce the tax burden imposed proportionally to the primary (upward) adjustment that was made in the taxable base of the first assessed party. This clause is not as widespread as Article 9.1 is as certain jurisdictions have been very reluctant to grant economic double taxation relief in this context. Notwithstanding, the clause was included in the MLI as part of the minimum standard in an obvious attempt to broaden its reach and cover tax agreements that it did not encompass before[48]. Additionally, it is relevant to note that the UN MTC and certain conventions signed primarily by developed countries contain a clause by which no corresponding adjustments would apply if one of the controlled enterprises is liable to a penalty with respect to fraud, gross negligence, or willful default[49]. In addition, it must be stressed that the transfer pricing rationale lies at the foundation of the PE profit attribution methodology present in Article 7.2 of the OECD, the UN, and the US MTCs[50] as well as the cap on source tax limitations present in Articles 11.6 (on interests) and 12.4 (on royalties).

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[46] See *H. Kroppen & S. Rasch*, Interpretation of the ALP Under Article 9: Does the ALP Cover Formal Requirements? 11 International Transfer Pricing Journal 26 (2004), *J. Wittendorff*, The Object of Article 9(1) of the OECD Model Convention: Commercial Or Financial Relations, 17 International Transfer Pricing Journal 200 (2010), *A. Bullen*, Arm's Length Transaction Structures: Recognizing and Restructuring Controlled Transactions in Transfer Pricing, sec. 6.1.1. (IBFD 2011) and *X. Ditz & M. Schneider*, Federal Tax Court Ruling on Relationship between Article 9(1) of the OECD Model Convention and National Income Adjustment Provision, 20 International Transfer Pricing Journal 188 (2013). See also the analysis of the issue in the Commentaries posed in supra note 3. As per case law, see e.g., the Australian cases SNF Australia Pty Ltd v. Commissioner, FCA 74 (2011) and Roche Products Pty Ltd v. Commissioner, AATA 639 (2008).

[47] See *R. Doernberg & C. Van Raad*, the Forthcoming U.S. Model Income Tax Treaty and the Saving Clause, 5 Tax Notes International 775 (1992) and *G. Kofler*, Some Reflections on the 'Saving Clause', 44 Intertax 574 (2016).

[48] See article 17 MLI. See also *OECD*, BEPS action 14: Making dispute resolutions mechanisms more effective. Final Report (2015). See an analysis in *A. Navarro*, The Multilateral Instrument (MLI) and Transfer Pricing, 49 Intertax 803 (2021).

[49] See article 9.3 UN Model Tax Convention.

[50] See *E. Kamphuis*, Significant People Functions and Functional Ownership: The New Motto in Transfer Pricing, 17 Tax Management Transfer Pricing Report 300 (2008), *H. Pijl,* Interpretation of Article 7 of the OECD Model, Permanent Establishment, Financing and Other Dealings, 65 Bulletin for International Taxation 294 (2011) and *K. Dziurdź*, Attribution of Functions and Profits to a Dependent Agent PE, 6 World Tax Journal 135 (2014).

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At the supranational level, EU Law also impacts transfer pricing rules in a manner that should not be underestimated. The case law on the limits posed by the EU fundamental freedoms on rules permitting the adjustment of profits of related parties[51] and the implications of the prohibition of state aid[52] have wide-reaching implications on the interpretation and enforcement of these rules. On the other hand, from the perspective of the elimination of double taxation, the EU Convention on this issue in connection with the adjustment of profits of associated enterprises[53] permits taxpayers resident in EU Member States to rely on alternative dispute resolution mechanisms to prevent economic double taxation. Similarly, the newer EU Directive on tax dispute resolution mechanisms in the European Union serves the same purpose[54] in the context of DTCs signed between EU Member States.

The soft law layer is also of great importance as the standardization that exists on the field has been possible since the recommendations of the OECD on the drafting of domestic rules on both policy and interpretation matters have been considerably followed by several jurisdictions. In this respect, the most important document by far is the OECD Transfer Pricing Guidelines. It is a non-binding document filled with recommendations relevant to the transfer pricing field that is being used by tax consultants, tax authorities, and even courts. It significantly helps to interpret and enforce transfer pricing rules comprehensively, including certain areas in which issues turn out to be remarkably complex[55]. Moreover, the UN elaborates a similar document, i.e. the UN Practical Manual on Transfer Pricing, of which the content is clearly inspired by its OECD homologue, yet it also focuses on providing guidelines that are of special interest for developing countries[56]. Both texts are complemented

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[51] See the European Court of Justice (ECJ) cases C-324/00 Lankhorst-Hohorst, C-524/04 Test Claimants in the Thin Cap Group Litigation, C-311/08 SGI, C-282/12 Itelcar, C-382/16 Hornbach-Baumarkt, C-558/19 Pizzarotti, C-484/19 Lexel, and C-431/21 Finanzamt Bremen. See *M. Glahe*, Transfer Pricing and EU Fundamental Freedoms, 22 EC Tax Review 222 (2013) and *S. Buriak & I. Lazarov*, Between State Aid and the Fundamental Freedoms: The Arm's Length Principle and EU Law, 56 Common Market Law Review 905 (2019).

[52] See the ECJ decision C-885/19 P Fiat and the General Court decisions T-636/16 Starbucks, and T-778/16 and T892/16 Apple. See *W. Schön*, Transfer Pricing Issues of BEPS in the Light of EU Law, British Tax Review 417 (2015), *R.J.S. Tavares, B.N. Bogenschneider & M. Pankiv*, The Intersection of EU State Aid and U.S. Tax Deferral: A Spectacle of Fireworks, Smoke, and Mirrors, 19 Florida Tax Review 121 (2016), *R.A. Galendi*, State aid and transfer pricing: the inherent flaw under a supranational reference system, 46 Intertax 994 (2018) and *W. Haslehner*, Transfer pricing rules and State aid law, in Research handbook on European Union taxation law 430 (C. Panayi, W. Haslehner & E. Traversa eds., Edward Elgar 2020).

[53] EU Convention 90/436/EEC.

[54] EU Council Directive 2017/1852 of 10 October 2017. See a thorough analysis of the Directive and the EU Convention at *H.M. Pit*, Dispute Resolution in the EU (IBFD 2018). See also *F. Debelva & J. Luts*, The European Commission's Proposal for Double Taxation Dispute Resolution: Turning the Tide? 71 Bulletin for International Taxation, 16 p. (2017).

[55] See *J. Calderón Carrero*, The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law? 35 Intertax 4 (2007). See also *M. Kobetsky*, The Status of the OECD Transfer Pricing Guidelines in the Post-BEPS Dynamic, 3 International Tax Studies 1 (2020) and *J. Bossuyt*, The Legal Status of Extrinsic Instruments for the Interpretation of Tax Treaties, sec. 3.3.1 (IBFD 2022)

[56] *United Nations*, Practical Manual on Transfer Pricing for Developing Countries (2017).

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by numerous discussion drafts on several topics and often accompanied with stakeholders' comments that are of great interest. In the European Union, the Joint Transfer Pricing Forum (JTPF) assists and advises the EU Commission on transfer pricing matters and issues reports on selected issues[57]. The interpretative value of all of these documents is a highly debated topic with relevant implications. This is due to the fact that, often, their uncritical use to interpret domestic transfer pricing rules and/or double tax conventions imply *de facto* granting normative value to a non-binding source of interpretation[58].

3. The enforcement of transfer pricing

3.1. Material aspects: the determination of an arm's length remuneration

3.1.1. The comparability analysis

The comparability analysis is considered to be the most crucial element of the application of the arm's length principle[59] as it refers to the methodology aimed at achieving the mandate posed in transfer pricing rules. It consists of a fact-intensive process that would first specify the relevant circumstances surrounding the transaction as it was structured by related parties. It subsequently searches and defines valid comparable market references to detect any deviations from market remuneration that should be corrected through a taxable adjustment[60].

The comparability analysis methodology serves not only to achieve an arm's length outcome but also aids both the taxpayer and the tax administration to assess the reliability of the adopted values. Specifically, the fact that a taxpayer has followed a well-constructed comparability analysis will be the best defense before an audit process is instigated by the tax authorities or before a court of law that has to gauge the validity of the taxpayer's derived results[61]. Often, in difficult cases, courts still apply a reasonability approach in the context that they would decide in favor of the

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[57] It has one representative from each Member State's tax administrations and 18 non-government organization members. All reports and further information on the documents produced for the meetings of the JTPF may be found at https://taxation-customs.ec.europa.eu/meeting-archive_en.

[58] See argumentation referred to the interpretative value of the OECD Commentaries to the Model Tax Convention that may be extrapolated to the TPG context in *E. van der Bruggen*, The Power of Persuasion: Notes on the Sources of International Law and the OECD Commentary, 31 Intertax 259 (2003), *H. Pijl*, The OECD Commentary as a Source of International Law and the Role of the Judiciary, 46 European Taxation 216 (2006) and *C. West*, References to the OECD Commentaries in Tax Treaties: A Steady March from "Soft" Law to "Hard" Law? 9 World Tax Journal 117 (2017). *J.F. Avery Jones & J. Hattingh*, Treaty Interpretation, in Global Tax Treaties Commentaries (P. Pistone ed., IBFD 2021).

[59] TPG par. 1.6.

[60] Cfr. The 9-step methodology proposed by the OECD in TPG par. 3.4.

[61] See *S. McDougall, A. Hickman & S. Pantelidaki*, Transfer Pricing and Comparables: Searching for a Needle in a Haystack, 11 International Transfer Pricing Journal 4 (2010).

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party – either the taxpayer or the tax authorities – that displayed a more significant effort to provide a thorough, methodical analysis on the matter of arriving at an arm's length outcome. This is valid even if there are still uncertainties as to whether the results are sufficiently accurate from an objective viewpoint. The specific burden of the proof rules of each jurisdiction will also play an important role in that regard, although the more effort a party displays in this regard, the better its interests will be[62].

As stated, the first stage of the comparability analysis will consist of thoroughly delineating the transaction as it was structured by the parties and the circumstances surrounding it. For that, a comprehensive understanding of the economically relevant characteristics and the key value drivers of the undertaking will be of great importance. These range from a broad-based perspective of the industry and the sector in which the transactions occur to a more specific level by identifying the nature of the transaction, the specific functions performed (e.g., R&D, promotion, sales, manufacturing, supervision, treasury), the assets used, and the risks assumed. Additionally, a value chain analysis will be important in order to better understand the role of the controlled entities in an MNE organization[63].

Specifically, the analysis of the transaction should begin with a review of the agreed contractual terms, although any information relevant to determine the actual conduct of the associated enterprises is pertinent[64]. As it is obvious, when written terms are inconsistent with the facts, i.e. with the actual conduct of the parties, the latter should prevail. Similarly, when no written terms exist, the actual transaction would need to be deduced from the evidence of actual conduct[65]. These thoughts may be illustrated with one of the most controversial aspects to be dealt with in this stage, specifically risk allocation[66]. It is relevant to determine how risks are contractually assumed, but

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[62] See TPG par. 4.13.

[63] See TPG par. 1.34. See also *P. Fris*, Dealing with Arm's Length and Comparability in the Years 2000, International Transfer Pricing Journal 194 (2003), *E. Muyaa*, Transfer Pricing Comparability Adjustments: The Pursuit of 'Exact' Comparables, 21 International Transfer Pricing Journal 347 (2014), *I. Verlinden & B. Markey*, From Compliance to the C-Suite: Value Creation Analysed through the Transfer Pricing Lens, 44 Intertax 774 (2016). *C.B. Ilhan*, The use of Value Chain Analysis in a Profit Split, 25 International Transfer Pricing Journal 273 (2018).

[64] See *D. Oosterhoff*, Proposed Revision of OECD Transfer Pricing Guidelines: The Importance of Facts and Circumstances, 17 International Transfer Pricing Journal 3 (2010) and *A. Pichhadze*, Exposing Unaddressed Issues in the OECD's BEPS Project: What about the Roles and Implications of Contract Interpretation Law and Private International Law in the Transfer Pricing Arm's Length Comparability Analysis? 7 World Tax Journal 99 (2015).

[65] TPG par. 1.49.

[66] See *C. Jie-A-Joen, D. Lierens & O. Moerer*, A Note on Controlling Risks from a Transfer Pricing Perspective, 18 Tax Management Transfer Pricing Report 659 (2009). *W. Schön*, International Taxation of Risk, 68 Bulletin for International Taxation 280 (2014), M.*O. Moerer, R. Agarwal & T.S. Respess III*, Transfer Pricing: Structuring a Post-BEPS Analysis of Foreign Exchange Risk, 42 Tax Planning International Review 4 (2015) and *I. Verlinden et al.*, OECD BEPS Action 9: Evaluating the Devaluation of Risk and Capital, 24 Tax Management Transfer Pricing Report (2015). *R.S. Collier & I.F. Dykes*, On the Apparent Widespread Misapplication of the OECD Transfer Pricing Guidelines, 76(1) Bulletin for International Taxation 20 (2022).

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how control and risk mitigation functions are performed[67], who bears the upside or downside consequences of risk outcomes, and whether the party allegedly assuming a risk has the financial capacity to confront its realization must be further examined. In this sense, it should be established whether compensations between the parties should be calculated at arm's length or, if pertinent, reallocate the risk in accordance with the conduct of the parties.

It is also important to note that this first fact-finding stage, i.e. where the transaction as structured by the parties is determined, a high risk of recharacterization exists that is often masked under the appearance of the accurate delineation of the transaction[68]. The adoption of transactional adjustments that modify the conditions of the controlled transaction is regarded as exceptional by the OECD and only admitted when there is a lack of commercial rationality, there are other options realistically available, and the taxpayer is left worse off on a pre-tax basis[69]. The distinction between such a possibility and the effect of other rules that would lead to the same outcome, such as thin capitalization rules or general anti-avoidance rules, also constitutes a great field for research[70].

Once the conditions and circumstances surrounding the controlled transaction have been determined, the second stage of the analysis must occur in which valid market comparable references must be determined to be compared against what was agreed between the related parties. The search of adequate comparables and adopting the most reliable method are highly interrelated steps. The process is not linear but is instead a trial-and-error method. The conditions and circumstances of the controlled transaction – determined in the first stage of the comparability analysis – will have to be contrasted with the availability and reliability of the information on internal or external comparables. This subsequently allows selecting the most appropriate method accordingly. Testing the validity of the possible outcomes and then choosing that which is most accurate will follow.

The transfer pricing methods adopt a specific benchmark in the form of prices, margins, or the split of profits under given circumstances. The strengths and weaknesses of each method, their appropriateness considering the facts of the case,

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[67] Some examples of relevant risks are financial risks, e.g. credit, collection, currency, interest rate, funding; other risks, e.g. operational risks, systems failure, inventory, and so on; product risks such as those concerning product liability, warranty, or contract enforceability, R&D risks, environmental risks, regulatory risks, or market risks, among others.

[68] Cfr. the Canadian Supreme Court decision in Shell Canada v. The Queen, 3 S.C.R. 622 (1999):, par. 45 bluntly expresses the mentioned idea: "a taxpayer is entitled to be taxed based on what it actually did, not based on what it could have done, and certainly not based on what a less sophisticated taxpayer might have done". In the US, see Frank v. International Canadian Corp., 308 F.2d 520 (9th Cir. 1962); Eli Lilly & Co. v. Commissioner, 856 F.2d 855 (7th Cir. 1988) and Claymont Investments v. Commissioner, 90 T.C.M. (CCH) 462 (2005).

[69] See TPG par. 1.141-1.142. Cfr. *OECD*, Transfer Pricing Guidelines (2010) par. 1.64 and *OECD*, Transfer Pricing Guidelines (1995) par. 1.36.

[70] See *J. Wittendorff*, The Transactional Ghost of Article 9 (1) of the OECD Model, 63 Bulletin for International Taxation 107 (2009), *A. Bullen*, Arm's Length Transaction Structures: Recognizing and Restructuring Controlled Transactions in Transfer Pricing (IBFD 2011) and *A. Navarro*, Transactional Adjustments in Transfer Pricing (IBFD 2018).

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the availability of reliable information, and the degree of comparability are relevant factors when choosing the most appropriate method to be applied[71]. Hereinafter, the five comparability methods acknowledged by the OECD, the UN, and the US are depicted.

The comparable uncontrolled price (CUP) is a two-sided method – the analysis focuses on both parties to the transaction – that compares the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction under comparable circumstances[72]. Between independent parties, a firm would never pay more for any product than the price at which the same product could be obtained from an alternative seller. Additionally, no independent firm would ever accept less than the price it could obtain from an alternative buyer[73], hence, the search for an equilibrium price that will reflect market conditions. This is what the CUP attempts to emulate, albeit it is also relevant to emphasize that markets are imperfect, and identical products may be purchased or sold at different prices. This method demands a high degree of similarity between the products and services that are compared, as well as functions performed, among other factors, which often renders it unreliable.

The resale price method (RPM) is a one-sided method that focuses on the gross margin that an independent reseller would seek in order to compensate for operating expenses and achieve an appropriate profit in accordance with the functions performed[74]. The consideration in exchange for the performance of similar functions tends to be equal within different activities, thus comparability may be reached even when the product sold to a related party is different from that of the selected uncontrolled comparable. As an example, consider a retail store selling toasters and blenders. These are not particularly close substitutes, thus, there would be no reason to expect their prices to be the same. However, the functions performed by the seller are indeed the same, therefore, the gross margin obtained is indeed comparable[75].

The cost-plus method (CPM) is a one-sided method that focuses on the mark-up on costs that a supplier of property or services would obtain under market conditions in accordance with functions performed. Thus, the focus should be on applying a comparable markup to a comparable cost base[76]. Its use is advised in cases of the sale of semi-finished goods to related entities when associated parties have concluded joint facility agreements or long-term buy-and-supply arrangements or when the controlled transaction is the provision of services[77].

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[71] See TPG par. 2.2 and US Treas. Regs. 1.482-3(b).

[72] TPG par. 1.128.

[73] See *C.H. Berry, D. F. Bradford & J. R. Hines*, Arm's Length Pricing. some Economic Perspectives, 54 Tax Notes 731 (1992) and *H. Hamaekers*, Transfer Pricing and the Arm's Length Principle: History, Present Situation, Future, 16 Skatterett 286 (1998).

[74] TPG par. 2.14 and US Treas. Regs. 1.482-3(c).

[75] This example is posed in TPG17 par. 2.30.

[76] TPG17 par. 2.50. and US Treas. Regs. 1.482-3(d).

[77] TPG par. 2.45.

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The transactional net margin method (TNMM) is also one-sided and focuses on the net profit relative to an appropriate base (profit level indicator) that a taxpayer realizes from a controlled transaction[78]. For instance, distribution companies could use return on sales as a benchmark (operating profits / sales) while, for manufacturing ones, most probably the most useful ratio is the return on capital employed (ROCE, EBIT / capital employed) or the net cost plus (operating profit / operating costs). This will depend on the information that is available and its reliability. The TNMM is considerably the most used method in practice since it may be based on the intensive use of databases over which a refinement process would derive a set of sufficiently close comparables. These databases are built on information from public sources such as documentation contained in public registers or published by the companies themselves[79]. The way to proceed in that regard is to define the scope of the research and the key points in order to narrow the results – industry, line of business, geographical market, availability of financial data, functions performed, etc. – and to adjust the results manually to gain accuracy and interpret the final results. In the US, the comparable profit method applies instead which implies a comparison of the operating income that results from the consideration actually charged in a controlled transfer with the operating income of similar taxpayers that are uncontrolled[80].

The profit split method (PSM) is a two-sided method that focuses on the allocation of profits derived from a transaction that independent parties would have agreed on in accordance with their involvement and expectations. This method is appropriate in cases in which both parties display high integration and perform unique and valuable contributions or when no reliable comparable references exist. Its use was revamped during the BEPS Project since it is less prone to a cost-based valuation and thus less malleable for tax planning purposes[81].

Although these are the five methods enshrined in the TPG, the UN PMTP, and the US Regulations, the list is not exhaustive. Other methods are also valid when they lead to achieve a more accurate arm's length outcome[82]. For instance, in certain scenarios, the use of discounted cash flow methods such as the net present value (NPV) or the internal rate of return (IRR) may be more appropriate that are widely present in project finance. Additionally, game theory-based and/or behavioral

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[78] TPG par. 2.64.

[79] See *M. Cools*, International Commercial Databases for Transfer Pricing Studies, 6 International Transfer Pricing Journal 167 (1999).

[80] US Treas. Regs. 1.482-5. See *B.N. McLennan*, Complying with the Proposed Section 482 Regulations: How to Create and Apply a Comparable Profit Interval, 4 Tax Notes International 1201 (1992), *T. Horst*, The Comparable Profits Method, 59 Tax Notes 1253 (1993), *R. Clark*, Choosing a Reliable Profit Level Indicator, 5 Tax Management Transfer Pricing Report 807 (1997) and *R. Feinschreiber & M. Kent*, Transfer Pricing Comparability: Use of the Comparable Profits Method to be Limited? 32 Intertax 193 (2004).

[81] See TPG par. 2.114 et seq. and US Treas. Regs. 1.482-6. See also *OECD*, Revised Guidance on Profit Splits (2017), *V. Chand & S. Wagh*, The Profit Split Method: Status Quo and Outlook in Light of the BEPS Action Plan, 21 International Transfer Pricing Journal 402 (2014) and *R. Petruzzi & C. Peng*, The Profit Split Method: Historical Evolution and BEPS Insights [Part 1], 1 Transfer Pricing International 44 (2017).

[82] TPG par. 2.9.

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methods such as the best alternatives to a negotiated agreement (BATNA) may be suitable in some cases for leading to more accurate results than the above-described methods[83].

Ultimately, the goal is for the taxpayer to select the most appropriate method and justify its applicability – yet, in certain jurisdictions at a domestic level, a hierarchy of methods is still contemplated –[84] although, when applicable, traditional methods (the CUP, RPM, and CPM) are more desirable. The CUP is especially popular and is regarded as the purest form of arm's length comparison[85]. Nonetheless, there is usually no need to analyze the applicability of all methods in depth[86], although the intensity of the analysis would depend not only on the complexity of the case but also on the specific domestic regulations of each jurisdiction.

The determination of the level of accuracy of a comparable as being considered sufficiently accurate is a difficult task as distinct results will rarely be the case. Tension is generated since, if stringent rules are adopted, the taxpayer will have a difficult time applying them, whereas, if a wide margin is allowed, reliable results may not be achieved. Virtue lies in the middle, thus it is important to acknowledge the relevance of certain tools that would help to increase the level of accuracy of the analysis and ease the obtention of reasonable results, specifically i) the adoption of reasonably accurate adjustments that would entail the modification of a comparable to better align it with the controlled transaction[87] and ii) the admission of transfer pricing ranges by which a reasonable precision level is only possible to be achieved when admitting that a single figure outcome cannot be reached but a range of plausible results. The outcome must reflect a result as close as possible to the mandate, but it must be acknowledged that more than one arm's length outcome may be admissible[88]

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[83] *E. Kamphuis & X. Zhang*, Game Theory, BATNA Insightful when Analyzing Options Realistically Available in Business Restructurings, 18 Tax Management Transfer Pricing Report 758 (2009), *J. Henshall & A. Barry*, He Who Calls the Tune should Pay the Piper...the Importance of Relative Bargaining Position in Determining UK Transfer Prices, 12 Transfer Pricing International Journal 13 (2011), *X. Chen*, Behavioural Game Split: The Arm's Length Principle and Highly Integrated Enterprises, 20 International Transfer Pricing Journal 339 (2013) and *J. Becker & R.B. Davies*, A Negotiation-Based Model of Tax-Induced Transfer Pricing (CESifo working paper 2014). See the United Kingdom case DSG Retail Ltd and others v. HMRC STC (SCD) 397 (2009).

[84] A hierarchy of methods was recommended by the OECD in the 1995 version of the TPG but abandoned in its 2010 update. See TPG 2.2 and US Treas. Regs.1.482-1(c).

[85] See TPG par. 2.1 et seq.

[86] TPG par. 2.8.

[87] See TPG par. 3.47-3.54. See also *J. van der Meer-Kooistra*, A Model for Making Qualitative Transfer Pricing Adjustments, 11 International Transfer Pricing Journal 190 (2004), *P. Fris & S. Gonnet*, ReAL Transfer Pricing: A New Paradigm for Transfer Pricing in Europe?, 7 Tax Planning International Transfer Pricing 3 (2006), *A. Joseph*, Transfer Pricing Comparability: Perspectives of OECD, Australia and United States, 14 International Transfer Pricing Journal 89 (2007), *M. Lucas Mas & G. Cottani*, OECD Proposed Revision of Chapters I-III of the OECD Transfer Pricing Guidelines. Business Comments on Selected Issues, 17 International Transfer Pricing Journal 239 (2010), *S. Gonnet, V. Starkov & M. Maitra*, Comparability Adjustments in the Absence of Suitable Local Comparables in Emerging and Developing Economies, 14 International Transfer Pricing Journal 4 (2013) and *E. Muyaa*, Transfer Pricing Comparability Adjustments: The Pursuit of 'Exact' Comparables, 21 International Transfer Pricing Journal 347 (2014).

[88] See TPG par. 3.55 and US Treas. Regs. 1.482-1(e).

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due to the frequent lack of availability of reliable comparables. In these cases, a range of plausible results may be regarded as the best possible result.

3.1.2. Specific issues

It is important to note that there are specific areas impacted by transfer pricing rules that deserve special attention due to their complexity, their impact on planning structures, or the interest they pose for certain jurisdictions. i) Aside from risk assumption –already mentioned above– one of the most relevant transfer pricing topics nowadays refers to the generation and exploitation of intangible assets, due to their profit potential. In addition to definition issues, the main addressed topic refers to the allocation of intangible related returns[89]. The uncertainty in the valuation of intangible assets at early stages of their development is also a highly discussed topic, as their transfer often do not reflect their profit potential at latter stages[90]. This leads certain countries to adopt hindsight rules that would authorize the tax authorities to perform retrospective adjustments[91]. ii) Although less sophisticated, the valuation of intra-group services is a very relevant topic due to the volume of these transactions within MNEs and the significant planning possibilities that they entail. Relevant aspects in this regard are the need to demonstrate that the service was effectively rendered and that it effectively benefits the entity requesting the services, alongside a proper calculation of the resulting remuneration[92]. ii) Intra-group finance also poses several issues since MNEs often structure their financial affairs in a manner that cannot be replicated within controlled parties[93]. Captive insurance or cash pooling

[89] See *J. Wittendorff*, 'Shadowlands': The OECD on Intangibles, 67 Tax Notes International 935 (2012), *C. Silberztein, M.C. Bennett & G.D. Lemein*, The OECD Discussion Draft on the Transfer of Intangibles (Revision of Chapter VI of the OECD Transfer Pricing Guidelines) - Detailed Comments, 41 Intertax 66 (2013), *M.A. Kane*, Transfer Pricing, Integration and Synergy Intangibles: A Consensus Approach to the Arm's Length Standard, 6 World Tax Journal 282 (2014), *O. Torvik*, Transfer Pricing and Intangibles: US and OECD Arm's Length Distribution of Operating Profits from IP Value Chains (IBFD 2019) and *K. Dziwiński*, The DEMPE Concept and Intangibles (Kluwer Law International 2022).

[90] See *J. Henshall & A. Lobb*, Hard-to-Value Intangibles and the Challenge of Valuing Uncertainty, 24 Tax Management Transfer Pricing Report 332 (2015) and *O. Fedusiv*, Transactions with Hard-to-Value Intangibles: Is BEPS Action 8 Based on the Arm's Length Principle? 23 International Transfer Pricing Journal 483 (2016). *C.C. Rodríguez Peña*, Compatibility between the OECD's Hard-to-Value Intangibles Methodology and the Arm's Length Standard: What is the Way Forward? 3(8) International Tax Studies 1 (2020). See also US literature *supra* at notes 23 and 39.

[91] See, e.g., in the United States section 482(2) IRC, in Germany section 1 of the Foreign Tax Act (AStG).

[92] See *E. Buono*, Transfer Pricing Aspects of Intra-Group Services: What are the Open Issues and what can be Improved? 27 International Transfer Pricing Journal 19 (2020). *N. Berndsen*, Profit Allocation Based on Scarcity Value: A New Factor for Taxing Intra-Group Services Where they Create Value, 12 World Tax Journal 829 (2020).

[93] See *M. Van der Breggen*, Intercompany Loans: Observations from a Transfer Pricing Perspective, 13 International Transfer Pricing Journal 295 (2006), *V. Chand*, Transfer Pricing Aspects of Cash Pooling Arrangements in Light of the BEPS Action Plan, 23 International Transfer Pricing Journal 38 (2016), *V. Chand*, Transfer Pricing Aspects of Intra-Group Loans in Light of the Base Erosion and Profit Shifting Action Plan, 44 Intertax 885 (2016) and *S. Greil & D. Schilling*, Intragroup Financial

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structures may be some examples. Additionally, intra-group loans or financial guarantees as well as hedging are of interest in this regard. iii) The adoption of cost sharing and cost contribution agreements (CSA, CCA) is also of relevance for transfer pricing purposes[94]. These are contractual arrangements among business enterprises aimed at sharing the contributions and risks involved in the joint development, production and exploitation of intangibles, tangible assets, or services. The calculation of a proper remuneration for the participation in the agreement – especially what is referred to as buy-in payments – as well as the distribution of costs are the two main issues to be addressed. iv) Business restructurings also pose major issues especially regarding the proper remuneration for the redistribution of functions, assets, and risks among related parties, especially when these components are reallocated to entities resident in low tax jurisdictions[95].

Moreover, there are certain topics that primarily attract the attention of developing countries[96] such as i) location savings that entail that the economic benefit arising from moving operations to a low-cost jurisdiction should be taxed by the country where such operations are carried out[97]; ii) marketing intangibles and the recognition of marketing expenses incurred by local entities for the benefit of related foreign enterprises[98]; or iii) the use of the sixth method in the context of commodities

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Transactions: Avoiding BEPS and Applying the Arm's-Length Principle, 87 Tax Notes International 251 (2017). *M. Lang & R. Petruzzi* eds., Transfer Pricing and Financial Transactions: Current Developments, Relevant Issues and Possible Solutions (Linde 2022).

[94] See TPG Chapter VIII Cost Contribution Arrangements and US Treas Regs.1.482-7. See also *Y. Brauner*, Cost Sharing and the Acrobatics of Arm's Length Taxation, 38 Intertax 554 (2010), *J. Wittendorff*, A Look at Cost Sharing in the OECD Discussion Draft, 78 Tax Notes International 1121 (2015), *R. van den Brekel*, BEPS Action 8: The Death of Development Cost Contribution Arrangements? 24 Tax Management Transfer Pricing Report (2016), *S.C. White*, Cost Sharing Agreements & the Arm's Length Standard: A Matter of Statutory Interpretation? 19 Florida Tax Review 191 (2016). See the US cases Xilinx, Inc. v. Commissioner, 598 F.3d 1191 (9th. Cir. 2010), Amazon.com, Inc. & Subs. v. Commissioner 148 T.C. 108 (2017), Altera Corp. v. Commissioner, n. 16-70496 (9th Cir. 2019).

[95] *A. Bakker & G. Cottani*, Transfer Pricing and Business Restructuring: The Choice of Hercules before the Tax Authorities, 15 International Transfer Pricing Journal. 272 (2008), *M. Herksen, C. Jie-a-Joen & M. Wallart*, Business Restructurings: The Latest Tax Trap, 10 Tax Planning International Transfer Pricing 22 (2009) and *J. Wang*, Business Restructurings: A Case Analysis and Regulations Applicable to Business Restructurings, 20 International Transfer Pricing Journal 317 (2013).

[96] See *M. Kobetsky*, Transfer Pricing Measures and Emerging Developing Economies, 14 Asia Pacific Tax Bulletin 363 (2008), *J.L. Andrus, M.C. Bennett & C. Silberztein*, The Arm's-Length Principle and Developing Economies, 20 Tax Management Transfer Pricing Report 495 (2011), *M. Durst*, Developing Country Taxation, Part VI: The Importance of Measuring the Effects of Transfer Pricing Reform, 24 Tax Management Transfer Pricing Report 495 (2015), *M. Lennard*, Base Erosion and Profit Shifting and Developing Country Tax Administrations, 44 Intertax 740 (2016).

[97] See UN PMTP, par. B.1.10.14. See also *J. Li & S. Ji*, Location Specific Advantages: A Rising Disruptive Factor in Transfer Pricing, 71 Bulletin for International Taxation 259 (2017).

[98] See UN PMTP par. B.5.2.13 et seq. See also *S. Wagh*, Transfer Pricing Aspects of Marketing Intangibles: An Indian Perspective, 69 Bulletin for International Taxation 9 (2015). See the Indian cases Honda Siel Power Products v. ACIT 346 ITA (2015) and Maruti Suzuki India v. ACIT 710 ITA (2015).

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demanding the fixed adoption of quoted prices of export/import goods at the time of shipment[99], among others.

3.2. Formal aspects: compliance and dispute resolution

Transfer pricing rules come at a significantly high compliance cost as the comparability analysis must be properly documented. The configuration of documentation duties should ensure that taxpayers effectively comply with transfer pricing requirements and that tax administrations are provided with useful information necessary to conduct an informed and thorough transfer pricing risk assessment[100].

In this context, not only taxpayers but also tax administrations have to deal with the negative consequences of transfer pricing rules and their complexity in the context of enforcement. Issues such as costs, time constraints, and competing demands for the attention of relevant personnel can sometimes undermine desired efficiency[101]. This is way achieving a balance between accuracy – and the increasing complexity it entails – and enforcement simplicity is one of the most important challenges within enforcement matters in transfer pricing. Proportionality should be the most relevant policy guideline in that regard. Compliance measures should be aimed at reducing opportunities and provide disincentives for noncompliance as well as granting positive assistance for compliance. Notwithstanding, assessment practices, burden of the proof aspects, and penalties for relevant infringements of transfer pricing rules are entirely defined in the domestic law of each jurisdiction, and no parameters are defined by the OECD which leads to a lack of uniformity.

A three-tier approach to documentation is proposed by the OECD[102] consisting of: i) a master file reflecting an overview of the MNE and a general description of the group's organizational structure, lines of business, intangibles, intercompany financial activities, as well as financial and tax position; ii) a local file comprising information that is more detailed on intercompany transactions for which the results of the comparability analysis must be reflected to ensure the compliance with transfer pricing rules within the specific jurisdiction, and iii) a country-by-country report containing aggregated jurisdiction-wide information relating to the global allocation of the income, the taxes paid, and certain indicators of the location of economic activity among tax jurisdictions in which the MNE group operates[103]. This provides tax administrations with an overall view for detecting high-level transfer pricing risks.

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[99] See TPG par. 2.18 and *OECD*, BEPS Action 10 Draft on Transfer Pricing Aspects of Cross-border Commodity Transactions (2014). See also *R. Feinschreiber & M. Kent*, Understanding the OECD's Commodity Transfer Pricing Regime, 81 Tax Notes International 589 (2016).

[100] TPG par. 5.5

[101] TPG par. 5.9.

[102] See TPG par. 5.16 et seq., and the TPG annexes to Chapter V on transfer pricing documentation.

[103] TPG par. 5.24, 5.25. This documentation requirement is perhaps the biggest success of the BEPS Project; see *OECD,* BEPS Action 13: Guidance on Transfer Pricing Documentation and Country-by-

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The inherent complexity in the enforcement of transfer pricing rules also generates disputes that could be addressed through prevention means. One of these is the establishment of safe harbors, usually under the predetermination of margins in certain sectors or under certain conditions or the predetermination of the application of a specific method[104]. Notwithstanding, these types of measures are usually very difficult to conceal with the case-by-case analysis demanded by the arm's length rationale. Moreover, advance pricing agreements (APAs) are useful to prevent disputes by means of a settlement between the taxpayer and the tax authorities on the way transfer pricing rules should apply to a transaction or a series of transactions before those even take place. This would prevent the initiation of tax audits as the tax administration would be able to know the valuation proposal by the taxpayer in advance. The former must agree with it for the APA to be effectively enforced. These agreements may be settled at a unilateral, bilateral, or even multilateral level depending on whether the tax authorities involved are those of a single jurisdiction or more[105]. In addition, APAs may be agreed in the framework defined by the mutual agreement procedure contained in a DTC[106].

Once a dispute on the means to apply transfer pricing rules exists, not only domestic remedies should be considered but also the availability of alternative dispute resolution mechanisms[107]. DTCs usually contain a mutual agreement procedure (MAP) clause that would allow the taxpayer to file a request for both contracting states to negotiate a reasonable outcome in order to eliminate double taxation not in accordance with the Convention, including the economic double taxation resulting

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Country Reporting. Final Report (2015). More than 100 countries have already implemented CbC rules, including the US, all EU Member States, all BRICS, Australia, Canada, and Japan, among others. A significant number of instruments exist to support the automatic exchange of CbC reports, specifically, the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA), various United States Competent Authority Agreements (US CAA), or the EU Council Directive 2016/881/EU of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation. According to the OECD, as of October 2022, there are over 3300 operative bilateral exchange agreements, see https://www.oecd.org/tax/beps/beps-actions/action13/.

[104] See *C. Silberztein*, OECD: Transfer Pricing Safe Harbours, 20 International Transfer Pricing Journal 2 (2013), *M. Lagarden*, New Transfer Pricing Documentation Requirements for Companies: Routes to Simplification?, 23 International Transfer Pricing Journal 1 (2016), *S. Picciotto*, Problems of Transfer Pricing and Possibilities for Simplification, ICTD Working Paper (2018). *A. Turina*, Back to Grass Roots: The Arm's Length Standard, Comparability and Transparency – Some Perspectives from the Emerging World, 10 World Tax Journal (2018),

[105] See TPG par. 4.173.

[106] These are what are known as MAP APA's. See the TPG Annex II to Chapter IV: Guidelines for Conducting Advance Pricing Arrangements under the Mutual Agreement Procedure (MAP APAs). The minimum standard promoted by the OECD also impacts the APA sphere as jurisdictions are requested to provide access to a MAP in transfer pricing cases, and countries should permit the roll-back of APAs. As best practices, it is recommended that countries include a corresponding adjustment rule in their tax treaties and that bilateral APA programmes are implemented.

[107] See *E. Baistrocchi & I. Roxan*, Resolving Transfer Pricing Disputes: A Global Analysis (Cambridge University Press 2012).

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from a transfer pricing adjustment[108]. Furthermore, certain Conventions will enable an arbitration procedure to begin if the parties are not able to reach an agreement within a specific period of time[109]. The OECD also hopes to extend the importance of arbitration clauses by means of the MLI[110]. At the EU level, the aforementioned Directive on tax treaty dispute resolution mechanisms recognizes the possibility to opt for arbitration in the context of DTCs signed between Member States[111].

4. Final remarks

The overwhelming number of materials on transfer pricing and its high level of complexity generates substantial entry barriers for conducting adequate research in the field of transfer pricing. The aim of this contribution is to briefly depict the most relevant issues and provide basic bibliographic references for researchers in order to provide a point of departure to approach the subject matter and to emphasize the most controversial aspects that merit further discussion.

The definition of the real scope of the arm's length fiction, its suitability to reflect the economic reality of efficiency gains generated by MNEs, the everlasting complexity of transfer pricing rules, the complex interaction of sources of law at a domestic level and at a supranational level – and the impact of soft law recommendations in their design– the level of accuracy that a comparability analysis needs to achieve to be appropriate, the assessment of conflicts between taxpayers and tax authorities, or the increasing repudiation of the appropriateness of the arm's length principle as a profit allocation parameter are just some of the most relevant challenges in the field of transfer pricing. Researchers properly addressing them and providing bold solutions is paramount for the adequate functioning and fitting of these rules within international tax law.

[108] See Article 25 OECD MTC. The eligibility for economic double taxation to be discussed under a MAP highly depends on the existence of a corresponding adjustment clause enshrined in the applicable DTC. Otherwise, the contracting states could argue that it was not their intention to address economic double taxation. That stated, it is also true that double taxation may be addressed in any case even for those not contemplated in the Convention as article 25.3 OECD MTC states.

[109] See Article 25.5 OECD MTC. See also *R. Ismer & S. Piotrowski*, A BIT Too Much: Or how Best to Resolve Tax Treaty Disputes? 44 Intertax 348 (2016).

[110] See Arts.18 et seq. MLI. See *L. Turcan & S. Govind*, The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instruments and the Proposed EU Arbitration Directive, 71 Bulletin for International Taxation 16 p. (2017)

[111] See *supra* note 54.

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https://doi.org/10.4337/9781788975377.00018

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