

Transfer Pricing Forum

**Transfer Pricing for the
International Practitioner**

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Legislation

The most significant legislation that impacted Nigeria's transfer pricing (TP) landscape during 2020 was the Finance Act No. 1 of 2020 (FA1 2020), which received presidential assent on January 13, 2020.¹ FA1 2020 amended, amongst others, TP-relevant provisions of extant tax legislation, such as the Companies Income Tax Act² (CITA), the Capital Gains Tax Act³ (CGTA), and the Value Added Tax Act,⁴ (VATA), which are considered respectively below.

By way of background, it is worth noting that Nigeria's TP regime is still evolving from its basic levels. Previously, Nigeria's general anti-avoidance provision (including transfer pricing) was comprised almost entirely in section 22 CITA and equivalent provisions in other tax legislation.⁵ The Income Tax (Transfer

¹Although self-described as Finance Act 2019, the correct designation is Finance Act 2020 because constitutionally, the Act only became law when it received presidential assent. Given that another Finance Act 2020 was signed by the President on December 30, 2020, for the purposes of this article, the two Finance Acts are referred to as FA1 2020 and FA2 2020, respectively.

² Cap. C21 Laws of the Federation of Nigeria (LFN) 2004. CITA is the primary legislation on the taxation of companies (apart from upstream companies) in Nigeria.

³ Cap. C1, LFN 2004.

⁴ Cap. V1, LFN 2004.

⁵ See Afolabi Elebiju, 'Why Our Anti-Avoidance Tax Provision Need Review', Taxspectives by Afolabi Elebiju, THISDAY Lawyer, 2nd July 2012, p. 12; and at: <https://lelawlegal.com/add111pdfs/Why-Nigerian-Tax-Avoidance-Provisions-Need-Review1.pdf> (last accessed 12th February 2021). Excerpts: "The Artificial Transaction Provisions: Section 22(1) CITA, Cap. C21 LFN 2004 provides: 'where the Board is of the opinion that any disposition is not in fact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, it may disregard any such disposition or direct that such adjustments shall be made as respects liability to tax as it considers appropriate so as to counteract the reduction of liability to tax affected, or reduction which would otherwise be affected, by the transaction and any company concerned shall be assessable accordingly.' By section 22(2)(a), 'disposition includes any trust, grant, covenant, agreement or arrangement' whilst section 22(2)(b) seeks to catch related party transactions. Section 22(2)(c) stipulates that 'transactions between persons one of whom either has control over the other or, in the case of individuals, who are related to each other or between persons both of whom are controlled by some other person, shall be deemed to be artificial or fictitious if in the opinion of the Board those transactions have not been made by persons engaged in the same or similar activities dealing with one another at arm's length.' The above provisions of section 22 CITA are replicated in *pari materia* as section 20 CGTA [Capital Gains Tax Act]; section 15 PPTA [Petroleum Profits Tax Act] and section 17 PITA [Personal Income Tax Act]. This shows the pervasiveness of the taxman's intent to deal with 'artificial' transactions."

Pricing) Regulations 2012 (TPRs 2012) was Nigeria's first TP focused statutory instrument,⁶ while its successor (and extant primary TP instrument, albeit a delegated legislation) is the TPRs 2018. The latter, together with its compliance/ documentation requirements vis à vis the substantive tax provisions and other subsidiary legislation, such as the Income Tax (Country by Country) Reporting Regulations 2018 (CbCRs) and the Income Tax (Common Reporting Standard) Regulations 2019 (CRSs) now comprise Nigeria's TP regulatory framework.

Changes in the Nigerian TP landscape in 2020 are highlighted below.

A. Companies Income Tax Act (CITA)

1. Seventh Schedule CITA - Quantum Limitations on Tax Deductibility of Expenses on Related Party Foreign Loans

The new six-paragraph 7th Schedule CITA ('Deductible Interest'), inserted by section 23 FA1 2020), disallows "excess interest," introducing new rules designed to combat thin capitalization that could have implications for the "optimal" equity-debt capital mix of projects or transactions. The 7th Schedule CITA curtails interest deductions on loans made to a Nigerian companies or fixed bases of foreign companies in Nigeria by "foreign connected persons" (related party status being determined via ownership or control tests, as described under the TPRs 2018). Thus, foreign related-party interest expense in excess of 30% of EBITDA is not allowable, and excess interest expense cannot be carried forward for more than five years, representing a maximum of six years of deductibility.

This thin capitalization limitation discourages foreign related-party debt financing in favor of equity on two fronts, i.e., by limiting: (a) the amount of allowable tax expense; and (b) the period over which deductions are allowed. Any amounts over the specified thresholds will be added to the taxable profits of the Nigerian borrower.

In addition, the Nigerian borrower in breach of this rule will be liable to 10% penalty and interest at CBN's minimum rediscount rate plus spread to be determined by the Minister on any adjustments made by the FIRS relating to excess interest charged during the year. It is noteworthy that the new section 27(1)(k) and (l) CITA (inserted by section 11 FA1 2020) disallows "any penalty prescribed by any Act of the National Assembly for violation of any statute" and "any tax or penalty borne by a company on behalf of another person."

Para 6(b), 7th Schedule CITA defines "debt" to mean "any loan, financial instrument, finance lease, financial derivative, or any arrangement that gives rise to interest, discounts or other finance charges that are deductible in the computation of income chargeable under the heads 'profits and gains of business or profession.'

⁶ See Afolabi Elebiju, "TP Regulations: Compliance, 'Stay Awake' Issues & Litigation," *Taxspectives* by Afolabi Elebiju, ThisDay Lawyer, February 4, 2013, p.12; also at: <https://lelawlegal.com/add111pdfs/TP-Compliance-Issues-and-Litigation1.pdf>. See also Afolabi Elebiju's presentation, "Transfer Pricing in Nigeria – The New Reality" (December 2012) available at: <https://www.slideshare.net/AfolabiElebiju/transfer-pricing-in-nigeria-the-new-reality> (last accessed February 13, 2021).

However, Para 3, 7th Schedule CITA exempts Nigerian banks and insurance companies from the above thin capitalization requirements with respect to debt transactions with their foreign connected persons. It has been argued that the 7th Schedule does not apply to upstream companies, since their own deductibility rules are enshrined in sections 10 and 13 Petroleum Profits Tax Act⁷ (PPTA), rather than in the CITA.⁸

2. Section 13(2)(c) and (e) CITA and the Companies Income Tax (Significant Economic Presence) Order 2020 (SEPO)

Section 4 FA1 2020 amended the fixed base/permanent establishment (PE) rules for the taxation of a nonresident company with respect to its Nigerian-source profits in section 13 CITA. The new section 13(2)(c) CITA taxes such a nonresident that engages in digital transactions "to the extent that the company has significant economic presence in Nigeria and profit can be attributed to such activity." Meanwhile, section 13(2)(e) targets an offshore provider of technical, management, consultancy and professional services to residents, "to the extent that the company has significant economic presence in Nigeria." Under enabling powers in that regard (per section 13(4) CITA), the Minister of Finance issued the SEPO in February 2020.⁹

The SEPO is applicable to nonresidents deriving gross turnover/income of ₦25 million or more from a combination of the listed digital activities/transactions. For purposes of determining whether the turnover threshold is met in a particular accounting year, "activities carried out by connected persons in that accounting year shall be aggregated."¹⁰ Connected persons include "associates" as defined in the Companies and Allied Matters Act¹¹ and "business associates" (such an association existing between two enterprises where one enterprise is a direct or indirect participant in the management, control or capital of

⁷ Cap. P13, LFN 2004.

⁸ See Afolabi Elebiju, "Nigeria's Finance Act 2020 Tax Amendments - Should The Oil And Gas Sector Be Nervous?," LeLaw Thought Leadership, March 2020, p. 2: <https://lelawlegal.com/add111pdfs/Nigeria-Finance-Act-2020-Oil-Industry-Impact.pdf> (accessed 9th February 2021).

⁹ The SEPO is contained in the Federal Government of Nigeria (FGN) Official Gazette No. 21, Vol. 107 of February 10, 2020, although the Gazette itself was published in May 2020. The effective date of the SEPO is February 3, 2020.

¹⁰ See Para 1(1) and (5) SEPO.

¹¹ The SEPO refers to CAMA, Cap. C20 LFN 2004 as amended, making the provisions of CAMA 2020 (enacted subsequent to the SEPO) applicable. While CAMA 2020 does not directly define "associates," this definition can be pieced together from provisions like section 312(7) (or section 312(8) for "connected" person). Section 381(1) CAMA 2020 deems a company to be a subsidiary of another company if the first company – "(a) is a member of the company and controls the composition of its board of directors; (b) holds more than 50% in nominal value of its equity share capital; or (c) the first-mentioned company is a subsidiary of any company which is that other's subsidiary." First Schedule CAMA 2020 (Form and Content of Company's Financial Statements) made pursuant to section 378 lists under Section A (General Information to be Disclosed), in Para 2(e) "its relationship with its significant local and overseas suppliers (if any) including the immediate and ultimate parent, associated or affiliated company." Para 4 mandates disclosure of "financial implication of inter-company transfer and technical management agreements between the company and its significant local and overseas suppliers (if any), including its immediate and ultimate, associated, affiliated company." In this way, CAMA 2020's provisions have (indirect) TP implications. Another illustration is the Third Schedule (Particulars in Company Financial Statements of Loan and Other Transactions Favouring Directors and Officers).

the other or both enterprises are subject to such management, control or capital by the same person (Para 1(6) SEPO)).

The SEPO has effectively made TP a very relevant consideration in giving effect to the new section 13(2) CITA on digital taxation. In this context, it is worth noting that Para 1(3) SEPO also recognizes that where a nonresident company is "covered by a multilateral or consensus arrangement to address the tax challenges arising from the digitalization of the economy to which Nigeria is a party," it is to be treated accordingly.

3. Section 27(g) CITA - Deductibility of Related Party Expenses to be Subject to TPRs 2018

New section 27(g) CITA (introduced by section 11 FA1 2020) disallows "any expense whatsoever incurred within or outside Nigeria involving related parties as defined under the Transfer Pricing Regulations, except to the extent that it is consistent with the Transfer Pricing Regulations."¹² In contrast to new section 27(g) CITA, erstwhile section 27(g) and (h) targeted, respectively, expenses incurred for purposes of earning management fees and expense incurred in the form of management fees by subjecting them to prior ministerial approval, without any direct TP specificity.

B. Capital Gains Tax Act (CGTA)

Section 49 FA1 2020 amends section 32 CGTA (CGT exempt status of business reorganizations between connected persons) by exempting from CGT (where both parties have been related parties for at least 365 days before the transaction), asset or business transfers pursuant to group restructurings that are driven by operating efficiency considerations, provided the acquiring company does not subsequently dispose of the assets within the next 365 days after the transaction. In the event of a subsequent disposal within this period, "any concession enjoyed ...shall be rescinded and the companies shall be treated as if they did not qualify for the concessions stipulated ...as at the date [of the] initial reorganisation."

This is a welcome development that strikes a balance between facilitating substantive business efficiency-driven transactions between related parties and requisite anti-avoidance measures to prevent abuse. The resulting savings is 10% of the CGT that would otherwise have applied.

C. Value Added Tax Act (VATA)

1. Section 42 VATA - VAT-Exempt Status of Business Reorganizations Between Connected Persons

New section 42 VATA (inserted by section 45 FA1 2020), provides in *pari materia* with new section 32 CGTA discussed in 2., above, thereby saving 7.5% VAT on asset value.¹³ One way of avoiding VAT in a regular

¹² The extant instrument is the TPRs 2018; however, by settled rules of statutory interpretation, the provision will always be applicable to the TP Regulations as amended from time to time.

¹³ "Where a trade or business carried on by a company is sold or transferred to a Nigerian company for the purpose of better organisation of that trade or business or the transfer of its management to Nigeria, and any asset employed in such trade or business is sold or transferred, no tax shall apply under this Act to the sale or transfer of the assets to the extent that one company has control over the other or both are controlled by some other person or are members of a recognised group of companies and have been so for a consecutive period of at least 365 days prior to the date of reorganisation. Provided that if the acquiring

transaction would be to transfer shares of the relevant company, rather than its assets or business, since the former are VAT-exempt.

2. Section 2A VATA - "Time of Supply"

New section 2A VATA also attempts to "tighten" the tests for the applicability of VAT, affirming the legislator's intent to deal with the substance rather than the form of transactions. Thus, a taxable supply is deemed to occur at the earlier of: (a) the time of issuance of an invoice or receipt; or (b) the time when payment for the supply is due or received (section 2A(1)). More importantly for TP purposes, section 2A(2) imposes "the test of access" in deeming the occurrence/existence of taxable supplies between related parties or "connected persons."¹⁴ Accordingly, the fact that an invoice has not been issued is immaterial. Once the goods concerned are removed or made available to the recipient, the relevant service is furnished, or the incorporeal property becomes available for the use of the recipient, a taxable supply has been made.

Cases and Rulings

As noted above, Nigeria's transfer pricing regime is still in its nascent stages; not surprisingly, the first case dealing with a core TP matter, *Prime Plasticem Nigeria Limited v. FIRS*,¹⁵ was determined by the Lagos Zone of the Tax Appeal Tribunal (TAT) in February 2020.

The tax appeal involved related party transactions (RPT) between Prime Plasticem Nigeria Limited (PPNL) and Vinmar Overseas Limited (VOL). PPNL imports plastics and petrochemicals from VOL for resale to Nigerian customers. Following the introduction of the TPRs 2012, PPNL filed its transfer pricing documentation (TPD) for 2013 and 2014. It applied the comparable uncontrolled price (CUP) method in 2013, using the price charged by a sister company, Vinmar International Limited (VIL), to third-party Nigerian customers as a benchmark, for consistency with the arms' length principle.¹⁶ However, due to the lack of a

company were to make a subsequent disposal of the assets thereby acquired within the succeeding 365 days after the date of transaction, any concessions enjoyed under this subsection shall be rescinded and the companies shall be treated as if they did not qualify for the concessions stipulated in this subsection as at the date of initial re-organisation."

¹⁴ This leads to Reg 12, TPRs 2018, which copiously defines "connected person" in terms of: Reg 12(1) ability to control or influence the other [person] in making financial, commercial or operational decisions or a third party can so influence or control both persons; and Reg 12(2) persons "related, associated or connected as defined in" substantive tax legislation (CITA, PPTA, PITA, CGTA); Article 9 OECD and UN Model Tax Conventions and provisions of double taxation agreements to which Nigeria is a party; and the OECD TP Guidelines and the UN TP Manual.

¹⁵ (2020) 51 TLRN 1. The TAT delivered this first TP judgement on February 19, 2020. See FIRS, 'Tax Evasion: Tribunal Orders Firm to Pay ₦1.7 Billion to FIRS, February 26, 2020:

<https://twitter.com/firsNigeria/status/1232613056334778370?s=20> (accessed February 14, 2021).

¹⁶ Per Reg 6 TPRs 2018, to establish that intra-group service charges comply with the arm's length principle, the charges must: (a) be for a service that was actually rendered; (b) provide, or were expected to provide, the recipient with economic or commercial value to enhance its commercial position; (c) be for a service for which an independent person in comparable circumstances would have been willing to pay, if the service were performed for it by an independent person, or a service that it would have performed in-house for itself; and (d) correspond to that which would have been agreed between independent persons for comparable services in comparable circumstances.

comparable to enable it to adopt the CUP method in 2014, PPNL applied the transactional net margin method (TNMM) in 2014.

In 2016, the FIRS conducted a TP audit of PPNL for the 2013 and 2014 financial years and questioned the inconsistency of PPNL's use of the CUP and TNMM in 2013 and 2014, respectively. The FIRS issued an additional assessment of ₦1.738 billion to PPNL based on: (a) the adoption of the TNMM for both years; (b) the use of the gross profit margin (GPM) as a profit level indicator (PLI) instead of the operating profit margin (OPM) used by PPNL; and (c) the imposition of penalties and interest, arising from the differentials in (a) and (b).

The TAT decided in favor of the FIRS, being swayed by the FIRS's arguments to the effect that: (a) the 2012 TPRs, the OECD TP Guidelines and the UN Practical Manual on TP for Developing Countries demanded consistency of comparables; (b) PPNL did not discharge the evidential burden on it as required by the TPRs 2012 and other applicable instruments of demonstrating the appropriateness of using the CUP and TNMM for the two years at issue; and (c) failure to comply with a condition precedent – PPNL being afforded the opportunity to "challenge" the grounds of the FIRS assessment before the Decision Review Panel (DRP) before commencement of the statutory tax dispute resolution process was not fatal to that argument. The TAT appeared not to have given sufficient weight to PPNL's argument to the effect that the use of two different comparables for the two years concerned on the basis of changes in circumstances is actually recognized by the OECD Guidelines and UN Manual. The authors believe that PPNL may have a chance of successfully appealing the TAT decision with some re-organization and "strengthening" of its narrative.

This ruling has ushered in the era of TP litigation and may accordingly open the floodgates in Nigeria. Taxpayers will likely up the ante of their TP compliance efforts, given the ramifications of the aggressive TP enforcement posture that the FIRS is likely to adopt. In line with the principle of judicial precedent (*stare decisis*), decisions of non TP-specific tax appeals during the year on diverse areas of Nigerian tax jurisprudence (on the interpretation of tax statutes, legitimate expectation, etc.) in particular, and Nigerian case law in general, will continue to be relevant for purposes of deciding TP disputes.

There has not been any change in the volume or types of TP cases being litigated. However, it is obvious that there will be more TAT cases related to transfer mispricing as a result of the FIRS' desire to increase government revenue and the potential ramping- up of TP enforcement. Also, issues around penalties and interest will be contested before the TAT following the decision in *Plastichem*. It is likely that the PPNL will appeal the TAT decision to the Federal High Court (FHC), given the strength of its case, especially as its narrative and case presentation before the TAT was somewhat responsible for the TAT agreeing with the FIRS' position.¹⁷

Transfer Pricing Documentation

There were no significant direct changes to the TPD requirements in 2020 – the primary TPD framework remains the Schedule to the TPRs 2018 (Information and Documents to be Maintained in Transfer Pricing Documentation), supplemented by notification and filing requirements under the Income Tax (Country by Country) Reporting Regulations 2018 (CbCRRs) and the Income Tax (Common Reporting Standard)

¹⁷ See copious reproduction of PPNL's submissions at pp 12-20 and of the FIRS' submissions at pp 20-32.

Regulations 2019 (CRSRs).¹⁸ There is also the SEPO (2020), which sets the threshold for reportable controlled transactions of nonresidents (deemed to have SEP in Nigeria), at ₦25 million.¹⁹ Also, there are indirect TPD (by way of disclosures in financial statements) under new provisions of CAMA 2020.²⁰

Although not directly a TP provision, new section 63 CITA (vide section 17 FA2 2020)²¹ is also relevant for TPD purposes. It mandates that all companies should "maintain books or records of accounts, containing sufficient information or data of all transactions" (63(1)). The books and records must "be consistent with the format that may be prescribed" by the FIRS (63(2)). There is a penalty (₦100,000 for the first month, ₦50,000 for every subsequent month) for failure to provide such books and records, on request to the FIRS (63(4)). Such books and records "shall be kept for ... at least six years after the year of assessment to which the income relates" (63(7)).

The contentious nature of TP compliance cum enforcement, stiffer penalty provisions in the TPRs 2018, and the aftershocks of *Plastichem* make robust TPD compliance (preparation and filing) an important risk management and tax governance strategy - the key underpinning of taxpayers' TPD being to demonstrate to the Revenue the arm's length equivalence of their controlled transactions.²²

Transfer Pricing Examinations/Audits

There have been a few changes relating to audits or investigations on TP audits. These include a recent restructuring in the organogram of the FIRS, which is more likely than not to affect the efficiency in administration of the tax authority and have ripple effects on the transfer pricing audit process.

¹⁸ The key TPD requirements are: (a) Master File: this provides an overview of the global business operations of the MNE group to which the ultimate holding company belongs; (b) Local File: this discloses detailed information on an enterprise's controlled transactions (the specifics contents of the Master and Local Files are as set out in the TPRs Schedule; (c) Country-by-Country Report (CbCR): the CbCR will provide information on an MNE's allocation of income, income tax paid and certain indicators of the location of economic activity among tax jurisdictions in which the MNE group operates; (d) TP Disclosure Forms: these forms are to be filed annually alongside the CIT returns. They will disclose the details of all the relevant companies' controlled transactions during the year; (e) TP Declaration Forms: these are used to 'declare' the structure of their group in terms of ownership, management, control and the nature of the business; (f) Transfer Pricing Policy Documents (TPPDs): preparation of local and group TPPDs setting out the principles adopted by a company in pricing its intra-group transactions; (g) Country-by-Country Reports (CbCR) Notification Forms: these are completed by a Nigerian tax resident member of an MNE group to notify the FIRS that it is the entity designated to file the CbCR on behalf of the group.

¹⁹ Also, Nigerian entities that have connected persons/related parties are required to record, via writing or digital means, sufficient information and data along with analysis of same for verification of their consistency with the arm's length principle in their controlled transactions pricing: Reg 16, TPRs 2018. Failure to keep such records or to supply documentation at the FIRS' request attracts a ₦10 million administrative penalty and a further penalty of ₦10,000 per day for every day the default continues (Reg 16(5)).

²⁰ See footnote 11 above.

²¹ Although FA2 2020 was signed into law on December 30, 2020, its effective date is January 1, 2021.

²² The TPRs 2018 impose the responsibility of/for TP documentation on the taxpayer and not its agents/advisors: Para 16(10).

A. Establishment of the Nonresident Persons' Tax Office (NRPTO)

The NRPTO was created in response to the FIRS' intent to devote more specialized attention to the tax affairs of taxable nonresidents. Although the related FIRS Notice was issued in October 2019, it directed that all nonresident taxable persons (companies and individuals) "shall submit every return, correspondence or enquiry relating to all the taxes administered by the [FIRS] to the [NRPTO]," with effect from January 1, 2020. Thus, all the files of nonresident persons must thenceforth be located at the NRPTO, which is situated in the International Tax Department.²³

In March 2020, the FIRS issued an update Notice to the effect that the NRPTO has commenced operations, requesting all non-residents to regularize their outstanding tax obligations, etc. with the NRPTO.²⁴

B. Creation of Additional Tax Audit Units

In 2020, the FIRS created 35 additional tax audit units. According to Mohammed Nami, the FIRS Executive Chairman, "[A]t the FIRS we are paying greater attention to a tax audit in general and Transfer Pricing audit in particular in order to improve the level of tax compliance in the country. As a result, in the last one year, we have created more than 35 additional Tax Audit Units and deployed experienced and capable staff to take charge of these offices..."²⁵

C. Suspension and Resumption of Audit Investigation and Monitoring

As a step toward easing the burden of the COVID-19 pandemic on taxpayers, the FIRS announced on April 6, 2020 that it was suspending all field audits, investigations and monitoring visits until further notice.²⁶ However in a subsequent notice, the FIRS resumed these activities in phases, so that in "Phase II," "field visits in respect of monitoring, tax audit and tax investigations will resume effective from 30th June 2020."²⁷ The FIRS also announced for the longer term, its plans for seamless online desk reviews and audits (discussed

²³ See the one-page FIRS Public Notice, "Establishment of Non-Resident Persons' Tax Office," October 2019.

²⁴ See the update Notice at: <https://taxaide.com.ng/wp-content/uploads/2020/08/NRPTO-Circular.pdf> (accessed February 16, 2021).

²⁵ Excerpts from opening remarks on Monday, January 11, 2021 at a "Workshop on Effective Audit of Multinational Corporations for Domestic Revenue Mobilisation in Nigeria," organized by the FIRS and the Tax Justice Network. See Uche Usim, "Why We Created 35 Additional Audit Units in 2020 - FIRS," The Sun, January 11, 2021: <https://www.sunnewsonline.com/why-we-created-35-additional-audit-units-in-2020-firs/> (accessed February 12, 2021). According to the report, "Nami further stated that with the signing of the 2021 budget of ₦13.588 trillion on December 31, 2020... and given the recent decline of oil resources, 'which had been the major revenue earner for the country, taxation is expected to continue to shoulder the Government's Budget performance the way it did in 2020. This underscores the importance of this workshop, as a tax audit of Multinational Corporations is very crucial in Nigeria's domestic revenue mobilisation. For me, this Workshop is an important step towards boosting compliance level; and, I have strong hopes that its outcome will further increase our efforts at driving tax compliance among Multinational Corporations in Nigeria,' he added." [Emphasis supplied.]

²⁶ FIRS Nigeria, "COVID-19: Statement on Palliative Measures to Cushion Effects on Taxpayers" <https://twitter.com/firsNigeria/status/1254084091806388225?s=20> (accessed February 13, 2021).

²⁷ See the subsequent FIRS Notice of June 2, 2020 at: <https://assets.kpmg/content/dam/kpmg/ng/pdf/tax/firs-resumes-field-audit--investigation-and-monitoring-exercises.pdf>.

under "Palliatives" below).

D. Central Bank of Nigeria (CBN) Circular on Product Price Verification Mechanism

On August 24, 2020, the CBN issued the above Circular "as part of continuing efforts by the [CBN] to "...eliminate incidences of over-invoicing, transfer pricing..." so that "Authorized Dealers are hereby directed to desist from opening Form M whose payments are routed through a busing company/agent or other third parties." The Circular also advised that "the CBN will be immediately introducing a Product Price Verification Mechanism to forestall overpricing and or mispricing of goods and services imported into the country...."²⁸

Impact of COVID-19

A. Economic Circumstances as Relevant Comparability Factor

The FIRS has not given any indication (directly or otherwise) of its likely response to COVID-19-induced economic circumstances comparability considerations. Rather, the FIRS' primary focus has been "to support taxpayers" by granting "palliatives" (waivers and concessions) with respect to: (a) filing deadlines; and (b) interest and penalties.²⁹ The authors envisage that the FIRS' views on any TP-related adjustments to economic arrangements as a result of COVID-19³⁰ will become manifest: (a) when reviewing TPD submitted by taxpayers for the 2020 financial year (and subsequent periods until COVID-19 disruption ceases); (b) in the context of TP audits; and (c) during tax appeals arising from differences of opinion with taxpayers and judicial decisions thereon. This would therefore be a matter of the "future outlook" for TP and the authors envisage that the earliest such disputes will arise will be in late 2021.

²⁸ See CBN Circular, (TED/FEM/FPC/GEN/01/005), "Destination Payment For All Forms M, Letters of Credit And Other Forms of Payment," August 24, 2020: <https://www.cbn.gov.ng/Out/2020/CCD/destpymtformMpdf.pdf> (accessed February 13, 2021).

²⁹ See FIRS' first Covid-19 Public Notice of March 23, 2020, "Covid 19 Message to Taxpayers from the Executive Chairman, Mohammed Nami:" <https://assets.kpmg/content/dam/kpmg/ng/pdf/tax/FIRS-chairman-message-to-taxpayers.pdf>: "...we have taken concrete steps to support you during these challenging times, whilst minimizing any disruption to tax administration and taxpayer services. ...On our part, we will continue to work with relevant agencies of Government to provide necessary reliefs to taxpayers to lessen the impact of this pandemic on businesses and other economic activities to taxpayers. To this end, we are offering the following palliatives to our taxpayers: ..." See also "Covid-19: Statement on Palliative Measures to Cushion Effect on Taxpayers," (referencing FIRS management decisions of March 31, 2020) to the effect that the FIRS had "set up a number of measures to provide support to taxpayers in managing their tax obligations as they are impacted by the Corona virus outbreak...": <https://assets.kpmg/content/dam/kpmg/ng/pdf/tax/firs-public-notice-on-palliative-measures-to-cushion-the-Effects-of-Covid-19-on-Taxpayers.pdf> (both accessed February 13, 2021). The initial FIRS publications also referred to safety protocols, including the encouragement of online engagement with FIRS to minimise physical interaction.

³⁰ Such arrangements could include higher levels of affiliate funding to significantly impacted entities, necessitating arm's length consideration of such transactions; reduced profits margins *vis à vis* earlier TPPDs; the effect of COVID-19-induced *force majeure*; and supply chain disruptions, especially for import/export controlled transactions.

B. FIRS "Tax Palliatives"

In the course of 2020, the FIRS severally announced certain concessions to taxpayers following the disruptions caused by the COVID-19 pandemic; some were revised or extended, reflecting the evolving circumstances.³¹ Key TP-related highlights of the FIRS' palliatives are as follows:

- Extension of time for filing monthly VAT and WHT returns and remittances from the 21st to the last working day of the month, following the month of deduction.
- FIRS' acceptance of unaudited accounts for filing by taxpayers, provided the audited accounts are filed within two months after the revised filing due date.
- Waiver of Late Returns Penalty (LRP) for taxpayers who pay early but file their returns subsequently, while supporting documents could be emailed to FIRS' designated email addresses or hard copies submitted later to the FIRS by those unable to use email.
- Extension of time for filing CIT returns by one month. This meant that a December 31 year end that would normally require filing by June 30 could be filed by July 31, 2020. However, on July 30, the deadline was further extended by one week to August 7, 2020. Since the TP Declaration under Reg 13(3) TPRs 2018 and disclosures of controlled transactions under Reg 14 are to all intents and purposes also "CIT returns," this extension should also cover TP compliance requirements. However, taxpayers can, if necessary, still take advantage of the Reg 15 provision for application for an extension of time, subject to stated conditions: application within the extended deadline and showing good cause (COVID-19). This is because the effect of Reg 15(3) is that non-compliance within any extension will trigger the stipulated administrative penalties "as if no extension was granted."

³¹ See also FIRS various Public Notices, and related news items, including: "Update on the Palliative Measure to Cushion the Effects of COVID-19 on Taxpayers No.3:" <https://twitter.com/firsNigeria/status/1255640505259606017/photo/1>; <https://assets.kpmg/content/dam/kpmg/ng/pdf/tax/firs-announce-additional-palliative-measures-in-response-to-covid19-pandemic-30042020.pdf>; "Further Update on COVID 19 Palliative No 5: Extension of Deadline on Penalty and Interest Waiver:" <https://taxaide.com.ng/resources/federal-inland-revenue-service-firs/#>; "COVID-19: Further Palliative Measure No 4: Extension of AEOI-CRS Reporting Dateline for Financial Institutions:" <https://twitter.com/firsnigeria/status/1262713944889790465> and <https://assets.kpmg/content/dam/kpmg/ng/pdf/tax/firs--extension-of-aeoifiling-deadline.pdf>; "Further Update on Covid-19 Palliatives No.6: Final Deadline on Penalty and Deadline Waiver:" <https://assets.kpmg/content/dam/kpmg/ng/pdf/tax/firs-public-notice-on-final-deadline-on-penalty-and-interest-waiver.pdf>; "Tax Waivers Windows Close Dec 31, 2020:" <https://pwcnigeria.typepad.com/files/firs-tax-waiver-notice-2020.pdf> Iheanyi Nwachukwu, "COVID-19 Pandemic: FIRS Announces Additional Palliative Measures for Taxpayers," BusinessDay, 22nd April 2020: <https://businessday.ng/news/article/covid-19-pandemic-firs-announces-additional-palliative-measures-for-taxpayers/>; "FIRS Launches e-filing Portal for Transfer Pricing," Proshare, 31.03.2020: <https://www.proshareng.com/news/Taxes%20&%20Tariffs/FIRS-Launches-e-Filing-Portal-for-Transfer-Pricing/50219>; Bassey Udo, "COVID-19: FIRS Unveils Automated Tax System to Boost Revenue Collection," Premium Times, 18th March 2020: <https://www.premiumtimesng.com/business/business-news/382506-covid-19-firs-unveils-automated-tax-system-to-boost-revenue-collection.html> (all accessed between February 1 and 14, 2021).

- E-filing and emailing of tax returns (including TPD) to designated email addresses -- the former for all registered taxpayers on FIRS' e-filing platform, efiling.firs.gov.ng and the latter depending on: the sector, the categorization of the taxpayer (large, medium, small or micro), and tax types. The FIRS also encouraged the utilization of its other e-platforms for relevant taxpayer compliance actions. Particularly relevant is the FIRS e-TP filing portal, transferpricing.firs.gov.ng launched in March 2020, which taxpayers can register to use in filing all their TPD, starting with the 2020 year of assessment documents in 2021. Since this automation is an obvious improvement over the manual process, this initiative further facilitates the payment of taxes in Nigeria.³²
- Seamless desk reviews and task audits -- "This would be a vide publication on the FIRS' website of related information requests and creation of a portal where such information can be uploaded to the FIRS' 'database for online access review desk.'

C. Waiver of Penalties/Interests on Outstanding Tax Debts

Tax arrears arising from desk review audits and investigations will qualify for waivers of related interest and penalties if such arrears are paid in full on or before May 31, 2020. This was later extended to June 30, 2020, widened to include defaulters under installment plans in the VAIDS tax amnesty program, and further extended to August 31, 2020. Following further extensions, the FIRS announced, vide a December 2020 notice, that the waiver window for such interest and penalties will close on December 31, 2020.

D. Extension of Reporting Deadline, Re: Automatic Exchange of Information-Common Reporting Standard (AEOI-CRS) by Financial Institutions (FIs)

Under the Income Tax (Common Reporting Standard) Regulations 2019, FIs were to file their reports by May 31, 2020. In recognition of the COVID-19 restrictions justification for requests for extensions made by FIs, the FIRS extended the AEOI-CRS reporting deadline to September 30, 2020.

What Can We Expect in 2021?

Anticipated TP developments or issues include the following:

A. Optimal TP Compliance/Risk Management

Given the *Plastichem* decision, the likelihood that the FIRS will take an aggressive TP enforcement posture, especially with a view to improving its revenue collection profile, and the contentious nature of TP generally, the authors envisage that affected taxpayers will be paying closer attention to their TP issues. This is likely to be reflected largely in a focus on optimal compliance, especially by way of robust TPD. The FIRS' e-TP portal should make compliance easier for taxpayers, but on the other hand may well make the FIRS less sympathetic to taxpayers' compliance defaults, resulting in potential exposure to significant TP penalties.

The above becomes even more relevant in light of the import of the FA2 2020 amendments to the Nigerian tax legislation, which took effect from January 1, 2021. These provisions will complement extant TP specific regulatory requirements. For example, section 52 FA2 2020 introduces a new section 26(1)-(3) FIRS

³² See the login page of the website at: <http://transferpricing.firs.gov.ng/login.php> (accessed February 14, 2021).

(Establishment) Act³³ (FIRSEA) that gives more enforcement powers to the FIRS, with stiff sanctions for default.³⁴ New confidentiality provisions also provide assurances regarding the protection of business sensitive information submitted to the FIRS.³⁵

B. Increase in TP Disputes and Tax Appeals

Following the decision in *Plasticem*, the pioneer TP tax case in Nigeria, there is likely to be a flurry of TP disputes, including some arising from the FIRS' reaction to MNEs' COVID-19-induced treatment of controlled transactions, which taxpayers may find objectionable. It is possible that many of the disputes will be resolved at the level of the FIRS's internal Decision Review Panel (DRP, pursuant to Reg 21 TPRs 2018), obviating the need for full-blown appeals to be determined by the TAT.

C. Defense of Covid-Related Controlled Transaction by MNEs

It is foreseeable that MNEs will need to deal with FIRS scrutiny of their controlled transactions, especially Covid-related adjustments by way of reduced revenues/profit margins; taxpayers will have the onus of convincing the FIRS that reduced margins/earnings arise from the disruptive economic conditions due to

³³ Cap. F34, LFN 2004.

³⁴ Section 26(1) FIRSEA empowers the FIRS, "for the purposes of obtaining full information in respect of the taxation of an individual, company or any person or for the purpose of performing any function conferred on it by this Act" to give notice to any individual, company or person requiring them "within the time specified by the notice" - to complete and deliver such specified return; appear personally before an officer of the FIRS; "produce or cause to be produced for examination, books, documents or records at the place and time stated in the notice, which time may be from day to day or for such period as the [FIRS] may deem necessary;" "provide orally or in writing, any information specified in such notice;" "grant the [FIRS] access to records, data or information stored or otherwise residing in computers or other electronic devices...." (Ss 26(1) (a) - (e)). While the time specified in such a notice may not be less than 30 days from the date of service of the notice, compliance default, where it relates to a tax liability, attracts a penalty of 10% of the tax liability and interest at the prevailing Central Bank of Nigeria minimum rediscount rate or ₦25,000 and ₦10,000 as first and subsequent months' penalties, where the contravention relates to other issues (ss.(2) and (3)).

³⁵ By virtue of new sections 39(1) and 50(5) FIRSEA, the confidentiality of taxpayer information is guaranteed (unauthorized disclosure of such taxpayer information is made a criminal offense, attracting financial penalties), but there is a carve-out for disclosure to authorized foreign officials in furtherance of any co-operation agreement with any other country, government or tax authority. This provision (on assurances as to the confidentiality of taxpayer information) is helpful given the mandated detailed TP information requirements. Section 69 FIRSEA (vide section 56(a) FA2 2020) comprehensively defines taxpayer information to include information: (i) received or generated by the FIRS under extant legislation; (ii) in any form received, accessed or produced by the FIRS under any exchange of information agreement or arrangement; and (iii) "written or electronic documents, returns, assessments, lists and copies of such lists relating to profits or items of profits of any person or to such matter which forms the basis of any agreement or arrangement with any country, government or tax authority."

COVID-19 and not from transfer mispricing that would be deemed to be non-arm's length during normal times.³⁶

D. Increase in TP Audits and Investigations

There is a likelihood of increased TP audit and investigation activity (especially in the form of desk and online reviews, due to newly-introduced online initiatives designed to facilitate seamless FIRS TP audits and investigations) as a consequence of a more energetic TP enforcement climate. The authors expect taxpayers to take advantage of recently launched online resources, including the e-TP portal in this regard. The FIRS continues to be under pressure to deal with transfer mispricing by MNEs.³⁷

E. Increased Automation of Tax Collection and Administration

COVID-19 has demonstrated that the sustained rollout of the FIRS automation strategy is imperative to the seamless optimization of tax administration and compliance. The FIRS's online footprint expanded in 2020 with a number of portals coming online. At the FIRS 1st National Tax Dialogue held on January 21, 2021, participants unanimously reiterated the need for an automated tax collection and administration system. Further digitalization of the tax collection and administration system aimed at widening the tax base while reducing compliance risk and BEPS activities is therefore to be expected.³⁸ However, there were glitches on the FIRS website at the time of writing.³⁹

F. Penalties

MNEs that fail to meet the compliance requirements are subject to various FIRS penalties, as provided under Reg. 20 TPRs 2018, the penalties being much higher than under its predecessor, the TPRs 2012. In 2018, the

³⁶ Reg 27 TPRs 2018 defines the "arm's length principle" as meaning "the principle that the conditions of a controlled transaction should not differ from the conditions that would have applied between independent persons in comparable transactions carried out under comparable circumstances."

³⁷ Against the backdrop of the news that Nigeria lost over US\$178 billion dollars to illicit financial flows, mostly due to transfer mispricing, between 2007 and 2017, tax experts have advised the federal government to adopt tighter TP rules. See, e.g., James Emejo, "FIRS: Nigeria Lost ₦5.4tn to Tax Evasion By Multinationals," ThisDay, January 12, 2021: <https://www.thisdaylive.com/index.php/2021/01/12/firs-nigeria-lost-n5-4tn-to-tax-evasion-by-multinationals/>; Nume Ekeghe and Dike Onwuamaeze, "To Stem Tax Evasion, Experts Seek Tighter Transfer Pricing Regulation," ThisDay, January 15, 2021: <https://www.thisdaylive.com/index.php/2021/01/15/to-stem-tax-evasion-experts-seek-tighter-transfer-pricing-regulation/> (both accessed February 14, 2021).

³⁸ At the event, the President also directed Federal Ministries, Departments and Agencies (MDAs) to grant the FIRS access to their systems: Terhemba Daka, "Buhari Directs FIRS to Enforce Compliance With Tax Payment," The Guardian, January 21, 2021: <https://guardian.ng/news/buhari-directs-firs-to-enforce-compliance-with-tax-payment/> (accessed February 14, 2021).

³⁹ FIRS, "Experts, Stakeholders Canvass Tax Automation at FIRS:" <https://www.firs.gov.ng/experts-stakeholders-canvass-tax-automation-at-firs-dialogue/>, which, like many pages on the FIRS website, returned an error message (last access attempt was made on February 22, 2021).

FIRS issued a Public Notice on the TPRs 2018 announcing its intent to apply the penalty regime strictly.⁴⁰ Furthermore, the introduction of the CbC Reports and CRS filings means that the FIRS will be better equipped to oversee various TP issues, especially violations.⁴¹

However, issues may arise as to whether extant conditions justify the imposition of penalties. For example, Reg. 11(1) of the CRS Regulations provides for circumstances in which there will be an exemption from administrative penalties: "...that there is a reasonable excuse for such omission or failure"; Reg. 11(3) CRSRs states that: "where a person had a reasonable excuse for a failure but the excuse has ceased, the person shall be treated as having continued to have the excuse, *provided the failure is remedied within a reasonable time after the excuse ceased.*" [Emphasis added.] If and to what extent the FIRS will wish to exercise its discretionary powers (for example, for extension of time) in the taxpayer's favor will thus be a question of facts and circumstances. The exercise of such powers amounts to a "decision" or "action" that could be the subject of a tax appeal under the FIRSEA.

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⁴⁰ See Paras 5 and 6, FIRS' Public Notice Income Tax (Transfer Pricing Regulations) 2018 on TPRs 2018: "5. The Service, by this notice, grants relevant taxpayers up to 31st December 2018 to fulfil all pending obligations pertaining to filing of TP declaration, making disclosures of controlled transactions, submission of TP Documentation, etc. 6. The administrative penalties imposed by the TP Regulations shall be fully visited upon any taxpayer who neglected or failed to comply with required obligations by the set date of 31st December 2018." <https://taxaide.com.ng/files/FIRS%20Public%20Notice%20on%202018%20Transfer%20Pricing%20Regulations.pdf> (accessed February 14, 2021).

⁴¹ Reg.10 CRSRs provides an administrative penalty of: (i) ₦10 million for the first month of each default and ₦1 million for every month in which the failure continues, where a taxpayer fails to comply with a duty or obligation imposed by the Regulations or where a Reporting Financial Institution (RFI) fails to file an Information Return as and when required under Reg. 5 CRSRs; (ii) ₦5 million for providing a false statement/report/declaration/ information or omission regarding the Information Return under Reg. 5 CRSRs; (iii) ₦1 million in the first instance and ₦100,000 for each subsequent day on which the failure continues, where an RFI or person fails to comply with the FIRS' requirements in the exercise or performance of its powers or duties under the Regulations; and (iv) ₦10 million in the first month in which the failure occurs and ₦1 million for every subsequent month in which the failure continues, where an RFI fails to keep records in accordance with Reg.6 CRSRs.



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