



## New (draft) Decree - transfer pricing (“TP”) and new limits on interest deductibility

On 2 June 2020 the Ministry of Finance (“**MoF**”) issued a new (draft) TP decree as well as proposed changes to interest deductibility rules for public comment (“**Draft Decree**”). Once adopted, the Draft Decree will replace existing Decree No. 20/2017/ND-CP (“**Decree 20**”) and is likely to take effect from 1 July 2020.

In this TaxAlert, we highlight some key proposed changes to transfer pricing and interest deductibility rules.

### 1. New interest deductibility cap

The Draft Decree proposes substantial changes to this cap as follows:

- Interest expense is calculated as net interest (i.e., interest expense net of any interest income). The offset of interest income against interest expense was not addressed in Decree 20.
- The cap is increased to 30% of EBITDA (from 20% of EBITDA under Decree 20).
- Non-deductible interest expense can be carried forward for use in future years within a five (5) year limit, provided that the interest expense of the future years does not exceed the cap.
- Certain government assistance loans are exempt from this interest limitation rule.

Unfortunately, the question of interest, which is capitalized and not expensed, is not specifically addressed in this Draft Decree and so remains an area of uncertainty.

### 2. The use of commercial database

The Draft Decree nominates the use of commercial and public databases by both taxpayers and tax authorities alike. Further, the Draft Decree limits the use of internal databases by tax authorities (i.e. ‘secret’ comparable data) to risk assessment and planning for tax inspection / investigation.

However, the Draft Decree still includes a provision which gives tax authority the power to use internal databases to make a TP adjustment in cases where a taxpayer is deemed not fully compliant with “*accounting, invoicing and evidencing documents, or regulations on handling of tax violations*”. In fact, during the application of Decree 20, this normally resulted in controversy between tax authorities and taxpayers, hence disputes.

### 3. Arm’s length range

The Draft Decree proposes the arm’s length range to be from the 35th percentile to 75th percentile. Accordingly, the lower bound of the arm’s length range has increased (previously 25th percentile).

Therefore, taxpayers need to reevaluate their transfer pricing policies going forward, as well as supporting benchmarking analyses, in order to comply with the new requirements. Otherwise, the tax authorities may impose a transfer pricing adjustment should the results of the taxpayer fall below this new arm’s length range.

### 4. Enhanced requirements on Country-by-country Report (“CbC Report”)

There are modified requirements for CbC Report filing and submission. The key proposed changes include:

- For a Vietnamese ultimate parent company (with worldwide consolidated revenue in a fiscal year exceeding VND 18,000 billion), it is required to file the CbC Report within 12 months from the end of the relevant fiscal year

- For a Vietnamese taxpayer with a foreign parent company, CbC Report filing is not required to be filed locally, if the CbC Report is available to the Tax Authorities through automatic exchange of information process.
- However a Vietnamese taxpayer is required to submit the CbC Report locally within 12 months from the end of relevant fiscal year in the following circumstances:
  - The ultimate parent is not obliged to submit the CbC Report in its respective jurisdiction;
  - The jurisdiction, where the ultimate parent resides, has an international tax agreement with Vietnam but does not have Multilateral Competent Authority Agreement (on the automatic exchange of information) with Vietnam as at the CbC Report submission deadline;
  - The jurisdiction, where the ultimate parent resides, has a Multilateral Competent Authority Agreement with Vietnam, but has suspended the automatic exchange of information mechanism or not successful in automatically providing Vietnam the CbC Report.
  - In situations where there is more than one taxpayer of the same group in Vietnam, the ultimate parent has to notify the Vietnamese tax authorities of the entity (i.e., which local taxpayer) that is appointed to file the CbC Report on behalf of the ultimate parent. Such notification has to be submitted before or on the fiscal year end date of the ultimate parent.

Importantly, the Draft Decree prohibits use the information obtained from the CbC Report by the Tax Authorities for the purpose of making tax adjustments.

## 5. Other notable points

- Taxpayer engaged in related party transactions solely with domestic (related) parties, would be relieved from preparing TP documentation under this Draft Decree, under the condition that tax payer and related parties have the same tax rate and none of the parties enjoys tax incentives
- Tax authorities must also allow taxpayers to explain and defend the use of independent comparables in transfer pricing documentation.

As the new TP decree is expected to be released by the end June 2020 and take effect from 1 July 2020, we strongly recommend that taxpayers study the draft and actively assess the potential impact on their business and tax controls, and consider implementation plans in advance. Any comment on the draft decree can be submitted directly to the MoF. Alternatively, you can contact KPMG to share your comments and suggestions so that we can incorporate your valuable ideas into KPMG’s submission to the MoF.

Should you require any further information or support, please contact KPMG advisors.

## Contact us

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Please contact us if you have any questions:

<p><b>Hanoi</b></p> <p>46<sup>th</sup> Floor, Keangnam Hanoi Landmark Tower, 72 Building, Plot E6, Pham Hung Street, Cau Giay New Urban Area, Me Tri Ward, South Tu Liem District, Hanoi, Vietnam</p> <p><b>T:</b> +84 (24) 3946 1600 <b>F:</b> +84 (24) 3946 1601 <b>E:</b> kpmghanoi@kpmg.com.vn</p>	<p><b>Ho Chi Minh City</b></p> <p>10<sup>th</sup> Floor, Sunwah Tower, No. 115, Nguyen Hue Street, Ben Nghe Ward, District 1, Ho Chi Minh City, Vietnam</p> <p><b>T:</b> +84 (28) 3821 9266 <b>F:</b> +84 (28) 3821 9267 <b>E:</b> kpmghcmc@kpmg.com.vn</p>	<p><b>Danang</b></p> <p>Unit D3, 5<sup>th</sup> Floor, Indochina Riverside Tower, No. 74, Bach Dang Street, Hai Chau 1 Ward, Hai Chau District, Danang, Vietnam</p> <p><b>T:</b> +84 (236) 351 9051 <b>E:</b> kpmgdanang@kpmg.com.vn</p>
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