# Transfer Pricing Forum

## Transfer Pricing for the International Practitioner

### Services or Intangible Property Transfer? – Senior Technical & Management Personnel Transfers

**Services or Intangible Property**

1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?
2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?
3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

**Valuing the Item Transferred**

1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

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**Supporting the Company**

1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

**THE TRANSFER PRICING FORUM**
is designed to present a comparative study of typical transfer pricing issues by Country Panelists who are distinguished transfer pricing practitioners in major and emerging industrial countries. Their discussions focus on practical questions posed by guidance, case law and practice in their respective jurisdiction, with practical recommendations whenever appropriate.

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# Argentina

**Cristian E. Rosso Alba & Matías F. Lozano**
Rosso Alba, Francia & Asociados

## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

Local transfer pricing regulations do not have any provisions regarding the relocation of management teams, nor has the Argentine Revenue Service (ARS) set a specific standard or interpretation.

The Income Tax Law does not provide a definition of intangibles, but rather a set tax treatment. Goodwill in general may not be amortized, unless it has a limited useful life. In practice, intangibles are regarded as such by reference to local accounting rules. Despite those standards, some local case law has elaborated further and adopted a definition of intangibles used by the School of Commercial Studies, from Copenhagen (1944), which holds that, "intangible assets represent the value of certain rights that are capable of creating value." Such domestic case law further considers that the most common assets included in this category are trademarks and/or trade names, organization expenses, patents, and goodwill.[1]

In the case of a local taxpayer paying for a workforce-in-place intangible, it is necessary to consider that this cost will not be amortized (i.e. no set useful life) and could be considered a deductible capital outlay to the extent that cost-reducing or profit-generating effects can be demonstrated. The possibility of deducting such a payment will depend on the evidence available to support the benefits obtained by the local entity, so that the expenses incurred and the documentation developed support the value that is added by the experienced work force.

However, it is worth mentioning that under the standards set in the past by the ARS, it would certainly be aggressive to regard such an intangible, related to the payment for workforce-in-place, as a deductible business expense.

From the opposite perspective, in practice, it seems unlikely that the ARS would quantify and claim an intangible asset for the relocation of a senior manager or a management team outside of Argentina.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

Considering what was mentioned above, the factors that would be considered to characterize this broad intangible asset would be the skills embodied in the experienced workers, the degree to which they work in a highly specialized or technical area, so that they have knowledge that one might call "know-how," as well as the ability of such a workforce-in-place either to reduce costs or to generate profits. In practice, it would be difficult to measure and to account for the cost-reducing effect or the profit-generating potential of a certain group of workers. However, the possibility of measuring that value and effects will be different from one industry to another, e.g. services industry vs. manufacturing industry.

The key factor in determining how to characterize the transfer of an intangible in this personnel transfer is the importance of the intangible that could be associated with the manager or group of managers under analysis. Since there are no express regulations on this matter, and the intangibles under review are hard to value and account for, we have not witnessed major tax adjustments on this basis by the ARS.

As a possible exception to that statement, in the past, when the ARS challenged the substance of foreign affiliated trading companies for eroding the tax base of Argentine producing companies, salaries paid to the individual traders would be used indirectly to determine the materiality of the trading function. It should be noted that in specific markets, like agro-exporting, there are worldwide standards for determining the value of high profile traders. In such cases, it did not matter what the number of employees involved was, but rather the key indicator of value was consideration paid to them as an indication of their unique and demonstrated significance. If compensation was not material, the ARS would deem those traders to be insubstantial, despite the number of other personnel.


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### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

Since the possibility of assessing an intangible and accounting for it properly will be different from one industry to another, the duties of the management person or team would be relevant on a case by case basis. For example, if a car manufacturing subsidiary were to launch a new vehicle designed by its parent or another affiliate, bringing in experienced engineers to support such a launch would certainly ensure on-site capabilities to ensure successful performance. In this case, in practice, the intangible would usually be easier to assess and capitalize in the launching expenses.

Considering the above, duties of the work force on-site could help to quantify an embodied intangible, since those roles could evidence the value attached to a quantifiable intangible, such as a specific know-how of highly qualified professionals, or a client list attached to a skilled marketing team. In practice, it would be easier to set contractual prices and standards in related-party agreements, in which R&D or relevant intangibles are properly benchmarked, rather than assessing implicit intangibles in view of a manager from a management team tasked to perform a role.

All of these transactions should be carefully analyzed in the transfer pricing report of the local taxpayer, observing the standards set by the local transfer pricing regulations, while also taking into account the local regulations governing corporate reorganizations.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

There are no specific regulations in Argentina that cover restructuring processes (in terms of moving workforce or activities) or that provide a way to value such transfers of intangibles. Moreover, there are no case law precedents on this issue.

In such a context, the Federal Tax Court has consistently noted that the OECD guidelines would be helpful to cover transfer pricing issues that are not specifically covered by domestic regulations. In the recent case of *Volkswagen de Argentina SA* (July, 2017) the Tax Court noted that despite Argentina not being a member of the OECD, it is an active participant in its tax forums. After considering the relevance of the guidelines from a comparative law viewpoint, the Tax Court sustained the validity of referring to the guidelineś solutions in the absence of specific domestic law, if the solution is not otherwise inconsistent with the Argentine Income Tax framework. For such reasons, the OECD Transfer Pricing Guidelines could be fruitfully used to complete the local regulations, like appealing to the Hard-To-Value Intangibles concepts included in those guidelines.[2]

However, closing the loopholes of the Argentine transfer-pricing framework may lead to burdening the taxpayer with tax obligations that are not spelled out in the law. For example, in the *Toyota Argentina SA* case (2012) the Federal Court of Appels dismissed a notice of deficiency made by the ARS in view of an interquartile range that was not set by the law. The Court sustained that the guidelines could not be used this far, as this outcome would violate the legality principle. In this regard, it could be argued that a request to impute compensation in the absence of a set statute is constitutionally contentious, despite the possibility to appeal to the OECD guidelines. In any case, the outcome could be different in cases where such a compensation is compliant with local unrelated-party comparable transactions e.g. if the transfer of workforce is also accompanied with other special clauses like the existence of non-compete clauses, etc. For this reason, a case-by-case analysis is required to test the deal with its full background.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

General Resolution 1122/01 establishes that when analyzing a transaction under the transfer pricing viewpoint, the business structure of the operation must be observed. In this way, the company policy should focus its attention on the substance of the transactions between related parties.

Consequently, a sound transfer pricing policy could depart from a rigid delineation of the controlled transaction. This requires identifying the commercial and financial relations between the associated enterprises and the conditions and economically relevant circumstances attaching to those relations, in view of the relevant industry practices, to assess the economically relevant characteristics of the transaction under study. These standards should be taken into account for subsequent proper benchmarking, ensuring that pricing and behaviors are comparable between the tested party and the back-up comparables. In addition, a sound policy should also implement all necessary mechanisms to keep corresponding documentation of the entire process under analysis; further keeping key supporting value recommendations of an independent expert, whenever available.

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**NOTES**

[1] Case: *Boldt S.A. s/ recurso de apelación*, Division C of the National Tax Court, 2004.

[2] Case: *Aventis Pharma S.A. s/ recurso de apelación-impuesto a las ganancias*, Division D of the National Tax Court, 2010.

# Australia

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

This is an often-discussed question for which there is little or no readily-available guidance. There are a number of different scenarios that need to be considered, and ultimately the outcome will turn on the specific facts and circumstances of the arrangements. Let's discuss some of the scenarios:

- An individual is temporarily reassigned to an overseas posting: this is basically a secondment and the employee is tasked to perform duties in the other jurisdiction. Irrespective of how senior that person is and what special skills they have, it is difficult to see this as anything other than the provision of a services, remunerable on a cost plus basis (assuming that they remain on the home country's payroll). In most, if not all situations, this would be treated as a service rather than the provision of an intangible;
- A team is temporarily reassigned to an overseas posting to perform a contract: again given the temporary nature of the assignment (think a group of engineers sent to work on a LNG construction project or a team of IT experts travelling the globe to assist in the implementation of a new ERP system), such an assignment would generally be considered to be a service, irrespective of the specialist skillset of the group. There is certainly nothing published by the Australian Taxation Office ("ATO") that the author is aware of that would suggest otherwise.

The situation with the permanent relocation of individuals and teams is slightly more complex but once again will turn on the specific facts and circumstances of the arrangement. The transfer pricing issues will also turn on what exactly is being transferred. In this context we need to consider some fundamental questions including:

- Is an employee or a group of employees an asset of a company?
- Does a company effectively "own" the employee or team of employees?
- If the employees are particularly skilful, does the company own those skills or is the company merely paying the employees to use those skills in the performance of certain tasks (which perhaps creates intellectual property owned by the company); and
- Does the company have any claim on the skillset of its employees such that they could be considered to be an intangible asset of the company?

The Australian Accounting Standards Board's AASB 138 Intangible assets (paragraphs 8-17) provides a detailed definition of an intangible asset. For example, in Paragraph 8 an intangible asset is defined as an identifiable non-monetary asset without physical substance. Paragraph 12 specifically states that "an asset meets the identifiability criterion in the definition of an intangible asset when either it (a) is separable, that is, is capable of being separated or divided from the entity and sold, transferred, licensed, rented or exchanged, either individually or together with a related contract, asset or liability; or (b) arises from contractual or other legal rights, regardless of whether those rights are transferable or separable from the entity or from other rights and obligations.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

In assessing the implications involved in the transfer of employees in the context of the AASB's definition of intangible assets, consideration should be given to employment law. Under Australian employment law, the employee owns his or her employment asset. The employee is in charge of his or her own employment destiny. As such, they cannot be compelled to perform a task that they do not want to (while their employment contract may specify the employee's roles and responsibilities, ultimately if the employee does not wish to fulfil those roles and responsibilities, he or she has the right to resign). As such, an employer cannot compel an individual to relocate or to take a different job (offer and acceptance must be involved). As a consequence, employees are free to come and go (subject to the notice periods in their employment contracts) as they see fit.

Therefore, if a multinational seeks to shift an employee or a group of employees from one location to




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another, the employee must agree to that shift: it cannot be a unilateral decision. In such cases, assuming that the move is permanent, the employee will resign from his or her current employment arrangement and be employed by the new company. Given the break in employment, arguably no transfer of the employee or group of employees occurs from one company to the other. Further, it can be argued that it is the employee exercising his or her employment rights, ceasing to offer his or her employment to his or her initial employer and then taking up the terms of offer from the new employer. Therefore, it is difficult to see how an employee or group of employees could be seen as an intangible asset of a company as they are not able to be separated or divided from the entity and sold, transferred, licensed, rented or exchanged, either individually or together with a related contract, asset or liability (only the employee can transfer himself or herself from one company to the other). Similarly, while the employment relationship does arise on a contractual basis, the contract is terminable at the will of the employee. It is difficult to see how this could be considered to be an intangible right of the company when that relationship is contingent on the will of the employee.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

So from the transfer pricing perspective, it is difficult to argue that the permanent relocation of an employee or group of employees constitutes the transfer of an intangible asset from the multinational's perspective. The only potential exception to this principle may be those business owners that are so integral to their business and its success that you cannot separate them from their business. It is those individuals that are the business: they are effectively the profile and the income-earning capacity of the business. In those cases, the profits of the business tend to follow that individual so if he or she relocates, the source of the business profits follow.

However, the permanent transfer of staff or teams is likely to constitute a business restructuring for transfer pricing purposes. The ATO released Taxation Ruling TR 2011/1 "Income tax: application of the transfer pricing provisions to business restructuring by multinational enterprises" ("TR 2011/1") in 2011. That ruling predates the current law and applies to the former rules found in Division 13 of the Income Tax Assessment Act 1936. The ruling has not been withdrawn, however, but must be read in the context of the new rules introduced through the current law. It is relevant to note that TR 2011/1 was published taking into account the arm's length principle as espoused in the then 2010 version of the OECD Transfer Pricing Guidelines.

TR 2011/1 makes it clear that the first question that needs to be addressed is to identify exactly what is being transferred: it poses questions such as "what are the true nature, terms and effect of the restructuring" and "what are the strategies behind the restructuring". Significantly TR 2011/1 notes that "a profit-making opportunity, business opportunity or a profit potential is not in itself a proprietary right that is an intangible asset. Profit potential may be relevant to valuing an asset but it is not of itself an asset."

In this context, the permanent transfer of a team of experts as part of the movement of a function from one jurisdiction to another is likely to constitute a business restructure.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

The ATO has not provided any specific guidance on the valuation of *hard-to-value-intangibles*. However, it has provided guidance relating to the valuation of intangibles more generally. The ATO provides that the valuation of intangible assets, including intellectual property but excluding goodwill,[1] is based on a number of established valuation methods using market-based, income-based, cost-based and probabilistic approaches.

These methods include:

- comparable transactions
- incremental income
- excess earnings
- relief from royalty
- replacement or reproduction cost
- simulation analysis.

The ATO provides that when intangible assets (other than goodwill) are valued, the ATO expects to see a number of factors taken into account. These include:

- any relevant factor described in the valuation of a business (accounting for the specific interest)
- a description of the specific intangible asset or item of intellectual property and substantiation that the intangible asset or item of intellectual property is adequately categorised (that is, under the separability or contractual/legal criteria)
- a description of the complementary assets used in generating value for the intangible asset or item of intellectual property, and the calculation of any value allocation or charge needed to account for the use of those assets
- an analysis of the useful or effective life of the intangible asset or item of intellectual property
- an analysis of the obsolescence factors affecting the intangible asset or item of intellectual property (such as functional, economic, legal and technical factors)
- the legal rights associated with the intangible asset or item of intellectual property
- evidence that the intangible asset or item of intellectual property derives incremental value (for instance, establishing proof of the value generated by the aesthetic elements of an industrial design versus the utilitarian nature embedded within the design)
- expert reports, where relevant (for instance, the results of any prior art search from an intellectual property attorney).

Given the general nature of the ATO's guidance, some of the factors above may not be applicable to the valuation of the transfer of a business activity.

In assessing the likelihood, consequence and tax risk associated with a valuation, the ATO states that it will usually consider:

- value of the asset or assets determined or used
- type of asset or assets involved (intangible assets are more likely to increase risk)
- materiality of any potential tax adjustment
- complexity of the valuation process
- documentary evidence supporting the valuation.

In assessing the valuation process risk, the ATO generally uses valuers (appraisers) to confirm whether the market value is acceptable. They usually review the valuation process to see if it complies with accepted valuation industry practice. Broadly, the review involves looking at:

- how adequately the process was documented
- which market value definition was used
- how appropriate the method used was
- what assumptions and information was relied upon

At the conclusion of the review, the valuer provides the ATO with a report on the value adopted which may include an estimate of the market value (or a likely range) of the asset or assets, based on data available to them at that time. When the report is reviewed the ATO use a standard risk assessment procedure to decide whether to take further action, such as an audit. The ATO has stated that it expects the tax valuation report to be sufficiently detailed to enable the ATO's valuers to reverse engineer the analysis and to be able to reach the same conclusions. This means that the ATO expects the taxpayer's valuation report to document and objectively measure and rationalise any and all assumptions made in the valuation analysis.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

As always, documentation is the key. From an Australian perspective, any business restructuring needs to be considered in the context of both the OECD's observations and the local Australian rules, specifically TR 2011/1. The business restructuring will also need to be disclosed in the taxpayer's International Dealings Schedule disclosure, along with a level of documentation disclosure.

As is noted above, the documentation needs to identify the precise nature of the business restructuring including the functions, assets and risks that are transferred. The ATO is seeking to understand elements of a business restructure, including the consideration paid (or not paid) to determine if the arm's length principle has been applied correctly to the dealings. The ATO has always recognised that arm's length parties do restructure their business operations and acknowledges that multinationals can also do so on an arm's length basis so long as the consideration payable (if any) is predicated on what makes commercial sense for the parties, having regard to what is in their best interests and the options realistically available to them at arm's length. The ATO is of the view that an independent party dealing at arm's length would seek to protect its own economic interest and would compare the options realistically available and seek to maximise the overall value derived from its economic resources: this may include not entering into a business restructure if it does not make commercial sense for the particular taxpayer.

This documentation needs to address the OECD's DEMPE functions as the latest OECD Guidelines from 2017 are now enshrined into Australia's transfer pricing rules.

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**NOTES**

[1] The ATO provides that the valuation of goodwill is generally based on the calculation of a residual value. In basic terms, this approach requires the valuation of the net identifiable assets of the business (market-adjusted) and the valuation (market value) of the equity of the business. A residual value may be derived by subtracting the value of the net identifiable assets of the business from the value of equity of the business. As a general rule, the calculation of a residual value will be the most appropriate method for deriving goodwill. However, other methods may be accepted if they are appropriate to the circumstances.

# Austria

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

Whether the relocation of a senior manager or management team out of or into Austria would be viewed as a transfer of intangibles as well as services or purely as services must be analyzed on a case-by-case basis. Caution has to be taken with the transfer of an Austrian employee who has highly specialized knowledge that is essential for the business of the entity, as it may represent a hidden transfer of "know-how" (highly specialized expertise) as well as a transfer of services. For instance, when an employee of a company that produces high-technology products is transferred to a newly set-up production entity abroad, with the intention to render services such as training on a particular machine, product or implementation of the technical equipment, an IP transfer would take place because the new production entity is receiving crucial know-how needed for its activities and it would have the right to use the know-how transferred through the services rendered by the employee. In principle, this same analysis equally applies in the case of a foreign employee transferring into Austria, and the foreign affiliate wanting compensation for the intangible.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

The importance of the services rendered by the employee to the business's value creation, as well as the exclusivity of the employee's know-how, influence the characterization of these transfers.

Additionally, it should not be relevant whether a single person or a group of managers is transferred abroad. Although a group of managers surely attracts more attention, it cannot be excluded that a single employee may represent a transfer of an intangible asset.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

In principle, transfer of know-how can be applied to technical as well as economic knowledge. However, the transfer of intangible assets is supposedly more frequent with respect to technical knowledge.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

A general provision regulating the valuation of assets exists in the Austrian tax law (§ 6 n 6 Austrian Income Tax Act). This provision is a national guideline for transfer pricing adjustments. When transferring assets abroad, these assets have to be valued at the level, which would have been set if these assets were delivered to an independent third party.

Hard-to-value intangibles are intangibles whose prospective value is hard to define or which are only partially developed at the date of transfer and whose commercial use is only expected several years after transfer. This hard-to-value intangibles concept may apply to the transfer of services, however, it has to be analyzed on a case-by-case basis and cannot be applied in general.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

The fact pattern and description of intangibles should be as specific as possible, and the comparability analysis should be as precise as possible, in order for an entity to rely upon its calculation of the nature and value of the transfer of services.

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# Belgium

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

In cases where the transfer of a senior manager or management team could potentially be treated as a transfer of IP, the most difficult questions which would arise are:

— How to identify the intangible (i.e., whether valuable experience is transferred, whether the team itself and its internal way of cooperation brings value, whether the team has developed some process know-how, knows trade secrets, brings valuable ideas, etc.)?

— How to value the intangible?

The valuation is closely linked to the ability to identify the object (i.e., IP). In practice, it is a quite difficult exercise as these types of IP are not recorded on the balance sheet of a taxpayer (i.e., off-balance sheet IPs).

In addition to the accounting and legal definition of an intangible, OECD Guidelines provide a definition of intangibles for transfer pricing purposes as: *". . .something which is not a physical asset or a financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances."*

Based on this definition, in deciding whether a company has transferred an intangible asset or provided services by transferring management employees, it is important to analyze:

(i) whether the company has lost control over the identified asset or assets due to the contemplated transfer;

(ii) whether the company can still use the asset or assets in its commercial activities; and

(iii) whether the company would have expected a compensation if a transfer was performed to an independent counterparty.

An important point also to consider is that Chapter VI of the OECD Guidelines does not explicitly consider workforce in place as an intangible, because the ownership requirement cannot be met with respect to employees.

Generally, a transfer of a senior manager or management team does not itself constitute a transfer of an intangible. However, it can be the case when, for instance, a management and main operational team of a Belgian enterprise – which has been working together for many years and managed to develop a valuable process, and acquire know-how or other IP – is moving to a newly established foreign entity. This could mean that the core business activity has been transferred in its totality to another entity. It can be clearly seen by comparing the pre-transfer and post-transfer potential and ability to generate a cash flow by the newly established entity.

In fact, the classification of a management relocation transaction does not have a unified approach from the Belgian tax authorities. Analysis is done on a case-by-case basis, examining the circumstances of each particular case to see if any intangibles have been transferred. Note that there has been a tendency for Belgian tax authorities to pay closer attention to all transactions which lead to a shift of profits to foreign jurisdictions.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

There are indeed some factors which would be useful to consider when deciding whether the transfer of senior manager or management team has resulted in transfer of IP. We would advise to consider the following:

**Payroll**

Consideration of whether an employee has been transferred to the payroll of another entity, is the most straight-forward exercise we would advise to start the analysis with. Where employees stay legally bound and controlled by their initial employer, the risk of having a transfer of an IP might be lower.

**Contractual arrangements**

It is important to clearly distinguish whether the transfer of personnel is based on secondment arrangements, permanent transfer arrangements or supply of services. Legally binding agreements and the wording used therein will have a material effect on the classification of the nature of transfer, as well as on types of financial settlements between the entity sending and the one accepting employee(s). For instance, under a secondment arrangement employees of company "A" are temporarily transferred to entity "B" to perform their functions remaining on the payroll of company "A". From a transfer pricing perspective, it is accepted that for the period of secondment, all costs incurred by company "A" with respect to activities of a secondee are recharged at cost / at cost plus a mark-up to company "B". These transactions are more linked to the supply of services, rather than to transfer of IP, as company "A" still keeps control over the asset and can expect future benefits from its exploitation.

**Reporting lines**

It is also useful to investigate how the reporting lines will change as a result of a transfer. If company "A" has transferred a senior manager or a management team to company "B" and this management maintains accountable and reportable to company "A", one would argue that neither control, nor expectation of future benefits were lost by company "A" and, therefore, there was no transfer of IP.

**Impact on functional profile**

One of the most important parts of the analysis would be an investigation of changes in functional profile of both entities upon the transfer of personnel. If, for instance, transfer of the management team can lead to cease of the entire activity in company "A" (that can be the case in consulting business), shifting it to company "B", with high level of probability we can speak about transfer of IP. Let's imagine a consulting group of companies with offices in Brussels and in London. Brussels office specializes in tax, legal, audit and real estate consulting, while the office in London is involved in technical, environmental, and management consulting. All consulting areas are operationally independent from each other, have their own management, their own customer lists and a recognized branded name. The group decides to move the management team of real estate consultancy department from Belgium to the United Kingdom. The functional profile of both entities as well as their potential to generate cash flow will change significantly upon the transfer. In this case, it is more likely that the Belgian tax authorities will claim that there was a shift of profits resulted from transfer of valuable IP for which Belgian taxpayer needs to be compensated.

**Benefit to the recipient company**

This stage of analysis is pretty similar to the "Impact on functional profile" stage. However, we would focus more on the technological knowledge which can be transferred with a senior manager or team of managers. Close attention should be paid to whether the recipient entity has already been acquiring such technical knowledge before the transfer itself, or whether this is brand new knowledge to the entity.

**Industry specifics**

Finally, it is useful to consider some industry specifics. For instance, in the highly automated manufacturing industry, the move of a management team might have a less significant change in the operational process of the entity. Moreover, its potential to generate profits would less likely be affected. On the other hand, in personality driven and creative industries (e.g., R&D, consulting, IT, artists activities etc.), a move of only one key employee can lead to a significant change.

As to the question on the relocation of a senior manager or group of managers, we believe that there is no a direct correlation between the number of employees transferred and the classification of transaction. Impact on the functional profile and the potential to generate cash flow is much more important in this case.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

Certainly, a difference exists between the transfer of senior management level employees and execution team members. The more advanced character of work done and decisions taken by an employee, the greater value he / she brings to a company. Moreover, senior management has the ability to affect the cash flows of a company, for instance, they may have close business relationships with clients. Another point which bares importance is the ability and cost for an entity to replace the transferred employee with another specialist. One would argue that if person can easily be replaced without a qualitative loss to a company's business, then there was no valuable IP transferred with the transfer of employee.

In the case of an R&D working group transfer, it is not just the matter of the actual transfer of employees that is of importance, but rather the instrument that has the ability to develop IP. In independent comparable circumstances a company would be willing and will be entitled for compensation for the transfer of an IP creating instrument.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

There are no local tax and valuation rules in Belgium, except for those generally accepted in the OECD framework. Belgian transfer pricing audit department, as well as Belgian ruling commission accept applicability of commonly used valuation techniques (i.e., discount cash flows (DCF) analysis, Multiples analysis and/or CUP analysis).

In a case where the transfer of management is considered to be a transfer of an intangible, one should analyse whether it can be considered to be a Hard-To-Value intangible or not. Belgian tax authorities will attempt to claim it was a Hard-To-Value if the intangible transferred proves to be successful after transfer. However, we make reference to the OECD Guidelines as to the definition of a Hard-To-Value intangible.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

One of the most important features of each transfer pricing policy is clarity and detail in describing facts and evaluating circumstances surrounding the transaction. We recommend ensuring an upfront, high-standard and ongoing documentation of DEMPE functions.

Apart from the preparation of transfer pricing documentation reports, it will also be important to ensure consistency in the way the transfer of management functions is being presented in the Master File and Local File Forms.

It is also recommendable to describe in board meeting notes which persons have been transferred, why they have been transferred, who is benefiting from the transfer, and who made the decision.

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# Brazil

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

Strictly from the standpoint of Brazilian transfer pricing, the Federal Revenue of Brazil ("RFB") does not take a position on whether a transfer of senior managers or a management team qualifies as: (i) purely a services transfer, or (ii) a transfer including an intangible. For instance, if a senior manager of a Brazilian company were relocated to another country, no transfer pricing concerns should arise, so long as: (1) the senior manager continued formally to work for that Brazilian company (and not for a group company abroad), and (2) the Brazilian company did not hire services of the group company abroad.

Transfer pricing concerns arise when a services relationship between a Brazilian company and a foreign related company exists. So if, for example, the scenario: (1) involved a transfer of the formal employment contract between the Brazilian entity and the foreign group entity, and (2) the Brazilian entity hired the services of the now foreign senior manager, the operation would entail an importation of services, subject to Brazilian transfer pricing rules. The same would be true in situations in which the senior manager was transferred to Brazil (regardless whether a formal employment contract with a group entity abroad was maintained).

Given that the Brazilian transfer pricing rules do not operate under a profit split method, the transfer itself is not a concern for purposes of allocating FARM (functions, assets, risks and market).

Outside of strict transfer pricing considerations under Brazilian Law, it is possible that a cross-border agreement for the rendering of technical services also contemplates the transfer of a certain piece of intellectual property, which would be treated as an intangible for purposes of Brazilian taxation. In that situation, either the contract would have to apportion the price of the services and the price for the intellectual property transferred (the services would generally be subject to transfer pricing rules and the intangible would be subject to (i) special deductibility rules, based on a fixed percentage of gross revenues of the Brazilian payor, of up to 5% (five percent), or (ii) regular taxation by Corporate Income Tax ("IRPJ") and Social Contribution on Net Profits ("CSLL"), at an aggregate rate of up to 34%, depending on the operation carried out between the parties), or RFB would regard the entire contract as "of technical services", therefore subject to the taxes applicable to the importation or exportation of technical services, depending on the operation.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

As noted above, the characterization of the transfer is relevant for Brazilian transfer pricing purposes to the extent it relates to a formal employment contract transfer. The transfer of a single person, as opposed to a group of managers, would not affect the application of Brazilian transfer pricing rules. This is based on the notion that a person does not contain knowledge that Brazil recognizes as an intangible separate from the work the person does. Thus, the intangible in a group of people is not a specific intangible or know-how, but just "workforce-in-place."

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

Please see our comments above. A difference, not directly related to the Brazilian transfer pricing rules, but nevertheless relevant for purposes of Brazilian federal taxation, does exist, however. Namely, a longstanding position of RFB holds that cost-sharing agreements (or cost contribution agreements, or shared services agreements) cannot have as their main purpose the execution of the core activities of a main services provider within the group. If such an agreement does have core activities as its main purpose, it will be treated, for tax purposes, as a regular services agreement, not eligible, for example, to the exception from Brazilian transfer pricing rules for cost contribution arrangements.

Regardless whether a cost-sharing agreement involving a Brazilian company includes the physical transfer of management personnel, the fact remains that management activities, *provided they are not directly related to the core activities of the main services provider within the group*, would assist the Brazilian company in qualifying the agreement as a cost-sharing agreement for Brazilian tax purposes. For example, a cost-sharing agreement related to HR management is unlikely to qualify as a core activity of a company selling vehicles (along with other elements established by RFB for the qualification of a cost-sharing agreement, this would allow for an exception to the application of Brazilian transfer pricing rules). On the other hand, management of the sales operations of the same company may be more directly related to its core activities, and therefore a trigger to disqualify the agreement as a cost-sharing agreement under Brazilian Law.

The importation or exportation of disqualified technical services (for purposes of cost-sharing agreements) would be subject to Brazilian transfer pricing rules (the most common method for importation would be the Cost Plus Method ("CPL"), which generally applies a fixed margin of 20% (twenty percent) on the cost of rendering the services; for exportation, the most common method would again be a variant of the Cost Plus Method ("CAP"), which generally applies a fixed margin of 15% (fifteen percent) on costs and applicable taxes).

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

Apart from a general recommendation that valuations accord with general accounting rules and standards (in Brazil, generally, IFRS), no local tax or valuations rules would apply to this situation (or to Brazilian transfer pricing rules in general). The concepts of "Hard-To-Value Intangibles" do not currently apply under Brazilian Law.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

In Brazil's view, a transfer pricing policy does not need any specific features reliably to support a calculation of the value of management personnel services/senior manager services. As it expressed to the OECD in its Final Report of Actions 8, 9 and 10 of the BEPS Action Plan, Brazil has a transfer pricing policy based on fixed margins and statutory methods (none of which involve a profit split analysis or a group consolidation analysis, and none of which directly mirror the OECD Transfer Pricing Guidelines). Brazilian government authorities have declared to the OECD their intention to maintain their transfer pricing policy, even in light of the general recommendations set forth in Actions 8, 9 and 10, and, two years after the release of the Final Reports, we do not anticipate that Brazil will change its position with regard to that topic.

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# Canada

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

To date, there are no provisions in Canada's income tax legislation that specifically address the transfer pricing implications of a relocation of employees. Further, the Canada Revenue Agency (CRA) has not published any guidance on the topic. Canadian courts generally refer to the OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD TPG") in evaluating transfer pricing matters, although cautioning that the OECD TPG are not controlling in the same manner as law. But, in the absence of legislation or formal written guidance about workforce transfers, we expect that the CRA and the Canadian courts would consult the 2017 OECD TPG for guidance.

Based on the authors' experience, any analysis and conclusion would be dependent on the facts and circumstances. Different scenarios can be contemplated:

- If employees of Company A are temporarily relocated to Company B but remain on the home country payroll of Company A, we expect that the relocation of employees would more likely be viewed as a provision of services (i.e., Company A would be viewed as providing a service for Company B). In this case, the transfer pricing for the services rendered would be evaluated similarly to any other service arrangement.
- Alternatively, if the employees are formally seconded from Company A to Company B (or cease employment with Company A and commence employment with Company B), we generally expect that there would not be a provision of services with from the ongoing activity of the employees in the host country. However, in this situation, it should also be considered whether there is a one-time transfer of something of value from Company A to Company B that would warrant compensation. For example, if the employees have a unique capability or know-how, it should be considered whether there is a transfer of an intangible. Commercial (non-transfer pricing) case law in this area is understood to be very fact-specific with a variety of outcomes – as such, it is not possible to generalize on whether there should be a payment from Company B to Company A.

As noted above, in the case of a long term secondment (or a transfer of employment relationship) we would not expect there to be an ongoing provision of services from the source entity to the host entity. However, the authors are aware of the CRA taking the position that the income derived from the activities of seconded employees should belong to the source (or lending) entity, and not the host entity.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

It is hard to generalize about what factors would be important in assessing whether a relocation of employees results in an intercompany transaction that requires compensation. Because the analysis mainly depends on the facts, all facts would be relevant.

While it is unusual for a relocation of employees to give rise to a transfer of something of value, relevant factors when considering this possibility may include:

- Whether the employee group that is transferred comprises the entirety of a business operation, such that there is a transfer of a business rather than just a relocation of employees (or a transfer of employees between business operations).
- If the employee group is not the entirety of a business operation, does the group have know-how or other specialized knowledge that it gained from working at the transferring company; and if so, was the fact that it had this knowledge an important part of the reason for the transfer?
- Employment contracts and employment laws of the source and host countries. Pursuant to such contracts or laws, are the employees precluded from using the know-how developed or gained during employment at the source country entity?
- Is the rationale for the relocation based entirely on external factors, such that maintaining employment at the source entity is not a realistic alternative for the employees in question?

Recognizing that the employees are not "owned" by their employer, but are subject to employment and commercial laws, the ultimate question to resolve is what would occur if the source and host entities were unrelated. Given that it is unusual to transfer employees between arm's length parties other than in the context of a sale of a business, it would likely be necessary to hypothesize what arm's length parties would do, taking into account all relevant facts as well as jurisprudence from commercial and employee litigation.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

The activities of the employee group are likely to be relevant to the analysis and conclusion – but only when considered in conjunction with all other relevant facts (including, in particular, the business rationale for the movement).

As noted above, it might be more likely that there has been a transfer of something of value if the employee group comprises a discreet and stand-alone business operation – thus appearing to be similar to a transfer of a business or a business activity rather than just a relocation of employees. However, the specific business facts still must be considered before a conclusion is reached. For example, if an important customer in Country B threatens to terminate the business relationship with the company unless it establishes a local presence in Country B, it might be prudent to relocate an existing team from Country A to Country B. In this situation, it may be argued that the transfer of the team from one entity to another is beneficial to both parties – it alleviates the sending entity from potential costs associated with reducing head-count due to the loss of an important customer, and it benefits the new entity in Country B. In such a fact pattern, even if the group of employees comprised an entire business activity, the price that would be agreed on in an arm's length transaction might be nominal or zero.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

There are no specific local rules, laws or policies on such valuations. Clearly, establishing a value for a transfer of employees is difficult – as noted above, all facts must be taken into account to determine whether there has even been a transfer of anything of value. It is not clear that the Hard-To-Value Intangibles ("HTVI") concepts are relevant, because it is not clear that there is a transfer of an intangible. That being said, the CRA may consider using the HTVI concepts for the transfer of a group of employees, if such a transfer results in a transfer of an intangible. However, as noted above, the Canadian courts have clearly indicated that the OECD TPG may be consulted, but are not governing in the same manner as the provisions of a statute. Thus, we expect the Canadian courts to be very cautious about applying HTVI concepts such as using *ex poste* information, unless it is clear that arm's length parties would do so in a similar fact pattern.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

A thoughtful and fact-based analysis is necessary in order to evaluate whether the relocation of an employee (or group of employees) is critical. The methodology for establishing a transfer price associated with the move must take into account all the relevant facts (including the possibility suggested by the parenthetical, that with regard to IP development, the transferred employees might be involved in activity constituting DEMPE functions). As such, it would be difficult to adopt a general transfer pricing policy that would be applicable to any movement of people. For companies that routinely move people, it might be possible to establish a policy for specific types of movements (e.g., short term vs. medium term vs. long term), provided that the relocations follow a standard pattern.

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# China

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

China does not have detailed legislation or a well-established administrative practice regarding the transfer pricing (TP) consequences of business restructurings. Contemporaneous to the OECD's release of its final BEPS Action Plan in 2015, China's State Administration of Taxation (SAT) issued a public discussion draft concerning the implementation of 'Special Tax Adjustments' for consultation (Discussion Draft). The 2015 Discussion Draft contained very broad recharacterization rules that stated special tax investigations and ensuing adjustments would be warranted when intangibles are transferred outside China at a low price or free of charge, or when taxpayers implement arrangements, without reasonable commercial purposes, resulting in tax minimization. Although these provisions were not included in China's transfer pricing overhaul finalized in 2017, tax authorities have approached similar situations by examining what independent parties, operating at arm's length, would have negotiated – and whether the domestic taxpayer has realized, or will realize, a profit from the arrangement or transfer.

Hence, even though China's TP system contains no specific provisions to determine whether the activities of a senior manager or management team create a specific and identifiable intangible asset, Chinese tax authorities may try to impose a higher profit margin to attribute to the domestic taxpayer as a consequence of the transfer.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

In this situation, the most important factor would be the value added by the activities of the specific individual or group of managers relative to the group's value creation chain. The transfer of a group of managers would likely trigger higher scrutiny on the assumption that the potential for (intentional) tax-avoidance, and complexity of the activities performed, are greater. It would also lead to a discussion on assembled work force, i.e., whether the transfer involved compensation for recruitment and integration. It is important to point out that, under China's new TP documentation framework, tax authorities have access to a wealth of critical information pertaining to the local company and group's operations, including a value chain analysis, which could potentially facilitate this assessment.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

As discussed above, the duties undertaken and the nature of the activities will be key in determining the importance of the individual, or team, within the group's value chain and, as a consequence, of the TP implications of the transfer. If the management is involved in IP development, for example, tax authorities may question whether a corresponding IP transfer occurred. Similarly, managing business risk may lead to an argument of risk-shifting, and, hence, profit-shifting.

We note a growing trend in China to underscore the importance of local marketing activities as a value-creating function – illustrated by SAT's concept of DEMPEP, where the additional "P" stands for promotion – as well as an increasing focus on the role of trade intangibles as a driver of business value. Accordingly, transfers of a sales or R&D team are likely to be more heavily scrutinized by tax authorities.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

Aside from Announcement 6's 2017 reference to "other TP methods," which may be applied in furtherance of the OECD's traditional or transactional profit methods, there are no specific rules or guidance on how corporate valuation principles would be applied to the situation at hand.

Although China was an active proponent of the G20/OECD's BEPS project, the country is not an OECD member and is committed to implementing its minimum standards only, including Action Items 5, 6, 13 and 14, but not the guidance on intangibles covered by Action Items 8-10. Thus, it is unclear whether China will endorse the hard-to-value intangibles concept, or how it would be applied in practice.

Nevertheless, as noted above, in a transfer scenario, the tax authorities would likely try to impose a higher profit margin that accounts for the financial impact of the role or function transferred in or out of China.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

As discussed, Chinese tax authorities tend to approach the consequences of business restructurings in a pragmatic manner – i.e., whether the arm's length principle would require the domestic taxpayer to realize incremental profits as a result of the transfer. Therefore, it is critical that taxpayers in China prepare adequate documentation and analysis to demonstrate that: (i) the transfer has been reflected in the entity's TP model by an ascertainable increase in the remuneration; and, (ii) a range of options have been considered to evaluate whether the local entity is 'better off' as compared to the previous set-up in light of the options realistically available.

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# France

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## 1. Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

As a matter of principle, the French tax legislation does not qualify "human capital" as constituting an "asset." Therefore, in the current state of the French law, "workforce – in place" would be viewed as a component of a company's function. Consequently, since such tax law is aiming at taxing asset transfers, no compensation would be required on a transfer of a work force, to the extent the transfer is not reflective of or associated to any other asset transfer, in particular of an intangible.

If the aforementioned transfer is purely made of a transfer of personnel (managers, directors or employees), without any other single tangible or intangible asset, it is unlikely to be seen as a taxable transfer of a profitable business, if externalized out of a French company. Even if there is no formal guidance on the characterization of a taxable "business restructuring" under French tax law, such a taxable event is generally evidenced by the transfer of several assets in addition to the transfer of personnel, in a single or in successive times. Such assets would notably include a clientele or going-concern, as the case may be, i.e. a bundle of client contract relationships enabling to transfer the corresponding underlying profit potential. In this case, and in line with the OECD developments on "transaction delineation", it is likely that the French Tax Administration would seek to establish that the transfer of personnel takes place within a wider context and, as such, is part of a taxable event.

In business restructuring situations, it is expected as well that the French Tax Administration would pay due attention to the compliance with contractual and commercial law. If the previous contractual relationship between the parties has not been duly cancelled and, possibly, indemnified (e.g. in case of an early termination), it is likely that the French Tax Administration would seek to establish a tax reassessment on these grounds.

It is only in exceptional, and possibly abusive, situations, that a "pure" transfer of personnel would be seen as taxable in the hands of the transferee, notably if the latter is not indemnified while the activity carried out by said personnel is also indirectly transferred to the beneficiary (for instance if the contractual relationship with third party clients is somehow transferred to the beneficiary, or ended without compensation by the transferee or if the contract between the transferee and the beneficiary for the services rendered by the transferred personnel is unduly cancelled without proper indemnification).

The way these "transfers" are operated should also be reviewed, as they could be seen as "revealing" a taxable transaction or a business restructuring. Indeed, a simple expatriation or temporary relocation of a single person or a team should not be seen in itself as such a taxable event, notably if the relocation is temporary or made for the direct or indirect benefit of the transferee (for example a parent company agreeing to relocate some of its management in certain subsidiaries, for specific assignments, such as integration or local development purposes).

Also, given the recent BEPS developments, the profit position of the transferee or transferor should be scrutinized post transfer, in order to assess whether the transfer has indeed led to a loss of activity or margin for the transferee, which should have been indemnified.

In short, the current practice of the French Tax Authorities ("FTA") would be to request compensation for a transfer of assets only, as opposed to a mere transfer of personnel, based on the French tax legislation. However, more sophisticated and state-of-the-art positions have been recently taken by the FTA for significant functions transfers. For such transfers, it is believed that the following action plan should be followed:

- An economic mapping of the existing functions and risks borne by the French company that locates the activity concerned (and possibly shared with other related companies within a single group) should be performed;
- A legal analysis should be carried-out to check whether the French company should be compensated;
- A financial analysis should be performed to check whether the French company can have an individual interest in the function restructuring;
- If, pursuant to these reviews, it cannot be demonstrated that (i) the French company had no right to a compensation or (ii) had its own interest in the restructuring, a compensation should be paid by the company that is taking the functions (in the event of a transfer of activity) or by some companies of the Group, notably the parent company (in the event of a closing of activity).

As an illustration of this approach, the Administrative Court of Paris ruled that a transfer of a cash pooling activity from a French company managing the cash pool to a foreign entity belonging to the same group without compensation was deemed to be an indirect transfer of benefits under article 57 of the French Tax Code. The judge confirmed the tax reassessment carried out by the FTA, through (1) an increase of the taxable basis subject to corporate income tax of the French company by the deemed compensation, together with (2) the application of a withholding tax on the corresponding amount, resulted in profits that were deemed transferred to the related foreign company as an undisclosed distribution of dividends.[1]

Apart from transfers of functions, the FTA can also proceed to certain reassessments pursuant to the termination of certain functions (e.g. total or partial closing of a business in France, without any transfer to a related or third party). It can notably be considered that the expenses related to the closing of such activity/function cannot necessarily be borne, totally or partially, by the French company locating this activity/function if such closing has been unilaterally decided by the foreign parent company of this French company, particularly if the activity was profitable. Correspondingly, the tax deductibility of closing expenses (particularly severance payments) as well as capital losses on asset write-offs could be challenged by the FTA. Therefore, if pursuant to the transfer of employees, some costs in relation to them or their terminated activities remain borne by the transferee, then their tax deductibility could be challenged, and this could be seen, again, as an undisclosed distribution of dividends to the beneficiary.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

Obviously, given section 1 above, in most cases, the transfer of a single person is unlikely to trigger a taxable event or the transfer of an intangible. Circumstances under which this could occur could include:

- if this sole person would be seen as a director of a company (1) having the legal ability to represent and take binding commitments for said company. In such a case, the company (2) employing that person could be seen as housing the permanent establishment of the company (1) in its premises.
- If the transfer of this person may convey the transfer of valuable intangible, such as know-how. In these situations, we would expect the transferor to be willing to pay for such transfer since it would have had to develop such know how if it had not benefited from the transfer.

The transfer of a larger group of people is more likely to raise more scrutiny. In practice, such transfer might correspond to transfer of complex functions and risks. But in such a case, a transfer of goodwill / clientele could still only be characterized under the conditions set out under section 1 above.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

The transfer of sales people would require more specific attention, as they are the most likely to carry the client relationship from the transferee to the beneficiary. However, the transfer itself should not result in the transfer of relationships with the corresponding clients, as contractually, the transferor would still be in relationship with the clients. However, if the transferee also transfers this contractual relationship, or agrees to terminate it without any proper indemnification while being legally justified to ask for it, this would be seen as an abnormal act of management, requiring to reassess its taxable profit by the amount unduly surrendered, from a French corporate income tax perspective. This would also be seen as a form of undisclosed distribution of dividends (as raised above under section 1) to the beneficiary, possibly triggering a withholding tax leakage upon the gross amount of this unjustified advantage.

The transfer of a management team of a company 1 could generate a permanent establishment of that company if transferred to company 2, if the management team keeps its duties in company 1 after the transfer.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

As mentioned previously, a valuation would be required only when the transfer of personnel takes place within the wider context of a business restructuring, or it typically relates to, simultaneously, a transfer of intangible such as know-how, rights, or "anything of value".

In those situations, the accurate delineation of transaction, and the consideration of options realistically available ought to be critical in the valuation.

There is no French regulation on how to value intangibles - or teams – for French tax purposes. The French Tax Administration in 2006 published a non-binding booklet on equity valuation which is not used or might not be used systematically, by practitioners.

In practice, the French tax administration enforces the arm's length principle, as per the OECD Transfer Pricing Guidelines. Consequently, it can be argued that the methodology to value such items would be the same – but for transfer pricing specific concepts – that the one which would have prevailed for dealings between unrelated parties.

Methods typically used to value intangibles include the Discounted Cash Flow method. However, in the case of intangibles associated with a workforce, the Replacement or Replication Cost Method may also be used.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

Quantitative Analyses, such as Discounted Cash Flow, Replacement or Replication Cost Methods require a thorough analysis. When applying such methods, critical parameters and assumptions ought to be carefully identified and justified, based on external, unbiased references. It is recommended to test the sensitivity of the results to alternatives values of key variables impacting the valuation results.

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**NOTES**

[1] Cour Administrative d'Appel de Versailles, n°10PA00748, December 31, 2012, Sté SOPEBSA.

# Germany

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

Two pieces of German transfer pricing regulations can be applicable when a senior manager is relocated, especially when relocated from Germany. Germany does have a specific regulation on Personnel Secondments,[1] but in practice the most important issue will be the question of whether the case falls under the more aggressive Decree on the Relocation of Functions (cf. 'Valuing the Item Transferred' below).[2]

In such cases the German legislation concentrates on the relocation of functions - the "transfer package" - and its profit potential. A function is loosely defined as an organic part of a company, which does not necessarily need to be an entire division. However, transferable functions usually represent an aggregation of homogeneous tasks, which may be executed by particular units or divisions of a company.

The relocation of a function includes the intangible assets necessary for performing it, as well as the connected opportunities and risks. In this respect, "relocation" means transfer from one company to another affiliated company or to a permanent establishment. Temporary or partial transfers may also be deemed "relocations".

No relocation, in the sense described in the preceding paragraph, occurs in cases of the expatriation of employees,[3] if the transfer of employment happens without the transfer of functions or intellectual property (or, in cases of the divesture or cession of single tangible assets, the supply of a singular service). The definition of the "relocation of functions" is broad and covers various relocations of tasks. The preamble of the law aims at securing the exit taxation in Germany, when intangible assets and advantages (know-how, patented or unpatented knowledge, trademark rights, customer base etc.) are relocated abroad.

While the simple secondment of personnel should therefore theoretically not be seen as a relocation of function, in practice it can often be observed that this is a heavily scrutinized issue due to the potential amounts that are involved.

Note that neither a Relocation of Function nor a Personnel Secondment is assumed to have occurred if the manager or management team is simply present at the foreign entity as part of a service rendered to the respective entity.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

To further complicate the issues, while the decree on the relocation of functions explicitly exempts cases of personnel secondments, it also limits this exemption, i.e. there is an exception to the exemption: If the manager or management team that is relocated remains responsible in their previous role and conducts their activities in a relatively unchanged fashion, the regulations would assume that a transfer of functions has in fact occurred, and must be valued as described below.

Normally managers resume a somewhat comparable activity at the entity that they are send to, which does make it extremely difficult to distinguish when exactly a transfer of a function would actually have been deemed to occur. This is further complicated by the fact that managers will often apply specific know-how that they learned at their original entity to their new residence (which can be a reason to transfer the managers in the first place). The transfer of intangibles is an indication of a relocated function – but generic know-how might not meet the threshold to constitute an intangible if it is not in fact capable of being owned.

This distinction is further clarified in the regulation on Personnel Secondments: General knowledge and experience is expected to be a part of a secondment (and not be separately remunerated), while a dedicated transfer of intangibles that includes certain chances and risks is to be separately remunerated.

Moreover, a distinction between a relocated function and a secondment can be made by the exemption clauses of the relocations of functions. If a relocated function is not lessened at the original company, it would count as being duplicated and the exit payment would be considerably lower. If a management team is only transferred for a limited time, and it can be proved that in fact no significant limitation at the original company is to be expected, there might be an additional argument for a secondment instead of a relocation of function.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

The duties of the management team do have an impact, especially if they relate to intangibles or future expected profits. For example it would typically be suspected that a group of researches that is transferred might also entail the transfer of certain research findings. The transfer of a sales team could also trigger an investigation of whether the customer base has in fact been co-transferred.

In this context, an assessment akin to the OECD "DEMPE" analysis for intangibles and significant people functions is required. The functions (and the control of them) as well as the value of the intangibles transferred need to be assessed. The assessment if valuable intangibles' profit potential is transferred can depend on the specific situation, illustrated by the following examples:

- In the case of a transfer of a sales team, valuable business contacts or customer lists may be transferred. Will future revenues and profits associated with these transferred clients be remunerated in Germany?
- If an R&D team is transferred, it is important to assess who will be the economic owner of R&D work that it does and results that might potentially be transferred as well.

Overall it is important to assess if economic ownership of valuable intangibles is transferred (R&D developments, customer relations, know-how, best practices, procurement relations, etc.) or if the management team will develop these intangibles in the new company from scratch. Furthermore it is important to assess if the transfer of the management team limits any functions that may have been pursued in Germany, had they not been transferred.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

Most valuations of intangibles transferred in employment transfers would fall under the regulations on the Relocation of Functions, and even in cases where these regulations do not directly apply, they would influence the overall methodology of the valuations.

Generally, the net present value of future earnings has to be determined for the sending and the receiving companies. When third-party comparable prices cannot be determined, the regulations required a hypothetical third-party comparison. For purposes of such a hypothetical third-party comparison, the minimum price that the transferor would be willing to accept and the maximum price that the receiving party would be willing to pay need to be determined by means of a functional analysis and internal business projections.

In general, the price reflecting the arm's length principle with the highest probability within the bargaining range should be used. If no such *prima facie* evidence is available, the arithmetic mean between the minimum and maximum prices may be used. The rationale behind this method is that the midpoint best approximates the results of fictitious negotiations between two third parties.

The range of values for the relocation of functions (transfer package) has to be determined through the transferred profit potential in its entirety using a method which is based on the capitalized earnings value.

According to the Funktionsverlagerungsverordnung (FVerlV), the profit potential derives from the expected after-tax profit. The calculations must also respect advantages from location savings and synergy effects. An appropriate interest rate and a reasonable capitalization period have to be applied.

When determining the profit potential, several aspects have to be taken into consideration. The relocation of functions does not generally lead to an isolated use of the transfer package. The transfer package usually represents only a part of the income of the transferee. The transferred functions are generally supplemented by further functions and vary in their absolute and relative value over time.

When calculating the minimum price that the ceding party is willing to accept, the legal and economic ownership of the transfer package have to be investigated, the lifetime of the package on the date of the transfer has to be verified, the future associated earnings have to be quantified, and various other elements need to be considered, such as the market development, the economic situation, gestation lags, decay rates, and appropriate amortization rates.

When calculating the upper limit of the price range, the contributions of the receiving party have to be analyzed, e.g. its own IP and workforce. The future associated earnings have to be quantified taking into consideration the market development, gestation lags, as well as decay, amortization and interest rates.

Finally, the bargaining power of the involved parties has to be analyzed in order to determine which price within the min-max range would be the most likely negotiation outcome between independent third parties.

When analyzing and calculating the arm's length price for a transfer package, accepted valuation methods should be used, as for example the Residual Profit Split (e.g. in the automotive industry). Other accepted valuation techniques are cost based contribution analyses, expert survey systems (e.g. concerning know-how and market power), and consumer survey systems (e.g. for brand value).

### Supporting the Company Position

#### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

As described above, the circumstances surrounding an employment transfer of any significance will typically be scrutinized under the regulations regarding the relocation of function and the secondment of personnel. Even if the tax payer does not consider the relocation of functions applicable, it would be extremely advisable to prepare documentation about why it is not applicable.

Documentation requirements in Germany are generally high, and even higher in "extraordinary cases" (i.e. those that affect the economic basis of transactions).[4] Moreover, for potential relocations of functions, the burden of proof is somewhat shifted to the taxpayer in that many factors of the valuation need to be made accessible and be of sufficient probative value. For example, tax payers must provide evidence of why a certain range in the bargaining range is more likely than others, or why certain co-transferred intangibles would only have a limited lifetime, etc.

Finally, in cases of the relocation of business functions, a rebuttable presumption arises that independent third parties would have agreed to periodical adjustments, as laid out in § 9 – 11 of FVerlV.

The Foreign Tax law (§ 1 (1) S. 2) assumes information transparency. This leads to the de facto renunciation from the arm's length comparison of the behavior of the prudent businessman, to the arm's length comparison of the results.

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**NOTES**

[1] Grundsätze für die Prüfung der Einkunftsabgrenzung zwischen international verbundenen Unternehmen in Fällen der Arbeitnehmerentsendung (Verwaltungsgrundsätze-Arbeitnehmerentsendung), 9 November 2001

[2] Verordnung zur Anwendung des Fremdvergleichsgrundsatzes nach § 1 Abs. 1 des Auszensteuergesetzes in Fällen grenzüberschreitender Funktionsverlagerungen (Funktionsverlagerungsverordnung - FVerlV), 13 October 2010

[3] Cf. § 1 Sec. 7, 2nd sentence FVerlV

[4] Cf Abgabenordnung (AO) § 90 (Mitwirkungspflichten der Beteiligten)

# Hong Kong

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

Hong Kong (HK) does not have clearly defined guidelines or transfer pricing (TP) legislations in place in relation to intangibles. However, in line with the OECD Guidelines, the HK Inland Revenue Department (IRD) will generally refer to, and intends to follow, the OECD Guidelines when determining arm's length conditions for transactions that involve the use or transfer of intangibles.

Further, in HK, there is far less guidance with respect to the relocation of senior managers / management teams. The market practice has, for the most part been to treat this as a service transfer. Every company or group may have variations in their profile and any conclusion on the treatment will be very much drawn by the facts and circumstances. With new TP rules and legislation to be gazetted shortly on December 29 2017 and to be introduced into HK, we expect that the position of the HK IRD will evolve on the issue of intangibles in general and will release more guidance in the future.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

See our responses for Part 1. The issues raised for this article are rare and have yet to be tested and challenged frequently enough in HK to provide any clear and definitive comment. Hong Kong, as compared to Europe, is far behind on this narrow topic of management team / staff transfer. Typical and more common is challenges on substance of an IP arrangement (i.e. brand) and what price / royalty rate should apply.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

While not directly related to the specific issue of the transfer of management, the duties and the roles of personnel can have a big impact on the evaluations or intangibles in general. The HK IRD does pay attention to such details and not just the titles of individuals but also any additional details / evidence for the roles and responsibilities. The HK IRD has also stated that they intend to adopt the development, enhancement, maintenance, protection and exploitation (DEMPE) framework with regards to evaluating intangibles (see further below). We expect more attention to this in the future.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

There are no clearly defined TP rules in HK related to the valuations of intangibles. With respect to evaluating payment for intangibles, we have seen questioning and scrutiny in various tax / TP audits in HK with respect to royalty arrangements between related parties. However, for complicated or integrated business, profit split methodologies have also been adopted with regards to addressing intangible transactions. Again unlike many other countries that have more prescriptive issued guidance in HK there is no available practice notes or formal guidance issued for TP treatment of IP. This will change and until the HK IRD issues its expected guidance on IP and application of DEMPE taxpayers in HK will continue to operate in a vacuum. So at a practical level companies and MNEs have adopted approaches acceptable in their respective home countries or use corporate finance or market based valuation method such as discount cash flows or other appropriate according to the type of assets being evaluated.

Typically, when determining the arm's length royalty fees, it is common practice to apply the Comparable Uncontrolled Price (CUP) method and search for comparable third-party data in the market (i.e.,


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fees that would be paid between third parties under a comparable royalty arrangement). A common source to obtain comparable royalty rates is Royalty Source, an online service provider.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions):

As mentioned in Part 1, although there are currently no TP rules or regulations in place, the HK IRD has indicated its intention to introduce TP legislations by the end of 2017. To support any TP policy companies in HK need to prepared sufficient TP documentation in support of pricing methods used including benchmark and / or other appropriate economic analysis.

In its consultation report on Measures to Counter Base Erosion and Profit Shifting (BEPS) issued in July 2017, under Paragraph 2.11, the HK IRD informed the public of its intent to adopt DEMPE-based principles to evaluate Intellectual Property (IP) related transactions.

With this broader DEMPE definition, we anticipate increased controversies as to how intangibles-related income should be shared within a multinational group.

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# India

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

India does not restrict its view of a personnel transfer to looking just at services. Rather, the question of whether the transfer includes an intangible is simply a conclusion to be drawn from an analysis of the nature of the transaction resulting from the transfer. The analysis as to whether the above mentioned relocation is a 'services transfer' or includes an 'intangible asset' should typically begin with a thorough understanding of the Multinational Entity's (MNE's) global business model; and the manner in which relocation is planned by the MNE to add or create value across the entire supply chain.

Key factors to be considered when characterizing a transfer would be the conditions typically agreed upon between independent parties in a comparable transaction. Whether the transfer is of a single person or a group of managers is not a key factor to be deliberated upon, instead consequent value creation arising from the transfer would be important. In a case pursuant to the relocation, services are being provided to the transferee entity, therefore it may be construed to be a transfer of services. On the other hand, in a case pursuant to the transfer, the transferee entity has obtained crucial sources of value and competitive distinctiveness, playing a pivotal role in the transferee's profitability, so the same may be construed to be a transfer of intangibles. Accordingly, depending upon the facts and circumstances of each individual case and due consideration of the functions being performed, assets employed and risks assumed (FAR), the transaction may be characterised to be either a 'services transfer' or an 'intangibles transfer'.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

OECD/ G-20 BEPS Action Plans 8 to 10 provide guidance in this regard. Section D.7 of the Action Plan 8 to 10 on Assembled workforce contains paragraph 1.152 which states that the existence of uniquely qualified and experienced employees may affect the arm's length price (ALP) for services provided by them or goods produced by the enterprise. Accordingly, such factors should ordinarily be taken into account in a TP comparability analysis. Where it is possible to determine the benefits or detriments of a uniquely assembled workforce vis-à-vis the workforce of enterprises engaging in potentially comparable transactions, then comparability adjustments may be made to reflect the impact of the assembled workforce on ALPs for goods or services.

Para 1.153 further states that in a case where the relocation is part of a business restructuring transaction, wherein the transfer of the assembled workforce along with other transferred assets of the business is likely to save the transferee the time and expense of hiring and training a new workforce, in such cases it may be appropriate to reflect such time and expense savings in the form of comparability adjustments to the ALP that are otherwise charged with respect to the transferred assets. Conversely there may be a situation where the transfer of the assembled workforce results in limitations on the transferee's flexibility in structuring business operations and could create potential liabilities if workers are terminated. In such cases it may be appropriate for the compensation paid in connection with the restructuring to reflect the potential future liabilities and limitations.

However the OECD does not endorse that the transfer or secondment of individual employees between members of an MNE group should always be separately compensated as a general practice. In many instances, the transfer of individual employees between Associated Enterprises (AEs) may not give rise to a need for compensation. Where employees are seconded (i.e. they remain on the transferor's payroll but work for the transferee), in many cases the appropriate arm's length compensation for the services of the seconded employees in question would be the only payment required.


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The OECD does acknowledge though, that in some situations, the transfer or secondment of one or more employees could result in the transfer of valuable know-how or other intangibles from one AE to another and recommends that such cases should be separately analyzed under the provisions of Chapter VI (Intangibles) and an appropriate price should be paid for the right to use the intangibles. It also recognizes that access to an assembled workforce with particular skills and experience may, in some cases, enhance the value of transferred intangibles or other assets, even where the employees making up the workforce are not transferred.

The United Nations Transfer Pricing Manual (UN TP Manual) notes that it is important to distinguish between the transfer of an assembled workforce in the context of a 'business restructuring' and the mere 'secondment of employees', which is common in any MNE group. As a general rule, it is rather rare that a transfer of individual employees between members of an MNE group should be compensated beyond the mere reimbursement of the employment and other associated costs, or the remuneration required for the services carried out by the seconded employees. The UN TP Manual acknowledges that the use or transfer of part or all of a workforce does not, in itself, constitute the transfer of intangibles. However, it can also be the case that the transfer of certain employees is accompanied by the transfer of intangibles such as know-how from one AE to another.

The Transfer Pricing (TP) regulations of India contain an elaborate definition of "intangible property", to *interalia* include human capital related intangible assets, such as, trained and organized work force, employment agreements and union contracts. However, apart from introduction of the above definition, considering that there has been no explicit guidance provided on the subject to date by the Indian Government, it is anticipated that the Indian Revenue authorities (IRA) would have due regard to the FAR analysis and accordingly construe the transfer of workforce to be either IP or 'services transfer', in alignment with the principles emanating from the guidance provided by the OECD and UN.

## 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

**Management team**

Management cross charges, as part of intra group services (IGS) is one of the more litigious issues in TP currently and involves greater subjectivity since considerable emphasis is placed on benefits derived from the services in addition to the pricing. The nature of management functions/duties of the employee(s) being transferred would warrant a thorough analysis to determine the way forward for a further ALP determination of such transaction. Discharging managerial functions would typically warrant an arm's length analysis similar to the receipt of any other services. Services such as management, coordination and control functions may be provided by the parent or by a member of the MNE group, to one or more AEs, in order to achieve efficiency and control costs. The OECD recommends ensuring that services are appropriately identified and associated costs appropriately allocated within the MNE group in accordance with the arm's length principle.

IRA tends to focus on the need, evidence, benefits and purpose of such management services, prior to examining the arm's length nature of such services. It is interesting to note that there have been a number of APAs signed in India relating to management cross charges, where the APA teams have provided a pragmatic and rational resolution on this rather controversial issue notwithstanding the fact that not much guidance is available internationally on resolution of similar issues through the APA route. The efforts have been towards understanding the FAR of the taxpayer and its AE and the availability and production of robust documentation supporting the same. This demonstrates the pragmatic view of the Indian Government in its endeavour to resolve this rather vexed TP issue.

**Sales team**

In case the duties of the team relocating involve carrying out sales related marketing and promotional activities, it would need to be seen whether such services could result in creation of a marketing related intangible or are in the nature of support services, etc. The OECD TP guidelines state that in case where the advertising, marketing and promotional (AMP) activities are undertaken by enterprises other than the legal owner and these AMP activities in turn benefit the legal owner of the intangible, it is important to compensate the entity performing AMP based on principle of arm's length.

In India, in case activities of the sales team constitute AMP related services, where the brand owner is the overseas parent, such activities have been subject to scrutiny with the IRA being of the view that such activities add value to the trademark / brand (owned by the overseas parent), by virtue of brand building and hence the Indian subsidiary ought to be remunerated commensurately.

In the recent past there have been a number of favourable judicial precedents supporting taxpayers in cases where they have been able to maintain robust TP documentation justifying the various business arrangements entered into; and where they have been able to demonstrate that the AMP expenses incurred by them were purely for the benefit of the local business, etc. The issue however is yet to reach finality, with the matter pending adjudication before the Supreme Court of India.

**R&D Group**

IRA generally follows the guidelines of the OECD and UN for research and development (R&D) services. Namely if the facts justify that the foreign principal conceptualises and defines the overall vista and direction of research, monitors the progress of the research on a regular basis, determines and allocates necessary budget for the research, etc. If the R&D centre in India merely executes the research under such guidance and ownership of the foreign principal, then the arrangement would be accepted as one of contract R&D service provision by the Indian R&D centre, as the centre is entitled to a cost plus form of remuneration.

On the other hand, if the facts suggest that the Indian R&D centre actually performs research on an end to end basis, namely it carries out even the strategic functions of conceptualisation and monitoring of the research; and the foreign principal does not carry out any function beyond funding the research, then a cost plus model may not be adopted; and the Indian R&D centre may be entitled to necessary intangible related returns.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

BEPS Action Plans 8 to 10 define HTVI to mean those intangibles for which, at the time of their transfer in a transaction between AEs, (i) no reliable comparables exist; and (ii) at the time the transaction was entered into, the projection of future cash flows or income expected to be derived from the transferred intangibles or the assumptions used in valuing the intangibles, are highly uncertain, making it difficult to predict the level of ultimate success of the intangible, at the time of the transfer.

In an Indian context, an example of a potential HTVI could be in the case of an Indian pharmaceutical company, which transfers to its AE a partly developed prototype drug component aimed at curing a health issue not treated as of yet. In this case, since there would typically be no third party comparables available and due to the fact that the drug is not fully developed, it would not be marketable for third parties thus making the estimation of future cash flows rather difficult. After identification of the HTVI, the next step is the appropriate valuation of its ALP. Valuation of HTVI tends to be a complex exercise not only due to the rather 'unique' features associated therewith, but also because the valuation methodologies would require the taxpayer to consider potential likely events and make reasonable assumptions to identify the consideration attributable to such HTVIs.

The OECD guidelines state that the ALP of such HTVIs should be determined by reference to what independent enterprises would have done in comparable circumstances to take account of the valuation uncertainty in the pricing of the transactions. Thus, if independent enterprises would have fixed the price based upon a particular projection, the same approach should be used by the tax administrations in evaluating the pricing. One such projection could include ex-ante (anticipated) returns to determine the valuation of intangibles. While considering the anticipated benefits, subsequent developments and the related risk which are foreseeable and predictable need to be taken into consideration. BEPS Actions 8-10 says that in situations where reliable comparable uncontrolled transactions for a transfer of one or more intangibles cannot be identified (which is also the case for HTVIs), it may be possible to use valuation techniques to estimate the ALP for intangibles transferred between AEs. In particular, the application of income based valuation techniques, especially valuation techniques premised on the calculation of the discounted value of projected future income streams (DCF technique) or cash flows derived from the exploitation of the intangible being valued, may be particularly useful when properly applied.

There are no guidelines available in the Indian TP regulations for HTVI. It is expected that the IRA should accept the generally accepted guidelines of using DCF technique for HTVI valuations, where applicable. A prudent way forward would be to ensure preparation of robust documentation noting all assumptions used for preparation of the projections / valuations of the HTVI, so as to support the taxpayer's contention of non-availability of information – in case of potential variances between the projections and reality (which would be likely available with the IRA at the time of conducting of audits).

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

India has adopted the OECD's approach on BEPS in relation to intangible-related returns, concurring that such returns should reside with the entity which takes strategic decisions around creation of the intangibles and not with the entity which has mere ownership of title and funding capacity. India therefore believes that by adopting the "significant people functions" approach in determining the economic owner of intangibles, the disparity between profit and economic activity would largely be resolved. Accordingly, MNEs would do well to ensure that their TP policies are formulated in a manner so as to include:

- Correct reflection of the comparability characteristics like market specific features, etc.;
- Highlighting the entity that is the legal owner of the intangible and in a way endorsing that the legal owner is not be entitled to any portion of the return derived by the MNE group from the exploitation of the intangibles other than the arm's length contribution with respect to the functions performed by such legal owner;
- Highlighting the entity bearing the funding risk (bearing such a risk without the assumption of any further risk generally would entitle the funder to a risk-adjusted rate of anticipated return on its funding and nothing more);
- Identification and determination of manner of compensation based on the relevant FAR analysis of all contributing members in relation to the DEMPE functions.

The above should be clearly outlined in the TP policy as this shall provide the analytical framework for identifying the ALP and other conditions for transactions involving intangibles.

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# Israel

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

The Israeli Tax Authority ("**ITA**") has not determined any particular rules regarding this issue. Currently, the ITA challenges cost plus models of services transactions to profit splits in cases where it determines the nature of a service as a non-routine.

As such, it is likely that in cases of senior manager/s transfers the ITA will treats these situations as ones that create value hereby valid for application of profit split.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

The comparison between the "before and after" states is usually done by preforming a functional analysis to understand whether a transfer of a single management person, and more significantly, a group of senior managers from one place to another incorporates added value to the transaction.

From our experience, in determining whether a manager/s transfer incorporates IP and not merely services the ITA will examine the nature of the services involved in the transfer and particularly will focus on strategic decision making functions and value creation for the multinational enterprise.

The ITA considers the location of where strategic decisions take place as an indication of value creation, therefore most likely that in both cases mentioned above the transfer may be considered in the view of the ITA as an IP transfer with all the implications derived from it, where the transfer of a group of managers would support this characterization even more.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

The role its self does not make much difference but more what the role represent within the supply chain of the entire transaction.

For example, if an entity was characterized as a marketing services provider and was remunerated with cost plus for the services, and now the Group's VP of marketing is transferred to this entity and all marketing strategic decisions of the group are carried out by that entity, then its current remuneration (i.e. cost plus) may not be appropriate, considering the management transfer.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

In such cases the ITA is less engaged with valuation methods and is more transfer pricing (TP) ordinated and thus it may apply a certain TP method such as the profit split.

Application of the profit split method could be carried by differentiating from the services provided under the transfer and the senior management function, where the services would be characterized as a routine function with a cost plus compensation and the senior management function would be characterized as a non-routine function that will be compensated by splitting the residual profit derived from the enterprise's relevant operations, after allocating relevant profit for routine functions.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

As long as the TP policy of the group would be more detailed and will explain the group's on-going business (with exceptional situations) the easier it would be to deal with DEMPE issues.

TP policy, unlike a Master File, explains in detail how an enterprise works implementing TP models for different types of intra-group transactions. A good TP policy will determine the headquarter and affiliates' responsibilities and present existing intra-group transactions (e.g. distribution, services, financing and transactions involving intangible property) as well as general rules regarding TP documentation, intercompany agreements and TP adjustment policy.

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# Italy

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

Italian transfer pricing rules (Article 110(7) of the ITA[1]) constitute the only legal basis for addressing the possible need for a remuneration of the transfer of personnel taking place within a multinational group. However, as Article 110(7) does not contemplate specific measures addressing business restructurings, or more specifically the relocation of a manager or a management team, the issue should be addressed in light of the arm's length principle, taking into account the principles set forth by Chapter I – D.7. and IX of the OECD Transfer Pricing Guidelines (TPG). It should be noted that these guidelines, as updated over the years, represent the main source of interpretation of the Italian transfer pricing provisions both in the Italian Tax Authorities' auditing practice and in case law.

As provided by the TPG, if the relocation of personnel reflects a redeployment of assets, functions or risks, then it may be reasonable that the Italian company is compensated for such transfer. The determining questions are whether there is a transfer of something of value (as for example in the form of transfer of intangibles, transfer of goodwill, transfer of "know-how", etc) and whether such a transfer would be compensated between independent parties in comparable circumstances.

The transfer of a senior manager or a management team to a foreign group company might also be relevant in Italy from an indirect tax perspective[2] as the relocation could be characterised as a sale of a branch of business. The Italian tax authorities commonly qualify a movement of employees to a foreign company as a transfer of going concern, relevant for indirect tax purposes, even where few or no other assets are transferred with the personnel.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

As provided by the Italian civil code, the definition of going concern is quite broad; according to Article 2555 of the civil code, a going concern is any set of assets (including contracts or relationships) organized for carrying on a business. The key elements to determine if some assets of an enterprise could qualify as a going concern are the "organization" and the "attitude" to carry on a specific business. In that regard, the matter has also been raised by the European Court of Justice with some decisions (decisions: 10 December 1998, nn. 127/96, 229/96 e 74/97, *Vidal*; 10 December 1998, nn. 173/96, 24/96, *Hidalgo*) holding that there may be a transfer of going concern when the transfer includes a group of employees, permanently coordinated and organized among themselves, whose operational capacity is ensured by the fact that they have a particular know-how.

This approach has been taken also by Italian Supreme Court, Labor Section, dated 5 March 2008, No. 5932[3] which maintained that a transfer of personnel could qualify as a transfer of a going concern when they are coordinated and organized between themselves and they have specific skills. In particular, the Italian Supreme Court stated that *"The transfer of a group of employees coordinated and organized among themselves - whose operational capability is enabled by the fact that they possess a special "know how" - may constitute a transfer of undertaking"*.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

If the Italian transfer pricing rules do not provide any specific guidance on the transfer of personnel, we believe that particular attention should be paid in the case of a transfer of a management team involved in the decision making functions, as the transfer may have an impact on the outcome of the DEMPE analysis.

In this case, the transfer of a management team could have consequences not only on the functions carried out by the companies involved (as in the case of transfer of personnel who perform certain R&D or sales functions which may involve the transfer of said functions) but also, for example, on the ownership of an intangible or on the exposure to risks.

The duties and experience of the personnel should also be considered to have an impact on the qualification of the transaction. On this point, it is important to mention the decision of the Provincial Tax Court of Milan No. 5404 dated 12 June 2015 which stated that experience and skills are key factors in the assessment of the transfer of personnel. The decision also provided that transferred employees could be considered as an intangible asset which represents the ability of a company to generate extra-profit compared to low or medium risk investments. The same principle has been affirmed by the decision of the Regional Tax Court of Lombardy No. 914 dated 20 February 2014. In that case, the Regional Court ruled that there was no transfer of intangibles as the transferred personnel performed low-technical activities.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

In certain cases, the Italian Competent Authorities have determined the value of goodwill transferred by calculating the replacement costs of the personnel ("*metodo del costo di sostituzione del capitale umano*"). In such a case, the replacement costs of personnel are determined within a range of 0.5 and 3 times the overall amount of the annual salaries, where the coefficient is selected depending on the level and remuneration of the employee transferred. This approach has been firmly criticized by practitioners as being unreliable. Similarly, the courts have criticized this method (see Regional Tax Court of Lombardy No. 914 dated 20 February 2014).

In other cases, we have seen the use of Discounted Cash Flow valuations or similar kinds of evaluations.

With regard to the Hard-To-Value Intangibles, we do not believe that the transfer of personnel meets the definition of hard-to-value intangibles provided by paragraph 6.190 of the TPG. However, the tax authorities may try to broaden the scope of paragraph D.4 to include the transfer of highly qualified personnel, thus allowing them to have wide discretion to freely adjust, not only the price of the HTVI but also, the (contractual) structure of intercompany pricing arrangements.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions):

Usually when a transfer of personnel takes place, the valuation is supported by an expert report of a third party appraiser attesting its conformity with the market value.

However, on the basis of the answer to question 3, it is important, in our opinion, to support the transfer of personnel with an ex-ante and ex-post DEMPE analysis. This analysis would reveal any changes due to the transfer of management teams involved in the decision-making process and, as a result, re-determine the profit allocation between the companies.

The documentation to be prepared by the taxpayer should also consider the new position expressed by the OECD on hard-to-value intangibles. Paragraph 6.192 of the TPG states that adjustments based on ex-post profit levels should not be made where "the tax administration is able to confirm the reliability of the information on which ex ante pricing has been based". It places the onus on the taxpayer to provide satisfactory evidence that any significant difference between the financial projections and actual outcomes is due to unforeseeable or extraordinary developments or events occurring after the determination of the price. To this end, the taxpayer should record sufficient details about how the ex-ante financial projection was calculated and, subsequently, all acts or data that became available ex-post in order to rebut the presumption set forth by the TPG.

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**NOTES**

[1] Under article 110(7) of the ITA components of income deriving from operations with related non-resident companies, i.e. companies which (i) control directly or indirectly the enterprise; (ii) are controlled by the enterprise; or (iii) are controlled by the same company which controls the enterprise, are valued with reference to conditions and prices which would have been agreed between independent persons operating on an arm's length basis and in comparable circumstances, if an increase in taxable income derives therefrom. This provision also ap-

plies if the result is a decrease in taxable income, subject to certain conditions.

[2] The sale of a going concern – as defined by Article 2555 of Italian Civil Code – is not a VAT relevant transaction and is subject to proportional registration tax. Italian registration tax applies generally at 3% proportional rate. Registration tax is generally applied on the agreed purchase price as resulting from the deed of transfer. However, the tax authorities have the right to assess the fair value of the going concern (in particular, by re-determining the goodwill).

[3] See also Supreme Court 4 December 2012, No. 21711, Supreme Court 5 March 2008, No. 5932 and Supreme Court 17 March 2009, No. 6452.

# Japan

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

Japan does not have an official view of whether a transfer of management between related parties is purely a services transfer, or includes an intangible asset. Rather, the tax authorities may review various factors case by case.

When conducting transfer pricing tax audits, one of primary concerns for the tax authorities is whether the value of intangibles provided by a Japanese entity is paid by a foreign affiliate. Therefore, the tax authorities will investigate related-party service transactions including transfers of people or teams as to whether the provision of intangibles is included in the service transactions.

In the Commissioner's Directive on the Operation of Transfer Pricing ("TP Directive"), which is the most detailed transfer pricing guideline in Japan, there is a relevant article, which reads as follows:

*(Provision of services)*

*3-8 The following points shall be noted when examining the provision of services:*

*(1) In some cases, the consideration for use of intangible properties is not included in the price for the provision of services, even though the intangible properties are used for providing services.*

*(Note) In the case where it is examined whether any intangible properties are used when services are provided, it shall be noted that the provision of services and use of intangible properties are conceptually distinct. Consideration therefore needs to be given to such matters as what kind of intangible properties are used by the service provider when providing services, and what impact the provision of services has on the activities and functions of the service recipient.*

However, the above rule is very general and does not indicate any view about whether, or in what situation, a service including a transfer of people or team between related entities includes intangibles.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

Although there is no clear definition of factors that should be considered to determine how to characterize the transfer, the Reference Case Studies on Application of Transfer Pricing Taxation ("TP Case Studies"), which is a supplement of the transfer pricing regulations and issued by the National Tax Agency ("NTA"), provides the following example.

*Case 15: Intangible properties of a corporation used by employees on loan*

***Key point***

*This case illustrates the contribution of a corporation in the case that it loans employees to a foreign-related party and its intangible properties are used in business.*

***Preconditions***

*(Summary of business of corporation and foreign-related party)*

*Japanese corporation P is a manufacturer and distributor of product A, and 10 years previously it established company S in country X as a subsidiary to manufacture and distribute product A. Product A is made using original technologies resulting from company P's R&D activities.*

*(Functions and activities of corporation and foreign-related party)*

*Although company P used to sell parts for product A to Company S, Company S presently manufactures product A by sourcing all its raw materials and other supplies locally within country X, and sells product A to approximately 200 retailers in country X. However, supplies of product A for the Japanese market are manufactured and sold by company P itself. Company P loans 10 employees to company S, five of whom are responsible for production engineering, and five for marketing and sales promotion. The production engineering loan employees are all employed in fields such as development of production technologies in company P's technology development division, and have advanced knowledge and experience of technology development. They are loaned to company S to provide access to company P's production know-how. As a result of improvements made to the production line in the production engineering division of company S under the guidance of employees on loan from company P and employing company P's*


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*manufacturing know-how, company S has achieved a low cost of manufacture through more efficient manufacturing.*

*As well as the five loan employees from company P, company S's production engineering division also employs local employees. These perform only auxiliary work, and do not have a particularly high level of technical knowledge.*

*Company P's employees loaned to company S's production engineering division communicate frequently with company P by email and fax in the course of their work to request materials from fellow researchers in company P's technology development division and to obtain advice.*

*The employees on loan who are involved in marketing and sales promotion do not have advanced marketing or sales knowledge, and perform routine work under the direction of local employees in company S's marketing and sales promotion division.*

***Treatment for transfer pricing taxation purposes***

*As in this case company S is able to engage in more efficient manufacturing and achieve a lower cost of manufacture as a result of guidance received by its employees from production engineers on loan from company P, it was found that company P's manufacturing know-how serves as a source of income in company S's foreign-related transaction compared with in the cases of a corporation engaging solely in routine activities. In this case, it was found that this manufacturing know-how resulted from company P's past activities in developing production technologies, and that this was furnished by company P to company S via the employees on loan.*

*On the other hand, the loan employees responsible for marketing and sales promotion have yet to acquire advanced ability and knowledge of sales and marketing through their work at company P, and so intangible properties such as marketing know-how created by company P were not found to be furnished to company S.*

In the above Case 15, the NTA indicates that out of the total 10 employees on loan from Company P to Company S, five production engineering employees have provided intangibles, i.e., valuable manufacturing know-how on behalf of the parent Company P. It implies that Company P should collect the value for the technology-related intangibles provided by the five employees from Company S.

In contrast, Case 15 also indicates that because the five marketing employees on loan from Company P haven't provided valuable know-how, Company P does not have to collect the value of those intangibles from Company S. The determining factor described here is whether the intangibles were included with the transfer of employees is the skill of employees, not the number of employees transferred.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

Just as the above Case 15 describes, if a team of loaned (transferred) production-engineering employees has a high skill, they will provide Company S with access to Company P's production know-how. As a result of improvements made to the production line in the production-engineering division of Company S, under the guidance of such transferred employees and employing Company P's manufacturing know-how, Company S can achieve a low cost of manufacture through more efficient manufacturing and higher profits.

While Case 15 determines that only the production-engineering team has skills that might give rise to a transfer of intangibles, the example should not be seen to specify which activities or roles will be viewed as skilled, and therefore be examined, and which will not be viewed as skilled and be ignored. Each case of transferred personnel should be examined separately to determine if valuable know-how has been transferred as well as personnel. For example, a management team may have special know-how involving processes of the company that transfers it, which could be a valuable intangible, or the team members may only have overall management experience of a kind that individuals acquire during a career in management, which would not give rise to a special transfer of value.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

In Japan there is no rule about how to value the transfer of employees or items moving with the employees such as intangibles.

According to the latest OECD Transfer Pricing Guidelines ("TPD") Chapter 6.189, the term hard-to-value intangibles (HTVI) "*covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises, (i) no reliable comparables exist, and (ii) at the time the transactions was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.*"

Whether the intangibles brought or created by transferred management team are HTVI should be examined individually. However, at least the production-engineering related intangibles brought by the transferred employees in the above Case 15 of TP Case Studies seem to be already established by Company P, and the future cash flow from those intangibles may not be highly uncertain, thereby indicating those intangibles are not HTVI.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

Regardless of HTVI, separately calculating the value of the intangibles brought or created by the transferred management team may be quite difficult, and the costs for doing such a separate calculation may not be cost-efficient in most cases. MNEs may want to develop a comprehensive global transfer pricing policy for intangibles that can be applicable to all related entities, particularly if they assume that the intangibles provided by transferred management team's DEMPE decisions are supplemental to the original valuable intangibles.. By developing such a policy, MNEs can justify that their royalty charges include the intangibles provided by the transferred management team.

However, if the intangibles provided by the transferred management team are not supplemental and have significant value, MNEs should consider if such intangibles should be categorized as HTVI and calculated separately using a discount cash flow method or another similar valuation analysis.

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# Mexico

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

This type of transaction would be subject to the provisions of Article 179 of the Mexican Income Tax Law (MITL), which requires taxpayers that enter into transactions with nonresident, related parties to determine their includible income and allowable deductions at arm's length.

While there are no specific regulations for this type of activity, the last paragraph of Article 179 states that the OECD Transfer Pricing Guidelines (Guidelines) apply for the interpretation of the transfer pricing provisions, to the extent they are consistent with local law. Therefore, the analysis and evaluation of the type of transaction in question should be carried out considering Chapter 6 of the Guidelines, on intangibles.

According to the definition of intangibles provided by the OECD, an intangible is something that "is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated.. . ." While workforce may not be intangible, as it does not fulfil the condition of being capable of being owned or controlled for commercial purposes, it may nevertheless affect the value of identifiable intangible assets. The transfer of employees may, in some circumstances, result in the transfer of valuable know-how or other intangibles from one enterprise to another.

A case-by-case analysis would be needed to parse the transaction in detail: (1) to determine whether intangibles are involved, (2) to ascertain whether the function performed by the workers is key to the group value chain or for certain enterprises, and (3) to understand any impact on the profitability of the enterprises involved.

In general terms, if the issue refers to a permanent transfer of a person or group, it cannot be regarded as a service, since the transferring enterprises will no longer have any control or responsibility over the person or group being transferred. Thus, the transfer should be analyzed to determine whether there are intangibles involved, the economic effects on both enterprises, and any compensation, as necessary.

In the case of a temporary transfer, it is necessary to understand all the aspects related with the transfer in order to determine if it could be considered as a services or other kind of transaction.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

It would be necessary to consider the characteristics of the person, or group of persons, being transferred in detail, including: their ability to perform their duties, the complexity of their work, their knowledge of the organization's procedures and systems, their teamwork capabilities; information regarding the persons' experience and expertise; information regarding compensation and benefits; and an understanding of the enterprise's or group's knowledge or intangibles, among other factors.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

It is important to consider the functions performed by the employee or group of persons, since managing key activities or value drivers within an enterprise differs from performing administrative or support activities. The transfer of personnel who manage capabilities or valuable intangibles within the enterprise has a greater impact than does a transfer of personnel performing routine activities. Given this difference, the existence of intangibles in the transfer and the estimated value of compensation should be evaluated. The estimated value of compensation will differ, but valuation methods will prove useful in both cases. In the case of marketing, for example, an income income-producing activity, the income approach could be used. For transfers of personnel involved in back office activities, the cost approach might be more appropriate. However, this will always depend on the circumstances of each case.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

In Mexico, there are no legal provisions regarding the valuation of this type of transaction. However, for transfer pricing purposes, valuation techniques are allowed to determine the arm's length value in transactions involving the transfer of intangibles, and that value's consistency with the provisions of the OECD Guidelines.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

Article 76, section IX of the MITL provides that taxpayers entering transactions with foreign related parties must obtain and keep supporting documentation, including data regarding the related parties, information regarding the functions, activities, assets and risks assumed in the transaction, information and documentation pertaining to the transaction, including the amount , and the transfer pricing method applied.

Most importantly, the documentation must reflect the economic reality of the transactions, since the tax authority has the power to recharacterize the transaction, and impose corresponding adjustments, in the case of any inconsistency.

Another factor that is currently of importance is whether the taxpayer can present arguments to support the conclusion that the transaction was consummated for valid business reasons. According to a judgment entered by the Mexican Supreme Court, the tax authority may validly use business reasons as an element in determining whether a transaction is a sham. In each case, this determination will be guided by an understanding of those elements on which the authority will rely in reaching its conclusion regarding whether to recognize the tax effects of a given act

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# The Netherlands

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## Services or Intangible Property

**1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?**

The Dutch Tax Authority (DTA)'s positions regarding this matter generally align with the guidance under the OECD Transfer Pricing Guidelines (OECD TP Guidelines). According to the OECD TP Guidelines, the transfer of an assembled workforce does not, by itself, constitute a transfer of an intangible asset. However, the OECD TP Guidelines promulgate that while an assembled workforce may not itself be an intangible (as that term is described in Section A.1 of Chapter VI), it can nevertheless have important effects on arm's length prices in matters involving the use of intangibles. For example, relocation of employees, including a senior manager or management team, may result in a transfer of valuable know-how or other intangibles, or enhance the value of transferred intangibles or other assets. Whether this is the case requires a factual analysis.

The DTA has consistently adopted thinking that reflects the economic reality of transactions. In this respect, the DTA could take the position that if the key people functions performed by the transferred employees have migrated to another jurisdiction, the associated profit potential may have partially migrated as well. In this regard, it is important to take into account the facts and circumstances attributable to the transfer of employees in order to determine whether something of value, in addition to the employees services, is actually transferred. If a senior manager or management team is relocated into or out of the Netherlands, it is relevant to perform an analysis in order to determine as to whether or not a full or partial transfer of value, as either part of the enterprise (e.g., goodwill or ongoing concern) or a deemed IP transfer, is applicable to the case at hand.

Further, for many years the DTA has continually favored this functional approach towards transfer pricing issues arising from the relocation of employees,[2] namely an analysis of the transferred key people functions and the associated profit potential of these key people functions. Therefore, it can be said the DTA's position preceded the OECD's direction in this regard. While each case is analyzed based on its own merits and the underlying facts and circumstances, it is likely that if a management team is transferred, the DTA would likely take a view that such a transfer also triggered a transfer of "something of value".

Finally, a more recent example is illustrated under the Dutch Finance Ministry's 2014 decree regarding the Dutch Innovation Box regime,[3] whereby the State Secretary emphasizes the importance of people functions as having control over the development of intangibles in order for the profitability connected with these intangibles to be eligible for the application of the Innovation Box regime. While this decree does not make an explicit reference to the transfer of employees, it does illustrate the importance of people functions in the context of research and development (R&D) activities, and the associated profit potential attached to the developed intangible asset. The State Secretary further elaborates on this point, requiring "a direct causal connection between the intangible asset and the Research and Development activities" for such income to be applicable for the Innovation Box regime. Again, different economic approaches are wielded in practice, depending on the facts and circumstances in question, rather than "standard computation rules or fixed percentages" to determine which income is attributable to the Dutch Innovation Box regime.[4]

**2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?**

The OECD TP Guidelines stipulate that the transfer of one or more employees would be treated in the same manner. In any event, based on our experience it is not common that a transfer of a single person is considered by the DTA as being associated with a transfer of an intangible asset. On the other hand, relocation of a group of managers has much higher likelihood of resulting in a transfer of intangible asset(s) and/or part of the business.

The DTA usually considers the context of the employees' relocation (i.e., functional analysis, facts and circumstances, the actual form and nature of the employees' relocation – e.g., a temporary assignment or permanent relocation), including the extent of profit potential or valuable IP that might have been transferred with the employees. In line with the focus of the DTA on the economic reality and people functions in relation to value creation, the transfer could either result in the provision of services, such as if the employees are temporarily relocated, or a transfer of valuable IP, goodwill, or ongoing concern. The actual characterization of the transfer of a senior manager or a group of managers should be also analyzed in the context of DEMPE functions.

**3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)**

While there is no definitive answer in this case, generally, the functionality of the role(s) itself will have a significant impact on transfer pricing considerations. Usually, roles that are more important will also have more significant profit potential attached to them, due to the strategic, entrepreneurial, and DEMPE functions inherent in these roles.

For example, a management body which directs the strategic vision of the group and bears the associated entrepreneurial risks would bear a different profit potential (and thus, value) than a routine sales group. The above will also depend on individual facts and circumstances, such as the governance structure and decision-making within an MNE, the industry in which the MNE operates, including critical success factors, business operating model, etc.

In the context of a transfer of an R&D group, the functions performed by the R&D group, along with the characteristics of the assets being developed or enhanced by this R&D group, may have an effect on the characterization of the transfer.

## Valuing the Item Transferred

**1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?**

There are no local tax or valuation rules applicable to valuing the items transferred, which may result from the transfer of assembled workforce. The valuation method depends on the facts and circumstances of the employees in question, the activities performed, risks assumed and the nature of services or assets that are associated with the transferred employees. In practice, the DTA favors a two-sided analysis, taking into consideration the positions of both the buyer and the seller, and their respective tax positions. However, this is regarded as an informal policy, as no official guidance has been published so far.

The Hard-To-Value Intangibles (HTVI) concept may apply in situations where the value (i.e., profit potential) at the time of the transfer is highly uncertain, because there is insufficient insight into the future benefits and risks of the transfer. The DTA's position on HTVI is clarified in the 2013 Dutch transfer pricing Decree. Specifically, the DTA will, under certain circumstances, also take a position that the inclusion of a price adjustment clause in the agreement between the associated enterprises is necessary, whereby the price of the transfer also depends on subsequent revenues.[5] The State Secretary continues, stating that in situations involving HTVI, the "valuation at the time of the transaction is highly uncertain, and the stipulation of a price adjustment clause would be reasonable."[6] These concepts may apply to situations involving the transfer of intangibles associated with the transfer of employees, as described above.

## Supporting the Company Position

**1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?**

The transfer pricing policy should accurately describe the functions performed, making a distinction as to what extent the management team provides an intercompany service, to what extent it performs shareholder activities, and to what extent its activities are related to DEMPE functions. The latter applies to any intangibles being transferred, but also any other intangibles in the group where the management team is involved in DEMPE decisions. Further, if the management team performs any DEMPE functions after the transfer, this function should be compensated for its contributions to the value of the intangible under the arm's length principle.[7]

The policy should also consider the legal ownership of the intangible assets in the context of the employee transfer. In principle, if the contractual arrangement states that no legal ownership has transferred, there is still sufficient DEMPE functionality, and management remains in the jurisdiction of ownership, then no transfer of intangibles should be deemed based on the OECD TP Guidelines, which are followed in the Netherlands. With this said, any contributions made by transferred employees to the control and development of the intangibles should be compensated. However, this compensation alone would not imply that any intangibles have been transferred.

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**NOTES**

[1] Authors want to thank Ronald van den Brekel and Danny Oosterhoff, Transfer Pricing partners at EY Netherlands, for their input and review.

[2] Decree State Secretary of Finance, 21 August 2004, IFZ 2004/680M.

[3] Decree State Secretary of Finance, 1 September 2014, BLKB 2014/1054M.

[4] Ibid.

[5] Decree State Secretary of Finance, 14 November 2013, IFZ 2013/184M.

[6] Ibid.

[7] OECD TP Guidelines, paragraph 6.32.

# New Zealand

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

In New Zealand, the Inland Revenue ("IRD") may accept that key personnel within a New Zealand entity may be relocated to another jurisdiction (or visa versa), potentially without the relocation being deemed a transfer of an intangible asset(s) requiring separate consideration or compensation in certain circumstances , as discussed further below.

However, when a taxpayer's restructuring transaction also involves a revision of an intercompany arrangement(s) and/or an asset (tangible or intangible) transfer(s), consideration may become necessary under Chapter IX of the 2010 OECD Guidelines in respect of business restructurings. In this regard, the IRD website provides the following:

*"There may also be transfer pricing questions as to compensation for the transfer of assets such as customer lists or the early termination of a distribution agreement in addition to the usual taxation issues arising (sale of revenue account property, depreciation recovery, deemed dividends where plant and equipment are sold for inadequate consideration and deductibility of restructuring costs)."*[1]

Considering the IRD's specific guidance on intangible property transfers, the following excerpt provides a basis for determining whether a transfer of key personnel (or workforce) either to or from an offshore entity may be deemed to be an intangible property transfer:[2]

*". . .care must be taken to ensure that bundled transfers do not include property that is inseparable from the business from which it has been generated, for example goodwill.*

*In all cases, it's important to be able to identify:*

Ÿ *what is being sold*

Ÿ *who developed it*

Ÿ *who currently owns it, and*

Ÿ *whether or not it is capable of sale.*

*A thorough examination of the legal arrangements implemented to affect the transfer is also critical. A valuation of the intangible property can only be undertaken once all of the facts are fully understood in context."*

Hence, in New Zealand, the transfer of personnel or workforce likely has a high threshold for determining whether it also involves the transfer of an intangible asset.

Given New Zealand's generally close adherence to the OECD's Transfer Pricing Guidelines and guidance, the OECD's BEPS Actions 8-10 is also relevant:

*"1.154 [. . .]. In many instances the transfer of individual employees between associated enterprises will not give rise to a need for compensation. Where employees are seconded (i.e. they remain on the transferor's payroll but work for the transferee), in many cases the appropriate arm's length compensation for the services of the seconded employees in question will be the only payment required."*

When key personnel are transferred either into or away from a New Zealand entity, the IRD website also provides guidance on appropriate service charges that may arise, based on a cost plus approach, as follows:[3]

*"We have reviewed a number of cases where claims have been made about the contribution of strategic management from an offshore site. Our position is that the cost plus method is generally the right approach to services and will always be considered first, in light of the facts and circumstances, before reverting to other methods. As management is naturally strategic, the use of this term has not altered our approach."*

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

It is essential to clearly support and document the nature and extent of any restructure from the taxpayer's perspective. Whether the transfer of personnel or workforce is treated as a transfer of intangible property, or as a transfer of the functions, assets and risks must be clearly outlined and delineated. The more material the transfer, in terms of the profit impact on the parties, the number of personnel involved, the nature of the transferred functions, personnel skills, etc., the higher the likelihood that compensation should be considered and potentially given.

The OECD's BEPS Actions 8-10 final guidance further illustrates that when valuable skills and know-how of personnel are transferred, the transfer is more likely to be characterized as a transfer of an intangible asset.[4]

The IRD website provides additional guidance which highlights that to justify a transaction/transfer as having economic substance, structural changes must be of real significance, as opposed to 'paper-only' changes. The revised contractual terms must be consistent with the conduct of parties in practice and where risks are shifted offshore (or onshore), the party now assuming those risks must have the capacity and capability to control and manage these effectively. [5]

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

As indicated above, when the personnel or workforce being transferred is of a higher skill level and provides a valuable contribution to the transferee, the transfer is more likely to be characterized as an intangible asset. This is particularly relevant if the transferred workforce are integrally linked to the derivation of profits. In these cases, more care should be taken to justify the transfer and consideration given in respect thereof.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

New Zealand generally does not have local direct tax or valuation rules with respect to assets transfers; hence, well-accepted valuation methods may be applicable should an arrangement rise to the level of an intangible property transaction.

As the IRD endorses the guidance implemented by the OECD, BEPS Actions 8-10 may provide guidance on the valuation of transfers of intangible assets, as follows:

"1.153. *In some business restructuring and similar transactions, it may be the case that an assembled workforce is transferred from one associated enterprise to another as part of the transaction. In such circumstances, it may well be that the transfer of the assembled workforce along with other transferred assets of the business will save the transferee the time and expense of hiring and training a new workforce. Depending on the transfer pricing methods used to evaluate the overall transaction, it may be appropriate in such cases to reflect such time and expense savings in the form of comparability adjustments to the arm's length price otherwise charged with respect to the transferred assets. In other situations, the transfer of the assembled workforce may result in limitations on the transferee's flexibility in structuring business operations and create potential liabilities if workers are terminated. In such cases it may be appropriate for the compensation paid in connection with the restructuring to reflect the potential future liabilities and limitations. . .*

*1.155 [. . .] the transfer or secondment of one or more employees may, depending on the facts and circumstances, result in the transfer of valuable know-how or other intangibles from one associated enterprise to another. [. . .] Where such a provision of know-how or other intangibles results from the transfer or secondment of employees, it should be separately analysed under the provisions of Chapter VI and an appropriate price should be paid for the right to use the intangibles.*

*1.156 Moreover, it should also be noted that access to an assembled workforce with particular skills and experience may, in some circumstances, enhance the value of transferred intangibles or other assets, even where the employees making up the workforce are not transferred."*

In situations where valuable know-how is transferred as a result of a transfer of personnel or workforce, it may be more difficult to determine an appropriate arm's length price to be given. In these cases, the profit split method could potentially accommodate the necessary pricing for such a transfer of intangible assets. Alternatively, in cases where the transfer of personnel is considered not to consist of valuable intangible assets, a high cost plus mark-up could appropriately be applied.

New Zealand IRD guidance is limited in respect of hard-to-value intangibles ("HTVI"), hence, an OECD approach should be most appropriate in respect of determining a possible link between personnel and HTVI. As such, the OECD's BEPS Actions 8-10 outlines the following:

*6.189 The term hard-to-value intangibles (HTVI) covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises, (i) no reliable comparables exist, and (ii) at the time the transactions was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.*

*6.190 Transactions involving the transfer or the use of HTVI in paragraph 6.189 may exhibit one or more of the following features:*

- *The intangible is only partially developed at the time of the transfer.*
- *The intangible is not expected to be exploited commercially until several years following the transaction.*
- *The intangible does not itself fall within the definition of HTVI in paragraph 6.189 but is integral to the development or enhancement of other intangibles which fall within that definition of HTVI.*
- *The intangible is expected to be exploited in a manner that is novel at the time of the transfer and the absence of a track record of development or exploitation of similar intangibles makes projections highly uncertain.*
- *The intangible, meeting the definition of HTVI under paragraph 6.189, has been transferred to an associated enterprise for a lump sum payment.*
- *The intangible is either used in connection with or developed under a CCA or similar arrangements.*

Thus, the transfer of an [existing] workforce arguably should not be regarded as a transfer of a HTVI as the pre-existence of the workforce would likely reduce valuation uncertainty, unless some significant know-how was also transferred in connection therewith for which valuation was highly uncertain.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

Robust documentation justifying the need and reasons for the changes (e.g. commercial rationale) and rigorous application of an appropriately selected pricing method(s) is likely the best approach in New Zealand.

DEMPE functions are relevant for purposes of determining where within a corporate group the profits attributable to an intangible asset(s) should be allocated, or whether the functions should be characterised as a services that should be rewarded under a cost based method, or a combination of both. If the taxpayer's particular transfer involves significant change in the performance of valuable DEMPE functions, the transfer is more likely to be characterizable as an intangible asset transfer.

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**NOTES**

[1] http://www.ird.govt.nz/transfer-pricing/practice/transfer-pricing-practice-restructuring.html

[2] http://www.ird.govt.nz/transfer-pricing/practice/transfer-pricing-practice-intangibles.html

[3] http://www.ird.govt.nz/transfer-pricing/practice/transfer-pricing-practice-service-charges.html

[4] Refer to excerpts of paras. 1.155 and 1.156 of OECD BEPS Actions 8-10 below.

[5] http://www.ird.govt.nz/transfer-pricing/practice/transfer-pricing-practice-restructuring.html

# Portugal

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

Portugal does not have a formal framework that specifically addresses the issues that arise in segregating intangibles from services. However, transfer pricing practice in Portugal suggests that OECD guidelines on transfer pricing are broadly accepted and that they therefore provide an appropriate basis from which to anticipate any approach from the Tax Authorities regarding similar cases.

Additionally, according to the Portuguese labour system, any assignment or transfer of employees could be included within one of the following situations: a services provision, a personnel assignment or a multi-employer agreement. An assignment or transfer of employees should be documented by a contract that provides all rights and obligations of both parties (employees and employers), as well as the nature of such assignment or transfer. This documentation could include support for (or against) the assignment or transfer including any transfer of an intangible.

A relevant factor in a transfer pricing analysis of any assignment or transfer of employees should be an assessment of which entity is controlling relevant functions and risks of the activity performed by such employees. For example, a service provision suggests that the assigned employees' activities or functions rely on the transferor's decisions and responsibilities; correspondingly, a normal transfer of an employee or group of employees would result in the employees' activities or functions relying on the decisions and responsibilities of the affiliate to which they were transferred.

Following from the above mentioned, it is our understanding that, in general, a senior manager or management team assignment or transfer would not amount to a provision of services, as the functions usually performed by these professional categories have, by definition, an implied high degree of autonomy.

Moreover, the common practice, whether the relocation is into or out of a given jurisdiction, is to match the value of the assignment with the costs of the members involved, as long as these costs are not significantly above the ones that are usually assumed regarding similar activities in the assignee's jurisdiction. However, it would be reasonable to equate the allocation of an extra value to the assignment if:

- The relocation produces contradictory impacts in both entities' performance; (i.e. the assignor is failing to make a profit potential as a consequence of the assignment);
- Benefiting from the business know-how of the employee(s) is the purpose of the relocation.

In addition, consideration should be given to the possibility of allocating or not allocating an extra value to the assignment when the transfer was requested by the employee or is an alternative to avoid a valuable employee from leaving a given group.

Therefore, from a practical perspective, a case-by-case analysis should be performed, to determine what arguments exist to sustain any reasonable transfer of extra value when a senior manager or management team is relocated.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

To properly characterize an employee or team assignment/transfer for transfer pricing purposes, it is important to take into account several factors, in particular:

- Comprehend what entity, if any, is controlling relevant functions and risks of the activity performed by the assigned employee(s);
- Analyze specific provisions and conditions agreed in the employment contract (e.g. the existence or non-existence of confidentiality clauses);
- Understand if a resource or cost-sharing agreement is in force between all parties;
- Take into account the expected term of the relocation;
- Determine whether it is expected that the know-how, procedures and techniques provided by the assignor to the assigned employee(s) are used;


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- Analyze the reasons behind the relocation process (i.e., if it is an interest of the assigned employee or team itself, or of the assignor, or of the assignee, or all entities, etc.);
- Understand what benefits or losses are involved in the relocation.

As long as these factors are considered and properly evaluated, there is no difference between a group of managers and a single person when determining how to characterize an employee or team assignment or transfer. In fact, assessing the actual operating impact and background of such assignment or transfer will provide the basis to properly characterize the transaction.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

In the light of the foregoing information, in a transfer pricing analysis of any assignment or transfer of employees, the focus should remain on the assessment of what entity is controlling relevant functions and risks of the activity performed by such employees. A service provision would suggest that the assigned employees' activities or functions rely on the transferor's decisions or responsibilities.

Therefore, the higher the degree of autonomy the transferred employees have in performing their relevant functions, the lower the probability should be of that assignment being considered a service. Responsibilities and controlling decisions are particularly relevant to properly characterize an employee or team assignment or transfer for transfer pricing purposes.

Moreover, to assess whether an extra value relating to a transfer of intangibles should be considered in an assignment or transfer of employees, the nature of their functions performed and responsibilities assumed should also suggest conclusions. Relevant factors should be balanced:

- What are the expected activities or functions to be performed by the relocated employee or team?
- What is the identifiable value added, or what distinctive value is included in the employees' functions or activities?
- What are the direct impacts of the employees' assignment on the business performance of both entities?

From a practical perspective, the less decision-making functions that are being assigned, the lower the possibility should be that an assignment would include an extra value or should command an extra compensation between entities.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

There are no local tax or valuations rules or conventions applicable to the valuation of these matters. However, Portugal follows the OECD framework on transfer pricing, and therefore its respective guidelines and practices are broadly accepted.

Taking this into consideration, it is relevant to highlight that the employees who make up a team cannot be considered an intangible by themselves. Actually, the "extra value" that could be reasonable to allocate in an assignment may not necessarily assume the nature of an intangible, but instead as compensation or indemnity.

Thus, in order to assess whether an assignment also implies a transfer of an intangible, it is important to consider if the know-how, techniques, and procedures that will be used in the transferee entity were acquired by the employees from the transferor entity, or if they are related to specific knowledge, performance, and business experience that was intrinsically developed by the assigned employees.

In cases where the know-how, techniques, and procedures that were acquired in the transferor entity are provided to the transferee as a necessary condition to perform the respective activity, the Hard-To-Value Intangible concepts may apply, depending on the activity or functions that are being transferred, in particular if the know-how, techniques and procedures that are being assigned are essential to the development or enhancement of other intangibles which fall within the definition of Hard-To-Value Intangibles.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

Given the uncertainty and the complexity of situations encompassed by these issues, as well as the increasing sophistication of the Tax Authorities, it is essential for taxpayers to prepare, in advance, appropriate and robust support to respective transfer pricing policies.

In practice, attention should be focused on providing appropriate background and procedures to properly guide a taxpayer's approach regarding transfer pricing transactions, as well as to anticipate any analyses or questions from the Tax Authorities.

Among several elements that a transfer pricing policy should consider, we highlight the following:

- A contract should establish the terms and conditions, rights, and obligations of the employees under the relocation, including the identification of any confidentiality or indemnification clauses (if applicable).
- A detailed description (*ex ante* and *ex post* analysis) should be given of the functions and activities being relocated, and should consider the following factors:

o When these functions started to be performed in the assignor entity;

o What unique (if any) or valuable functions are (or were) performed by the employees before the relocation;

o When and what functions or responsibilities will be relocated;

o Whether any of the relocated functions that will be performed after the relocation process are among the unique or valuable functions performed before the relocation;

o What entity will assume the risks and provide the assets related to the assigned functions; and

o What entity is providing the respective supporting or operating team to the assigned functions.

- A detailed description of the reasons behind the relocation process (i.e., if it is an interest of the assigned employee or team itself, or of the assignor, or of the assignee, or all entities, etc.), including the expected term of the relocation.

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# Russia

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

Russian legislation does not have any definition of intangible assets specifically for transfer pricing purposes, nor does it have any provisions specifically for transfer pricing considerations of business restructurings or transfers of intangibles. Currently, intangibles are largely defined by reference to a Russian civil code provision, whereby goodwill, a uniquely qualified or experienced group of employees, or an assembled workforce are not prescribed as intangible assets.

In practice, a transfer of teams may take the form of an assignment of personnel or a change of employer as part of a wider business transfer from one entity to another. In the case of an assignment of personnel, a cost-plus remuneration is widely seen as the pricing approach applied to this arrangement. Where employees are transferred as part of a business transfer, this would generally not require a separate consideration. Where employees are transferred as part of a wider business transfer involving goodwill, one could argue that such a business transfer may potentially represent a transfer of value, which should be remunerated from an arm's length perspective. At the same time, Russian legislation currently does not recognize a business transfer as a taxable event from a transfer pricing perspective, unless specific identifiable assets are transferred between related parties as a result (for example, fixed assets, inventory, trademarks, know-how, receivables, etc). Again, employees or employee teams are not viewed as transferable assets from the transfer pricing perspective.

Going forward, we do not deny that the transfer pricing view of intangibles in business restructurings may change as Russian legislation becomes more aligned with international tax principles, and as the country takes an active part in implementation of the BEPS Action Plans.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

As mentioned above, an employee transfer is currently not considered as an intangible transfer from the Russian standpoint, irrespective of whether it represents a single person transfer or a management group transfer. If and when Russian legislation requires such transfers to be assessed from the transfer pricing perspective, one should possibly consider the value impact of the transfer as opposed to the size of the transferred teams. In this respect, a transfer of a single person with a highly qualified skill set, a significant management role, or possessing a unique know-how or an important customer relationship, could represent a higher value than a team of employees assigned with only routine functions.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

Different teams may have different impacts on the contribution of value, depending on the value drivers and business needs specific to that or another enterprise. For example, a company engaged in developing IT solutions would be most interested in obtaining highly qualified R&D teams focused on IT development. At the same time, a company making most of its value from sales would be most motivated to attract a sales person who has key customer relationships in the transferee's market. In the end, the difference in value may be driven not only by the quality of the people to be transferred, but also by sector specifics, geographical market, and the competitive position of the transferee in that market. Alternatives available to a transferor should also be considered. For example, the tax authorities may question the economic reasoning of a reassignment arrangement if it brings a lower profit margin to a Russian company as compared to the margin which the Russian company was able to command with the same team prior to the reassignment.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

As mentioned above, employee transfers do not need to be valued from the Russian transfer pricing perspective. At the same time, where employees are transferred as part of a wider business transfer, the business value is usually determined with reference to valuation standards, often based on the discounted cash flow analysis. This is acceptable under Russian transfer pricing rules if a transaction is a one-off, and it is not possible to apply any of the transfer pricing methods allowed by Russian law. In practice, valuation reports prepared based on the Russian valuation standards are given preference in case of a tax dispute around the business values.

The Hard-To-Value Intangibles concept is not present yet in the Russian transfer pricing law.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

The content of a transfer pricing policy will largely depend on a particular situation. If the management team is involved in rendering services for a related party, but at the same time is involved in important intangible asset DEMPE decisions, the first step is to confirm to what extent the DEMPE related role would be relevant to the services rendered by management. If the management team does exercise the DEMPE role in rendering services to its related party, the service remuneration should provide an arm's length compensation for the DEMPE functions.

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# Spain

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

Spanish TP rules do not specifically address the transfer, or relocation and deployment, of senior employees or teams. Thus, potential tax effects must be determined on a case by case basis.

A relocation of employees, even if it results in a shift of profit potential, can be considered taxable only when it implies a transfer of a specific valuable intangible according to OECD TP Guidelines Chapter IX. OECD TP Guidelines are legally considered to interpret the Spanish domestic legislation unless in contradiction which is extremely unlikely due to the fact that the Spanish domestic legislation is not extensive at all. Therefore the reference to the Guidelines is in many occasions the only valid reference to analyze a specific issue.

Indeed, Spanish tax authorities may view the expatriation of employees as a way to transfer know-how between related companies in cases where that "know-how" is clearly identifiable and is being implemented by the recipient entity.

However, in addition to a dearth of administrative guidance, there is very little, if any, case law specifically on this topic.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

As mentioned, the tax characterization of the transfer would be analyzed on a case by case basis, since no specific guidance or case law is available.

Transfers of groups of managers or assembled teams would more likely be characterized as a taxable transfers of intangibles. Such opinion is based on the fact the likelihood of a know-how being transferred by a group of managers is more feasible than a single person. In either case, tax authorities should evidence this judgement. However, as normally services are provided when a group of managers are transferred, it is still our opinion that, so long as the services are adequately valued, the chance of being challenged as transferring an intangible is low.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

The functions of the managers transferred would be key to determining whether an intangible was transferred. R&D or technical personnel would more likely be linked to a potential transfer of know-how if it is clear that knowledge was transferred with the transfer of the team. A transfer of sales managers would only be considered a taxable transaction if the sales people were specifically linked to supply agreements specifically so, in effect, the business was transferred with them. .

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

Aside from traditional OECD transfer pricing methods, no specific tax or valuation rules are included in Spain's internal legislation. However, in that legislation there is a statement that recognizes that "other methods" may be accepted. Most of the employment transfer cases discussed above could qualify as "hard-to-value intangibles." Accordingly, different methods could be utilized. Most importantly, however, it could give rise to an expectation of price monitoring, with respect to the accuracy of the estimations, if the authorities can show that other, similarly situated parties would have included a review clause.

As mentioned, however, experience and case law are very limited in this area and it is unclear what view the tax authorities might take. At the moment, there does not appear to be a valid procedure to assess such cases, and the correct answer will likely require long term analysis.

However one might also want to consider that an audit takes place a few years after an event and it might be difficult for tax authorities to avoid hindsight, at a time when much more information is available, if the estimations differ from the actual facts.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

A company's transfer pricing policy should have the following to support whichever position (transfer of intangibles or not) it wants to establish:

Ÿ A clear description of the management team, with job descriptions and history in the company.

- A full legal analysis of contracts involving the team transferred.
- A description of the intangibles transferred including supporting technical documentation regarding those intangibles.
- Statements of business people involved in the transactions.
- Solid functional analysis on the DEMPE functions.
- Reliable benchmarks based on third party agreements, if available, to value the intangible.
- Other valuation methods, as appropriate.
- Analysis of the economic effects (P&L) on the recipient entity.

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# United Kingdom

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## Introduction

The UK transfer pricing position on the transfer of senior teams stems from Part 4 of the Taxation (International and Other Provisions) Act (***TIOPA***) 2010. This Act aims to ensure that connected parties transacting between themselves do not obtain a tax advantage by setting prices that would not be available from unconnected parties on the open market (i.e. prices that are not "at arm's length"). Part 4 of TIOPA 2010 applies where a basic pre-condition is satisfied and an actual provision confers a potential UK tax advantage.[1] The basic pre-condition requires that an actual provision is made or imposed between any two affected persons by means of a transaction (or series of transactions),[2] such persons are under common control or management and the provision differs from that which would have been made between independent enterprises (in other words, an arm's length provision).[3] The profits and losses of the advantaged person(s) are then calculated as if the arm's length provision had been made or imposed instead of the actual provision in place.[4]

Part 4 of TIOPA 2010 is to be read consistently with the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the ***OECD Guidelines***) published by the Organisation for Economic Co-operation and Development (***OECD***), as well as the arm's length principle set out in Article 9 of the OECD Model Tax Convention on Income and on Capital (***Article 9***).[5] Further guidance is set out in HMRC's International Manual.[6] Although not binding on taxpayers, HMRC will normally expect to apply the interpretations and policies set out in this manual.

The transfer of a senior manager or management team might conceivably result in a transfer of goodwill and potentially an entitlement to the returns of other existing or future intangibles. The analysis is likely to differ according to the value that would be placed on a particular senior manager or management team and whether an independent third party would remunerate that particular transfer.

It is likely that the UK would not regard the transfer of a "workforce in place" as entailing, by itself, the disposal of an asset. The effect of this transfer in enhancing the value of any other transferred asset, on the other hand, might be recognised and need to be remunerated appropriately where it results in the transfer of know-how or another intangible. The OECD Guidelines also note that business restructurings involving the transfer of an ongoing concern, such as research facilities operated by an experienced research team, should be valued in order to reflect the value of the facility and the impact of that assembled workforce on the arm's length price.[7]

Profit potential is not recognised as an intangible asset in the OECD Guidelines. There is no UK requirement to compensate the value of transferred profit potential, beyond the extent of paying for any underlying assets which have been transferred or services provided.

Part 8 of the Corporation Tax Act (***CTA***) 2009 sets out provisions on the tax treatment of intangible fixed assets (or at least, generally speaking, those created since 2002), including the taxable income or deduction that will result on a transfer. These provisions are drafted on the basis that the transfer pricing rules in Part 4 of TIOPA 2010 apply to transactions within Part 8 CTA 2009. Further, Chapter VI of the OECD Guidelines sets out a presumptive *ex post* mechanism for the valuation of Hard-to-Value Intangibles which may, in certain circumstances, be relevant to the transfer of a senior manager or management team where this entails the transfer of intangibles.[8]

The taxpayer should assemble sufficient documentation at the time of the transfer to support the valuation of any transferred asset. This is likely to include support for assumptions concerning future cash flows and the risk(s) attached to the same.

## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

As noted above, a "provision" is required in order for Part 4 of TIOPA and the associated materials to apply. HMRC's International Manual notes that "provision" is not defined in Part 4 of TIOPA 2010; however, it is broadly equivalent to the phrase "*conditions made or imposed between two [associated] companies*" in Article 9(1) of the OECD Model Tax Convention. Further, a "condition" in Article 9 is not restricted to formal or enforceable arrangements and therefore encompasses all terms and conditions attaching to a transaction or series of transactions. This point was made in *DSG Retail Ltd v Revenue and Customs Commissioner*s where the Special Commissioners stated that a "provision" may be made by means of informal arrangements or understandings.[9] This interpretation is supported by the legislative requirement to read Part 4 of TIOPA 2010 in a manner consistent with the OECD Guidelines.[10]

The relocation of a senior manager or management team can therefore fall within the transfer pricing rules where it entails a condition made or imposed between two associated companies. The transfer need not be a formal or enforceable arrangement, but will be analysed by reference to the actual facts and circumstances in hand. We also note that, where a company provides services involving the transfer of a senior manager or management team which are of a temporary or transient nature, this will be characterised as a "provision" of services. Should this be the case, guidance can be found in Chapter VII of the OECD Guidelines and the International Manual.[11]

**Goodwill**

Chapter VI of the OECD Guidelines addresses intangibles for the purposes of transfer pricing. An intangible is defined as something which is not a physical or financial asset, is capable of being owned or controlled for use in commercial activities and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances.[12] Whether the transfer of an intangible would be compensated therefore depends on the specific intangible and its worth. HMRC's guidance also asks whether the intangible property would be worth anything at arm's length and, if so, whether an independent party would pay to use it (or charge another to do so).[13]

Whether the transfer of a senior manager or management team includes an intangible asset such as goodwill is not addressed directly in HMRC's transfer pricing guidance; however, the International Manual states that:

"*Importantly, it will be the goodwill or reputation of the relevant business, product or service which gives the trade mark or name its apparent value and it is not necessarily the case that the party which owns the registration of the trade mark in a particular territory also owns the goodwill or reputation in that territory. A licence of a trade mark at arm's length is implicitly also a licence of the goodwill or reputation associated with that trade mark as ownership of the different intangibles is rarely separated. In group situations, however, it might be that the trade mark is registered with a party other than that which has carried on the business that has produced the goodwill or reputation (and consequently owns that goodwill or reputation) which gives the trade mark its apparent value. It would not be appropriate for a significant payment to be made in such circumstances to the party which owns only the trade mark or name but not the associated intangibles*."[14]

If the reputation and goodwill of the business is attached in some way to an individual or team (perhaps because particular individuals hold key customer relationships), their transfer to a different entity may reduce the goodwill of the transferor business and thus result in a transfer of value.

UK tax law recognises the possibility of a disposal of goodwill, although it is generally recognised that goodwill cannot be segregated or transferred separately from other business assets.[15] Part 8 CTA 2009 includes provisions concerning the realisation of goodwill.[16] Here, goodwill is given the same meaning as used for accounting purposes.[17] However, the OECD Guidelines note that intangibles considered for transfer pricing purposes are not always those recognised as such for accounting purposes.[18] In addition, goodwill can be used to refer to a number of different concepts, including the future economic benefits associated with business assets that are not individually identified and separately recognised.[19]

There is no statutory definition of goodwill, and the concept is not straightforward. Case law, including the oft-quoted *Inland Revenue Commissioners v Muller & Co Margarine Limited*, has offered various interpretations. [20] Goodwill was defined there as "*the benefit and advantage of the good name, reputation and connection of a business*". This includes "*whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers and agreed absence from competition*".[21] This case was cited in *Kirby (Inspector of Taxes) v Thorn E.M.I. Plc*, where Nicholls L.J. reiterated that reputation is a form of goodwill and has a value.[22]

In *R J Reuter Co Ltd v Mulhens* the court held that goodwill represents the value of the attraction to customers which the name and reputation of a business or business product possesses.[23] More recently, *Brit-*

*ish Broadcasting Corporation v Talksport Ltd* noted that words which are merely descriptive of a service cannot create goodwill.[24]

HMRC have made reference to *Whiteman Smith Motor Co v Chaplin* when identifying goodwill for tax purposes.[25] This case set out the following classes of goodwill:

(a) customers who stay faithful to the location, not the person;

(b) customers who stay faithful to the person, not the location;

(c) customers who are attracted by neither person nor location; and

(d) customers who use the service because it is convenient and for no other reason.[26]

These distinctions could be interpreted, more practically, as the following categories of goodwill:

(a) inherent – the goodwill attaching to the property by virtue of its location;

(b) personal – related to the skills and personality of the proprietor, e.g. a chef or hairdresser; and

(c) free – related to the overall worth of the business, which can be split into

(i) adherent; and

(ii) separable[27].

Adherent goodwill is defined in HMRC's Capital Gains Manual as goodwill which does not arise from the locational advantages, but from the carrying on of a particular business for which those premises have been or are specially adapted or licensed. Separable goodwill is defined as the true free goodwill generated independently from the premises. In practice, the distinctions between inherent, adherent and free are no longer really applied given that inherent and adherent should be included in the underlying value of the business asset.

It follows that goodwill attaching to a senior manager or management team may be more easily identifiable where customers cease to buy from the transferor business due to an appreciation of the intangible assets that may have transferred with this manager or team. Business customers or high net worth investors for instance may be more alert to the worth of a senior manager or management team, and certain highly-skilled individuals in professional services (including those not in the position of senior manager) may also hold significant and separately identifiable value.

**Workforce in Place**

The concept of a workforce in place is not specifically addressed in HMRC's International Manual. However, the OECD Guidelines state as follows:

*"Some businesses are successful in assembling a uniquely qualified or experienced cadre of employees. The existence of such an employee group may affect the arm's length price for services provided by the employee group or the efficiency with which services are provided or goods produced by the enterprise. Such factors should ordinarily be taken into account in a transfer pricing comparability analysis. Where it is possible to determine the benefits or detriments of a unique assembled workforce vis-à- vis the workforce of enterprises engaging in potentially comparable transactions, comparability adjustments may be made to reflect the impact of the assembled workforce on arm's length prices for goods or services.*

*In some business restructuring and similar transactions, it may be the case that an assembled workforce is transferred from one associated enterprise to another as part of the transaction. In such circumstances, it may well be that the transfer of the assembled workforce along with other transferred assets of the business will save the transferee the time and expense of hiring and training a new workforce. Depending on the transfer pricing methods used to evaluate the overall transaction, it may be appropriate in such cases to reflect such time and expense savings in the form of comparability adjustments to the arm's length price otherwise charged with respect to the transferred assets. In other situations, the transfer of the assembled workforce may result in limitations on the transferee's flexibility in structuring business operations and create potential liabilities if workers are terminated. In such cases it may be appropriate for the compensation paid in connection with the restructuring to reflect the potential future liabilities and limitations.*

*The foregoing paragraph is not intended to suggest that transfersor secondments of individual employees between members of an MNE group should be separately compensated as a general matter. In many instances the transfer of individual employees between associated enterprises will not give rise to a need for compensation. Where employees are seconded (i.e. they remain on the transferor's payroll but work for the transferee), in many cases the appropriate arm's length compensation for the services of the seconded employees in question will be the only payment required.*

*It should be noted, however, that in some situations, the transfer or secondment of one or more employees may, depending on the facts and circumstances, result in the transfer of valuable know-how or other intangibles from one associated enterprise to another. For example, an employee of Company A seconded to Company B may have knowledge of a secret formula owned by Company A and may make that secret formula available to Company B for use in its commercial operations. Similarly, employees of Company A seconded to Company B to assist with a factory start-up may make Company A manufacturing know-how available to Company B for use in its commercial operations. Where such a provision of know-how or other intangibles results from the transfer or secondment of employees, it should be separately analysed under the provisions of Chapter VI and an appropriate price should be paid for the right to use the intangibles.*

*Moreover, it should also be noted that access to an assembled workforce with particular skills and experience may, in some circumstances, enhance the value of transferred intangibles or other assets, even where the employees making up the workforce are not transferred. Example 23 in the Annex to Chapter VI illustrates one fact pattern where the interaction between intangibles and access to an assembled workforce may be important in a transfer pricing analysis."*[28]

The example referred to in paragraph 1.156 above concerns a situation in which the price paid for an acquired company:

*"is justified primarily by the value of the promising, but only partly developed, technologies and by the potential of Company T personnel to develop further new technologies in the future."*

The relevant intangibles are transferred to another Company (S), which pays Company T's personnel for their ongoing research. According to the OECD Guidelines:

"*Depending on the facts, some portion of the value described in the purchase price allocation as goodwill may also have been retained by Company T*."[29]

From this discussion, it is possible to draw the following conclusions about the UK's likely approach to the transfer of a workforce in place:

(a) it would not necessarily have separate value in itself;

(b) its effect of enhancing the value of any other transferred asset should be recognised; and

(c) where it results in the transfer of know-how (or some other intangible), this should be remunerated appropriately.

One can imagine situations where the transfer of highly-skilled employees justifies or commands a "transfer fee". The question arises as to what exactly is being transferred. This may be the benefit of the relevant employment contracts (particularly where the individuals generate value for the business in excess of their remuneration) combined with a willingness to remain with the business. The latter is included given that, in principle, most employees can choose to leave at will but tend not to do so ("stickiness").

The OECD Guidelines continue as follows:

"*Assume that several employees of M1 are relocated to M2 in order to assist M2 in the start of the manufacturing activity so relocated. Assume such a transfer would be regarded as a transfer of an ongoing concern, should it take place between independent parties. In order to determine the arm's length remuneration, if any, of such a transfer between associated enterprises, it should be compared with a transfer of an on going concern between independent parties rather than with a transfer of isolated assets*."[30]

Thus, if the management team are transferred at the same time as an asset or assets, the effect could be that the whole should be valued as the transfer of a going concern. Further, the OECD Guidelines state that business restructurings involving the transfer of an ongoing concern, such as research facilities operated by an experienced research team, should be valued in order to reflect the value of the facility and the impact of that assembled workforce on the arm's length price.[31]

Wider guidance on this issue can be found in the context of financial reporting. Here, an assembled workforce is frequently valued as part of a purchase price allocation (***PPA***) exercise for International Financial Reporting Standard 3: Business Combinations. While International Accounting Standard 38 specifies that the fair value of the assembled workforce should not be recognised as a separate intangible asset apart from goodwill, the value of an assembled workforce can have an effect on the value attributable to certain other intangible assets and therefore does typically need to be valued. This is similar to the suggestion in the OECD Guidelines that the existence of a workforce in place should be viewed as a comparability factor.

In a PPA, a Cost Savings Method is typically used to value the assembled workforce. This takes into account the cost to recruit and train an entirely new workforce. The value of the current workforce is therefore based on the costs saved by avoiding the need to recruit and train an equivalent workforce with the same skills and to the same level of efficiency. This is usually calculated by estimating the recruitment cost for hiring people at a similar level. Additionally, it is assumed that a new employee is less productive compared to an employee who has been in the relevant position for some time. Therefore, an estimate is made of the level of efficiency when the new employee starts compared to a fully-efficient equivalent and the number of months that it will take for the new employee to reach full efficiency. The salary costs wasted during this period are added to the recruitment costs in order to determine the value of the existing workforce. This is equivalent to the total cost saved by avoiding the need to recruit new employees.

This approach does not take into account any unique skills of senior management, key R&D or marketing staff and therefore does not seek to capture any major impact on the business (such as losing key sales contracts or the inability to innovate due to the loss of key R&D teams). If such losses are expected, then a "with or without" analysis may be more appropriate. As the name suggests, this analysis seeks to compare two scenarios: one in which the key staff to be valued are part of the business, and the second in which the key staff are not part of the business. The difference between the two scenarios can be quantified and used as an indication of the value of the employees.

Therefore, this financial reporting approach could potentially be used to calculate the size of the comparability adjustment required for a workforce in place in a transfer pricing valuation.

**Profit Potential**

The concept of "profit potential", according to the OECD Guidelines, means "expected future profits" and may, in some cases, encompass losses. The concept is often used for valuation purposes in determining an arm's length compensation for a transfer of intangibles or of an ongoing concern. It may also be used to determine an arm's length indemnification for determination or substantial renegotiation of existing arrangements, once it is found that such compensation or indemnification would have taken place between independent parties in comparable circumstances.[32] The OECD Guidelines also note that:

"*An independent enterprise does not necessarily receive compensation when a change in its business arrangements results in a reduction in its profit potential or expected future profits. The arm's length principle does not require compensation for a mere decrease in the expectation of an entity's future profits. When applying the arm's length principle to business restructurings, the question is whether there is a transfer of something of value (an asset or an ongoing concern) or a termination or substantial renegotiation of existing arrangements and that transfer, termination or substantial renegotiation would be compensated between independent parties in comparable circumstances*."[33]

Profit potential is not recognised as an intangible in the OECD Guidelines.[34] As Part 4 of TIOPA 2010 is to be read consistently with these guidelines, the UK tax system will not seek to treat the relocation of a senior manager or management team as entailing the transfer of an intangible asset comprising profit potential.

Rather, "profit potential" may be regarded as a measure of the value of an asset, particularly relevant when it is valued using an income method.

**Capital Gains**

It is also noteworthy that Part 4 of TIOPA 2010 does not apply to the calculation of a chargeable gain (or allowable loss).[35] This is discussed further at Part II below.

## 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

As noted above, Part 8 CTA 2009 sets out the modern UK tax regime for intangible fixed assets. An intangible fixed asset is realised when, in accordance with generally accepted accounting practice, it is no longer reflected on the company's balance sheet or its accounting value is reduced.[36] Where the asset is internally generated and therefore not recognised on the balance sheet, the realisation will occur when there is a transaction which, if the asset did have a balance sheet value, would have resulted in the asset ceasing to be recognised on the balance sheet or reduced the accounting value of that asset.[37]

This leads to the question of whether value would be placed on the transfer and whether an independent party would have remunerated this transfer (such that the actual provision could differ from the arm's length provision). As noted in the OECD Guidelines, this requires identification of the commercial or financial relations between the associated enterprises and the conditions and economically relevant circumstances attaching to those.[38] Where intangibles are transferred between associated enterprises, it is necessary to identify the nature of and rights in these intangibles.[39] Where a business restructuring is involved, this will also involve analysis of the two associated entities' ongoing businesses after the restructuring has taken place.[40]

Following the discussion of goodwill potentially attaching to a senior management team above, it is conceivable that a single person could also attract goodwill (for example, an individual with important and valuable customer relationships). Similarly, as noted above, valuable know-how may reside within particular individuals. It may be the case that, where a single person as opposed to a team is relocated, an independent party would not have remunerated that particular transfer. However, this will be specific to the facts and circumstances of the individual transfer. Where for example a pharmaceutical laboratory team is relocated as compared to an individual accountant, the worth of that laboratory team may be significant due to the combined amount of its expertise. In this scenario it is more likely that the transfer would provide a commercial benefit to the receiving entity and that a third party would have been willing to pay for that transfer.

## 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

To the extent that a management team was closely involved in the sales process in a manner which was visible to the company's customers, the analysis above would suggest that some goodwill could attach to that team in a way that might not arise if the activities of the team were less externally evident. On the other hand, informed business customers who sought out the company for its special technology might place greater worth on a team who functioned as the core R&D team. In the latter case, that R&D team could be a valuable workforce in place.

If the R&D team were involved in making key intangible asset Development, Enhancement, Management, Protection and Exploitation (***DEMPE***) function decisions, and would continue to do so after being transferred, the transferee entity's entitlement to the intangible-related returns would need to be recognised either through the subsequent ongoing transfer pricing arrangements, any lump sum payment at the point of transfer (potentially by reference to the approach to Hard-to-Value Intangibles, on which see the discussion below) or both.

Put simply, the duties of a team will impact on the value that they provide to the business. In turn, this will affect the arm's length price and whether an independent party would have provided remuneration for the transfer of that particular team. In the case of an R&D group, the OECD Guidelines note that appropriate compensation for research services will depend on all the facts and circumstances of the transfer. This includes whether the research team possesses unique skills and experience relevant to the research, assumes risks, uses its own intangibles, or is controlled and managed by another party.[41] The value of the group and the arm's length price payable for its transfer will depend on such factors.

# Valuing the Item Transferred

## 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

**Valuations**

It is critical to analyse the precise nature of what is being transferred before determining how to value that particular transfer. The realisation of an intangible fixed asset (or at least those which, broadly speaking, were created since 2002) will lead to a tax charge or deduction under the intangible fixed assets regime, as set out in Chapter 4, Part 8 CTA 2009.[42] Depending on the nature of the intangible asset realised, this charge or deduction will be a trading or non-trading debit or credit. Chapter 4 provides that the difference between the realisation proceeds and the tax written down value of the intangible asset immediately before realisation is brought into account for tax purposes. The resultant tax charge or deduction will then depend on whether these proceeds exceed or fall below that tax written down value.[43]

In general, for capital assets, section 17 of the Taxation of Chargeable Gains Act (***TCGA***) 1992 provides that asset disposals and acquisitions made otherwise than by way of a bargain at arm's length (which is deemed to be the case by section 18 TCGA 1992 for connected party transactions) are treated as made at market value. In particular, this applies where an asset is disposed of wholly or partly for a consideration that cannot be valued, or in consideration for or recognition of services or past services in any office or employment (or of any other service rendered or to be rendered).[44] However, for intangible assets the provisions of Part 8 CTA 2009, where applicable, take priority and, even for assets that would ordinarily be viewed as capital, impose the revenue account basis of taxation described above for intangible fixed assets arising since 2002.

HMRC also note that Part 8 CTA 2009 overrides general computational rules and takes precedence over other corporation tax legislation.[45] However, the transfer pricing provisions set out in Part 4 of TIOPA 2010 are expressed in terms of the computation of profits and losses, rather than by reference to specific items of income or expenditure. As a result these provisions are not overridden and no special provision is needed to ensure that Part 4 of TIOPA 2010 applies to transactions within Part 8 CTA 2009. Part 8 is therefore drafted on the basis that transfer pricing rules do apply to these transactions.[46]

**Hard-to-Value Intangibles**

As noted above, Part 4 of TIOPA 2010 is to be read consistently with the OECD Guidelines and, since the incorporation of the BEPS outcomes, the provisions for valuations therein, including those on Hard-to-Value Intangibles. Chapter VI of the OECD Guidelines states that such intangibles arise where:

(a) no reliable comparables exist; and

(b) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived, or the assumptions used to value the intangible, were highly uncertain.[47]

The chapter goes on to set out a proposed valuation for Hard-To-Value Intangibles whereby *ex post* outcomes provide presumptive evidence on the reasonableness of the projections used on an *ex ante* basis in order to determine the pricing of a transaction.[48] This presumptive evidence can be rebutted if it is demonstrated that it does not affect the accurate determination of the arm's length price.[49]

HMRC's guidance on the valuation of intangibles in turn draws on the OECD Guidelines and states that:

*"Where a transaction between associated parties involves a hard to value intangible and none of the exemptions apply, 'ex post' outcomes can be considered by HMRC as presumptive evidence regarding the appropriateness of the 'ex ante' pricing arrangements, the reasonableness of the assumptions used in determining those arrangements and, consequently, the extent to which they comply with the arm's length principle.*

*Such consideration can include the structure of the arrangements including any contingent pricing arrangements that might have been entered into at arm's length. It might be appropriate in some cases to undertake a multi-year analysis."*[50]

The exemptions referenced above are as follows:

*"the MNE group provides:*

*1. details of the projections used at the time of the transaction to determine the pricing arrangements, including risk-weightings or adjustments used and how the appropriateness of these was determined; and,*

*2. reliable evidence that any significant difference between the financial projections and actual outcomes is due to either (a) unforeseeable developments or events occurring after the determination of the price that could not have been anticipated by the associated enterprises at the time of the transaction; or (b) the playing out of probability of occurrence of foreseeable outcomes, and that these probabilities were not significantly overestimated or underestimated at the time of the transaction; or*

*the transfer of the HTVI is covered by a bilateral or multilateral advance pricing arrangement in effect for the period in question which covers the transaction in question; or*

*any significant difference between the financial projections and actual outcomes does not have the effect of reducing or increasing the compensation for the HTVI by more than 20% of the compensation projected at the time of the transaction; or*

*a commercialisation period of five years has passed following the year in which the HTVI first generated unrelated party revenues for the transferee and in which commercialisation period any significant difference between the financial projections and actual outcomes was not greater than 20% of the projections for that period."*[51]

HMRC also note the following situations in which Hard-to-Value Intangibles are likely to arise:

(a) the intangible is only partially developed at the time of the transfer;

(b) the intangible is not expected to be exploited commercially until several years following the transaction;

(c) the intangible does not itself fall within the definition of Hard-to-Value Intangible but is integral to the development or enhancement of other intangibles which does fall within that definition;

(d) the intangible is expected to be exploited in a manner that is novel at the time of the transfer and the absence of a track record of development or exploitation of similar intangibles makes projections highly uncertain; or

(e) the intangible is either used in connection with, or developed under, a Cost Contribution Agreement.[52]

In light of the above, it is possible that intangibles associated with the transfer of a senior manager or management team could fall within the Hard-to-Value Intangibles rules where, at the time of the transfer, there were:

(a) no reliable comparables;

(b) uncertain projections of future cash flows;

(c) uncertainties over the expected income; or

(d) uncertainties over the assumptions used to value the transfer.

In such a scenario, the OECD Guidelines state that outcomes following the transfer may then be used to test whether projections used at the time to value the transfer were reasonable and the price paid was therefore at arm's length.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need, in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

HMRC do not prescribe any specific documentation for the transfer of a team of people, and as such the guidance on business restructurings contained in the OECD Guidelines would be referred to. This states that:

*"As part of their transfer pricing documentation, MNE groups are recommended to document their decisions and intentions regarding business restructurings, especially as regards their decisions to assume or transfer significant risks, before the relevant transactions occur, and to document the evaluation of the consequences on profit potential of significant risk allocations resulting from the restructuring. In describing the assumption of risk as part of business restructuring, it is recommended that taxpayers use the framework set out in Section D.1.2.1 of Chapter I."*[53]

The relevant documentation for valuing an asset transferred as part of the relocation of a senior manager or management team, and in particular a Hard-to-Value Intangible, would depend on the valuation method selected. Where income-based methods involving estimations of discounted cash flows are used, the OECD Guidelines note that assumptions on the following inputs are required:[54]

(a) realistic and reliable financial projections;

(b) growth rates;

(c) discount rates;

(d) the useful life of the intangible

(e) taxes on future revenue, tax amortisation benefits available to the acquirer and taxes on the sale proceeds; and

(f) terminal values (where appropriate) - that is, ongoing contributions to revenue after the forecasting period.

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**NOTES**

[1] Sections 147(2)(a)-(b) and 147(4)(b) TIOPA 2010. A potential tax advantage is defined in section 155(2)-(4) TIOPA 2010 as a reduction in taxable profits for a chargeable period or the creation or increase of tax losses for a chargeable period due to the fact that a provision was not at arm's length.

[2] A "transaction" is defined in section 150(1) TIOPA 2010 to include arrangements, understandings and mutual practices (whether or not they are (or are intended to be) legally enforceable). Section 150(5) TIOPA 2010 notes that an "arrangement" means any scheme or arrangement of any kind (whether or not it is (or is intended to be) legally enforceable). Under section 150(3)-(4) TIOPA 2010, a "series of transactions" can still give rise to a provision even where there are one or more transactions in the series to which neither person is a party, or no transactions to which both are parties.

[3] Sections 147(1)(a), 147(1)(b) 147(1)(d) and 148 TIOPA 2010. The requirement for common control or management is set out in section 148 TIOPA 2010. This requirement is met when one of the two affected persons directly or indirectly participated in the management, control or capital or the other, or a third person participated in the management, control or capital of both affected persons.

[4] Sections 147(3) and (5) TIOPA 2010. These rules apply to both cross-border and UK-UK provisions.

[5] Section 164(1) TIOPA 2010. The latest version of the OECD Guidelines, released on 10 July 2017, reflects clarifications and revisions made as part of the OECD's Base Erosion and Profit Shifting project (***BEPS***). In particular, these relate to BEPS Actions 8-10 on Aligning Transfer Pricing Outcomes with Value Creation as agreed in the October 2015 BEPS Reports. The definition of transfer pricing guidelines in section 164 TIOPA 2010 requires updating to incorporate the revised, consolidated OECD Guidelines published in 2017. We are aware that HMRC are preparing a Statutory Instrument to address this point.

[6] INTM410000 to INTM489000.

[7] OECD Guidelines, Chapter IX, Section E.3.1, paragraph 9.68.

[8] OECD Guidelines, Chapter VI, Section D.4, paragraph 6.188.

[9] [2009] UKFTT 31 (TC). The Special Commissioners noted that this was due to the obligation to construe the legislation in such manner as best ensures consistency with the OECD model.

[10] INTM412050 and section 164(1) TIOPA 2010.

[11] From INTM440060.

[12] OECD Guidelines, Chapter VI, Section A.1, paragraph 6.6.

[13] INTM440110.

[14] INTM440140.

[15] Ibid. Lord Lindley in *IRC v Muller & Co Margarine Limited* noted at [235] that *"goodwill is inseparable from the business to which it adds value"*.

[16] Chapter 4, Part 8, Corporation Tax Act (***CTA***) 2009. Note that section 715(1) CTA 2009 states Part 8 CTA 2009 applies to goodwill as it applies to an intangible fixed asset.

[17] Section 715(3) CTA 2009. The definition of goodwill here includes internally-generated goodwill. Section 715(1) CTA 2009 notes that Part 8 applies to goodwill as it applies to an intangible fixed asset.

[18] OECD Guidelines, Chapter VI, Section A.1, paragraph 6.7.

[19] OECD Guidelines, Chapter VI, Section A.4.6, paragraph 6.27.

[20] [1901] A.C. 217.

[21] This case was also cited in *Breyer Group Plc v Department of Energy and Climate Change* [2014] EWHC 2247 (QB) at [68].

[22] [1988] 1. W.L.R. 445.

[23] [1954] Ch 50.

[24] [2001] FSR 53. Selected further case law discussing goodwill includes *Kennedy v Lee* [1817] 3 Mer 441 at [452], *England v Downs* [1842] 6 Beav 269 at [276], *Potter v IRC* [1854] 10 Exch 147 at [157], *Wedderburn v Wedderburn (No 4)* [1856] 22 Beav at [104], *Churton v Douglas* [1859] John 174, *Ginesi v Cooper & Co* [1880] 14 Ch D 596 at [600], *Trego v Hunt* [1896] AC 7 at [16]-[17], *Hill v Fearis* [1905] 1 Ch 466 at [471], *Corbin v Stewart* [1911] 28 TLR 99, *Shaw Bros (Hong Kong) Ltd v Golden Harvest (HK) Ltd* [1972] RPC 559, *H P Bulmer Ltd and Showerings Ltd v J Bollinger SA and Champagne Landon Pere et Fils* [1977] 2 CMLR 625 and *Shelley v Cunane* [1983] FSR 390.
[25] [1934] 2 KB 35.
[26] These four elements of goodwill are discussed in *Whiteman Smith Motor Co v Chaplin* by reference to a cat, rat, dog and rabbit. The cat represents customers who continue to go to an old shop despite the fact that the old shopkeeper has gone, the dog represents customers who follow the person rather than the place, the rat represents the customer who follows neither place nor person and the rabbit represents the customers who come simply from propinquity to the premises. The first three analogies appear to stem from a book published by the counsel in this case, Mr SPJ Merlin, whilst the rabbit analogy was introduced by Maugham LJ in this case. The analogies were later picked up on in *FC of T v Williamson* [1943] HC 24 and *Kirby (Inspector of Taxes) v Thorn E.M.I.*[1988] 1. W.L.R. 445.
[27] *Goodwill Hunting*, Jenny Nelder, Taxation, 22 October 2008.
[28] OECD Guidelines, Chapter 1, Section D.7, paragraphs 1.152 - 1.156.
[29] OECD Guidelines, Annex to Chapter VI, Example 23.
[30] OECD Guidelines, Chapter IX, Section E.3.1, paragraph 9.70.
[31] OECD Guidelines, Chapter IX, Section E.3.1, paragraph 9.68.
[32] OECD Guidelines, Chapter IX, Section D.1, paragraph 9.40.
[33] OECD Guidelines, Chapter IX, Section D.1, paragraph 9.39.
[34] There is no reference to profit potential in the context of an intangible within Chapter VI of the OECD Guidelines.
[35] Sections 147(6)(c)-(d), 213 and 214 TIOPA 2010.
[36] Section 734(1)(a)-(b) CTA 2009.
[37] Section 734(3) CTA 2009.
[38] OECD Guidelines, Chapter 1, Section D.1, paragraph 1.33.
[39] OECD Guidelines, Chapter VI, Section C.1.1, paragraph 6.89.
[40] OECD Guidelines, Chapter IX, Section B.1, paragraph 9.18.
[41] OECD Guidelines, Chapter VI, Section B.4.2, paragraph 6.79.
[42] Sections 733-741 CTA 2009.
[43] Section 735 CTA 2009.
[44] Section 17(1)(b) TCGA 1992.
[45] CIRD10110.
[46] CIRD47060.
[47] OECD Guidelines, Chapter VI, Section D.4, paragraph 6.189.
[48] OECD Guidelines, Chapter VI, Section D.4, paragraph 6.188.
[49] Ibid.
[50] INTM440176.
[51] Ibid.
[52] INTM440176.
[53] OECD Guidelines, Chapter IX, Section B.4, paragraph 9.33.
[54] OECD Guidelines, Chapter VI, Section D.2.6.3, paragraph 6.157.

  

# United States

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## Services or Intangible Property

### 1. If a senior manager or management team is relocated into or out of your jurisdiction, does your country have a view about whether the transfer is purely a services transfer, or includes an intangible asset such as goodwill (or even workforce in place); or of an intangible such as profit potential?

Based on the existing regulations under Internal Revenue Code3 Section 936(h)(3)(B), the term "intangible property" means any—(i) patent, invention, formula, process, design, pattern, or know-how;

(ii) copyright, literary, musical, or artistic composition;

(iii) trademark, trade name, or brand name;

(iv) franchise, license, or contract;

(v) method, program, system, procedure, campaign, survey, study, forecast, estimate, customer list, or technical data; or

(vi) any similar item, which has substantial value independent of the services of any individual.

However, at the time these review comments are provided, both the House and Senate have passed the final version of the Tax Reform Bill[1] and it is on the way to the President for his signature. The final version produced by the committee of conference has revised the above definition under 936(h) by removing clause (vi) and adding two new clauses as follows:

(vi) any goodwill, going concern value, or workforce in place (including its composition and terms and conditions (contractual or otherwise) of its employment); or

(vii) any other item the value or potential value of which is not attributable to tangible property or the services of any individual.

The revised definition in the Tax Reform Bill includes workforce in place as a clearly defined IP item, although it is not identified in the existing regulations. For the topic under discussion, taxpayers may consider whether the personnel being transferred would constitute workforce in place. More importantly, one needs to determine whether a transfer of any valuable IP could effectively be transferred through the transfer of certain personnel. For example, if the U.S. parent company, USP, is transferring a R&D team to its Irish subsidiary("IS") to build and then operate a new laboratory to conduct molecule studies and develop new drugs in the future. In evaluating the compensation that would be necessary in association with such a transfer, it is important to consider not only the value of the team itself (and the R&D capacity that team provides), but also to consider whether or not other IP transfers are being effectuated through the provision of the team. It might be the case that valuable processes or know how could effectively be transferred through the transfer of this team. If this is the case, compensation may be required not only for the functional capacity, but also for the IP transfers that have effectively occurred as a result of this transfer.

The US Tax Court has addressed the definition of IP fairly recently. In both the Veritas[2] and the Amazon[3] cases[4], the Tax Court held that items such as workforce in place, going concern value, goodwill, growth options, corporate resources and corporate opportunities are not included in the definition of IP in Sec. 936(h)(3)(B). Accordingly, the Tax Court held that these items were not compensable. Specifically, for the Veritas case, the IRS considered access to the U.S. entity's R&D team and access to the U.S. entity's marketing team as constituting workforce in place. The Tax Court noted that there was insufficient evidence regarding whether the access to the R&D team and access to the marketing team had value. The Tax Court further pointed out that, even if such evidence were provided, the IRS would still be incorrect because "access to R&D team" and "access to marketing team" are not enumerated in Sec. 936(h)(3)(B). However, as described above, the Tax Reform Bill revised the definition of IP under Sec. 936(h)(3)(B) and as a result an analysis of elements that are or are not compensable could yield different conclusions than those associated with these cases.

In addition, it's important to note that the final regulations under Sec. 367(a) and (d),[5] effective September 14, 2015, subject to taxation any transfer of workforce in place, goodwill or going concern value that occurs through contributions governed by Section 367. . Together with the revised definition under Tax Reform Bill, characterization of the transferred intangibles as goodwill or going concern value vs. other types of IP defined under 936(h)(3)(B) intangibles will not affect their status as a taxable transfer.

Furthermore, the services regulations under Sec. 482-9 discuss the interaction between intragroup services and the use of intangible property with examples of situations where a provider of intragroup services would earn higher margins, or could be expected to share in the profits of the development of IP that is jointly developed by the owner of the property and the service provider.

Ultimately, temporary regulations under Sec. 482 were issued in 2015 and provided that in determining arm's-length compensation under the best method rule, the taxpayer must consider the entire arrangement between the parties to a controlled transaction in order to account for all the value provided between parties, without regard to the form or character of the transaction.

### 2. What factors would be considered to determine how to characterize this transfer? In particular, might it make a difference whether it is a single person or a group of managers?

In the past, the court cases suggested that individuals or access to a specialized team do not constitute workforce in place, nor are they enumerated in the existing Sec. 936(h)(3)(B). The Tax Reform Bill, which revised the definition to explicitly include workforce in place as IP, will put more focus on whether a transfer of personnel constitutes workforce in place. In that regard, it is less likely that a single person would be considered as workforce in place It's worth pointing out that clause (vii) of the revised definition intends to address other similar items that have value independent of tangible property or services of any individual. Therefore, it's still critical to determine whether any valuable IP can be derived from a transfer of personnel.

### 3. What difference might the duties of the management team make? (For example, suppose this was a sales person or team, as opposed to a management team? Or an R&D group?)

The functions, specialties, and other characteristics of the personnel being transferred will matter to the extent that they imply whether or not an IP transfer can potentially be derived from such a personnel transfer. Generally, a transfer of executive management or R&D team is attached with a higher value than others such as a group of call center employees. It requires a thorough understanding of the taxpayers' business circumstances and value drivers. If the sales person being transferred is the owner of key customer relationships, if the R&D group bears significant knowledge of the taxpayer's core technology, or if the senior management person is key to executing central control and running their global operation, it certainly justifies the need for a deeper analysis on whether a transfer of such personnel would result in a transfer of IP.

## Valuing the Item Transferred

### 1. Are there any local tax or valuations rules or conventions on such valuations? How would the Hard-To-Value Intangibles concepts apply?

If any IP is derived and separately identified from a personnel transfer, the analysis should follow the requirements under Sec. 482-4 related to IP transfer. The U.S. Regulations do not include provisions identifying Hard-To-Value Intangibles ("HTVI") as a separate category of IP, but rather the commensurate with income ("CWI") standard applies to all IP transfers. CWI requires that the income with respect to such IP transfer (or license of IP) shall be commensurate with the income attributable to the IP. This provision provides the IRS the right to audit the reliability of the assumptions used to set the price of the IP transfer, by imposing periodic adjustments if the actual cumulative benefits realized from IP exceed a range of plus or minus 20 percent of the projected results (the "safe harbour"). The CWI standard suggests that taxpayers implement mechanisms used by third parties to account for the foreseeable development, or clauses to perform self-initiated adjustments if the safe harbour is exceeded.

## Supporting the Company Position

### 1. What features does a transfer pricing policy need in order to use it to support a calculation of this value reliably (given that the management team provides current services but may also be involved in important intangible asset DEMPE decisions)?

The U.S. regulations do not specify any documents or policies related to a transfer of personnel. To avoid any ex-post adjustments, it is advisable to prepare a contemporaneous analysis to document the determination of such transfer. In cases that any IP is identified and to the extent that projections are used to value any IP transfers deemed to have occurred, it's advisable that the taxpayers maintain a reasonable level of support for the validity of the projections, which generally applies to valuation analysis of any IP. Such support may include data and analyses regarding the risks associated with the IP, as well as various scenarios of projections based on the probability of various foreseeable events. Similar considerations should be given to the determination of the economic life of IP, terminal value, discount rate, and other key parameters used in the valuation analysis.

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**NOTES**

[1] Tax Cuts and Job Act 2017

[2] Veritas Software Corp. v. Commissioner, 133 T.C. No. 14 (2009)

[3] Amazon v. Commissioner, 148 T.C. No. 8 (2017)

[4] For both cases, the key issue under litigation was that the Internal Revenue Service ("IRS") attempted to apply the discounted cash flow ("DCF") method to value the entire business in perpetuity.

[5] Sec. 367 addresses tax treatment of transfers by U.S. persons of property—including goodwill and going-concern value—to foreign corporations.

# Transfer Pricing Forum Editorial Board and Country Panelists

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Murray is listed in *Chambers Europe, Chambers UK, The Legal 500 UK, Who's Who Legal, PLC Which Lawyer? Yearbook, Tax Directors Handbook, Legal Experts and International Tax Review's World Tax*. He is a fellow of the Chartered Institute of Taxation, past-Chairman of the British branch of the International Fiscal Association and a member of the CBI's Taxation Committee and International Direct Taxes Working Group.

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Mayra Lucas Mas has been an advisor at the Centre for Tax Policy and Administration, Tax Treaty, Transfer Pricing and Financial Transactions Division of the OECD since June 2008. She is responsible for chairing bilateral and multilateral transfer pricing events at OECD for the development of the OECD Transfer Pricing Guidelines, for the update of OECD Transfer Pricing Country Developments and for OECD accession review in the field of Transfer Pricing. She also provides technical assistance to non-OECD economies. In the past she has worked as a senior consultant for the transfer pricing group of a leading accounting firm and in the Taxation and Customs Union unit of the European Commission.

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In his personal capacity, Rahul has handled several APAs in India, involving clients from across industries; and also covering complex transactions, e.g. industrial franchise fees/variable royalties under non-integrated principal structures; contract R&D service provider model; distribution models, with related marketing intangible issues; financial transactions; profit split models for royalties; etc. He has been consistently rated as amongst the leading transfer pricing professionals and tax litigators in the world, by Euromoney and International Tax Review, since 2010.

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In addition to lecturing at many national and local training events organised by the Chinese tax authorities, Mr. Chi has provided technical advice on a number of recent transfer pricing legislative initiatives in China. A frequent speaker on transfer pricing and other matters, his analyses are regularly featured in tax and transfer pricing publications around the world i.e. International Tax Review). Mr. Chi has been recommended as a leading transfer pricing advisor in China by the Legal Media Group.

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Philip de Homont specializes in complicated transfer pricing audits and the valuation of intellectual property for international corporations and law firms. He has defended major transfer pricing cases throughout Europe and the Americas in a wide range of industries from consumer goods to financial services.

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Philip de Homont is the co-author of dozens of articles and two books on transfer pricing and intellectual property valuation. He has participated in various transfer pricing conferences.

## Hong Kong

**John Kondos**
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John Kondos is the Asia-Pacific Leader for Financial Services and the Financial Services Transfer Pricing team. He specializes in transfer pricing documentation, planning, controversy, and audit resolution matters, including competent authority negotiations. John has lived and worked in Asia for over 14 years, and has extensive experience with banking and capital markets, asset management, insurance, treasury and group service transactions in Japan, Korea, Hong Kong, Singapore, Taiwan and other Asian countries. He is a graduate of the University of Melbourne, and has a Bachelor of Commerce and Masters (Commerce & Business Administration) degrees from Kobe University in Japan.

**Irene Lee**
**Director, KPMG Global Transfer Pricing Services, Hong Kong**

Irene Lee has practiced tax for 11 years, the last 7 specializing in transfer pricing matters involving the financial services sector. She joined KPMG in Hong Kong in 2013, and advises banking, asset management, and insurance clients on transfer pricing policies, documentation, and risk management in the Asia region. She earned a Bachelors of Business Administration (B.B.A.) degree from the Chinese University of Hong Kong, and has studied at the University of North Carolina (Chapel Hill).

**Jeffrey Wong**
**Manager of Global Transfer Pricing Services, KPMG Hong Kong**

Jeffrey Wong is a Manager of Global Transfer Pricing Services at KPMG in Hong Kong.

## India

### Rahul Mitra
### Partner and National Head, Transfer Pricing & BEPS, KPMG India

Rahul K Mitra is currently the National Head of Transfer Pricing & BEPS for KPMG in India. Prior to joining KPMG India, Rahul was the national leader of PwC India's transfer pricing practice between 2010 and 2014. Rahul was a partner in the tax and regulatory services practice of PwC India between April 1999 and February 2015. Rahul has over 22 years of experience in handling taxation and regulatory matters in India. He specializes in transfer pricing, particularly inbound & outbound planning assignments, and advises on profit/cash repatriation planning; value chain transformation or supply chain management projects; profit attribution to permanent establishments, etc. Rahul independently handles litigation for top companies before the Income Tax Tribunals. At least 50 of the cases independently argued by Rahul have been reported in leading tax journals of India. Some of Rahul's major wins before the Tax Tribunals in transfer pricing matters have set precedents, both in India and globally.

In his personal capacity, Rahul has handled several APAs in India, involving clients from across industries; and also covering complex transactions, e.g. industrial franchise fees/variable royalties under non-integrated principal structures; contract R&D service provider model; distribution models, with related marketing intangible issues; financial transactions; profit split models for royalties; etc. He has been consistently rated as amongst the leading transfer pricing professionals and tax litigators in the world, by Euromoney and International Tax Review, since 2010.

Rahul has been a visiting member of the faculty of the National Law School in the subject of transfer pricing and international tax treaties, was the country reporter on the topic, "Non Discrimination in international tax matters", for the IFA Congress held in Brussels in 2008, and was invited by the OECD to speak in the 2012 Paris roundtable conference on developing countries' perspective on APAs.

### Yashodhan D. Pradhan
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Yashodhan is the Director at BSR & Co. LLP, located in Mumbai, India.

## Ireland

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Catherine is a partner in the tax department at Matheson. Catherine has over ten years' experience advising multinational corporations doing business in Ireland on Irish corporate tax. Catherine has a particular interest in transfer pricing, competent authority matters and business restructurings and also has extensive experience in structuring inward investment projects, mergers and acquisitions and corporate reorganisations. Catherine's clients include many of the leading multinational corporations established in Ireland, primarily in the pharmaceutical, healthcare, ICT and consumer brand sector. Catherine has published articles in leading tax journals, is co-author on the Ireland section of the Bloomberg BNA TP Forum and is co-author of the Ireland chapter of the International Fiscal Association Cahiers on Cross Border Business Restructuring.

Catherine is a Chartered Tax Advisor and a member of the Law Society of Ireland.

## Israel

### Yariv Ben-Dov
### Partner, Herzog Fox & Neeman, Tel Aviv

Yariv Ben-Dov is the Head of Transfer Pricing and Valuations Department at Herzog, Fox & Neeman. He is an expert in drafting and defending transfer pricing studies and intercompany agreements, with over 15 years of experience. Yariv counsels both multinational conglomerates and small start-ups on their transfer pricing matters, including multinationals which have no activity in Israel. Prior to joining HFN, Yariv was a co-founder of Bar-Zvi & Ben-Dov, a boutique law firm specializing in transfer pricing and high-tech, and prior to that Yariv served as the Head of the Transfer Pricing Unit in Teva Pharmaceuticals. Yariv has published articles in the subject of transfer pricing and has been asked to keynote as an expert in transfer pricing at several conventions in Israel, Europe and the U.S..

Yariv is a member of Transfer Pricing Associates, the world's largest network of independent transfer pricing experts, a member of the Israeli Bar Tax Committee, and of the Board of the Israeli-LATAM Chamber of Commerce. Yariv is also a Board member of the Arthur Rubinstein Music Society and the head of the Society's NYC branch. Yariv counsels (pro bono) to the Israeli Navy Association. Yariv speaks Hebrew, English, French and Italian, and has often advised global clients in their local language.

## Italy

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Aurelio Massimiano is associate of Maisto e Associati since 2005, after having worked for the International Tax Office of the Italian Revenue Agency. His areas of expertise are international taxation and transfer pricing. He is the permanent assistant of Professor Guglielmo Maisto at the EU Joint Transfer Pricing Forum.

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Aurelio Massimiano is a partner at Maisto e Associati, where he has practiced since 2005, after having worked for the International Tax Office of the Italian Revenue Agency, and prior to that, for a Big 4 accounting firm. His areas of expertise are international taxation and transfer pricing. He is the permanent assistant of Professor Guglielmo Maisto at the EU Joint Transfer Pricing Forum. A member of the Association of Chartered Accountants, he holds degrees from Luiss Guido Carli University in Rome, and an LL.M. in International Tax Law from the University of Leiden, The Netherlands.

**Mirko Severi**
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Mirko Severi joined Maisto e Associati in 2011 after obtaining a Master Diploma in Tax Law at IPSOA. He graduated (cum laude) in Economics from the University of Parma, in 2010. His areas of expertise include corporate taxation and group taxation.

### Japan

**Takuma Mimura**
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Takuma Mimura is Managing Director of Cosmos-International Management, a transfer pricing boutique consulting firm in Japan. He has more than 14 years of transfer pricing experience, including 6 years at Deloitte Touche Tohmatsu (both Tokyo and New York), and international banking experience prior to transfer pricing. He has worked extensively with transfer pricing issues worldwide and is especially experienced in Japan, U.S. and China Transfer Pricing matters. He has also worked with a broad range of clients in manufacturing, financial services and telecommunications and has assisted many taxpayers in negotiations with the Japanese tax authorities on transfer pricing audit examinations.

Takuma has authored articles for professional journals including BNA Transfer Pricing Report and Monthly International Taxation of Japan, and is a frequent speaker on transfer pricing topics.

### Korea

**Dr. Tae-Hyung Kim**
**Deloitte, Korea**

Dr. Tae-Hyung Kim is a senior partner and the national leader of the Global Transfer Pricing Group at Deloitte, Korea. Over more than 14 years, Dr. Kim has represented multinational corporations in various industries in transfer pricing audit defense, advance pricing agreement negotiations, mutual agreement procedures, and planning and documentation studies.

Prior to his current position, Dr. Kim headed the national transfer pricing practice at other Big Four firm in Korea and the Law and Economics Consulting Group in Korea. Before specializing in transfer pricing, Dr. Kim was a research fellow for the Korea Institute for International Economic Policy (KIEP). During his tenure at the KIEP, he advised the Ministry of Finance and Economy, the Ministry of Commerce, Industry, and Energy and the Ministry of Foreign Affairs in the area of international trade and investment policies.

Dr. Kim' s recent publications appear in IBFD's International Transfer Pricing Journal, BNA Tax Management's Transfer Pricing Reports, and Euromoney's Transfer Pricing Reviews. His economics publications also appear in Canadian Journal of Economics and Review of International Economics.

He holds a Ph.D. in economics from the University of Washington and is a graduate of Advanced Management Programs of both Harvard Business School and Seoul National University.

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**Head of Transfer Pricing Group, Deloitte, Seoul**

Mr. Seong Kwon Song, former Assistant Commissioner for International Tax Investigation and Head of the Competent Authority at the Korean National Tax Services (KNTS) leads the Deloitte transfer pricing group in Korea. The group has over 40 specialists including ex-KNTS officers and economists with global background.

### Mexico

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Moisés Curiel is a member of the Firm's Transfer Pricing Practice Group. He is recognized by International Tax Review as one of Mexico's top tax advisers, and has served as the Transfer Pricing Audits and Resolutions administrator of Mexico's Ministry of Finance and Public Credit for seven years. Mr. Curiel helped prepare and implement various tax transfer pricing rules in Mexico, including the Income Tax Law, the Omnibus Tax Ruling and the Federal Tax Code. He also led the Advance Pricing Agreements Program in Mexico, where he negotiated over 300 unilateral agreements and 34 bilateral agreements. His impressive track record also includes proposing amendments to legislation on various matters for Latin American countries, and representing Mexico before the OECD for the transfer pricing party (WP6).

**Armando Cabrera**
**Partner, Baker & McKenzie, Mexico City**

Armando Cabrera-Nolasco is a partner in Baker McKenzie's Tax Practice Group in Guadalajara. He has 10 years of experience in transfer pricing issues. Mr Cabrera- Nolasco currently coordinates the transfer pricing services for financial and services industries, and the financial valuation practice.

Mr. Cabrera-Nolasco's practice focuses on transfer pricing documentation for tax compliance; pricing strategies and benchmarking analysis by product, industry, country and region; defense in litigation; and alternative dispute resolution of any transfer pricing matter in Mexico and Latin America.

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Jorge Ramirez Dorantes is a member of the Latin America Transfer Pricing Group. He has been a transfer pricing practitioner for over six years, with involvement in transfer pricing consulting/restructuring, economic analysis and valuation, controversy support (audit and litigation defense), transfer pricing documentation, and negotiations with various tax authorities in the Latin America region.

Mr. Ramirez Dorantes has worked with clients in a broad range of industries, with considerable experience in transactions for the aerospace, retail and services industries. He has also participated in the negotiation of APAs for the maquiladora industry, and advising on the tax efficiency of supply chain operations. Aside from consulting projects, Mr. Ramirez

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**The Netherlands**

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Leslie is the managing director of TP EQuilibrium l AustralAsia LP ("TPEQ") (formerly, Ceteris New Zealand). TPEQ provides transfer pricing services in Australia and New Zealand, across an extensive range of industries, transactions and engagements, including APAs; independent second opinions and expert advice; tax authority reviews, investigations and audit defence; global, regional and country-specific documentation; etc. Leslie has over 22 years of specialised transfer pricing experience based in the APac Region (Sydney and Auckland), and an additional 10 years of corporate taxation experience in Big 4 accounting firm practices specialising in mergers, acquisitions, bankruptcies and reorganisations based in the United States (New York City and Chicago). Prior to forming TPEQ, Leslie commenced the transfer pricing practice of Ernst & Young New Zealand, where she served as the National Leader for a number of years. Leslie frequently provides 'thought leadership' contributions to various international publications and associations.

**Stefan Sunde**
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Stefan is a Senior Analyst at TPEQ. He joined TPEQ in 2013 in a university internship role, and since such time has worked on major projects for most of the practice's major client base and all industries, and has managed some more recent projects. Stefan completed his tertiary studies in 2014 and has since worked for the firm in a full-time capacity.

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Sophie is an Analyst at TPEQ. She has over a year of transfer pricing experience since joining TPEQ in July 2015, working across various industries and projects for TPEQ's client base. Sophie completed her tertiary studies in 2016 and has since worked for the firm in a full-time capacity.

**Portugal**

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Patrícia Matos is currently Associate Partner in Deloitte's Lisbon office in the transfer pricing department.

Patrícia has a business degree and is a chartered accountant. She started her professional career in Arthur Andersen (Arthur Andersen, S.A., presently Deloitte & Touche as result of an effective association of both firms since April 2002) in 1997 and was promoted to Associate Partner in 2008.

Patrícia has extensive experience in tax planning, due diligence and tax compliance for Portuguese and Multinational companies. In 2002, she began working exclusively in transfer pricing. She advises clients in several aspects of transfer pricing, ranging from tax audits to comprehensive transfer pricing planning, structuring of intercompany transactions and defensive documentation.

Her experience spans a wide range of industries including communications, technology, media, financial services, automotive, consumer goods, tourism and pharmaceuticals.

Patrícia has been a speaker at several seminars and conferences on tax, economic and transfer pricing issues.

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Henrique is currently a Manager in Deloitte's Lisbon office in the transfer pricing department.

**Russia**

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**Ernst & Young, Moscow**

Evgenia joined the firm as a partner in March 2011. Before that she worked for more than 15 years with another Big Four company where she obtained extensive experience in providing advisory services to Russian and international companies on various areas of taxation and conducting business in Russia, structuring investments, and coordinating approaches to tax planning. Since 2007 Evgenia has been focusing on transfer pricing. She has led transfer pricing planning and documentation projects for multinational and Russian clients in various industry sectors, including structuring of entry/exit strategies of clients from the transfer pricing perspective, adaptation of global transfer pricing policies to Russian requirements, business restructuring, development of sustainable transfer pricing methodologies, etc. Evgenia specialises on serving companies working in retail, consumer products and life science industries. She is currently a Partner in the Transfer Pricing Group for Ernst & Young in Moscow.

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Ibragim is a Manager with the EY Transfer Pricing Group in Moscow. He has specialized in transfer pricing for more than 5 years, and has actively participated in transfer pricing projects for foreign and Russian companies from various industries, including FMCG, chemical, Oil & Gas, automotive, pharma, etc. Ibragim has broad experience in conducting benchmarking studies, preparing TP documentations, designing the TP methodologies, business restructuring, intangible assets and intra-group financial transactions analysis. He graduated with honors from All-Russian State Tax Academy of the Ministry of Finance of the Russian Federation and holds a degree in Taxes and Taxation. Ibragim is currently studying for a Ph.D degree at the Plekhanov Russian University of Economics.

### Singapore

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**Senior Consultant (Tax and Transfer Pricing), Baker & McKenzie Wong & Leow, Singapore**

Peter Tan leads the Baker & McKenzie Transfer Pricing practice in Singapore. He was called to the Bar of England and Wales in 1976, and started his tax career in London, continuing it in Singapore. Mr. Tan advises multinational companies from various industries on tax issues related to mergers and acquisitions, group and business restructuring, joint venture projects, intellectual property, franchising and distribution transactions, technical services arrangements and licensing, and financial products. He also assists clients in obtaining tax incentives. Mr. Tan also has extensive experience in tax dispute resolution. A member of the Middle Temple Inn of Court in England and Wales, Mr. Tan is also an Accredited Tax Advisor in the Singapore Institute of Accredited Tax Professionals.

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An economist with 16 years of experience in transfer pricing consulting and academia, Michael Nixon's experience includes transfer pricing and business restructuring projects in the U.K., Germany, the Netherlands and Singapore, where he has been based for the last six years. He has advised multinationals across various industries throughout the planning, compliance and audit cycle. His practice is focused on transfer pricing controversy, intellectual property valuations and business restructuring. He is a member of the Singapore Transfer Pricing consultation group with the Inland Revenue Authority of Singapore (IRAS), and has undertaken training for the IRAS Tax Academy. He also consults with Singapore academic institutions on transfer pricing and business restructuring matters. Mr. Nixon has a Bachelor of Arts Economics degree from Nottingham Trent University and a Master of Science Economics (with distinction) from the University of London. He is a member of the Chartered Institute of Taxation in the U.K., and of the Society of Financial Advisors in the U.K..

### Spain

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**Global Transfer Pricing Services, Partner, Tax Department, KPMG Abogados, Spain**

Ms. Trapé joined KPMG in 2007 and has worked on numerous transfer pricing projects including transfer pricing policy design, documentation work, APA negotiations as well as audit defence and recourse in transfer pricing cases and international taxation. Her work has spanned the financial, consumer products, energy and pharmaceutical sectors.

Prior to joining KPMG, Montserrat Trapé worked at the Spanish Revenue Service. As Co-Director of International taxation she was responsible for negotiating several multilateral and bilateral APAs, judicial defence of TP assessments as well as actively participating in the new transfer pricing legislation. Ms. Trapé was also Vice-Chair of the European Union Joint Transfer Pricing Forum for four years. During this period, the JTPF worked on recommendations for the effective implementation of the Arbitration Convention, on a transfer pricing model documentation to simplify documentation compliance requirements and on a report on best practices for APA within Europe.

Montserrat Trapé is also a Visiting Professor at ESADE Instituto de Estudios Fiscales, where she has conducted several training courses for Spanish & Latin American Tax Authorities in Madrid. She is a frequent public speaker and contributor to articles and books on transfer pricing, dispute resolution mechanisms and international taxation issues.

Ms. Trapé has been included in the list of 2009 and 2010 "Best lawyers" in Spain.

**Elisenda Monforte**
**Partner, Global Transfer Pricing Services, KPMG, Spain**

Elisenda Monforte is a Partner in KPMG's Global Transfer Pricing Services practice. She joined KPMG in the U.S. in 2007, and has been part of the Spanish practice since 2011. Elisenda has extensive experience in the financial services industry, with a focus on banking and insurance, and funding transactions for non-financial clients. She has been involved in operational transfer pricing engagements, and analyzed the effective implementation of transfer pricing policies for IP licenses and services, as well as assisting clients in tax audits and the negotiation of APAs. Elisenda has been a lecturer both in internal training and external sessions at ESADE and Centro de Estudios Fiscales, and has co-authored a number of articles on the Spanish transfer pricing environment. She has also been a teaching assistant at NYU's Stern School of Business and College of Arts and Sciences. Elisenda is a graduate of Universitat Pompeu Fabra (BA in Law '05, BA in Economics '03) and NYU (MA in Economics '06).

### Switzerland

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Michelle Messere is a Consultant in the Transfer Pricing and Value Chain Transformation team based in Zurich, Switzerland. She graduated in Law and Accounting in Brazil and is an admitted attorney at the Brazilian Bar Association. She is currently studying the LL.M of International Contracts and Arbitration at the University of Fribourg, Switzerland.

### United Kingdom

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**Managing Director, Transfer Pricing, Duff & Phelps, London**

Danny Beeton is a Managing Director in the London office of Duff & Phelps and is part of the Transfer Pricing practice. He has over 25 years' experience advising multinational companies on global transfer pricing issues, bringing a management consulting perspective to business analysis and transfer pricing advice, supported by deep economics skills and extensive international experience. Prior to joining Duff & Phelps, Danny was global head of transfer pricing economics at Freshfields Bruckhaus Deringer and, before that, was a partner and global head of transfer pricing in an international accounting firm. He advises on the pricing of all types of transactions including financial transactions and transfer pricing for financial services, with a particular focus on international tax planning and transfer pricing dispute resolution. He is well known as an international speaker and author on transfer pricing. Danny is listed in various directories including The World's Leading Transfer Pricing Advisers and received his PhD in economics from Queen Mary College in the University of London.

**Murray Clayson**
**Editorial Board Member and Panelist for United Kingdom**
**Tax Partner, Freshfields Bruckhaus Deringer, London**

Murray Clayson is a partner in Freshfields' tax practice group and is based in London, and leads the firm's international transfer pricing practice. He specializes in international tax, finance and capital markets taxation, corporate structuring, transfer pricing, banking and securities tax, asset and project finance, derivatives and financial products, particularly cross-border. Murray is listed in *Chambers Europe, Chambers UK, The Legal 500 UK, Who's Who Legal, PLC Which Lawyer? Yearbook, Tax Directors Handbook, Legal Experts and International Tax Review's World Tax*. He is a fellow of the Chartered Institute of Taxation, past-Chairman of the British branch of the International Fiscal Association and a member of the CBI's Taxation Committee and International Direct Taxes Working Group. Murray is a graduate of Sidney Sussex College, Cambridge, and holds a PhD from the University of London for research in the field of transfer pricing. He joined the firm in 1983 and has been a partner since 1993.

**Andrew Cousins**
**Director, Duff & Phelps, London, United Kingdom**

Andrew is an international tax practitioner in the Duff & Phelps Transfer Pricing practice, with more than 18 years of cross-border experience in private practice, industry and in government. He brings a comprehensive regulatory, commercial and advisory perspective to the fields of transfer pricing and business restructuring, with a focus on practical implementation. Before joining Duff & Phelps Andrew was Deputy Comptroller of Taxes in the Jersey tax authority, acting as competent authority for all of Jersey's international tax agreements. He also served as Jersey's delegate to the Global Forum on Transparency and Exchange of Information for Tax Purposes, as well as representing Jersey at the OECD's Global Forums for Transfer Pricing and for Tax Treaties. Andrew spent eight years in industry as a global head of transfer pricing, and has led the transfer pricing practice in two FTSE 100 FMCG multinationals.

Andrew is a graduate of Oxford University and is an Associate of the Institute of Chartered Accountants in England and Wales. He qualified as a chartered accountant at Deloitte before focusing on transfer pricing at Ernst & Young, where he was a member of its Tax Effective Supply Chain Management team.

### United States

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**Reed Smith LLP, Washington, D.C.**

Jeffrey S. Korenblatt is a tax attorney with more than 15 years of experience. He has a broad-based transactional tax practice and focuses on international tax planning and transfer pricing. Jeff delivers tax solutions to clients in multiple industries, including, but not limited to, manufacturers, retailers, franchisors, web-based providers of goods and services, and taxpayers in life-sciences industries.

**Patrick McColgan**
**Duff & Phelps LLP, Atlanta**

Patrick McColgan is a managing director in Duff & Phelps' Atlanta office and part of the transfer pricing team. He has a strong focus on assisting growth companies with their global transfer pricing needs through the design of defensible and pragmatic solutions. Patrick has more than 11 years of transfer pricing experience and has worked across several industries including automotive, chemical, consumer products, medical products, pharmaceutical, software, internet, and manufacturing.

**Emily Sanborn**
**Duff & Phelps LLP, Altanta**

Emily Sanborn is a director in the Atlanta office of Duff & Phelps' Transfer Pricing practice. Emily has more than nine years of transfer pricing experience and has both led and assisted in the design and implementation of practical and effective transfer pricing solutions to address a broad spectrum of transfer pricing issues, including management fees, license and migration of intangible property, and tangible goods transfers. Emily also has experience assisting clients throughout the transfer pricing lifecycle, from planning to documentation to litigation and arbitration support.



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# Transfer Pricing Forum Country Contributors

## Country Contributors

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Cristian Rosso Alba heads the Tax Law practice of Rosso Alba, Francia & Asociados. He has a well-recognized expertise in tax law, with particular emphasis on domestic and international tax matters. Mr. Rosso Alba has served as professor of Tax Law at the Pontifical Catholic University of Argentina; visiting professor at the University of Buenos Aires, School of Economics; professor of Tax Law at Austral University and professor of postgraduate courses at the Torcuato Di Tella University. Additionally, he has been a regular lecturer in the United States and speaker in domestic and international tax conferences and is the author of more than eighty articles appearing in specialized publications. Cristian Rosso Alba holds an LL.M from Harvard Law School, and a Certificate in International Taxation jointly from Harvard Law School and the J.F. Kennedy School of Government at Harvard; a Masters in Taxation from Buenos Aires University School of Economics; and the degree of Abogado from the University of Buenos Aires Law School. He is a member of the American Bar Association (ABA), the Canadian Tax Foundation and the Advisory Board of the Argentine Chamber of Commerce. He has been recommended as one of the "Leaders in their Field" (Tax – Argentina) by *Chambers Latin America*.

**Matias F. Lozano**
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Matías F. Lozano works at Rosso Alba, Francia & Asociados in Buenos Aires, Argentina.

### Australia

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**Director, Duff & Phelps, Australia**

Stean Hainsworth is the Director of Transfer Pricing at Duff & Phelps based in Australia and has over 20 years of legal and tax experience, specializing in transfer pricing. Previously he was a Director of an international transfer pricing firm, at a global advisory firm as the transfer pricing leader for Asia, and worked as a senior transfer pricing specialist for a Big 4 firm in New Zealand, Canada and Australia.

### Austria

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**Tax Director at PricewaterhouseCoopers, Vienna**

Alexandra Dolezel has been a Tax Director in the Vienna, Austria, practice of PricewaterhouseCoopers since 2011. There, she specializes in transfer pricing; international tax structuring and value chain transformation; and mergers and acquisitions. In addition, she is a lecturer on European Union tax law and comparative tax law at FH Campus Wien, the largest university in Austria. Prior to joining PricewaterhouseCoopers, she was Head of Corporate Taxes for Borealis AG, where she had overall responsibility for group corporate tax, including matters affecting tax risk management, transfer pricing and international structures. Ms. Dolezel received her education at the Vienna University of Economics and Business Administration, and she is also a member of the Austrian Chamber of Accountants.

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### Belgium

**Dirk van Stappen**
**Partner, KPMG, Antwerp/Brussels**

Dirk van Stappen is a partner with KPMG and leads KPMG's transfer pricing practice in Belgium. He joined KPMG in 1988 and has over 28 years of experience in advising multinational companies on corporate tax (both domestic and international) and transfer pricing issues. He leads KPMG's transfer pricing practice in Belgium. Furthermore, Dirk is a former member of the EU Joint Transfer Pricing Forum (2002-2015).

Since 1996, Dirk has been a visiting professor at the University of Antwerp (Faculty Applied Economics, UA) teaching Tax to Master students. He has been named in International Tax Review's "World Tax –The comprehensive guide to the world's leading tax firms", Euromoney's (Legal Media Group) "Guide to the World's Leading Transfer Pricing Advisers" and Euromoney's "Guide to the World's Leading Tax Advisers."

He is a certified tax adviser and member of the Belgian Institute for Accountants and Tax Advisers and of the International Fiscal Association.

**Yves de Groote**
**Director, KPMG, Antwerp**

Yves de Groote is a LL.M from King's College London, MSc. HUB; he joined KPMG in 2004 and has over 10 years of experience in advising multinational organizations on transfer pricing issues. He has been involved in and conducted various tax planning and transfer pricing assignments, ranging from the preparation of European and global transfer pricing documentation (including functional and economic analyses and comparables searches), domestic and international transfer pricing audit defense to the negotiation of (uni-, bi- and multilateral) rulings and advance pricing arrangements (APAs).

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## Brazil

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Mr. Carvalho is a Tax Associate with TozziniFreire Advogados, São Paulo. In addition to his practice, he is a teacher and lecturer, and a frequently published author. He holds an LL.M. in International Taxation from New York University School of Law; an LL.M. in Corporate Law from the Instituto Brasileiro de Mercado de Capitais (IBMEC); an International Executive MBA from the Chinese University of Hong Kong; an MBA in Taxation from Fundação Getúlio Vargas (FGV), and an LL.B. (magna cum laude) from Federal University of Ceará.

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## Canada

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Richard Garland is a partner in the Toronto office of Deloitte. He is a Chartered Professional Accountant and has over 25 years of accounting experience focused in the area of corporate international taxation. Richard has assisted clients in all aspects of international taxation, with particular emphasis on tax treaty issues, cross border financing structures and transfer pricing. Over the past several years, Richard's work has been focused in the area of transfer pricing, and he has been repeatedly recognized in Euromoney's guide to leading transfer pricing practitioners. .

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## China

**Cheng Chi**
**Partner-in-Charge for China and Hong Kong, KPMG, Shanghai**

Based in Shanghai, Cheng Chi is the partner-in-charge of KPMG's Global Transfer Pricing Services for China and Hong Kong. Mr. Chi has led many transfer pricing and tax efficient supply chain projects in Asia and Europe, involving advance pricing arrangement negotiations, cost contribution arrangements, Pan-Asia documentation, controversy resolution, global procurement structuring, and headquarters services recharges for clients in the industrial market including automobile, chemical, and machinery industries, as well as the consumer market, logistic, communication, electronics and financial services industries. In addition to lecturing at many national and local training events organized by the Chinese tax authorities, Mr. Chi has provided technical advice on a number of recent transfer pricing legislative initiatives in China. A frequent speaker on transfer pricing and other matters, his analyses are regularly featured in tax and transfer pricing publications around the world i.e. International Tax Review). Mr. Chi has been recommended as a leading transfer pricing advisor in China by the Legal Media Group. Mr. Chi started his transfer pricing career in Europe with another leading accounting firm covering many of Europe's major jurisdictions while based in Amsterdam until returning to China in 2004.

**Rafael Triginelli Miraglia**
**Senior Tax Manager, Global Transfer Pricing Services, KPMG, Shanghai**

Rafael Triginelli Miraglia is a Senior Tax Manager with the Global Transfer Pricing Team of KPMG China and member of the firm's BEPS Center of Excellence. His practice focuses on design and implementation of transfer pricing systems, business restructuring advice, value chain analysis and planning and outbound investments.

Rafael is graduated in Law (Universidade Federal de Minas Gerais, Brazil, 2004) and has obtained the degrees of Master of Laws (Pontifícia Universidade Católica de Minas Gerais, Brazil, 2008) and LL.M. of Advanced Studies in International Tax Law (ITC-Leiden University, the Netherlands, 2011). He is a Transfer Pricing Lecturer at the ITC-Leiden University and has taught courses in Tax and Constitutional Law at Pontifícia Universidade Católica de Minas Gerais. Rafael is a member of the Brazilian Bar Association (Ordem dos Advogados do Brasil) since 2005.

Before joining KPMG China, Rafael worked between 2011 and 2015 as Tax Associate with a global law firm in the Netherlands and, prior to that, as Head of Tax with a Brazilian law firm.

## France

**Julien Monsenego**
**Partner, Gowling WLG**

Julien Monsenego specializes in international taxation, tax treatment of M&A and restructurings. He assists French and foreign companies in their international investments as well as in the course of their tax audits and litigations. He particularly focuses on Life Science and R&D-intensive industries. He has extended practice of transfer pricing and has intervened for French and non-French groups in setting up intra-group flows, IP companies and business restructuring. Before joining Olswang, Julien Monsenego worked at Arthur Andersen International, Ernst & Young, Coudert Brothers and Dechert LLP. Mr. Monsenego is a member of the Paris Bar.

**Guillaume Madelpuech**
**Principal, NERA Economic Consulting**

Mr. Madelpuech is a Principal within the Transfer Pricing Practice of NERA Economic Consulting in Paris.

### Germany

**Alexander Voegele**
**NERA Economic Consulting, Frankfurt**

For more than 25 years, Alexander Voegele has been advising international corporations and leading law firms on transfer pricing issues, specializing in the development of innovative economic structures for transfer pricing strategies and for the defense of major international transfer pricing cases. He has led hundreds of large transfer pricing projects and defense cases for a variety of clients in a range of industries. Prior to joining NERA, Dr. Voegele was a partner with PriceWaterhouse and KPMG, where he was in charge of their German transfer pricing practice. He holds a doctorate in economics and a Masters of Tax and Business Administration from the University of Mannheim. He is a certified German auditor and tax adviser and is a French Commissaire aux Comptes. He has received numerous awards as a transfer pricing adviser and has frequently been ranked as a leading tax and transfer pricing professional.

**Philip de Homont**
**NERA Economic Consulting, Frankfurt**

Philip de Homont specializes in complicated transfer pricing audits and the valuation of intellectual property for international corporations and law firms. He has defended major transfer pricing cases throughout Europe and the Americas in a wide range of industries from consumer goods to financial services. He holds a MSc in Economics from the University of Warwick and a Diplom (Masters-equivalent) in Physics from the Technische Universitat Munchen. Philip de Homont is the co-author of numerous articles and two books on transfer pricing and intellectual property valuation. He has participated in various transfer pricing conferences.

**Florian Sarnetzki**
**NERA Economic Consulting, Frankfurt**

Dr. Florian Sarnetzki is a consultant at NERA Economic Consulting, where he provides economic planning and litigation advice to international corporations and law firms. Using his profound mathematical and statistical knowledge, Dr. Sarnetzki helps the team through his expertise in the identification and quantification of microeconomic and macroeconomic effects. He is specialized in valuation, complex calculations and econometric analysis of financial investments. Florian Sarnetzki was awarded with the Reinhard-Selten-Award (Young Author Best Paper Award) by the German Economic Association. Mr. Sarnetzki holds a PhD in Economics from the University of Mannheim, and an MSc-equivalent in Mathematics from University of Heidelberg, Germany.

### Hong Kong

**John Kondos**
**Partner, KPMG Global Transfer Pricing Services, Hong Kong**

John Kondos is the Asia-Pacific Leader for Financial Services and the Financial Services Transfer Pricing team. He specializes in transfer pricing documentation, planning, controversy, and audit resolution matters, including competent authority negotiations. John has lived and worked in Asia for over 14 years, and has extensive experience with banking and capital markets, asset management, insurance, treasury and group service transactions in Japan, Korea, Hong Kong, Singapore, Taiwan and other Asian countries. He is a graduate of the University of Melbourne, and has a Bachelor of Commerce and Masters (Commerce & Business Administration) degrees from Kobe University in Japan.

**Irene Lee**
**Director, KPMG Global Transfer Pricing Services, Hong Kong**

Irene Lee has practiced tax for 11 years, the last 7 specializing in transfer pricing matters involving the financial services sector. She joined KPMG in Hong Kong in 2013, and advises banking, asset management, and insurance clients on transfer pricing policies, documentation, and risk management in the Asia region. She earned a Bachelors of Business Administration (B.B.A.) degree from the Chinese University of Hong Kong, and has studied at the University of North Carolina (Chapel Hill).

### India

**Rahul Mitra**
**Partner and National Head, Transfer Pricing & BEPS, KPMG India**

Rahul K Mitra is currently the National Head of Transfer Pricing & BEPS for KPMG in India. Prior to joining KPMG India, Rahul was the national leader of PwC India's transfer pricing practice between 2010 and 2014. Rahul was a partner in the tax and regulatory services practice of PwC India between April 1999 and February 2015. Rahul has over 22 years of experience in handling taxation and regulatory matters in India. He specializes in transfer pricing, particularly inbound & outbound planning assignments, and advises on profit/cash repatriation planning; value chain transformation or supply chain management projects; profit attribution to permanent establishments, etc. Rahul independently handles litigation for top companies before the Income Tax Tribunals.

At least 50 of the cases independently argued by Rahul have been reported in leading tax journals of India. Some of Rahul's major wins before the Tax Tribunals in transfer pricing matters have set precedents, both in India and globally.

In his personal capacity, Rahul has handled several APAs in India, involving clients from across industries; and also covering complex transactions, e.g. industrial franchise fees/variable royalties under non-integrated principal structures; contract R&D service provider model; distribution models, with related marketing intangible issues; financial transactions; profit split models for royalties; etc. He has been consistently rated as amongst the leading transfer pricing professionals and tax litigators in the world, by Euromoney and International Tax Review, since 2010.

Rahul has been a visiting member of the faculty of the National Law School in the subject of transfer pricing and international tax treaties, was the country reporter on the topic, "Non Discrimination in international tax matters", for the IFA Congress held in Brussels in 2008, and was invited by the OECD to speak in the 2012 Paris roundtable conference on developing countries' perspective on APAs.

**Vinita Chakrabarti**
**Director of Transfer Pricing, KPMG India**

Vinita Chakrabarti is a Director, Transfer Pricing, KPMG India.

**Esha Tuteja**
**Manager of Transfer Pricing, KPMG India**

Esha Tuteja is a Manager, Transfer Pricing, KPMG India.

## Israel

**Yariv Ben-Dov**
**Partner, Herzog Fox & Neeman, Tel Aviv**

Yariv Ben-Dov is the Head of Transfer Pricing and Valuations Department at Herzog, Fox & Neeman. He is an expert in drafting and defending transfer pricing studies and intercompany agreements, with over 15 years of experience. Yariv counsels both multinational conglomerates and small start-ups on their transfer pricing matters, including multinationals which have no activity in Israel. Prior to joining HFN, Yariv was a co-founder of Bar-Zvi & Ben-Dov, a boutique law firm specializing in transfer pricing and high-tech, and prior to that Yariv served as the Head of the Transfer Pricing Unit in Teva Pharmaceuticals. Yariv has published articles in the subject of transfer pricing and has been asked to keynote as an expert in transfer pricing at several conventions in Israel, Europe and the U.S. Yariv is a member of Transfer Pricing Associates, the world's largest network of independent transfer pricing experts, a member of the Israeli Bar Tax Committee, and of the Board of the Israeli-LATAM Chamber of Commerce. Yariv is also a Board member of the Arthur Rubinstein Music Society and the head of the Society's NYC branch. Yariv counsels (pro bono) to the Israeli Navy Association. Yariv speaks Hebrew, English, French and Italian, and has often advised global clients in their local language.

## Italy

**Marco Valdonio**
**Partner, Maisto e Associati, Milan**

Marco Valdonio was admitted to the Association of Chartered Accountants in 2002. He joined Maisto e Associati in 2000, after working for another tax law firm. He headed the London office from 2002 to 2004, and has been partner in the firm since 2011. Marco's areas of expertise comprise transfer pricing, tax controversies and settlements, mergers and acquisitions, financial instruments, and international taxation.

**Aurelio Massimiano**
**Partner, Maisto e Associati, Milan**

Aurelio Massimiano is a partner at Maisto e Associati, where he has practiced since 2005, after having worked for the International Tax Office of the Italian Revenue Agency, and prior to that, for a Big 4 accounting firm. His areas of expertise are international taxation and transfer pricing. He is the permanent assistant of Professor Guglielmo Maisto at the EU Joint Transfer Pricing Forum. A member of the Association of Chartered Accountants, he holds degrees from Luiss Guido Carli University in Rome, and an LL.M. in International Tax Law from the University of Leiden, The Netherlands.

**Mirko Severi**
**Associate, Maisto e Associati, Milan**

Mirko Severi joined Maisto e Associati in 2011 after obtaining a Master Diploma in Tax Law at IPSOA. He graduated (cum laude) in Economics from the University of Parma, in 2010. His areas of expertise include corporate taxation and group taxation.

## Japan

**Takuma Mimura**
**Managing Director, Cosmos International Management Co., Ltd, Nagoya**

Takuma Mimura is Managing Director of Cosmos International Management, a transfer pricing boutique consulting firm in Japan. He has more than 14 years of transfer pricing experience, including 6 years at Deloitte Touche Tohmatsu (both Tokyo and New York), and international banking experience prior to transfer pricing. He has worked extensively on transfer pricing issues worldwide and is especially experienced in Japan, U.S. and China TP matters. He has also worked with a broad range of clients in manufacturing, financial services and telecommunications and has assisted many taxpayers in negotiations with the Japanese tax authorities on transfer pricing audit examinations. Takuma has authored articles for professional journals including BNA's Transfer Pricing Report and Monthly International Taxation of Japan, and is a frequent speaker on transfer pricing topics.

## Mexico

### Moises Curiel Garcia
**Transfer Pricing Partner, Baker & McKenzie, Mexico City**

Moises Curiel heads Baker & McKenzie's Latin America Transfer Pricing and Valuation practice in Mexico. He has more than 22 years of experience in transfer pricing and international taxes, and currently, among other aspects of his practice, tax counsel for the maquiladora industry and the Employers' Confederation of the Mexican Republic. He is recognized by International Tax Review as one of Mexico's top tax advisers. Mr. Curiel has previously served as the transfer pricing audits and resolutions administrator of Mexico's Ministry of Finance and Public Credit for almost eight years. He helped prepare and implement various transfer pricing rules in Mexico, including the Income Tax Law, the Temporary Tax Ruling and the Federal Tax Code. He also led the country's Advance Pricing Agreements Program and conducted the first transfer pricing audits in Mexico and in Latin America. He has represented Mexico before the OECD for the transfer pricing party (WP6). Mr. Curiel's educational certifications include degrees in public accounting from the Universidad ISEC in Mexico City and in taxation from the Universidad Panamericana, as well as certifications from Anahuac University (International Expert Transfer Pricing) and Instituto Mexicano de Contadores Puìblicos de Meìxico, A.C. (Tax Specialization Certificate).

### Norma Noyola-Cedillo
**Tax Specialist, Baker & McKenzie, Mexico City**

Norma Noyola-Cedillo is a Tax Specialist at Baker & McKenzie in Mexico City, Mexico.

## The Netherlands

### Robin Carmiggelt
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### Scott Smith
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### Krzysztof Lukosz
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## New Zealand

### Leslie Prescott-Haar
**Managing director, TP EQuilibrium | AustralAsia LP ("TPEQ")**

Leslie is the managing director of TP EQuilibrium | AustralAsia LP ("TPEQ") (formerly, Ceteris New Zealand). TPEQ provides transfer pricing services in Australia and New Zealand, across an extensive range of industries, transactions and engagements, including APAs; independent second opinions and expert advice; tax authority reviews, investigations and audit defence; global, regional and country-specific documentation; etc. Leslie has over 22 years of specialised transfer pricing experience based in the APac Region (Sydney and Auckland), and an additional 10 years of corporate taxation experience in Big 4 accounting firm practices specialising in mergers, acquisitions, bankruptcies and reorganisations based in the United States (New York City and Chicago). Prior to forming TPEQ, Leslie commenced the transfer pricing practice of Ernst & Young New Zealand, where she served as the National Leader for a number of years. Leslie frequently provides 'thought leadership' contributions to various international publications and associations.

### Sophie Day
**Analyst, TPEQ**

Sophie is an Analyst at TPEQ. She has over a year of transfer pricing experience since joining TPEQ in July 2015, working across various industries and projects for TPEQ's client base. Sophie completed her tertiary studies in 2016 and has since worked for the firm in a full-time capacity.

### Stefan Sunde
**Senior Analyst, TPEQ**

Stefan is a Senior Analyst at TPEQ. He joined TPEQ in 2013 in a university internship role, and since such time has worked on major projects for most of the practice's major client base and all industries, and has managed some more recent projects. Stefan completed his tertiary studies in 2014 and has since worked for the firm in a full-time capacity

## Portugal

### Patrícia Matos
**Transfer Pricing Partner, Deloitte, Lisbon**

Patrícia Matos is a Partner in Deloitte's Lisbon office in the transfer pricing department. She has a business degree and is a chartered accountant. Patricia started her professional career in 1997 with Arthur Andersen, S.A., which became Deloitte & Touche after the combination of both firms in April 2002. Patrícia has extensive experience in tax planning, due diligence and tax compliance for Portuguese and multinational companies. In 2002, she began working exclusively in transfer pricing. She advises clients in several aspects of transfer pricing, ranging from tax audits to comprehensive transfer pricing planning, structuring of intercompany transactions and defensive documentation. Her experience spans a wide range of industries including communications, technology, media, financial services, automotive, consumer goods, tourism and pharmaceuticals. Patrícia has been a speaker at several seminars and conferences on tax, economic and transfer pricing issues.

**Henrique Sollari Allegro**
**Manager, Partner at Deloitte & Associados SROC, S.A., Lisbon**

Henrique is currently a Manager in Deloitte's Lisbon office in the transfer pricing department.

## Russia

**Evgenia Veter**
**Partner, Ernst & Young, Moscow**

Evgenia Veter joined the Transfer Pricing Group of Ernst & Young as a partner in March 2011, coming from another major accounting firm. She has extensive experience in providing advisory services to Russian and international companies on various areas of taxation and conducting business in Russia, structuring investments, and coordinating approaches to tax planning. Since 2007 Evgenia has been focusing on transfer pricing. She has led transfer pricing planning and documentation projects for multinational and Russian clients in various industry sectors, including structuring of entry/exit strategies of clients from the transfer pricing perspective, adaptation of global transfer pricing policies to Russian requirements, business restructuring, development of sustainable transfer pricing methodologies, etc. Evgenia specializes on serving companies working in retail, consumer products and life science industries.

**Ekaterina Nikolaeva**
**Ernst & Young, Saint Petersburg**

Ekaterina Nikolaeva works at EY Moscow.

## Singapore

**Peter Tan**
**Senior Consultant (Tax and Transfer Pricing), Baker & McKenzie Wong & Leow, Singapore**

Peter Tan leads the Baker & McKenzie Transfer Pricing practice in Singapore. He was called to the Bar of England and Wales in 1976, and started his tax career in London, continuing it in Singapore. Mr. Tan advises multinational companies from various industries on tax issues related to mergers and acquisitions, group and business restructuring, joint venture projects, intellectual property, franchising and distribution transactions, technical services arrangements and licensing, and financial products. He also assists clients in obtaining tax incentives. Mr. Tan also has extensive experience in tax dispute resolution. A member of the Middle Temple Inn of Court in England and Wales, Mr. Tan is also an Accredited Tax Advisor in the Singapore Institute of Accredited Tax Professionals.

**Michael Nixon**
**Director of Economics (Transfer Pricing), Baker & McKenzie Wong & Leow, Singapore**

An economist with 16 years of experience in transfer pricing consulting and academia, Michael Nixon's experience includes transfer pricing and business restructuring projects in the U.K., Germany, the Netherlands and Singapore, where he has been based for the last six years. He has advised multinationals across various industries throughout the planning, compliance and audit cycle. His practice is focused on transfer pricing controversy, intellectual property valuations and business restructuring. He is a member of the Singapore Transfer Pricing consultation group with the Inland Revenue Authority of Singapore (IRAS), and has undertaken training for the IRAS Tax Academy. He also consults with Singapore academic institutions on transfer pricing and business restructuring matters. Mr. Nixon has a Bachelor of Arts Economics degree from Nottingham Trent University and a Master of Science Economics (with distinction) from the University of London. He is a member of the Chartered Institute of Taxation in the U.K., and of the Society of Financial Advisors in the U.K..

## Spain

**Montserrat Trapé**
**Global Transfer Pricing Services EMA Leader, KPMG, Barcelona**

Montserrat Trapé leads KPMG's Global Transfer Pricing Services practice in Europe, Africa and the Middle East (EMEA). She joined KPMG in 2007 and has worked on numerous transfer pricing projects including transfer pricing policy design, documentation work, APA negotiations as well as audit defence and recourse in transfer pricing cases and international taxation. Her work has spanned the financial, consumer products, energy and pharmaceutical sectors. Prior to joining KPMG, Ms. Trapé worked in several roles at the Spanish Revenue Service. As Co-Director of International Taxation she was responsible for negotiating several multilateral and bilateral APAs, judicial defense of transfer pricing assessments as well as actively participating in the new transfer pricing legislation. She was also Vice-Chair of the European Union Joint Transfer Pricing Forum for four years. During this period, the JTPF worked on recommendations for the effective implementation of the Arbitration Convention, on a transfer pricing model documentation to simplify documentation compliance requirements and on a report on best practices for APA within Europe.

Montserrat Trapé is also a Visiting Professor at ESADE Instituto de Estudios Fiscales, where she has conducted several training courses for Spanish and Latin American tax authorities in Madrid. She is a frequent public speaker and contributor to articles and books on transfer pricing, dispute resolution mechanisms and international taxation issues. Ms. Trapé has been included in the list of "Best lawyers" in Spain.

**Cesar Salagarar**
**Director, Global Transfer Pricing Services, KPMG, Barcelona**

Cesar Salagarar is a Director at KPMG Abogados.

**United Kingdom**

**Danny Beeton**
**Editor in Chief and Panelist for United Kingdom**
**Managing Director, Transfer Pricing, Duff & Phelps, London**

Danny Beeton is a Managing Director in the London office of Duff & Phelps and is part of the Transfer Pricing practice. He has over 25 years' experience advising multinational companies on global transfer pricing issues, bringing a management consulting perspective to business analysis and transfer pricing advice, supported by deep economics skills and extensive international experience. Prior to joining Duff & Phelps, Danny was global head of transfer pricing economics at Freshfields Bruckhaus Deringer and, before that, was a partner and global head of transfer pricing in an international accounting firm. He advises on the pricing of all types of transactions including financial transactions and transfer pricing for financial services, with a particular focus on international tax planning and transfer pricing dispute resolution. He is well known as an international speaker and author on transfer pricing. Danny is listed in various directories including The World's Leading Transfer Pricing Advisers and received his PhD in economics from Queen Mary College in the University of London.

**Murray Clayson**
**Editorial Board Member and Panelist for United Kingdom**
**Tax Partner, Freshfields Bruckhaus Deringer, London**

Murray Clayson is a partner in Freshfields' tax practice group and is based in London, and leads the firm's international transfer pricing practice. He specializes in international tax, finance and capital markets taxation, corporate structuring, transfer pricing, banking and securities tax, asset and project finance, derivatives and financial products, particularly cross-border. Murray is listed in *Chambers Europe, Chambers UK, The Legal 500 UK, Who's Who Legal, PLC Which Lawyer? Yearbook, Tax Directors Handbook, Legal Experts and International Tax Review's World Tax*. He is a fellow of the Chartered Institute of Taxation, past-Chairman of the British branch of the International Fiscal Association and a member of the CBI's Taxation Committee and International Direct Taxes Working Group. Murray is a graduate of Sidney Sussex College, Cambridge, and holds a PhD from the University of London for research in the field of transfer pricing. He joined the firm in 1983 and has been a partner since 1993.

**James Palmer**
**Managing Director, Duff & Phelps, London**

James Palmer is a Managing Director in the London Valuations practice of Duff & Phelps Ltd. James joined Duff & Phelps in 2004 and has over 17 years of valuation experience. James received his MEng. in mechanical engineering from Cambridge University.

**Georgina Walshe**
**Trainee Solicitor, Freshfields Bruckhaus Deringer, London.**

Georgina Walshe is a Trainee Solicitor at Freshfields Bruckhaus Deringer LLP. Georgina joined Freshfields Bruckhaus Deringer in August 2016, and received a Bachelors of Arts from Cambridge University and law degree from BPP University.

**United States**

**Jeffrey S. Korenblatt**
**Reed Smith LLP, Washington, D.C.**

Jeffrey S. Korenblatt is a tax attorney with more than 15 years of experience. He has a broad-based transactional tax practice and focuses on international tax planning and transfer pricing. Jeff delivers tax solutions to clients in multiple industries, including, but not limited to, manufacturers, retailers, franchisors, web-based providers of goods and services, and taxpayers in life-sciences industries.

**Patrick McColgan**
**Duff & Phelps LLP, Atlanta**

Patrick McColgan is a managing director in Duff & Phelps' Atlanta office and part of the transfer pricing team. He has a strong focus on assisting growth companies with their global transfer pricing needs through the design of defensible and pragmatic solutions. Patrick has more than 11 years of transfer pricing experience and has worked across several industries including automotive, chemical, consumer products, medical products, pharmaceutical, software, internet, and manufacturing.

**Emily Sanborn**
**Duff & Phelps LLP, Altanta**

Emily Sanborn is a director in the Atlanta office of Duff & Phelps' Transfer Pricing practice. Emily has more than nine years of transfer pricing experience and has both led and assisted in the design and implementation of practical and effective transfer pricing solutions to address a broad spectrum of transfer pricing issues, including management fees, license and migration of intangible property, and tangible goods transfers. Emily also has experience assisting clients throughout the transfer pricing lifecycle, from planning to documentation to litigation and arbitration support.

**Adriano Suckow**
**Duff & Phelps LLP, Altanta**

Emily Sanborn is a Transfer Pricing Analyst in the Atlanta office of Duff & Phelps' Transfer Pricing practice.