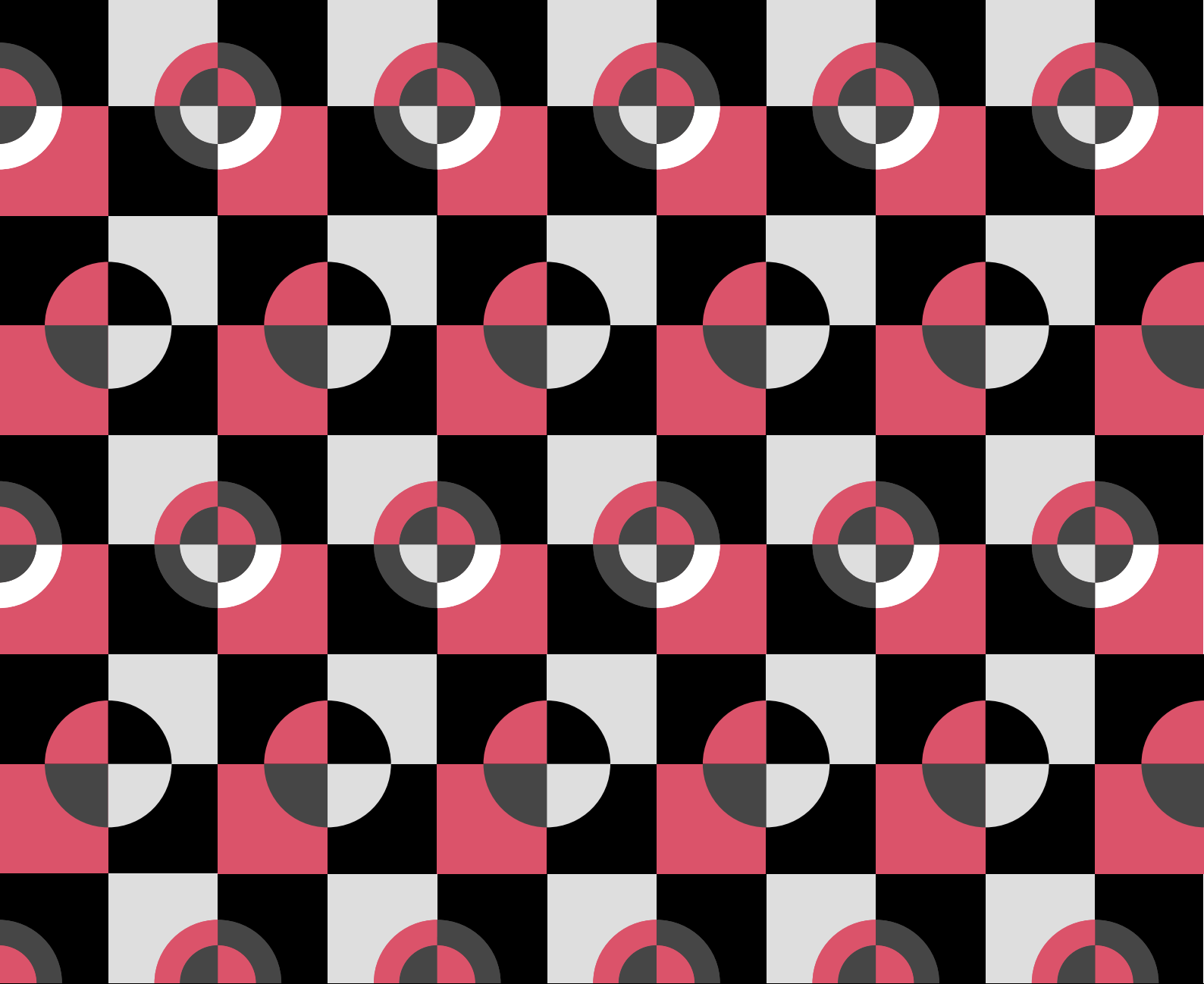
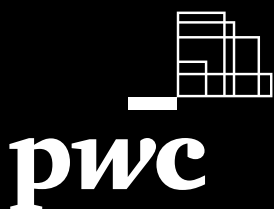




The dawn of a new transfer pricing regime in Ghana

Ghana TP 2.0



www.pwc.com

After eight years of the entry into force of Ghana's first Transfer Pricing ('TP') Regulations ('Old TP Rules'), the Government of Ghana has repealed and replaced the Old TP Rules with new Transfer Pricing Regulations, 2020, (L.I. 2412) hereinafter referred to as the "New TP Rules".

Per article 11 (7) of the 1992 Constitution of the Republic of Ghana, Legislative Instruments such as the New TP Rules become law after having been gazetted and laid in Parliament for twenty-one Parliamentary sitting days. The New TP Rules therefore entered into force in November 2020, a month before citizens of Ghana go to the polls to elect its President and Members of Parliament for the next four years.

The New TP Rules have been enacted to simplify the administration of the law, reduce compliance burden for some eligible taxpayers, and provide clarity on key technical terms. The intention is also to incorporate some of the significant action plans emanating from the work of the Organisation for Economic Co-operation and Development ('OECD') on Base Erosion and Profit Shifting ('BEPS') schemes by Multinational Enterprises ('MNEs').

The Ghana Revenue Authority ('GRA') is at the heart of the administration of all tax statutes including the TP Regulations. The GRA has been building a solid TP Unit and administering the old TP Rules since 2012. The deep insights and experiences the GRA gained while administering the Old TP Rules also informed the need to repeal and replace them with the New TP Rules.

The New TP Rules in a nutshell

The New TP Rules (and in fact TP Regulations worldwide) apply to transactions or arrangements between persons who qualify as associates or are in a controlled relationship. The New TP Rules also apply to: persons doing business together as partners; individuals and their relatives and trustees, beneficiaries and settlor in a trust relationship; as all these classes of persons are deemed to be in a controlled relationship.

The next point to consider is at the very heart of TP: that persons in a controlled relationship must ensure that the terms and pricing of arrangements or transactions with their associates or persons in a controlled relationship reflect the terms and pricing of arrangements or transactions existing between independent (third or unrelated) parties. The technical term underlying this rule is called the arm's length standard or arm's length principle ('ALS' or 'ALP') and it is to ensure that persons in a controlled relationship are not 'controlling' the price to achieve a purpose that in substance leads to a tax advantage.

The New TP Rules therefore define the ALP and provide broader guidance on the pricing of matters such as financing transactions, business restructuring, cost contribution arrangements and low value-adding services. For example, certain services considered as low value-adding services will be deemed to be arm's length if the mark-up over their relevant cost does not exceed 3%.

Apart from the requirement for transactions to be done at ALP, there is a requirement for persons affected by the New TP Rules, to prepare and file an annual TP return within four months from their financial year-end. While this requirement existed under the Old TP Rules, the information required to be disclosed in the TP return is now more extensive.

There is also the requirement for persons affected by the New TP Rules to prepare a TP documentation and file an electronic copy with the GRA within four months after the end of the person's financial year. The key change introduced with respect to TP documentation relates to the contents, which are now in twofold: a Master File ('MF') and a Local File ('LF') report. All the details can be gleaned from Regulations 12 of the New TP Rules. The good news, however, is that the New TP Rules exempt some persons engaged in certain eligible transactions from the preparation and electronic filing of the TP documentation with the GRA.

Another key requirement for a person deemed as an Ultimate Parent Entity or a Constituent Entity is for such an Ultimate Parent Entity or a Constituent Entity to file, in Ghana, an extensive report known as the Country-by-Country Report ('CbCR') annually. Definitions of these terms can be found in Regulation 17 of the New TP Rules.

Lastly, the New TP Rules provide sanctions for non-compliance with the law. Any dispute arising from a TP audit, if not satisfactorily resolved by the taxpayer at the GRA level, may first be referred to the Independent Tax Appeals Board ('ITAB') created by the Revenue Administration (Amendment) Act, 2020 (Act 1029) when it becomes operational, and then to the High Court, Court of Appeal and the Supreme Court of Ghana progressively.

The following paragraphs will deal with some of the key notable requirements and issues already addressed at a high level as follows:

Aligning arrangements with persons in controlled relationships to those of comparable third parties (i.e. applying the ALP)

Who and what arrangements are subject to the ALP?

As we have already seen, the New TP Rules have maintained the requirement that all arrangements between 'persons in a controlled relationship' are subject to the ALP. In effect, any transaction including supply of services, goods or property of any kind between persons in controlled relationships constitute the arrangements which are subject to the ALP requirement. The new TP rules rely on the definition of persons in controlled relationships in section 128 of the Income Tax Act, 2015 (Act 896).

While Act 896 provides us with the list of persons subject to the ALP requirement from a direct tax perspective, the Value Added Tax Act, 2013 (Act 870) and laws on Customs and Excise, also do so for the purposes of indirect tax.

In simple terms, the process of applying the ALP consists of determining the most suitable comparables (comparable third-party entities engaged in transactions comparable to those entered into by the taxpayer in question) and then determining the most suitable financial indicator such as price, financial ratio, etc. to use for that comparison.

In finding adequate and reliable comparables, it is necessary to conduct a comparability analysis based on the five comparability factors stipulated in Regulation 3 of the New TP Rules. It is worth noting that, the New TP Rules give special consideration to the allocation of the economically significant risks between the relevant parties. This is an interesting development and we foresee more challenges in the future on benchmarking and non-comparability on the basis of the allocation of significant risks.

Selection of the most appropriate TP method

The prescribed list of TP methods to be used for the pricing of arrangements and transactions affected by the New TP Rules remain the same as in the Old TP Rules and are as follows: Comparable Uncontrolled Price ('CUP'), Cost-Plus Method ('CPM'), Resale Price Method ('RPM'), Transactional Net Margin Method ('TNMM'), and Transactional Profit Split Method ('TPSM'). Like the Old TP Rules, the New TP Rules give affected persons the option to request approval from the Commissioner-General ('C-G') of the GRA to use an alternative TP method in certain situations.

When preparing the TP documentation for a particular transaction, the New TP Rules now require a comparative analysis on why one TP method was chosen over the other prescribed TP methods. Affected persons must ensure that their analyses and conclusions for choosing one TP method over the others are robust and borne out of the facts and circumstances underlying the transactions, the nature of business engaged by the persons and other key terms and conditions of the arrangements, lest they be challenged by the GRA.

Testing of single transactions or grouping transactions?

It is often the case that testing transactions individually is unreliable or almost impracticable as they are either economically closely linked or form a continuum. The New TP Rules allow for transactions of that nature to be treated as one for the purposes of performing a comparability analysis and applying an appropriate TP method. While this aligns with best practice globally, taxpayers should be mindful of the indirect tax (such as VAT and Customs Duty) consequences that may arise when these transactions are combined for TP purposes.

Selection of tested party

Some of the TP methods cannot effectively be utilised without the identification and selection of tested parties – that is, entities whose financial results will be compared to that of the independent third-party comparables. The New TP Rules have stipulations which are consistent with international standards, and these require that the tested party can either be the resident or non-resident related entity.

The arm's length range

The New TP Rules define an arm's length range to include the interquartile range of a three-year weighted average measurement of specified financial indicators.

Specific provisions on Intra-group services

The general conditions required to exist for an intra-group service to be considered as being at arm's length under the Old TP Rules have been maintained in the New TP Rules. However, some additional provisions similar to the OECD's TP Guidelines' conditions for an intra-group service to be considered as having been 'rendered' have to be complied with.

Examples of intra-group service payments not considered as being arm's length include duplication of services already being received and incidental benefits derived by a resident person for services provided to other members of the same group.

Specific provisions relating to the owning and use of Intangible Property ('IP')

Additions to the previously existing provisions on Intangible Property ('IP') transactions in the Old TP Rules are mainly focused on considerations relating to contractual arrangements surrounding the development, enhancement, maintenance, protection and exploitation of IPs, commonly known as 'DEMPE' within the transfer pricing world. The New TP Rules recommend that consideration be given to the allocation of risks and commercial alternatives available to the buyer/licensee as some of the key factors in setting an arm's length price for intangible property transactions.

Issues expected to be a challenge for both taxpayers and the GRA are compensation for marketing intangibles, business case/rationale, royalty rates and the availability of alternatives.

Specific provisions relating to Cost Contribution Arrangements ('CCAs')

A provision on CCAs has for the first time been introduced in the New TP Rules. The OECD defines a CCA as 'a contractual arrangement among business enterprises to share the contributions and risks involved in the joint development, production or the obtaining of intangibles, tangible assets or services with the understanding that such intangibles, tangible assets or services are expected to create direct benefits for the businesses of each of the participants'.

A CCA is simply a contractual arrangement and not necessarily a distinct juridical entity or fixed place of business of all the participants. In accordance with the arm's length principle, each participant's proportionate share of the overall contributions to a CCA must be consistent with the participant's proportionate share of the overall expected benefits to be received under the arrangement. Further, each participant becomes an effective owner of an interest in any intangibles or tangible assets resulting from the activity of the CCA, or is entitled to receive services resulting from the activity of the CCA, and may exploit such interest or entitlement without paying additional consideration to any party for that interest or entitlement.

The New TP Rules provide general guidance on the nature of activities which could give rise to CCAs and key considerations to be followed in determining the ALP. Some of the key considerations include a proportionate allocation of costs in line with the expected benefit. Due to the complexity of CCAs, some of the challenges to be anticipated are the limitations of contractual arrangements to clearly stipulate expected benefits and costs as well as what constitutes proportionate costs which correspond with the benefits and risks of a CCA participant.

Specific provisions on financing arrangements

The New TP Rules have also introduced a regulation on financing arrangements which was not hitherto included in the Old TP Rules. The New TP Rules now include guidance on the determination of an appropriate arm's length interest rate and/or fees for financial transactions by taking into account factors such as the purpose of the loan, the terms and conditions, the credit profile of the borrower and economic conditions in the geographical location of both the borrower and lender. The New TP Rules now deem financial guarantees and trade payables (any forms of credit) remaining unpaid for over twelve (12) months as financing arrangements which require arm's length compensation.

It is anticipated that benefit testing of loan transactions and interest rate analysis will be an area of challenge, while companies with significant and longstanding payables will have to review their policies.

Specific provisions on business restructuring

There is also a new provision on business restructuring which provides factors to be considered in determining whether a business restructuring activity is in line with the arm's length standard. Any centralisation of functions or transfer of certain functions (activities) to another group entity should be reviewed in line with the New TP Rules. Going forward, it is expected that the GRA will keenly monitor news on business restructuring deals of group of companies via diverse media platforms, and such deals will be subjected to increased scrutiny and assessments from the GRA.



Annual filing requirements

Filing of annual TP returns

Not much has changed regarding the filing of an annual TP return, except for the two issues addressed below.

Firstly, under the Old TP Rules, it was possible to argue that the TP return formed part of the corporate income tax return generally required to be filed by all businesses, and once the income tax return was filed without the TP return, the GRA could not levy a penalty for non-filing of the TP return. At best, the person could only be faulted for filing an incomplete corporate income tax return, as it excluded the TP return required under the Old TP Rules. This ambiguity has been cleared with the promulgation of the New TP Rules: the TP return is now a standalone return for which penalties for non-filing or late filing apply in the same way as they apply to a corporate income tax return.

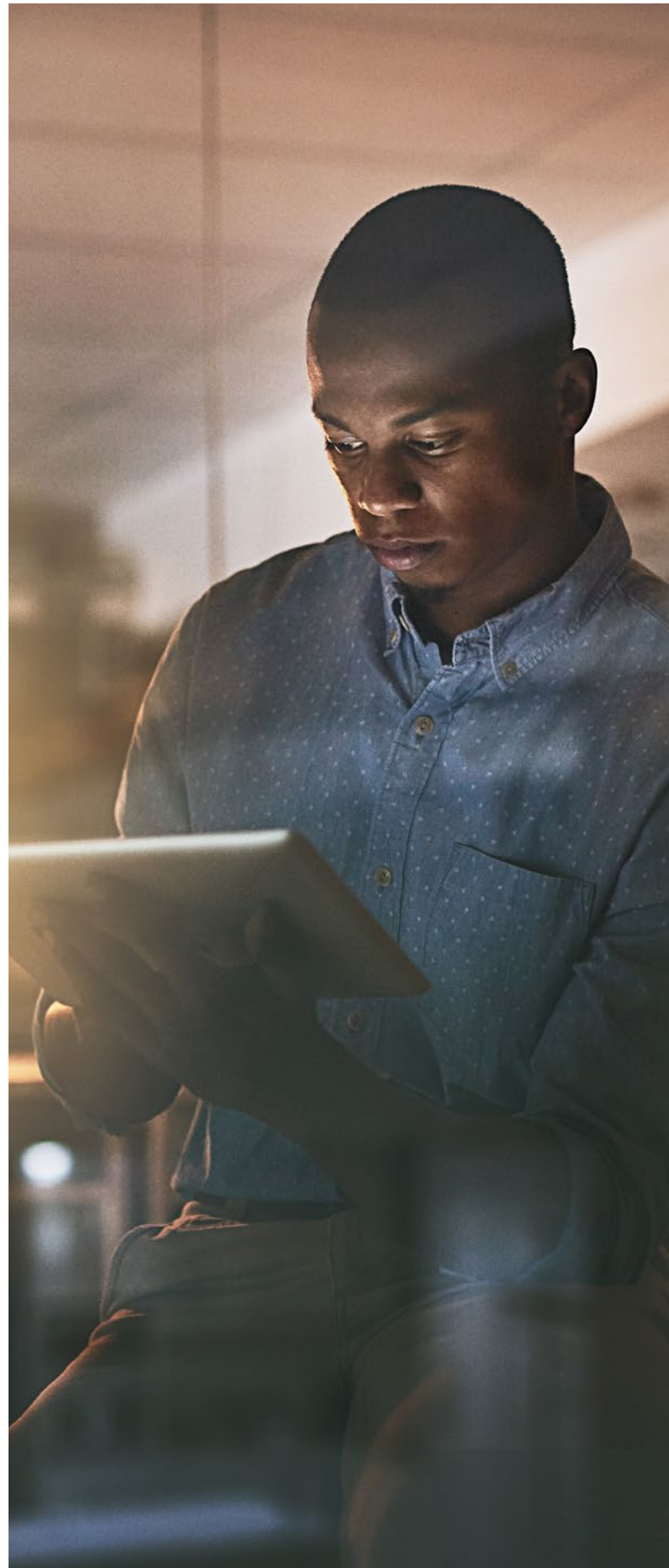
Secondly, the annual TP return now requires more information, including those relating to group revenue, number of employees, reason for choosing a TP method, etc. We expect the GRA to release a new TP return template, given that taxpayers whose financial year will end on 31 December 2020 need to comply with the provisions of the New TP Rules on or before 30 April 2021.

Country-by-Country Report

There are further provisions on the submission of a document called a CbCR, by a Ghanaian entity which is part of a Group with a minimum Group revenue of GHS 2.9 billion in its previous financial year. This filing requirement is waived or excepted where a CbCR has been filed at Group level or by a relevant entity within the Group and this report could be made available to the GRA based on the international conventions available. The Ghanaian entity will instead be required to notify the C-G of the GRA about the identity and tax residence of the entity required to file the CbCR on behalf of the group. The deadline for filing CbCRs and for notifying the C-G, where applicable, is no later than twelve months after the year-end of the group.

Except for cases where a Double Tax Agreement exists, the real issue is that Ghana is yet to sign a convention that will grant rights to the GRA to access CbCRs filed in other jurisdictions. If this remains unchanged, all entities of MNEs meeting the revenue requirements might be required to file a CbCR in Ghana.

The CbCR generally should contain consolidated tax-related information on the MNE group broken down according to the various states in which the group's individual entities have a presence, including information such as income, taxes paid, etc.



TP Documentation

Annual preparation and filing of the Master File and Local File

One of the biggest changes in the TP landscape in Ghana is the incorporation of the OECD BEPS Action 13, which seeks to enhance tax transparency.

According to the New TP Rules, a person engaged in an arrangement with another person with whom that person has a controlled relationship shall maintain contemporaneous documentation (i.e., Master File and Local File) of the arrangement engaged in by that person in each year of assessment and electronically file the same with the GRA not later than four months after the end of each accounting year of the affected person. A TP documentation may however not be required from a person engaged in a transaction or arrangement with another person which does not exceed the Ghana Cedi ('GHS') equivalent of US\$200,000. Note however that, two or more transactions can be consolidated or aggregated under the New TP Rules, and it is contended that even in cases where an individual transactional value is not up to US\$200,000 the GRA could argue that those transactions be consolidated for purposes of TP, hence a TP documentation may be required in such a situation.

A Master File contains high-level information on the global business of the group of companies the Ghanaian company belongs to and the relevant policies, while the Local File focuses on the key information on the Ghana operation of the local entity. The New TP Rules spell out the minimum content of the MF and the LF, which is largely in line with existing international best practice information disclosures.

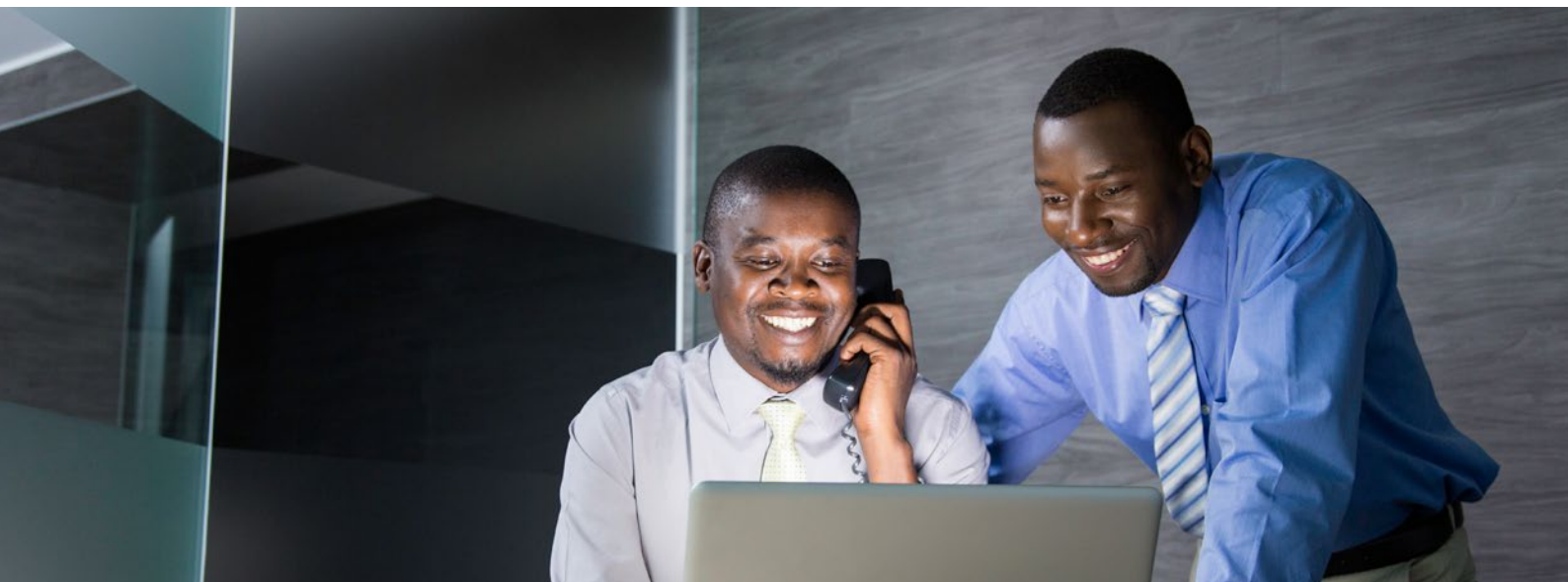
Some of the critical issues regarding the filing deadline of these two reports to be considered by MNEs is the probable filing requirement of the MF and LF when signed audited accounts are yet to be finalised and/or an extension of the filing deadline has been requested for the TP return.

Simplified approach

Instead of requiring the preparation of voluminous and complex MFs and LFs covering all transactions above the US\$200,000 threshold or its equivalent in Ghana Cedis, New TP Rules allow taxpayers to opt in to a simplified approach to TP documentation for their low value-adding services (which attract a mark-up of not more than 3% of the relevant costs).

The same applies to transactions covered by technology transfer agreements ('TTA') approved by the GIPC where royalties, know-how and management/technical fee, do not exceed 2% of net profit (i.e., profit after tax, interest, depreciation and amortisation but excluding the charge for technology transfer) per transaction. While this is good news, the chances are that this may not apply to many TTRs, as a significant number of these are priced as a percentage of sales/revenue and this amount will in most cases be higher than the 2% of net profit threshold.

Entities that elect to opt in to the simplified approach to TP documentation would be required to append relevant information as provided by the New TP Rules regarding those transactions as part of their annual TP return filing and will not be able to opt out of this arrangement for a period of three years unless with the prior approval of the C-G of the GRA.



TP audits and penalties

The requirement for the GRA to conduct periodic TP audits and provisions on the imposition of penalties, have been retained in the New TP Rules and are consistent with general provisions applicable to tax audits.

What is the way forward from now?

We expect the GRA to issue templates for all mandatory compliance requirements and practice notes in order to provide guidance on the implementation and their interpretation of certain matters in the New TP Rules. Taxpayers should start re-assessing their operations and readiness to implement this new piece of legislation.

How can we help?

Please connect with Kingsley Owusu-Ewli (kingsley.owusu-ewli@pwc.com) who leads Transfer Pricing Services in Ghana or any of our Tax Partners in case you wish to discuss any matters concerning the TP framework in Ghana. We have a dedicated and specialised TP team in Ghana with a combined TP experience spanning countries in Africa as well as the United Kingdom and the USA, with access to a global TP network to assist you.



Let's talk

For a deeper discussion of how this issue might affect your business, please contact:



George Kwatia
Tax Leader
+233 (0) 54 433 4009
george.kwatia@pwc.com



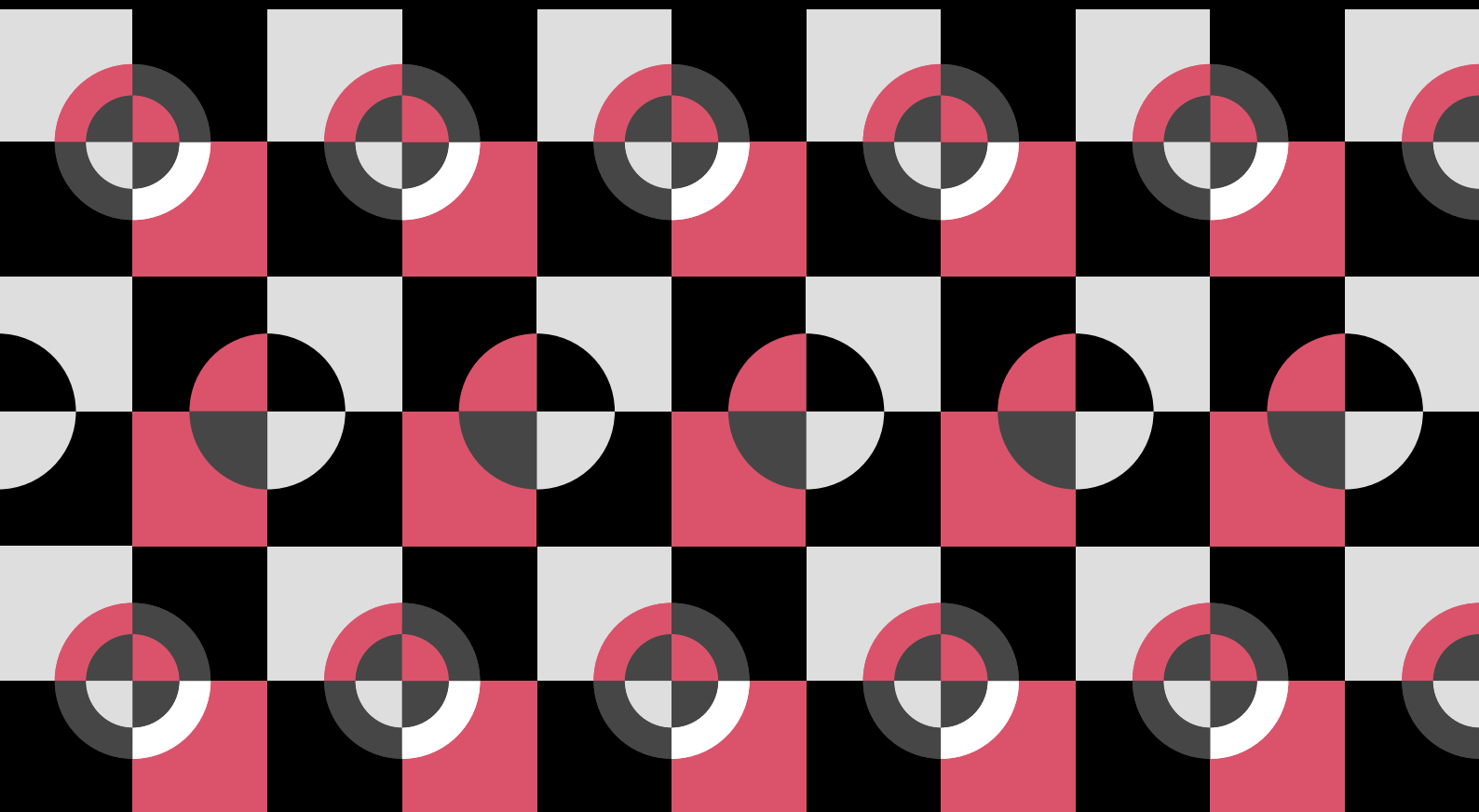
Ayesha Bedwei
Partner
+233 (0) 24 481 3956
ayesha.a.bedwei@pwc.com



Abeku Gyan-Quansah
Partner
+233 (0) 20 820 8106
abeku.gyan-quansah@pwc.com



Kingsley Owusu-Ewli
Partner
+233 (0) 54 566 3500
kingsley.owusu-ewli@pwc.com



At PwC, our purpose is to build trust in society and solve important problems. We're a network of firms in 155 countries with over 284,000 people who are committed to delivering quality in assurance, advisory and tax services. Find out more and tell us what matters to you by visiting us at www.pwc.com.

PwC refers to the PwC network and/or one or more of its member firms, each of which is a separate legal entity. Please see www.pwc.com/structure for further details.

© 2020 PwC. All rights reserved

(20-26230)