2021 WU Global Transfer Pricing Conference: “Transfer Pricing Developments around the World”

This article highlights key points discussed during the 2021 WU Global Transfer Pricing Conference “Transfer Pricing Developments around the World 2021”, organized by the WU Transfer Pricing Center at the Institute for Austrian and International Tax Law at WU (Vienna University of Economics and Business), and summarizes the topics analysed during the eight sessions of the event.

1. Introduction

From 15 to 18 February 2021, the WU Transfer Pricing Center at the Institute for Austrian and International Tax Law at WU (Vienna University of Economics and Business) organized its sixth Global Transfer Pricing Conference “Transfer Pricing Developments around the World 2021”, for the first time in a virtual environment. About 190 participants from over 50 countries attended the conference, representing academia, advisory firms, the business community, government officials and international organizations, including the Organisation for Economic Co-operation and Development (OECD), the United Nations (UN) and the European Commission (EC). Based on the participation of several key stakeholders, the conference could be viewed as an academically guided platform facilitating significant debates on the future of transfer pricing. This year’s conference built on the concept established in previous conferences organized by the WU Transfer Pricing Center and addressed current topics in transfer pricing.

This article presents the key points discussed during the conference and summarizes the topics that were analysed during the eight sessions of the event. This year, the conference was held remotely over a period of 4 days, with two panels every day. The first panel on the first day of the conference saw extensive discussions on global transfer pricing developments, which included the most important amendments in the regulatory concepts, as well as significant case law (see section 2). The second session dealt with specific transfer pricing developments in the European Union (see section 3.1). The second day of the conference was dedicated to regional developments in the developing countries and emerging economies (see section 3.2) and the United States (see section 3.3). The third and fourth days of the conference focused on topical issues, in particular on challenges arising from the digitalization of the economy (see section 4.1), transfer pricing developments and COVID-19 (see section 4.2), transfer pricing developments and simplification measures (see section 4.3), and transfer pricing developments and dispute resolution (see section 4.4).

2. Overview of Global Transfer Pricing Developments

The year 2020 has witnessed considerable challenges in transfer pricing topics around the world. The Inclusive Framework (IF) released a package consisting of the Report on the Pillar One Blueprint and the Report on the Pillar Two Blueprint, and the UN has proposed a new article 12B in its Model. The first session gave an overview of the critical changes in the transfer pricing environment during 2020 and 2021 and analysed their implications for multinationals, governments, advisers and academia. In particular, during the first panel, the following topics were discussed: (i) OECD Pillar One and Pillar Two; (ii) digital service taxes (DSTs); (iii) TP developments in the United States and its position on Pillar One and Pillar Two; (iv) developing countries’ perspectives; and (v) businesses’ perspectives.

The first part of the panel discussion focused on the OECD’s work on digital. In particular, after the release of Blueprints on Pillar One and Pillar Two and the Public Consultation, the OECD kept working to identify key areas of technical issues that needed to be resolved before a political agreement within the IF could be reached. What came through very clearly from the Public Con-
sultation is Pillar One’s complexity: there is broad awareness among IF members that new rules need to be simple; they need to be clearer to reduce compliance costs for taxpayers and to prevent disputes. The OECD is committed to reaching an agreement by mid-2021, but there is very little time to resolve these issues and simplify both pillars. The OECD is also looking specifically at simplifications in areas such as the nexus, segmentation, double counting, marketing and distribution safe harbours and elimination of double taxation. Some political and technical concerns need to be bridged between IF members. For example, some countries do not support two separate thresholds for automated digital services (ADSs) and consumer-facing businesses (CFBs); some countries want lower thresholds, others higher ones; some countries do not support the deemed nexus concept, and other countries do not want plus factors or, on the contrary, support a specific plus factor. The OECD is working on reducing these gaps. Meanwhile, it will continue to receive input from IF members over the following months.

The panel discussion then focused on DSTs. In particular, various countries worldwide, from developing to developed countries, introduced (or are in the process of introducing) DSTs as interim solutions. These measures are working as a way to collect revenue and act as catalysts for pushing for a solution to issues related to the taxation of digital economies. However, considering that the major source of countries’ revenue is value added tax (VAT) (and not corporate income tax), it could be explored how to redesign parts of the VAT system to address some of the issues discussed.

Concerning the US’s position on Pillar One and Pillar Two, it emerged that the Biden administration would probably be more flexible compared to the previous administration’s red lines and would push forward the adoption of both pillars. Words like “fair share” and “race to the bottom” used during the Treasury Secretary’s speech at the confirmation hearing could imply that the United States will support Pillar Two. However, the United States’ position on safe harbours is less clear. Everything seems to be back to square one, because the safe harbour appeared to bring the progress of the work to a temporary halt. Additionally, careful consideration of the timeline is needed. Setting strict deadlines could be counterproductive considering the massive amount of work and the number of open issues.

It was emphasized that the Biden administration does not like the emergence of unilateral DSTs. In the administration’s view, many DSTs have been designed in a way that unfairly singles out large US digital platform companies. The US Trade Representative Executive Office of the President put out six new reports on DSTs, and found that they (i) discriminate against US companies; (ii) are inconsistent with prevailing international tax principles; and (iii) impose a wide range of burdens on covered US companies.

As for developing countries’ and emerging economies’ perspectives on the work done by the IF, several issues are worth mentioning: (i) the complexity associated with the proposals; (ii) whether the proposal will result in something significant for the developing countries in terms of share of revenue; and (iii) the destiny of the arm’s length principle (ALP). As for the first point, although the OECD’s work on Pillar One and Pillar Two has been remarkable, ultimately, the complexity remains, and for developing countries administering these issues could be more difficult. With this background, the UN tax committee has proposed a treaty-based solution, a new article 12B in the UN Model. The second issue concerns the share of the revenue. If developing countries only take a portion of non-routine profits as the share of market traditions, that is a relatively low figure. With reference to the last point, some panellists stressed that the question of whether we stick to the ALP or not is not even relevant, since the proposed solution of using an apportionment method will not result in fewer disputes than there would be under the ALP.

From the businesses’ perspective, several elements related to the political discussion need to be addressed when analysing the OECD’s work. Taxpayers support the project, but the outcome must reflect business reality. The categorization between ADSs and CFBs does not seem to capture how certain multinational business models work and could lead to subjectivity. Therefore, simplification and clarifications are needed. Moreover, the concept of “surrendering jurisdiction” needs to be addressed. Indeed.

4. During the confirmation hearing, the Treasury Secretary said that the United States looks forward “to actively working with other countries through the OECD negotiations on most taxes on multinational corporations’, in order “to try to stop the destructive global race to the bottom on corporate taxation”. Moreover, she said that “in that context, the US would assure the competitiveness of American corporations even with a somewhat higher corporate tax”, see Responses to Questions for the Record to the Honorable Janet L. Yellen, available at https://www.finance.senate.gov/download/responses-to-questions-for-the-record-to-the-honorable-janet-l-yellen (accessed 27 May 2021).
5. During the aforementioned confirmation hearing, the Finance Committee Chair stated to be “against foreign countries trying to tap into the US tax base with unilateral, digital services taxes under their self-proclaimed rights to invade our tax breaks”.  
6. In this respect and, particularly, as far as the Indian equalization levy is concerned, it was pointed out that – despite the US investigation’s report – there was no intention to specifically cover US companies. The reason why DTs cover more US companies is just that they are more into the business.
9. To provide a concrete example, in the streaming entertainment industry, most companies would struggle to consider digital content streaming as an ADS or a CFB because there is simply a misunderstanding at the bottom of this discussion, which is the fact that these companies are distributing their service primarily through the Internet. However, if these companies sell a product, they need to have people “on the ground” and concretely invest in a market to develop a show or a film.
it seems that the United States will be the country that would put the vast majority of the money on the table – assuming that this is the country where the most significant chunk of deemed residual profit is – and so the OECD might want to design a system where the United States will be supported by other countries to share Amount A. Another critical element concerns the need to avoid double taxation, also to reduce tax controversies. As for dispute prevention and dispute resolution mechanisms, many aspects could be improved. For instance, the 2019 MAP statistics released by the OECD in November 2020 showed that approximately seven MAP cases were started every day in 2019, of which three were TP cases and four other cases, for a total of almost 2700 new cases in 2019 alone – which is 20% more than in the previous year. The number of cases closed is increasing but at a slower pace.

From the authors’ point of view, several crucial questions emerged during the first panel discussion. To begin, the extent to which the new system is allocating profits to market jurisdictions constitutes a change of direction compared to the decisions made in 2008 through the AOAT and then reiterated in 2017 with the new TP guidelines and the emphasis on the allocation of profits based on the location of the significant (people) functions. Furthermore, there was no consensus amongst panellists on the opportunity to move away from the ALP. On the one hand, the need to continue building on the work done over the past three decades to shape a system that will last was recognized. The ALP has allowed the OECD Secretariat in the past to be more neutral vis-à-vis countries’ diverging political interests. On the other hand, it has been stressed that the issue of whether sticking to the ALP or not is not even relevant because the solution of using an apportionment method is not going to result in fewer disputes than there would be under the ALP.

During the discussion, panellists also had the chance to discuss the link between Pillar One and Pillar Two. On the one hand, it was stressed that keeping these projects linked is adding complexity to negotiations and it would probably be better to deal separately with (i) the digital economy-related problems and (ii) whether there should be a minimum tax or not. On the other hand, a strong connection between these projects has been recognized by those who affirmed that they are not facing only digital economy issues. It is crucial to find a definition or what a “digital company” is, and in this respect, an interesting point raised during the conference concerns the title of the “digital company” is, and in this respect, an interesting point raised during the conference concerns the title of the work: “Tax Challenges Arising from Digitalisation”. Panellists observed that according to the Economic Impact Assessment Report, CFBs are now a significant part of Pillar One, whereas BEPS Action 1 initially rather focused only on the challenges of “digitalization”. Looking at the aforementioned report, assuming a 10% profitability threshold, the total global residual profit in scope would amount to USD 493 billion, out of which only 16% is from ADSs and 84% from CFBs. Considering a 20% profitability threshold, the total global residual profit in scope will amount to USD 174 billion, out of which 22% is from ADSs and 78% from CFBs. Based on this data, one could assume that these projects are not trying to resolve issues related to the digitalization of the economy or tax avoidance, but are concerned with the political willingness of allocating more profits to market jurisdictions (which is a policy decision).

3. Regional Transfer Pricing Developments

3.1. European Union

Before the panel discussion, a detailed and extended presentation of recent developments in the European Union was given. The presenter addressed hot topics such as: (i) fairness; (ii) cooperative compliance and transparency; (iii) updates on the EU blacklist; (iv) country-by-country reporting; (v) DAC6 and DAC7; (vi) joint audits; (vii) the European Parliament Subcommittee on tax matters; (viii) avoidance, evasion, fraud and aggressive tax planning; and (ix) the ESG Agenda. The Apple®, and Impresa Pizzarotti® cases were also mentioned.

As for recent developments at the European Union, the EU Commission has put forward an action plan for a fair and simple taxation to support the recovery strategy, including 25 actions for the next five years. In particular, it is worth mentioning that there is a willingness to relaunch an Expert Group on Transfer Pricing. Perhaps it will have a more flexible structure than the previous one.

14. A suggested solution implies the extension of the notion of marketing safe harbour.
15. For more details on dispute prevention and dispute resolution, see sec. 4.4 of this article.
16. It has been stated that having a principle-based approach (such as the ALP) allows to refer back to the overarching principle in case of disputes on the practical implementation aspects, and try to figure out what independent parties would have agreed to and what the rule is supposed to achieve.

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16. SE: ECIJ 20 Jan. 2021, Case C-484/19, Lexel AB v. Skatteverket, Case Law IBFD. This is an important case concerning a Swedish company that has been denied a deduction for interest expenses paid to a French group company, where the ECJ ruled that the exception to the Swedish 10% interest deduction rule is contrary to the EU freedom of establishment. This judgment raises several interesting aspects (e.g. among others, the fact that ECJ conducted an in-depth analysis of justification that goes beyond what has been stated by the EU Commission and Swedish judges) and could provide the opportunity to claim interest deduction. In particular, it has been emphasized the importance of paragraph 67 of this judgment where the ECJ analysed whether the counting of the prevention of tax avoidance could be regarded as a justification reflecting the need to preserve the balanced allocation of tax powers. The ECJ answered that, no, the aim of preventing the erosion of the Swedish tax base could not be confused with the need to preserve the balanced allocation of the power to impose taxes between the Member States.
Joint Transfer Pricing Forum and will also consultation with the Member States and taxpayers when necessary. Another interesting development concerns the EU Corporate Compliance project, which has the objective of establishing a platform where tax administrations perform a common risk assessment (the EU Commission is building upon the idea of the International Compliance Assurance Programme (ICAP)). The project is already at a quite advanced stage: the EU Commission aims at concluding the design of the project by summer 2021 and launch a public consultation; then, after summer, a pilot phase will start. This project, the goal of which is preventing double taxation and tax disputes, will have a different approach than APAs since it will provide recommendations and guidelines to create a common framework but the outcome will not have legal certainty.

The discussion then moved to the main challenges faced by MNEs and, in this respect, three main issues have been identified. The first one concerns DAC6\(^{18}\) regulation and interpretation of hard-to-value intangibles (HTVIs).\(^{19}\) It was stressed that the main issue of the E2 hallmark is the fact that in order to identify (in an arrangement that involves the transfer of an intangible) characteristics that make the intangible “hard to value”, there is an automatic referral to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines)\(^{20}\) and recommendations. This created a lot of space for interpretation by the different Member States.\(^{21}\) From the MNE’s perspective, the implications of the automatic referral to OECD Guidelines could create many concerns since reporting for transparency reasons (which in principle is fine) could lead to other unwanted consequences\(^{22}\) while not reporting a transaction could cause huge reputational damage to MNEs as well as high fines from tax administrations. According to the speaker, a second challenge that MNEs faced in 2020 concerned DAC7 and, in particular, was related to the balance between MNEs and users’ tax liabilities. Taxpayers welcome digital platform companies’ obligations to provide information to tax authorities; however, there is a blurred line between platforms’ obligations and responsibilities, and this could cause many uncertainties.\(^{23}\) A third challenge is raised by digitalization – and in particular, by videoconferencing tools – which could affect companies’ places of effective management during the lockdown and work-from-home periods. To conclude this part of the discussion, it was highlighted that taxpayers have the feeling they are providing a lot of data, sometimes the same information via different forms/models. Therefore, it would be desirable for tax authorities to minimize reporting obligations on taxpayers and facilitate the exchange of information that is already reported (perhaps using an integrated data collection framework).

The section dedicated to State aid, after a general comment on Advocate General Kokott’s Opinion in the Magnetrol case,\(^{24}\) mainly focused on the Apple case. In this respect, three positive findings have been emphasized: (i) the EU Commission is competent to assess the tax rulings under State aid rules; (ii) the AP can be used as a tool/benchmark to determine whether group companies’ transfer pricing is in line with market prices; and (iii) for the selectivity assessment, group companies are in a factually and legally comparable situation with stand-alone companies. At the same time, several unclear aspects remained and were addressed during the conference. First of all, considering that section 25 of the Taxes Consolidation Act 1997 does not set out a profit allocation method and that the General Court accepted the AOA application, the question is whether the AOA has been interpreted and applied correctly. Apple Inc.’s functions were considered relevant by the General Court for the profit allocation between Irish branches and head offices. It is unclear whether the Court considered that those functions were remunerated under the cost sharing agreement. Second, under the transactional net margin method, the Court found that the choice of the tested party is not important and both parties could be tested provided reliable data exists. The questions that emerged in this respect is whether this is true even where complex functions exist. Finally, concerning the burden of proof, the EU Commission needs to prove the existence of an advantage and cannot rely on assumptions. The question that arises here is how to avoid assumptions where the tax rulings are incomplete, inconsistent or even defective.

As for recent developments on the Dispute Resolution Directive, it has been said that the EU Commission is currently doing a transposition check, but letters of formal notice have not been sent yet. Moreover, the EU Commission...
The first debate focused on recent TP development at the UN. As for the UN TP Manual, there are many reasons why it is more relevant than ever before. First, developing countries have more awareness of TP issues, and it is crucial to have a common understanding of how article 9 in both the UN Manual and OECD Model should be applied. Second, in some areas, the UN Manual goes into more detail than the OECD Guidelines, where in the latter case some areas are not even covered. One of the most important recent updates concerns the fact that the UN has added more practical examples to the UN Model, which is really important for financial transactions.

Other critical developments concern the revised chapter on dispute avoidance and resolution and the chapter concerning the relationship between transfer pricing and customs valuation, which has been updated.

In terms of forecasts for 2021, the UN wanted to have the Manual ready for the session in April 2021 and eventually released it in the session of 27 April 2021. The Manual will be very helpful not only for developing countries and emerging economies, but for developed countries as well. Also, updates on Chapter D on country practices will include new guidance by Brazil, China, India, Mexico and South Africa. As for potential issues for the next Subcommittee on Article 9, many important areas need further development. As initial thoughts, the authors would mention: (i) understanding what developing countries need; (ii) providing tailored guidance to face crisis situations and the impact that COVID-19 can have on transfer pricing for developing countries; (iii) simplicity, and in particular safe harbours; and (iv) dispute resolution.

From the multinationals’ point of view, “certainty” is critical in terms of managing tax affairs and making investment decisions. Multinationals feel that there have been many positive developments (e.g. expansion of APA programmes and improved availability of MAPs), but in some cases these are more “theoretical” developments than answers to real problems. Panelists stressed that, sometimes, the solutions that are adopted do not match what MNEs really face, and there is a sort of disconnection between the policy/laws put into place and how they are actually implemented on the ground. As for expected developments in 2021, there is hope that the efforts made on Pillar One will eventually produce an outcome that is reasonably administrable, economically rational and able to produce certainty for taxpayers. Moreover, hopefully, holding on gross income or (ii) an apportionment formula on qualified profits from automated digital services. See Committee of Experts on International Cooperation in Tax Matters – Twentieth session – 20–23 and 26–29 October 2020, Tax consequences of the digitalized economy – issues of relevance for developing countries, available at https://www.un.org/development/desa/financing/files/2020-10/CRP4%20Digitalized%20Economy%20-%20Pillar%20One%20Final%20Report%20-%202020.pdf (accessed 4 May 2021); see also Butani & Kejriwal, supra n. 8, at para. 5, and E. Scuderi & R. Holzinger, The Digitalized Economy – Which Is the Best for Developing Countries? 74 Bull. Int’l Taxn. 12 (2020), Journal Articles & Opinion Pieces IBFD.

3.2. Developing countries and emerging economies

Developing countries and emerging economies have introduced relevant changes in their transfer pricing legislation and practices and faced various court decisions dealing with transfer pricing topics. In particular, during the third panel of the conference, the following topics were discussed: (i) recent developments at the UN; (ii) multinationals’ perspectives; and (iii) China’s perspective.

Before the panel discussion, recent transfer pricing developments in developing countries and emerging economies were presented. It emerged that only a very limited number of jurisdictions in the emerging economies issued any form of domestic guidance on the transfer pricing implications of COVID-19, but there have been some policy shifts by countries and companies in light of it (e.g. in Vietnam, Bangladesh and Thailand). On the other hand, it emerged that developing countries and emerging economies are trying to align their TP legislation with global standards and have increased their focus on TP issues. There is a vast range of actions taken, from the introduction of transfer pricing regulations to amendments to existing laws and alignment with the OECD to issuing landmark rulings. In the transfer pricing realm, the UN has updated the Practical Manual on Transfer Pricing for Developing Countries (UN TP Manual). Meanwhile, the UN has also proposed a new article 12B in its Model, related to income from ADSs, to deal with the tax treatment of digital services payments.


26. For a detailed analysis of recent transfer pricing developments in developing countries and emerging economies, see Butani & Kejriwal, supra n. 8.


progress will continue on the alleviation of double taxation and the points raised in Action 14. Finally, it would be great if transfer pricing documentation could be somehow streamlined to lighten taxpayers’ burdens to fill many different detailed forms in many different ways.

In the end, the discussion moved to China’s perspective and in particular on how the State Taxation Administration of the People’s Republic of China (STA) dealt with this unprecedented time. It has been stressed that the STA has made efforts to move forward on APA and MAP cases in 2020 and, while the pandemic made face-to-face meetings almost impossible, the STA managed to hold virtual MAP and APA negotiations with the counterparty’s competent authorities. At the same time, the STA has been exploring measures to offer more services to companies with a strong record of compliance. For example, the STA took the lead in exploring the development of a simplified uniform unilateral APA programme to help provide tax certainty and reduce tax compliance burdens for taxpayers, especially for SMEs. Furthermore, the STA has been thinking of drafting China’s guidance on TP implications of COVID-19 to help companies overcome the impact of the economic crisis and support business development in China. To conclude, it was stressed that while COVID-19 has become a major worldwide risk, it particularly impacted certain regions and specific industries and that in China, while some industries have experienced deep contraction, others have recovered very quickly and even achieved high growth.

3.3. United States

This session presented recent developments in the United States and, in particular, discussed the following topics: (i) the IRS’ perspective of US TP developments in 2020; (ii) US businesses’ perspective; (iii) the COVID-19 impact on US MNEs’ transfer pricing policies; and (iv) US TP case law.

A brief introduction was made before the panel discussion and three main topics were highlighted: (i) recent developments in the United States; (ii) the IRS repeated victories in Court (e.g. the Coca Cola, Whirlpool® and Altera cases); and (iii) COVID-19. A hot topic of 2021 is the US position on BEPS 2.0. In particular, it was stressed that the United States supports an optional Pillar One alternative to DSTs, and a GILTI exemption from Pillar Two. The Biden administration could have different views on BEPS 2.0 compared to those of the previous administration. Another interesting development concerns telescoping. In 2020, because of the dramatic change in tax law due to the Tax Cuts and Jobs Act (TCJA), the Advance Pricing and Mutual Agreement program (APMA) announced that it will generally not telescope MAP settlements across the TCJA divide (2017/2018).

The first panel discussion addressed 2020 highlights of the IRS and a forecast for 2021. In this respect, three main topics were examined. First, the ICAP. The Forum on Tax Administration has recently released a handbook to guide countries and MNEs intending to engage in the ICAP. Efforts are being made to extend its coverage and bring other countries on board. It is worth noting that extra precautions should be taken when non-Treaty countries are involved in the ICAP, since US regulations prevent the IRS from disclosing certain information; appropriate protocols and particular caution are required in such cases. Second, risk assessment. Subject matter experts are looking across the whole of the filing population, to understand the variables that drive the risk and help the IRS improve its decision-making on which ones they are going to perform an audit on. Third, MAPs. The IRS is working (i) with Working Party No. 1 to understand how Action 14 can be improved; (ii) with Working Party No. 6 to deal with transfer pricing in the post COVID-19 environment; and (iii) to improve multilateral MAPs and APAs.

The discussion then focused on the US businesses’ view on the OECD’s work on BEPS 2.0. In particular, it seems that there is a broad consensus among US companies to avoid unilateral measures. Regarding the US TP regulatory front, US businesses are monitoring the development of key changes in the US Tax Code (e.g. aligning section 482 regulations with the expanded statutory definition of intangible property in section 367(d)(4) of the US Tax Code) and are waiting for the IRS’ guidance for taxpayers to comply with the Altera decision. To conclude the discussion on this topic, it was stressed that taxpayers need simplicity and certainty and that sometimes the solutions proposed turn out to be more problematic than the issues addressed.

The panel debate then moved to the impact of COVID-19 on US MNEs’ transfer pricing policies. It was stressed that some industries suffered more than others while

The Tax Court ruled in favour of the IRS. For a detailed analysis of this case, see Foley et al., supra n. 29, at Part I, para. 5.

31. US SC, 22 June 2020, Altera Corp. v. Commissioner, No 19-1009; this is a case about whether stock-based compensation must be included in a cost-sharing payment. The US Supreme Court declined to issue a writ of certiorari and let the government favorable decision stand. For a detailed analysis of this case, see Foley et al., supra n. 29, at Part I, para. 2. See also M. Silver, Silver and Altera: Modern-Day Tales of David and Goliath (7 Aug. 2020), R. Finley, The Ninth Circuit’s Altera Decision: An ‘Isolationist Ruling?’ (10 June 2020).

some sectors achieved higher sales than in previous years. Because of the pandemic, all MNEs are however expecting additional audit pressure but it emerged that better synergies could improve the audit procedures. For example, it would be great if tax authorities could use the in-depth analysis conducted during an audit and roll it forward in a cost-effective way. APAs are hugely expensive for taxpayers, and the level of information that tax administrations need (which they sometimes already have as part of the audit) seems excessive from their point of view. Ultimately, the APMA clarified that a change in economic conditions, such as seen in the pandemic, might trigger the standard assumption. Taxpayers began to enter negotiations with the APMA to understand how this will work out in practice. It is worth noting that the IRS’ set of FAQs published in April 2020 — when the United States had not yet experienced the devastating effects of COVID-19 on its economy — contained an interesting example. It stated that taxpayers that are materially impacted by economic forces and struggling with their transfer pricing and that fall out of the range, should explain in their documentation the reasons why they are out of the range instead of simply trying to adjust it. This was important advice, but, interestingly, it was not published in direct response to the pandemic.

On a final note, panellists focused on the US TP case law in 2020. In particular, it emerged that, on the one hand, it could be said that BEPS issues did not actually drive the Whirlpool case; this case involved the US subpart F analysis, invoked a part of the statute and regulations that predated BEPS, and addressed a technical point as to whether the Mexican branch could be a subsidiary of Luxembourg (which would therefore trigger subpart F). On the other hand, it emerged that there is a blurred line where BEPS could intersect this case: following a careful technical reading of the law, companies felt comfortable in having the challenged structure, as it seemed the law allowed it. Instead, even surprisingly, the outcome of the case was different. As for the Coca Cola case, it was stressed that it should not be so surprising that a taxpayer would continue to apply (and expect the IRS to continue to apply) something they have done for a while, notwithstanding that the legal issue is clear (which implies that there was no legal basis for continuing to rely on an expired agreement). As a final observation, as far as the Altera case is concerned, it is interesting to see how taxpayers outside of the Ninth Circuit will react since they can still rely upon the Tax Court decision. This case shows that the IRS can win significant cases if it does not overreach itself, that taxpayers need to continually review their facts to be sure their transfer pricing is up to date and well documented, and that external comparable uncontrolled transactions (CUTs) are more difficult to sustain as compared to internal CUTs (as used successfully, for example, in the Amazon case).

4. Topical Issues

4.1. Tax challenges in the digitalization of the economy

Digitalization is significantly changing the way business is carried out and poses challenges to the effectiveness of current international tax provisions and transfer pricing rules. Countries and international institutions are seeking solutions to rethink and amend the international tax systems.

In this respect, various players in the international transfer pricing arena (i.e. the EU, the OECD and the UN) are working (or contemplate working) on approaches in order to overcome the tax challenges of the digitalization of the economy. Besides the approaches of the EU and the UN, which were briefly already addressed in sections 2. and 3.2., the most recent attempt to reach consensus on tax issues related to the digitalized economy is represented by the OECD’s “Unified Approach” under Pillar One and Pillar Two.

In this respect, it appears that the OECD is still in the driver seat in the international transfer pricing arena regarding digitalization and – in October 2020 – it released Reports on Pillar One and Pillar Two Blueprints. During session 5 of the conference, issues related to the Pillar One Blueprint were at the heart of the discussion.

After a presentation on that topic, the discussions kicked off with issues related to scope and nexus aspects of the Pillar One Blueprint. In this respect, critical considerations were made regarding the notions of ADS and CFB. As Pillar One is intended to be only applicable to those businesses that are defined within the scope of application (i.e. ADS and CFB), the panellists stressed that this might create various interpretational issues, for example related to the objective understanding of whether a business is an ADS/CFB or not. The fact that – especially nowadays in a world of evolving digitalization – business models continuously change and there is (massively) rapid technological development also makes it rather complex to find a sound approach in order to properly define scope and nexus criteria under Pillar One (i.e. either broad or narrow).

37. See OECD, Report on Pillar One Blueprint, supra n. 36, at para. 186 et seq.
Besides scope or nexus aspects, the panellists also discussed the specifics of Pillar One (among other things, Amount A, Amount B, and tax certainty). Regarding revenue sourcing rules, one of the discussed issues related to complexity and difficulties in an administration/audit (for both taxpayers and tax administrations). In this respect, discussions highlighted that revenue sourcing rules eventually might require clear guidance to distinguish activities connected to in-scope revenues from other activities, those connected to locally sourced revenues from non-locally sourced revenues, and profits attributable to marketing and distribution activities connected to those revenues from those attributed to other activities or assets. In addition, tax base determination was perceived by the panellists as one of the main challenges under Pillar One, as there are obvious differences in accounting standards and segmentations in MNEs.

With regard to Amount B, the panellists shared the view that the proposal under the Pillar One Blueprint presents some obvious challenges from a design and administration perspective. In this respect, one of the key questions – with diverging opinions of the panellists – was whether Amount B should rather be narrow or broad. Moreover, in light of the Pillar One Blueprint, safe harbours also require further attention by the OECD/IF, as there are obvious questions as to the manner in which the “fixed return for in-country routine marketing and distribution activities” will be calculated. In this respect, the panellists rightly pointed out that the Pillar One Blueprint does not explicitly indicate what relationship, if any, this fixed return might have to the fixed return provided to remunerate “baseline marketing and distribution activities” under Amount B. However, at least there seems to be kind of a similarity with the Blueprint’s description of Amount B as applicable to a distribution entity that, according to the accurate delineation of the transaction, performs functions, owns assets and assumes risks that would characterize it as a routine distributor at arm’s length.

Finally, the panellists also touched upon the topic of tax certainty under the Pillar One Blueprint. In this respect, it was concluded that the determination of the amounts relevant for profit allocation and the system for the elimination of the double taxation will be a key point in order to reach an agreement that is satisfactory for all the parties and countries involved; in that regard, tax certainty will definitely be crucial in order for the project to be successful.

Summing up the current state of developments under the Pillar One Blueprints, following the discussions of the panellists (and the effects of the COVID-19 crisis on the ability to come up with solutions), there appeared to be a common understanding among the panellists that more time is needed to come up with a proper solution. Besides the different technical aspects that still require contemplation, the OECD/IF of course already faces plenty of challenges due to the fact that there are a huge number of stakeholders/states at the table – it is simply not easy to find a solution that perfectly satisfies everyone.

4.2. Transfer pricing and COVID-19

In 2020 (and obviously beyond), the COVID-19 pandemic continues to have a major impact on our lives. Not just from a health perspective, as this global pandemic has also created significant challenges to the operation of MNEs’ transfer pricing policies.

For example (and in light of the pandemic), it remains questionable whether limited risk entities should always be profitable, whether and how intra-group arrangements will be affected by the economic crisis and whether existing APAs need to be reviewed. Solutions to overcome the problems posed by COVID-19 to transfer pricing systems can be found in both qualitative and quantitative approaches, however, obviously there are no “one-size-fits-all” solutions and an in-depth understanding of the advantages and disadvantages of different approaches is key.

During this session, some of the major aspects in light of the immediate impact of COVID-19 on transfer pricing as well as possible long-term consequences of the crisis were discussed. As always, the session kicked off with a presentation by one of the panellists followed by in-depth discussions.

As a starting point, the discussion on the panel focused on the OECD Guidance on the transfer pricing implications of the COVID-19 pandemic (COVID Guidance). In this respect, the COVID Guidance in essence covered four areas, namely (i) comparability analysis, (ii) losses and allocation of COVID-19 specific costs, (iii) government assistance programmes and (iv) advance pricing agreements. As a key take-away it was concluded by the panel that the OECD did not intend to diverge from the OECD Guidelines through its publication of the COVID Guidance, but rather wanted to clarify aspects that were already (partly implicitly) derivable from the existing interpretation guidance in order to make the application of the ALP in such a challenging environment clearer.

43. OECD, Guidance on the transfer pricing implications of the COVID-19 pandemic, OECD Policy Responses to Coronavirus (COVID-19) (OECD 2020), where it says: “The Guidance provides clarifying comment on, and illustrations of, the practical application of the arm’s length principle in four priority issues […]”
Besides that, the panelists also discussed the disrupting effects of COVID-19 on MNEs’ global supply chains as well as the short- and long-term effects of the crisis on MNEs – especially regarding their transfer pricing policies. In this respect, the drop in demand, the falling away of entire or parts of supply chains, the unavailability of raw material, etc. posed tremendous challenges to the overall strategic set-up of modern MNEs and their viability in terms of profitability as a whole. From a transfer pricing perspective, MNEs continue to be faced with various challenges, ranging from classical aspects that are for example also addressed by the OECD’s COVID Guidance to more operational TP aspects that eventually result in challenges in terms of TP documentation and eventually also in terms of future TP audits.

When it comes to the approaches of TP policies or results, there are in general two different ways to do so, namely rather qualitative or rather quantitative (or of course a combination of both). During the course of the discussions, the panelists welcomed that the OECD also highlighted some quantitative approaches in its COVID Guidance (e.g. regression analysis), which might eventually be properly applied in order to substantiate the arm’s length nature of a certain – COVID-tackled – transfer pricing position.

Where there is shadow, there is also light. Based on that thought, the panelists also concluded that the TP challenges around COVID-19 eventually also resulted in a situation under which taxpayers and tax administrations became more familiar with “new” technologies and approaches on transfer pricing, which might help to avoid and/or resolve disputes more properly in the future.

4.3. Transfer pricing and simplification measures

The OECD Guidelines include measures to overcome some of the challenges that taxpayers may encounter when carrying out a transfer pricing analysis. Most commonly known, such measures may comprise safe-harbour regimes and rebuttable presumptions. However, from a more holistic perspective, simplification measures can be classified as follows: (i) substantive simplification measures; and (ii) procedural simplification measures.

Simplification measures in transfer pricing are not just something with which the OECD member countries are concerned – non-OECD member countries that intend to become members in the future also have to deal with issues around simplification in transfer pricing. One of the most prominent developments regarding simplification measures in 2020 concerned the joint project between the OECD and Brazil. In this respect – on 30 July 2020 – as part of the implementation phase of a joint transfer pricing project between the OECD and Brazil, 45 the OECD Secretariat and Receita Federal do Brasil (RFB) launched a survey to seek public input on the work related to the development of safe harbours, as well as other simplification measures that can contribute to enhanced tax certainty. This project and other aspects were at the heart of the discussion in session 7 of the conference.

The session kicked off with a presentation on recent developments in transfer pricing and simplification measures, providing an overview of different substantive simplification measures (e.g. in the area of commodity pricing, interest rates and intra-group services) and procedural simplification measures (e.g. less stringent documentation requirements, alleviated penalties and streamlined procedures). In addition, the presentation also touched on the topic of simplification in the context of digitalization with special reference to Amount B in light of the OECD Pillar One Blueprint 46 and made a proposal for standardized benchmarks as a simplification measure.

After the presentation, the discussions on the panel started with an outlook on the ongoing transfer pricing project between the OECD and Brazil. In this respect, the project aims at aligning Brazil’s transfer pricing rules (which are to a certain extent based on different safe harbour rules) more with the OECD’s arm’s length approach. However, the OECD and many countries around the world are increasingly looking at simplification measures like safe harbour rules, which are not necessarily fully compliant with the ALP. Accordingly, a key point in this project between the OECD and Brazil appeared to be that it is not just Brazil that can learn about the ALP from the OECD but also vice versa.

When talking about simplification measures, one key question that arises is: What weighs more – manageability or accuracy of transfer pricing? This question was also addressed by the panelists. In essence, it is perfectly clear that each and every substantive simplification generally represents a certain deviation from the ALP. However, in terms of transactions, which do not tend to raise substantial BEPS concerns (e.g. rather routine transactions), it may be wise to opt for simplification measures more strongly as they would eventually tend to increase the manageability of transfer pricing without increasing the risk of erosion of fiscal revenues.

The topic of simplification is also strongly linked with the question at which of the following steps of a transfer pricing analysis such measures could generally be taken: (i) accurate delineation of the transaction; (ii) recognition of the transaction; (iii) selection of the TP method; or (iv) application of the TP method. In this respect, it appeared that the panel rather considered the selection and application steps of the TP methods as areas in which substantive simplification measures could be properly applied for certain types of transactions. However, as more and more tax administrations also tend to question the accurate

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46. See OECD, Report on Pillar One Blueprint, supra n. 36, at para. 649 et seq.

delineation and recognition of transactions (sometimes also based on non-TP rules like GAARs), certain simplification measures in that regard – e.g. step-by-step processes such as the OECD’s six-step risks analysis approach – were also considered to be viable solutions.

When it comes to procedural simplification measures, one of the key aspects is less stringent documentation requirements. Discussions by the panel made it clear that many jurisdictions essentially provide such lowered documentation requirements especially for small- and medium-sized business units or sometimes for non-material transactions. Those kinds of simplifications are generally welcome, since they tend to increase the manageability of transfer pricing (especially for smaller MNEs) without increasing the risk of erosion of fiscal revenues.

In essence, the panellists concluded that there is a certain need for simplifications in the transfer pricing world, both from a taxpayer and a tax administration perspective. However, oversimplification was viewed rather critically by the panel since this could – especially when it comes to unilateral simplifications – eventually increase the risk of double taxation or double non-taxation.

4.4. Transfer pricing and dispute resolution

The last session of the 2021 conference dealt with recent developments on dispute resolutions and transfer pricing. According to the latest OECD’s Mutual Agreement Procedures statistics, 48 the length of time to conclude a MAP for transfer pricing matters has again decreased compared to the previous results. Since the start of the OECD BEPS Project, most major players in the global transfer pricing arena were active in dispute resolution. In this respect, BEPS Action 14, the Multilateral Convention, 49 the EU’s proposal on binding dispute resolution and the UN’s work were discussed in this session. 50

The last session started with a presentation on the topics that focused on the current developments in the area of MAPs. In this respect, the typical steps of a MAP – starting with establishing whether a MAP may apply and ending with the implementation of a MAP agreement – were outlined. In addition, various statistical and survey information was also presented, according to which approximately 15% of companies feel highly confident that the MAP process is an effective means to resolve double taxation and approximately 6% of companies are highly confident about the efficiency of MAPs. However, about 78% of companies would have more confidence in MAPs if mandatory binding arbitration were included in bilateral tax treaties. One aspect that raises concerns regarding the effectiveness of MAPs is the fact that there is a certain trend towards denial of the access to MAP since tax administrations do not proceed to transfer pricing adjustments, but rather adapt the tax base according to different domestic rules.

Those and other aspects were then discussed on the panel, starting with the issue of the general effectiveness of the dispute resolution mechanism currently foreseen in the OECD Model (e.g. MAP and arbitration). In this respect, the general understanding of the panellists was that those mechanism are – aside from typical technical mistakes from a taxpayers’ and a tax administrations’ perspective – an effective means to resolve transfer pricing disputes. However, it was also stressed that dispute avoidance is the first step of dispute resolution; in this respect, the panel saw a certain need for an enhancement of additional dispute avoidance and resolution tools like joint (TP) audits or the OECD ICAP. 51

After that, the panel discussed BEPS Action 14 to some extent. The title of this action item, ”Making Dispute Resolution Mechanisms More Effective”, implicitly raises the question whether dispute resolution was not effective at all prior to BEPS. As the wording of the respective provisions in the OECD Model was not subject to radical changes, one could question whether dispute resolution is effective post-BEPS. In this respect, the panel also referred to the OECD’s Mutual Agreement Procedures statistics, which indicate that positive resolution of cases is increasing and the average length of the procedures is decreasing, which of course can be seen as enhanced effectiveness. 52 This might also be linked to the now published results of the peer review process, which could boost the intrinsic motivation of tax administrations to report proper results.

The discussion then moved to the EU Dispute Resolution Directive 53 and its differences with the Arbitration Convention. 54 In particular, it has been pointed out that the EU Directive has a broader objective scope than the Arbitration Convention, thus going beyond mere transfer pricing and profit attribution cases. 55 In this respect, tax and transfer pricing disputes can be settled on a much more comprehensive basis, including also related withholding tax issues, etc. In addition, taxpayers can play an active role in the process, which was welcomed by the panellists, since this could also raise the perception of taxpayers regarding the effectiveness and efficiency of dispute resolution procedures. Another aspect which could raise the effectiveness of dispute resolution based on the EU Dispute Resolution Directive compared to the EU Arbitration Convention.

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49. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (7 June 2017), Treaties & Models IBFD.
54. See Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 90/463/EEC.
55. See arts. 1 and 4 EU Arbitration Convention (Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 90/463/EEC, as amended).
6. Conclusion

Reviewing the year 2020 and the conference panel discussions confirm that transfer pricing tends to be one of the liveliest practice areas in the international tax world. The conference also showed once again the importance of facilitating a balanced debate between various stakeholders in the international tax and transfer pricing community, since such debates eventually raise the quality of any kind of (legislative) outcome.

Furthermore, the conference was held at a good time, since it took place during the OECD’s ongoing work regarding the Pillar One and Pillar Two Blueprints to address tax challenges arising from the digitalization of the economy.

Besides those digitalization issues, the conference also again provided different stakeholders in the international transfer pricing arena with valuable insights on topical issues, how taxpayers and tax administrations perceive them and what concerns there are regarding various transfer pricing topics. As key take-aways of the 2021 WU Global Transfer Pricing Conference, the following points can be highlighted:

- With respect to global developments, there was a broad consensus on the need to keep working on the simplification of the Pillar One Blueprint. However, the need to find an agreement should be balanced with technical and political issues. Strict deadlines aiming at reaching a global agreement on Pillar One and Pillar Two by mid-2021 could be counterproductive, considering the significant amount of work required. Looking at the bright side, the OECD is determined to find a solution that works for all the stakeholders and continues to actively engage with them to find possible solutions.

- As for developments in the European Union, there are concerns about the compatibility of the EU’s proposed digital levy with the OECD’s work on digital, especially concerning Pillar Two (while it has been stressed that the eventual solution will be compatible with Pillar One). As for other developments, hopefully, a new Expert Group on Transfer Pricing will soon be established. Finally, more multilateral exchange of information and cooperation between tax administrations is needed.

- The need for a more constructive dialogue between taxpayers and tax administrations was also felt by developing countries and emerging economies. Furthermore, a crucial lesson of 2020 developments is that they can deal with the arm’s length principle. Of course, simplification is desirable but developing countries and emerging economies have demonstrated that they are able to also deal with complex transfer pricing issues in difficult times.

- As far as the United States is concerned, it seems that the IRS has turned the difficulties experienced in 2020 into an opportunity to improve communication with taxpayers through new technological tools. Moreover, the IRS has also won some significant victories in court, perhaps as a result of the BEPS Project.

- With regard to COVID-19, the long-term impacts might be very far-reaching for TP analyses and will very likely accompany transfer pricing practitioners for several years. However, from a transfer pricing perspective, COVID-19 at least had some positive effects, since various new technologies were developed during the pandemic, which might eventually help in avoiding and resolving transfer pricing disputes in the future.

- When talking about simplification measures, it has to be pointed out that these are generally welcomed by taxpayers as well as tax administrations around the globe. However, when talking about simplification, one should be cautious to a certain extent and take care not to oversimplify transfer pricing, as this eventually comes with the risk of double-taxation and double non-taxation, hence “missed opportunities” for taxpayers and tax administrations.

- Concerning dispute resolution, there is absolutely no standstill in the international arena, since more and more work is done by international organizations in that regard and more and more tools are developed to prevent disputes. However, it should be stressed that there is a certain need to change the overall attitude and openness in cases of transfer pricing disagreements; this change of attitude and openness should especially be contemplated in light of paragraph 1.13 of the OECD Guidelines, which states: “It should also be recalled at this point that transfer pricing is not an exact science but does require the exercise of judgment on the part of both the tax administration and taxpayer.” In order to be able to exercise the said judgment, capacity building and knowledge development of transfer pricing topics is key.

In sum, the conference was once again a great success. In 2022, the WU Global Transfer Pricing Conference is set to take place from 16 to 18 February in Vienna.