

## **CROSS-BORDER TAX IN AFRICA**

Transfer pricing in the time of tax  
evolution – what **2023** may hold



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## Introduction

In 2022, the focus within the TP sector (and business as a whole, it could be argued) has moved on from predominantly being concerned with COVID-19 related matters to broader issues, ranging from global tax reform to new technologies and their implications, as well as managing the increased revenue authority interest in cross-border taxation.

Produced with multinational entities (MNEs) and revenue authorities in mind, this year's report from Graphene Economics explores some of the significant themes from the past year, as well as looking forward to what the future holds for 2023 and beyond. We hope you find it insightful.

### SAMPLE DETAILS

In 2021, Graphene Economics created our inaugural annual survey on transfer pricing (TP) in the African context with the goal of tracking trends in the industry to share with our clients, associates and the various stakeholders in our sector. In this, our second edition of the survey (and third of our annual report on the state of TP), we

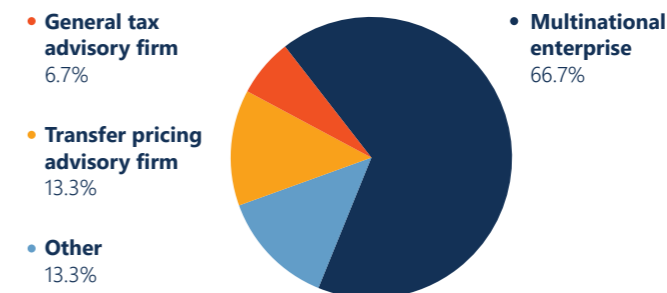
tweaked our questions slightly and added a few news ones, learning from our first efforts and striving to improve.

We had a total of 40 respondents, comprising individuals working across four African countries. These included representatives from MNEs headquartered in Africa, Europe, North America, the United Kingdom and Asia, as well as individuals from tax consulting firms, revenue authorities and academics.

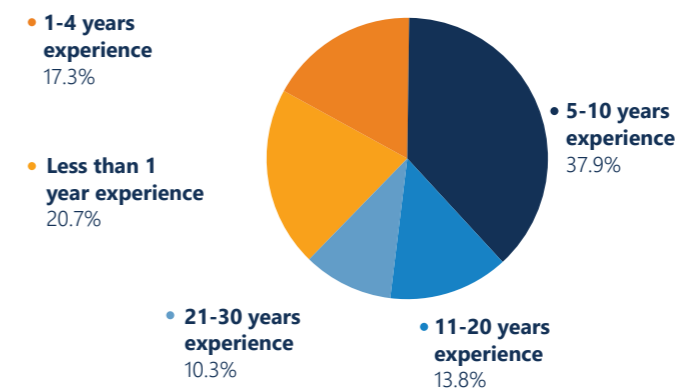
Our survey data once again showed a direct correlation between MNE size and the size of the organisation's TP team. Interestingly, in large organisations with three or more TP team members, the feeling was that TP is appropriately prioritised, whereas in organisations with only one TP team member, the feeling was that TP needed to be given more attention.

Of the respondents, the majority (52%) have between 5 and 20 years of TP experience and are managers or senior managers within their organisations.

### Graphene Economics 2022 TP survey Respondents by industries and organisation type



### Graphene Economics 2022 TP survey Respondents by experience

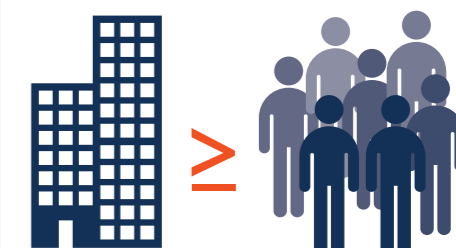


### Transfer pricing team size to MNE size

Less than USD 0.2 billion  
team of 1 or less



Less than USD 0.67 billion  
team of 1 or more



## TP trends and challenges

Of MNE representatives surveyed, the top three most significant TP trends in 2021 were listed (in order of significance) as more frequent and rigorous audits, global tax reform, and adoption of technology. In 2022, this changed to increased information sharing between revenue authorities in different countries, more frequent and rigorous audits and taxation of digital transactions.

With regards to the increased information sharing between revenue authorities, there are various ways this is taking place. For example, automated exchanges of Country-by-Country Reporting (CbCR) are one mechanism. Another is that countries that have double taxation agreements with one another may exchange certain tax information.

At the same time, a country might introduce specific legislation with the aim of improving access to information. For example, in South Africa, record-keeping requirements were introduced by the South African Revenue Authority (SARS) a few years ago, defining the data taxpayers need to keep on hand for their TP submissions. Several countries have also updated their legislation in recent years to include more information on taxpayers' cross-border transactions.

When it comes to the trend of more frequent and rigorous audits, at Graphene Economics we've seen a definite improvement in the quality of audits we're

dealing with from revenue authorities, which suggests more robust reviews are taking place. We know that several revenue authorities are working on skills development and capacity building related to TP, and this is evident in their audits.

If we look at services-based MNEs, we see a reversal in a trend from 2021, where the challenge of data quality ranked as a low priority. However, in 2022, this jumped to one of the most significant issues organisations are facing, and that might be as a result of the more frequent and rigorous audits. It may also be due to the expectation of business leaders that data be used better to identify trends, opportunities and risks. The trends reveal that revenue authorities are looking for more granular data and that sometimes an audit will go back several years, and that data may no longer be available or easily accessible. As one official from a revenue authority recently told us during a transfer pricing audit, "It all comes down to evidence." This means that it will increasingly be necessary to obtain relevant financial and other business data to be able to substantiate the position taken by the taxpayer.

### Capacity development efforts by the UN

Emily Muyaa, Chief of the Capacity Development Unit at the United Nations (UN) Financing for Sustainable Development Office, explains that as part of its capacity development strategy for tax, the UN is organising practical and integrated trainings for governments on dispute avoidance and resolution, based on guidance developed by the UN Tax Committee in the Handbook on Dispute Avoidance and Resolution. The trainings will focus on various aspects including mutual agreement procedures, and Advanced Pricing Agreements (APAs). They will take place in every region around the world, and Africa is part of the 2023 schedule.

The UN Transfer Pricing Manual was also updated in 2021 and includes some new guidance. For example, Emily says, there is now a chapter on financial transactions – another critical topic for developing countries. A new section on centralised procurement has also been added to the chapter on intra-group services. The guidance on procurement was specifically developed in response to requests by many developing countries, notably from Africa.

### Top 3 most significant trends 2021 v 2022

#### 2021

- More frequent and rigorous audits
- Global tax reform
- Adoption of technology

#### 2022

- Increase information sharing between revenue authorities in different countries
- More frequent and rigorous audits
- Taxation of digital transactions

### Top 3 most significant trends: service MNEs vs goods MNEs



#### Services MNE top 3 trends

- Taxation of digital transactions
- Increased information sharing between revenue authorities in different countries
- More frequent and rigorous audits



#### Goods MNE top 3 trends

- More frequent and rigorous audits
- Global tax reform
- Increased compliance requirements

While there is no easy fix for this, at Graphene Economics, we're advising clients to ensure they improve their data collection and record-keeping to avoid future challenges related to data quality. For example, as intra-group services continue to be a focus area for revenue authorities, we suggest that MNEs record appropriate evidence to substantiate services rendered and to ensure that

charges are warranted in a way that meets revenue authority requirements.

This goes beyond having an intercompany agreement in place and requires actions such as ensuring all invoices are correctly captured and filed, business decisions are documented for future reference, and adequate levels of detail and actual evidence is available to justify services rendered.

**A note on intra-group services**

Emily Muyaa explains that there have been recent developments in transfer pricing of intra-group services, especially around the OECD Base Erosion and Profit Shifting (BEPS) Project, focused on "low value-adding services" (LVAs). The recommendation for a simplification measure for LVAs is contained in both the OECD Transfer Guidelines and the UN's Practical Manual on Transfer Pricing. The objective of this measure, which provides for a reimbursement of costs involved in rendering LVAs and a modest cost-plus mark-up, was to try to simplify transfer pricing compliance for MNEs and administration for tax authorities. However, there has been a relatively low uptake of it by countries in Africa. As far as Emily is aware, only Zambia has something in their regulations on this. Aside from LVAs, she believes intra-group services generally continue to be a big issue on the continent in terms of two broad angles – withholding tax and transfer pricing.

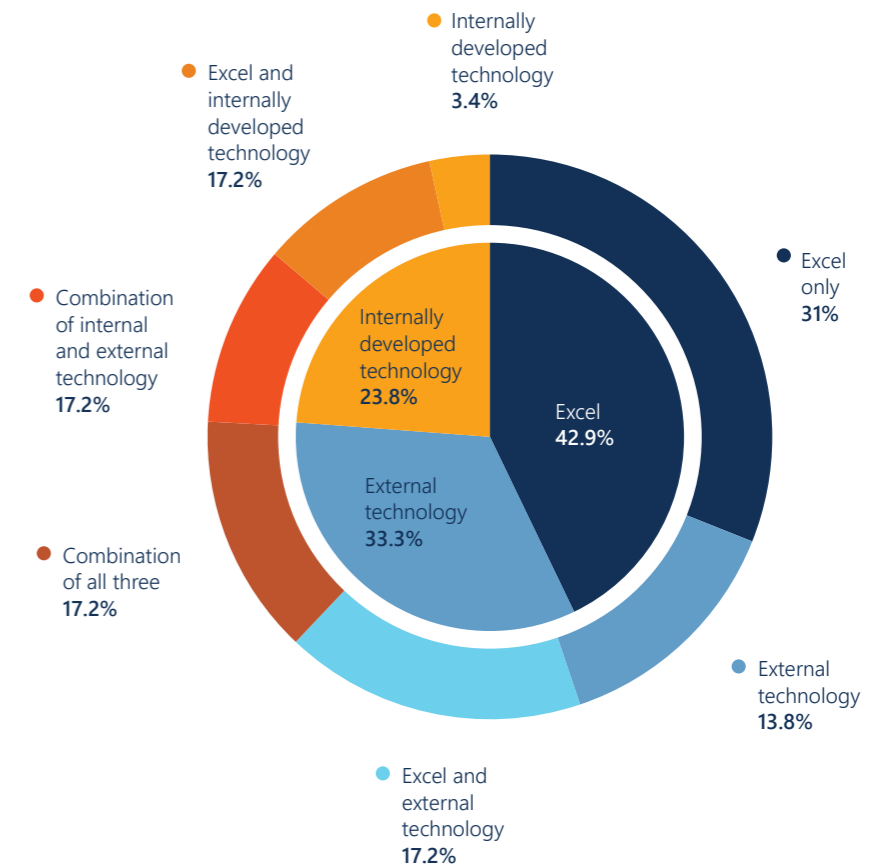
Looking at this from a transfer pricing perspective, most MNEs rely on intra-group services in one way or another for the sake of operational efficiency. When we see transfer pricing audits that flag intra-group services, it usually relates to centralised services for certain parts of the business. For example, it may make sense to use shared IT or HR services for the whole group. This could be because certain skills are not widely available in each country in which the MNE operates, to create synergies and uniformity within the group, or purely as a cost-saving measure. But there are tax complications that need to be considered.

Most businesses don't keep detailed time-sheets for every employee who is involved in rendering services to group companies. Given that most tax audits also happen a few years down the line, it can often be difficult to remember why certain decisions were taken or to find specific evidence that tax authorities are requesting.

Companies that have cross-border related party transactions need to carefully consider their intercompany transactions to ensure that they are compliant with transfer pricing regulations in the various countries where they operate.

**What technology do you use to manage and calculate TP?**

- Internal ring is total technology usage
- External ring is specific usage breakdown in organisations



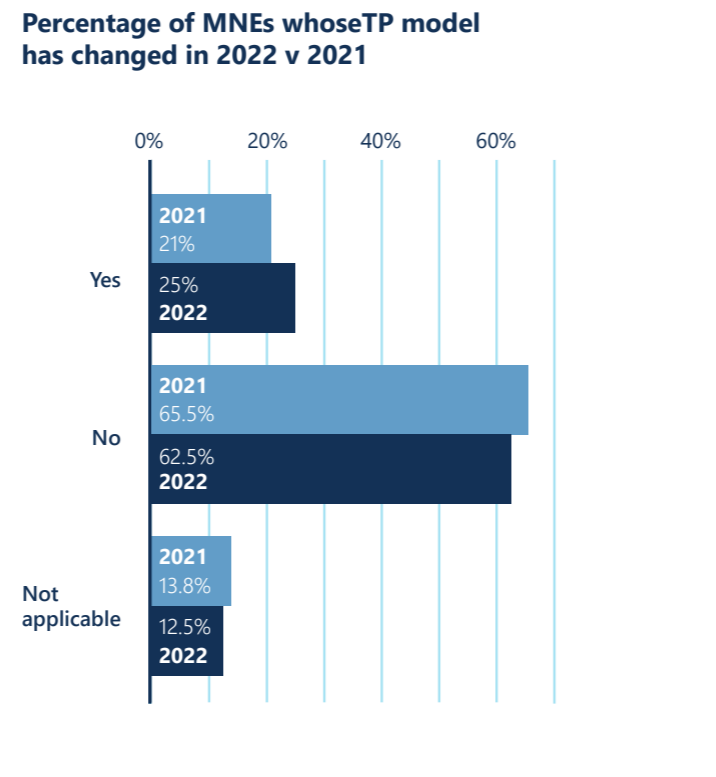
**COMPLIANCE CRUNCH**

As in the 2021 survey, our 2022 survey showed that the majority of TP professionals who responded found that compliance tasks occupied most of their time. While the specific tasks have changed slightly, the fact remains that many TP professionals spend valuable time on tasks that could be outsourced to a TP consultant or automated with TP technology tools.

At Graphene Economics, for many of our clients, that's a role we work to fill – assisting in managing their compliance needs so we can free up their time for more strategic work. We also offer recommendations on how clients can work differently to free up time to spend on strategic business aspects.

Something we're also keeping tabs on is the room for technology to simplify and improve how we all work. AI is developing rapidly. Technologies such as the chatbot ChatGPT, launched by OpenAI in November 2022, which is a programmable artificial intelligence application, are being successfully used for everything from writing business emails to simplifying large report documents. Soon, we believe, we'll start to see AI applications in tax too, particularly in compliance.

Graphene Economics continues to work to ensure we are able to support clients with their technological needs.



### CHANGING TP MODELS

We've seen a spike in the number of respondents who said their organisations' TP transaction models have changed over the course of 2022 versus 2021.

This could be because businesses are starting to move forward again after pausing many aspects during the height of the COVID-19 pandemic. Another reason for the change is the response to the increase in TP audits from tax authorities. Companies are re-evaluating their models and changing them as required to meet regulatory requirements and to avoid disputes down the line. There was a significant spike in M&A deals and activity in 2021, so changes to TP models may also have been in response to this trend<sup>1</sup>.

Technology is also facilitating new opportunities and business models in many industries, which necessitates a rethink. For example, tech companies that were launched

during the early phases of COVID-19 might have grown substantially and be expanding cross-border, which means exploring how to set up in new countries and meet new sets of requirements.

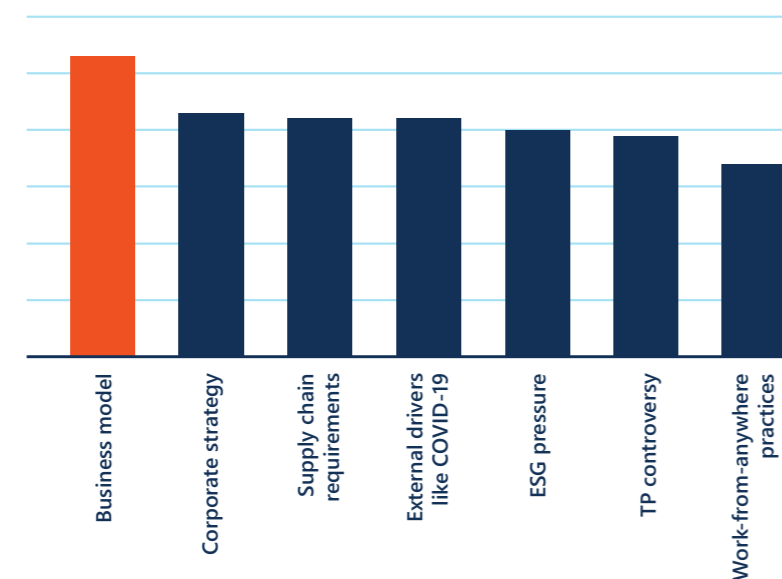
From a Graphene Economics perspective, we're also encouraged by the fact that many of our interactions with MNEs are happening at more senior levels, seeming to suggest that TP is becoming a priority with CFOs and board members, rather than the sole domain of the tax department. COVID-19 certainly shifted risk models, and it appears that cross-border tax is being recognised as a potentially significant business risk at senior management level.

Respondents in the 2022 survey said that, over the next year, the drivers of changes to their TP transaction models would likely be business model, corporate strategy and supply chain changes or requirements.

<sup>1</sup> <https://www.mckinsey.com/capabilities/m-and-a/our-insights/global-m-and-a-market-defies-gravity-in-2021-second-half> and <https://www.mckinsey.com/capabilities/m-and-a/our-insights/global-m-and-a-market-slows-in-2022-first-half-but-shows-signs-of-strength>.

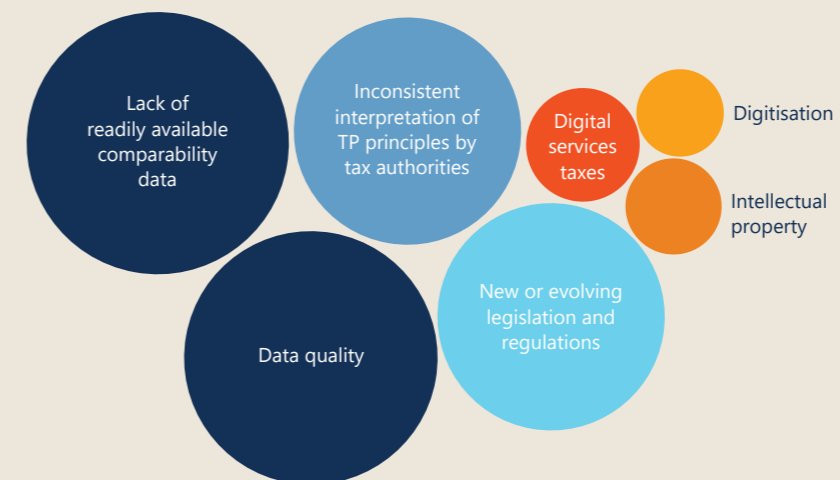
### What will drive changes to your organisation's approach to TP strategy over the next 12 months?

Responses



### Scale of challenges experienced with regard to the following TP matters in the past 12 months

● blues are the challenges experienced most  
● oranges are the challenges experienced least



**Talking TP at the top**

*While external factors, such as changing regulation and an increased focus from tax authorities, might be helping to move TP up the priority list within MNEs, there's also an important strategic role that internal TP professionals should play.*

*Most MNEs that are required to consider TP will employ somebody with a TP background within their tax team to oversee their cross-border taxation. However, it's easy for this person to get sucked into the minutiae of compliance requirements. Instead, we suggest, this person should be equipped with the resources and scope to fulfil the role of an internal TP champion.*

*Elevating TP within the business helps to mitigate potential risk and controversy within the business, and ensure TP is undertaken with a strategic lens.*

*Your TP champion needs support from not only the Head of Tax, but the CFO and board. Given the ever-increasing compliance burden and the changing regulations (both country-by-country and globally), they also need to be able to tap into external expertise should they require it, leveraging the domain knowledge and wide-ranging experience that TP consultants can offer.*

*Our survey showed that most TP professionals rely on tax consulting firms to supply up-to-date, accurate and summarised information regarding developments in TP and cross-border tax.*

*Furthermore, within the taxation industry, stakeholders (including professionals, professional bodies, education institutions and regulators, among others) should be working to develop more TP skills, which remain scarce, and to build TP capacity in the African continent.*

**MORE CHANGE AHEAD**

Much has been written about the rapid changes that COVID-19 has wrought across industries and ways of working over the past three years. While it may seem as though we're now well into adapting to "the new normal", there are many changes likely to affect TP in the coming months and years.

Sustainability and climate change are pressing issues of our times, and as businesses grapple with them, there are sure to be tax implications. We're already seeing carbon tax coming into play around the world, and environmental, social and governance (ESG) objectives changing business value drivers, operating models and supply chains, among other things. This will have tax implications – particularly any business restructuring and changes to operational models – and TP models will need to be updated accordingly.

Emily Muyaa notes that it will be important to consider the transfer pricing considerations for CO2 certificates. The UN Tax Committee is considering this issue both from TP and pure environmental tax perspectives.

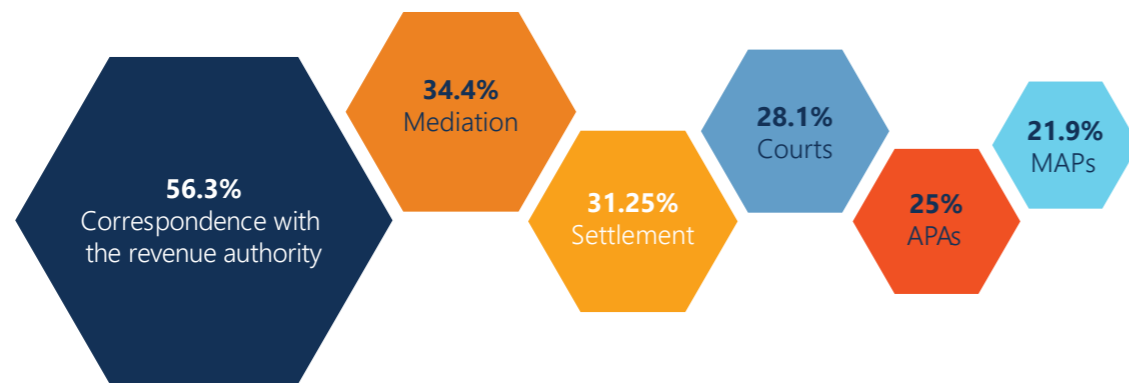
Macroeconomic and geopolitical factors will also continue to affect global economies and therefore MNEs and their tax strategies.

# TP disputes

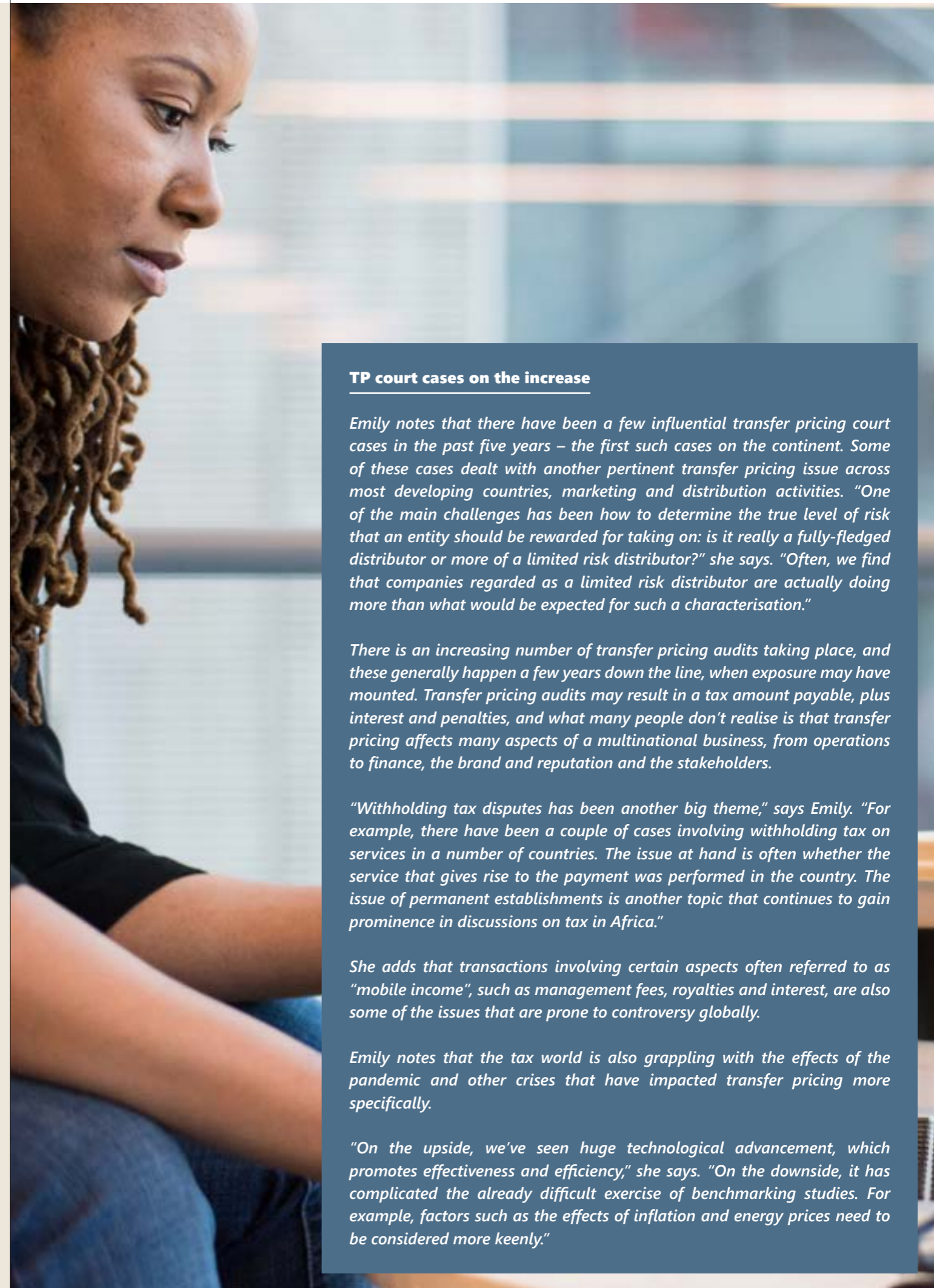
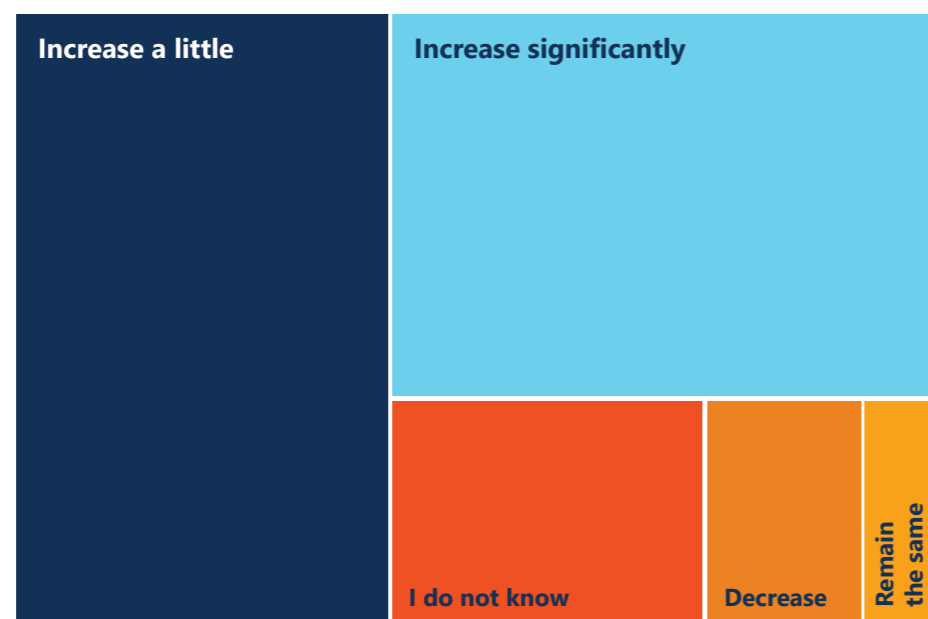
As in 2021, in 2022, the vast majority of respondents believe that TP disputes and controversies are likely to increase over the next 12 months.

Emily Muyaa says that dispute avoidance and resolution is a trend that has grown in Africa over the last five years.

Percentage of respondents which have used TP dispute resolution mechanisms in the last 12 months?



In the next 12 months, do you think the number of TP disputes and controversies will...



## TP court cases on the increase

Emily notes that there have been a few influential transfer pricing court cases in the past five years – the first such cases on the continent. Some of these cases dealt with another pertinent transfer pricing issue across most developing countries, marketing and distribution activities. “One of the main challenges has been how to determine the true level of risk that an entity should be rewarded for taking on: is it really a fully-fledged distributor or more of a limited risk distributor?” she says. “Often, we find that companies regarded as a limited risk distributor are actually doing more than what would be expected for such a characterisation.”

There is an increasing number of transfer pricing audits taking place, and these generally happen a few years down the line, when exposure may have mounted. Transfer pricing audits may result in a tax amount payable, plus interest and penalties, and what many people don’t realise is that transfer pricing affects many aspects of a multinational business, from operations to finance, the brand and reputation and the stakeholders.

“Withholding tax disputes has been another big theme,” says Emily. “For example, there have been a couple of cases involving withholding tax on services in a number of countries. The issue at hand is often whether the service that gives rise to the payment was performed in the country. The issue of permanent establishments is another topic that continues to gain prominence in discussions on tax in Africa.”

She adds that transactions involving certain aspects often referred to as “mobile income”, such as management fees, royalties and interest, are also some of the issues that are prone to controversy globally.

Emily notes that the tax world is also grappling with the effects of the pandemic and other crises that have impacted transfer pricing more specifically.

“On the upside, we’ve seen huge technological advancement, which promotes effectiveness and efficiency,” she says. “On the downside, it has complicated the already difficult exercise of benchmarking studies. For example, factors such as the effects of inflation and energy prices need to be considered more keenly.”

## ADVANCED PRICING AGREEMENTS

Advanced Pricing Agreements (APAs) are one mechanism that can help tax-paying entities to avoid disputes, audits, additional assessments or even double taxation. They can also reduce mutual agreement procedures (MAPs) and create an environment of tax certainty. However, there are currently only a few countries in Africa that we know of where there APA legislation has been drafted and/or implemented to date (Tanzania, Morocco, Nigeria and Uganda). Despite these programmes in place, Nigeria has not yet implemented the legislation and Tanzania has been reluctant to issue any APAs due to the lack of transfer pricing capacity. As for Uganda, there are no known cases of any issued APAs.

Within the BRICS countries, Russia, India and China have APA legislation. In addition, Australia, Canada, New Zealand and the United Kingdom – countries with similar tax regimes to South Africa – all have APA legislation in place. Furthermore, most EU countries have implemented APA programmes. It could therefore be said that South Africa has fallen behind its peers with regard to putting APA programmes in place.

In line with the Bilateral Advance Pricing Arrangement Manual (BAPAM), the Inclusive Framework has agreed the members should

start reporting annual statistics with respect to APAs. Such reporting will be published from 2024 onwards. These statistics will provide a more complete and more accurate picture of a jurisdiction's efforts to prevent and resolve transfer pricing disputes. To date, only the European Commission has provided statistics on the various APA programmes implemented by EU member states. HM Revenue and Customs (the non-ministerial department of the UK government responsible for the collection of taxes) is now also reporting on APA statistics.

In December 2021, SARS published a high-level model and draft legislative framework for an APA unit and associated processes at SARS, and the introduction of an APA programme. This follows a discussion paper consulted on in 2020 for the introduction of an APA programme to improve dispute resolution and tax certainty with respect to TP. SARS currently has an advance tax ruling system, although this does not cater for transfer pricing and cannot be used to request an APA or its equivalent.

If and when the APA programme comes into play in South Africa, we expect more MNEs with operations in the country to explore this as a potential dispute avoidance mechanism.

## Evolving regulation

One of the challenges that MNEs rated as significant in the survey is rapidly evolving regulation. As global tax reform continues, this includes broad, international changes, as well as country-specific amendments.

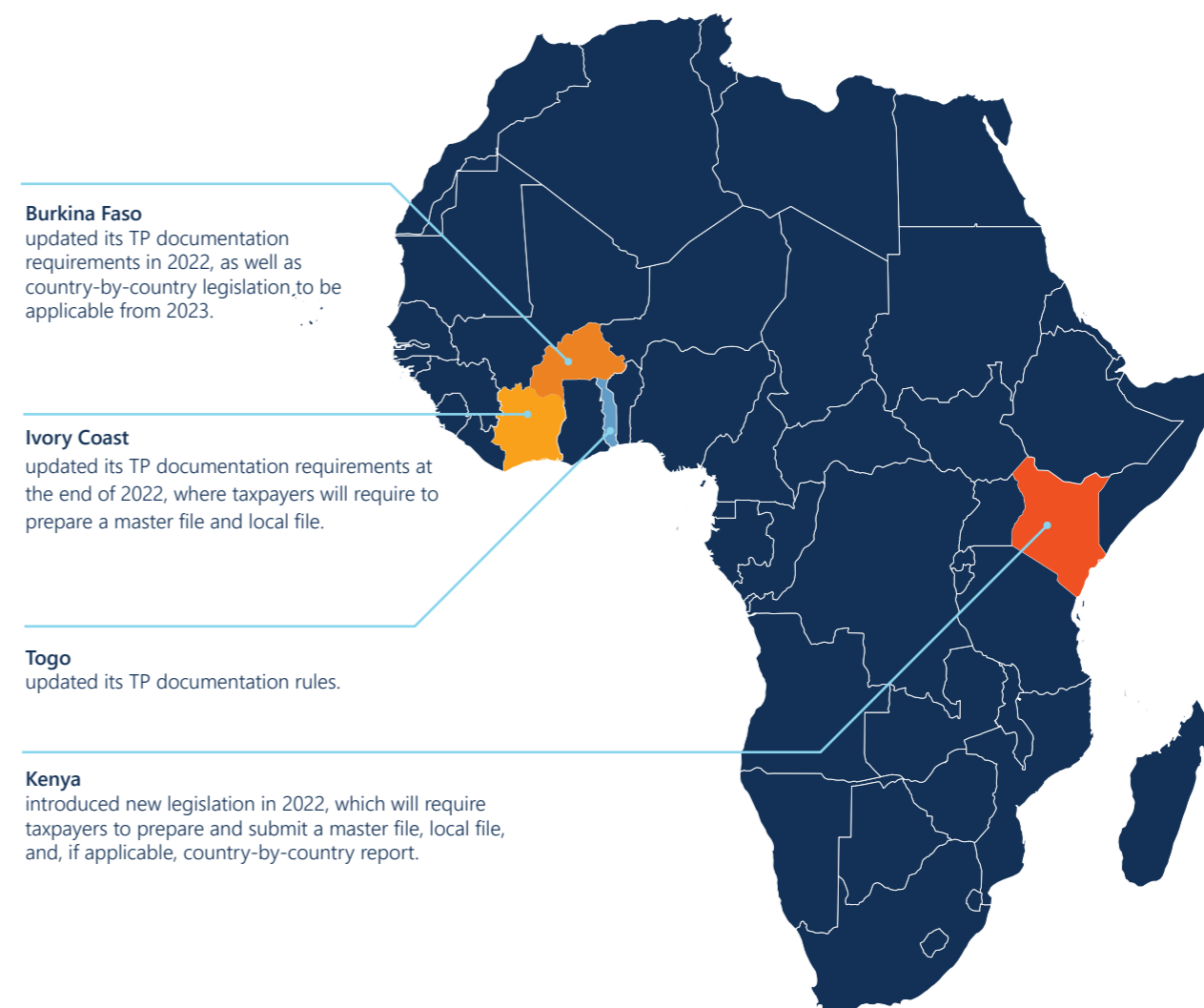
### CHANGES ACROSS AFRICA IN 2022

- Kenya introduced new legislation in 2022, which will require taxpayers to prepare and submit a master file, local file, and, if

applicable, country-by-country report.

- Burkina Faso updated its TP documentation requirements in 2022, as well as country-by-country legislation to be applicable from 2023.
- Togo updated its TP documentation rules.
- Ivory Coast updated its TP documentation requirements at the end of 2022, where taxpayers will require to prepare a master file and local file.

### Evolving regulation changes across Africa in 2022



## REALLOCATION OF TAXING RIGHTS AND GLOBAL MINIMUM TAX

On the global front, there have been developments relating to the OECD's proposal to address the tax challenges of globalisation and digitalisation, which it estimates will reallocate more than \$200 billion in taxing rights under Pillar I (equating to tax revenue gains of \$21-36 billion) and generate over \$220 billion in additional global tax revenues annually under Pillar II. However, we remain unconvinced that that will benefit developing countries (including most of Africa) as much as developed countries.

Since July 2021, 138 countries (accounting for more than 90% of the global economy) have agreed to the Two Pillar deal aimed at reallocating profits of MNEs, as well as ensuring companies pay a global minimum tax rate of 15%. The idea behind the new system is that it will benefit countries where a company's products and services are consumed, and not only the countries where the products or services are created. This is a response to the trend towards companies migrating income from intangible sources (such as digital services or intellectual property royalties) to low tax jurisdictions to avoid paying a higher tax rate in their "home" countries.

As Prof. Adrian Saville noted, speaking at an event on global minimum tax and new taxing rights in South Africa co-hosted by Graphene Economics at the Gordon Institute of Business Science (GIBS) in August 2022, "In this world of inflation, cost of living crisis, inequality, the evaporation of economic growth, and fiscal strain the matter of taxation is a critical conversation."

He pointed out that it's "the big tech guys" that have been accused of finding tax jurisdictions that ensure they pay very low tax rates. "We find some of the investment heroes of the last five years are also the tax shy," he noted, pointing out that over a decade Amazon paid an average tax rate of 12% versus the US tax rate of 21%.

While the proposed global minimum tax and new taxing rights, expected to be implemented from 2024, seems like a good idea for countries that have lost out on revenue collections from low tax arrangements, many developing countries (including South Africa and most African countries) are likely to have to give up any potential digital services taxes.

It is also worth noting that the updated impact assessment of the impacts of Pillar I and Pillar II presented by the OECD specifically scoped out the impact of companies having to forgo their digital services taxes. Developing countries therefore need to consider what they stand to lose, in exchange for limited potential benefit. This may explain why only 23 African countries have signed the deal to date.

**We need further impact assessment, urgently.**

However, dialogue on global minimum tax in South Africa and elsewhere on the continent has been very limited to date, which is concerning. We suggest that business, academia and National Treasury need to come together to undertake an economic impact assessment of Pillar One and Pillar Two for the South African context, and that similar discussions need to place in other developing countries.



**Global minimum tax in a nutshell**

In October 2020, the OECD released “blueprints” for a two-pillar solution to counter tax avoidance and manage the digitalisation of the economy, comprising two “pillars”.

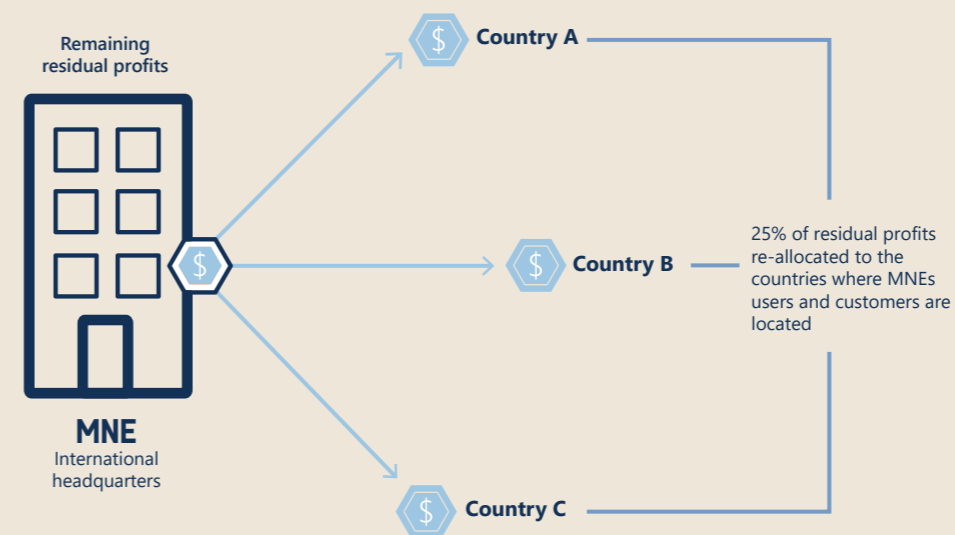
The objective of Pillar I is new taxing rights over MNEs regardless of physical presence. It will apply to multinationals with global turnover above 20 billion euros and with a profit margin above 10%.

Pillar II, which aims to ensure that MNEs pay a global minimum tax rate of 15%, will apply to those with global turnover above 750 million euros. Both of these pillars will have direct and indirect consequences for large multinationals operating across borders. It will affect companies whether they’re above the threshold or down the line, even those that are not above those thresholds. In addition, countries, particularly those in Africa, need to consider the impact of these proposals on the income tax incentive programmes, especially if these programmes have the potential to reduce the effective tax rate paid in a country to below 15%. The OECD highlighted they are looking to support emerging markets in understanding the impact of these proposals on their incentive programmes.

Under the new proposals, the benefits of tax havens have been considerably reduced. The ability for countries to tax digital revenue streams may require use of the VAT system if digital services taxes are abolished. If developing countries’ priorities are not taken into account and the solutions do not cater for them, we expect to see more aggressive revenue authority audits down the line.

**Overview of Pillar 1 and Pillar 2**

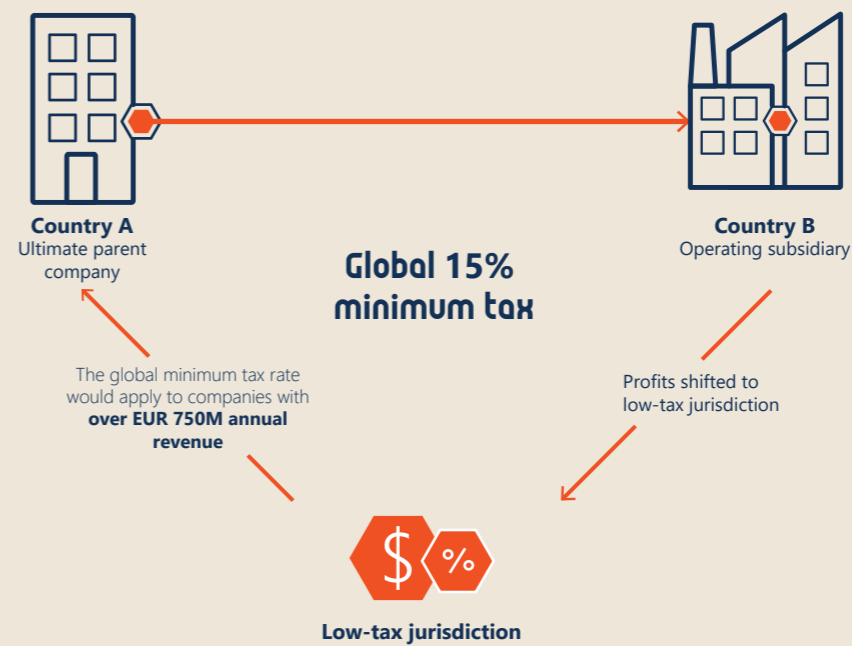
Overview of Pillar 1



Source: OECD/G20 Base Erosion and Profit Shifting Project Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OCTOBER 2021

**Overview of Pillar 1 and Pillar 2**

Overview of Pillar 2



## BACKGROUND AND CONTEXT

The concept of the two-pillar solution has developed out of several key worldwide trends:



### Fourth industrial revolution:

The disruption caused by the Fourth Industrial Revolution has been accelerated by COVID-19, and increased our need for agility, adaptability, and positive transformation. As the global economy rapidly digitalises, an estimated 70% of new value created over the next decade will be based on digitally enabled platform business models<sup>2</sup>.



**Digitalisation:** Many of the previous boundaries that existed between digital and 'traditional' or 'bricks and mortar' service providers are rapidly dissolving as enterprises across all sectors increase their online presence/services to generate more business by reaching new customers and markets but also to reduce costs<sup>3</sup>.



### Digital identity:

Having a trusted, verifiable identity is essential. As digital interaction increases at unprecedented rate, not least due to the COVID-19 crisis, the information comprising our identities is being widely shared in ways that create both opportunities and risks. If designed correctly, digital identities can provide countries with economic value equal to as much as 13% of their GDP, save hundreds of billions of hours through streamlined e-government, and cut trillions of dollars in costs for businesses by 2030, according to one estimate<sup>4</sup>.



**Physical presence:** In today's digitalised world, MNEs often conduct large-scale business in a jurisdiction with little or no physical presence, this being a cause of concern as the old taxing rules do not provide taxing rights in such circumstances<sup>5</sup>.



**Competition in global tax rates:** Tension is building between multinational companies and tax authorities residing in various capitals around the world, particularly where tax and technology issues intersect. There is intense scrutiny on fiscal concerns amid rapid globalisation and technological advances. In the international tax context, these economic trends are neither a background nor a mere "sign of the times". They pose a direct challenge to the existing international tax regime, rules, and regulations, and they increasingly put multinational companies and tax authorities in conflict. Witness, for example, the U.S. Internal Revenue Service claims made public against Amazon.com, alleging that the major e-commerce company misreported \$2.2 billion of taxable income outside of the United States, primarily in a lower tax jurisdiction, Luxembourg. There are considerable numbers of such tax controversies at various procedural stages, if not yet filed in U.S. Tax Court, while similar cases are heard in other courts around the world<sup>6</sup>.



**Unlisted MNEs:** Uber, Spotify, Airbnb and Snap (Snapchat) are all examples of unlisted MNEs that do not report any information on the geographic distribution of operations and on their global ownership structure<sup>7</sup>.

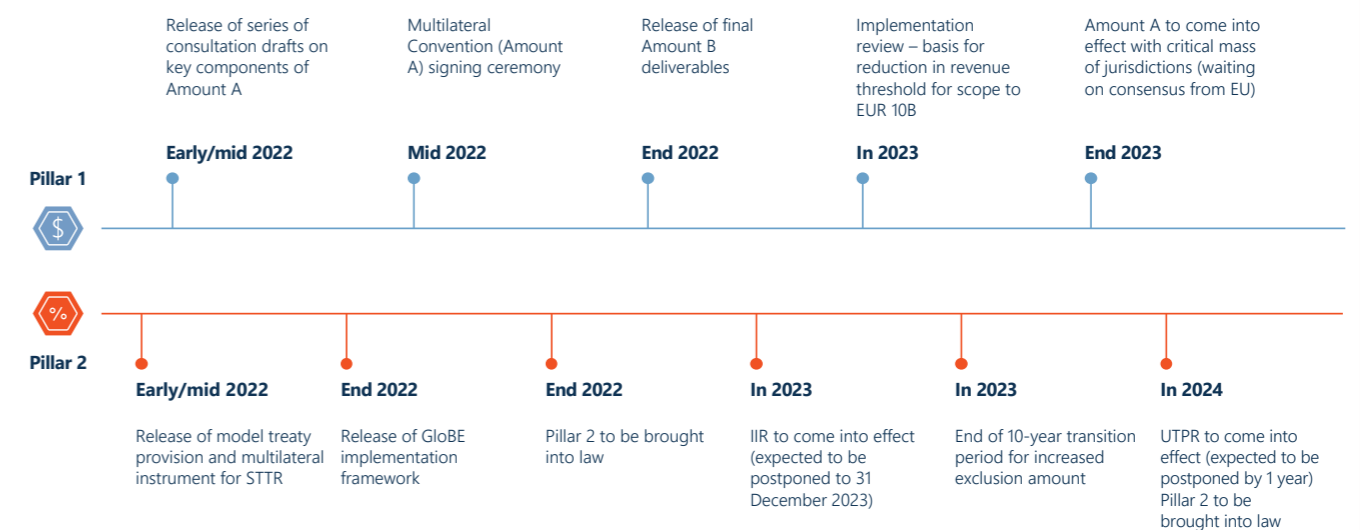
## IMPLICATIONS, SUMMARISED

Given the lack of discussion on the proposed global tax reforms in the local market to date, Graphene Economics is seeking to spark conversations on the matter, as we believe it's a critical issue that has wide-ranging implications for African countries and the MNEs operating within them. We believe it's important to note that:

- The two-pillar solution represents a significant global tax reform, affecting taxing rights and minimum level of tax to be paid.
- It will have direct and indirect consequences for large MNEs operating cross-border (whether they are above the thresholds or not).
- Currently the known benefits (if any) for South Africa and rest of Africa are limited and further impact assessment is required.
- Countries need to consider the impact of these proposals on their tax incentives programmes.
- Lower tax rate benefits of tax havens have been considerably reduced.
- Amount B and Pillar 2 seem more stable.
- The ability for countries to tax digital revenue streams may require use of the VAT system if digital services taxes are abolished.
- Pillar 1 and Pillar 2 will present significant compliance requirements for MNEs that will need to disclose data that may not be readily available.

2) [https://intelligence.weforum.org/topics/a1Gb0000001SH21EAG?utm\\_source=Weforum&utm\\_medium=opic+page+TheBigPicture&utm\\_campaign=Weforum\\_Topicpage\\_UTMs](https://intelligence.weforum.org/topics/a1Gb0000001SH21EAG?utm_source=Weforum&utm_medium=opic+page+TheBigPicture&utm_campaign=Weforum_Topicpage_UTMs)  
 3) <https://www.oecd.org/tax/beps/tax-challenges-digitalisation-part-2-comments-on-request-for-input-2017.pdf>  
 4) <https://intelligence.weforum.org/topics/a1G0X000005JGcUAO>  
 5) <https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>  
 6) [Tax management transfer pricing report: A Tale of two technologies: Transfer Pricing of intangibles in the digital economy, https://www.oecd.org/ctp/comments-received-tax-challenges-digital-economy.pdf](https://www.oecd.org/ctp/comments-received-tax-challenges-digital-economy.pdf)  
 7) [https://unctad.org/system/files/official-document/wir2017ch4\\_Annex\\_en.pdf](https://unctad.org/system/files/official-document/wir2017ch4_Annex_en.pdf)

### Pillar 1 and Pillar 2 progress timelines





## Global tax leadership role on the cards for the UN

In November 2022, the UN General Assembly unanimously adopted resolution mandating the UN to set course for a global tax leadership role, as reported by Tax Justice Network<sup>8</sup>. This is a significant development – if it comes to pass, it will possibly signal the end of the OECD’s controlling role as the leading tax rule-maker. Tax Justice Network envisions a potential power struggle between the two organisations.

For now, the resolution allows countries and their governments to begin discussions about UN reforms to the global tax system. According to Tax Justice Network, the UN Secretary-General Antonio Guterres was tasked with delivering a report on the flaws of current arrangements and the solutions, including the creation of a UN tax convention that would overhaul global tax rules to bring an end to global tax abuse by multinational corporations and the superrich.

Tax Justice Network also noted:

“For the majority of the world, moving rulemaking on global tax to the UN will mean lifting the hold that former colonial powers have continued to exert via the OECD over global tax rules since the dissolution of their empires. Determining global tax rules through inclusive and democratic forums at the UN will give most countries for the first time since their independence sovereignty over their taxing rights.

For OECD member countries, which lose the largest sums of tax to global tax abuse, moving rulemaking on global tax to the UN will provide an opportunity to end the outsized influence corporate lobbyists and tax havens have held over the OECD’s rulemaking processes – which has repeatedly come at a cost to their tax revenues, people and public services.”

<sup>8</sup> <https://taxjustice.net/press/un-adopts-historic-decision-to-take-on-new-tax-leadership/>

## Notable cross-border tax and related developments in 2022

### NEW MEASURES FOR TAXING DIGITAL SERVICES INTRODUCED

Certain African countries, such as Tanzania, have been exploring introducing new measures for taxing digital services. This indicates that some African countries may implement unilateral taxation measures as opposed to waiting for the OECD to finalise the BEPS 2.0 project.

According to an update from the Parliament of Tanzania, the Finance Bill 2022 was approved on 28 June 2022, containing the measures for the Budget for 2022/23, which also include the introduction of a digital service tax at the rate of 2% on the income of non-resident digital (electronic) service providers received from individuals in Tanzania in respect of services rendered through a digital market place, which is payable on a monthly basis by the 7th day of the following month. The following definition are relevant:

- “digital market place” means a platform that enables direct interaction between buyers and sellers of goods and services through electronic means; and
- “electronic service” has the meaning ascribed to it under section 51 of the Value Added Tax Act, which includes any of the following services provided or delivered through a telecommunications network: (a) websites, web-hosting, or remote maintenance of programmes and equipment; (b) software and the updating thereof; (c) images, text, and information; (d) access to databases; (e) self-education packages; (f) music, films, and games, including gaming

activities; and (g) political, cultural, artistic, sporting, scientific, and other broadcasts and events including broadcast television.

### SARS INTERPRETATION NOTE 127

On 17 January 2023, SARS released an interpretation note 127 (IN 127), which provides guidance on how SARS will determine arm’s length pricing for intra-group loans.

According to SARS, it remains critical that, in any intra-group transactions, the arm’s length principle is scrupulously observed by those participating in such a transaction. SARS will act sternly to protect the fiscus if the parties are found to have acted at variance with this principle.

The IN 127 is largely aligned with Chapter X of the 2022 version of the OECD Guidelines and requires that the taxpayer considers the arm’s length nature of the amount of debt, as well as the cost of debt. SARS indicates that it would consider the taxpayer’s debt as non-arm’s length where the taxpayer is carrying a greater quantity of debt than it could sustain on its own, the duration of the lending is greater than would be the case at arm’s length, or the repayment, interest rate or other terms are not what would have been entered into or agreed to at arm’s length.

The IN 127 applies not only to direct funding between related parties, but also to indirect funding transactions, such as back-to-back transactions with banks or financial institutions, or where a guarantee

is obtained by a non-resident related party on funding obtained from a bank or financial institution.

The IN 127 has removed any safe harbours or indicators whether the debt capacity and cost of debt are less risky. Therefore, irrespective of the loan amount or interest rate applied, a detailed transfer pricing analysis, which includes a determination of the borrower's credit rating, will have to be performed.

### **SOUTH AFRICAN CABINET APPROVED BEPS MLI**

The multilateral instrument (MLI) is a mechanism which will enable double taxation agreements (DTAs) to be amended automatically where countries have signed up to the MLI (rather than countries having to renegotiate all DTAs separately). South Africa deposited its instrument of ratification for the MLI with the OECD on 30 September 2022. This means that the MLI entered into force in South Africa with effect from 1 January 2023. South Africa has 79 bilateral double taxation treaties and 76 of these are covered by the MLI. Accordingly, once the MLI comes into force in those countries, then the various treaties will meet the tax related BEPS measures without the need to renegotiate the existing bilateral tax treaties.

The MLI will generally enter into force for a particular covered agreement on the first day of the month following a three-month period after both parties to the covered agreement have deposited their ratification instrument. Once in force, the provisions of the MLI will generally apply for a covered agreement from 1 January of the year following its entry into force in respect of withholding taxes, and for all other taxes with respect to taxable periods beginning on or after the expiration of a six-month period following the date of entry into force.

### **UNITED NATIONS: TAX COMMITTEE WORK PROGRAMME ON TRANSFER PRICING**

The UN Committee of Experts on International Cooperation in Tax Matters held its 24th session on 4 to 7 April and 11 to 12 April 2022. Ahead of the session, the Transfer Pricing Subcommittee published the Co-Coordinator's Report<sup>9</sup> on its proposed work programme covering various areas. Transfer pricing related matters are discussed in detail below:

**Industry / sector guidance for primary products:** the work stream on industry guidance on primary products (e.g., agriculture) would contain a description of the value chain of this industry, especially at an international level, including frequently applied business models and contractual terms, as well as an explanation of how functions, risks and assets are commonly arranged. Guidance would distinguish between different sub-sectors, depending on their specific characteristics, such as food (perishable or not), forestry and fishing, among others. Increasing environmental regulation would also be considered given their influence on the industry. With the information gathered, good practices and special guidance would be drafted, for the application of a transfer pricing regime to this industry / sector, including recommendations related to the delineation of the transaction, methods, comparable operations, and potential sources of information. Constant cross references to the UN TP Manual (2021) would complete the guidance to be understood as the UN Manual's application to a specific industry.

**Industry / sector guidance for the pharmaceutical industry:** this work stream on guidance for the pharmaceutical industry would contain a description of the value chain of the industry and an

explanation of how functions, risks and assets are commonly arranged. It would also include an overview of the particularities of the industry, most notably governmental regulations and parallel imports. Based on this background information, recommendations regarding the delineation of transactions, transfer pricing methods, potential sources of information and comparables will be discussed including the challenge to benchmark routine entities in relevant market jurisdictions. Thereafter, common transfer pricing risks would be identified followed by good practices in auditing and containing this risk. Lastly, a section would be devoted to potential changes to the industry stemming from the COVID-19 pandemic (co-operation between third parties, governmental contracting). Constant cross references to the UN TP Manual (2021) would complete the guidance to be understood as a UN Manual's application to a specific industry.

**Toolkits to assist developing country tax administrations in conducting efficient and effective transfer pricing risk assessments and audits:** this work stream would aim to provide a toolkit or toolkits to assist developing country tax administrations in conducting efficient and effective transfer pricing risk assessments and audits. It is envisaged that the toolkit(s) could provide step-by-step guidance to assist tax administrations with the planning, execution and resolution of transfer pricing risk assessments and examinations:

**Transfer pricing domestic anti-abuse rules:** this workstream would entail a "desktop" research and targeted follow-up to gain an overview over existing transfer pricing domestic anti-abuse rules, their effectiveness and efficiency. A report on the analysis of domestic transfer pricing anti-avoidance provisions would be drafted. Developing countries considering the

9) [https://www.un.org/development/desa/financing/sites/www.un.org/development/desa/financing/files/2022-03/CRP.13%20Transfer%20Pricing%20Co-Coordinator%20Report%2024th%20Session\\_0.pdf](https://www.un.org/development/desa/financing/sites/www.un.org/development/desa/financing/files/2022-03/CRP.13%20Transfer%20Pricing%20Co-Coordinator%20Report%2024th%20Session_0.pdf)

introduction of domestic transfer pricing anti-avoidance rules will be able to benefit from this paper, for a better-informed decision-making process.

**COVID-19 / economic downturn:**

a work stream on economic downturns, as evidenced by the COVID-19 pandemics, focuses on the significant issues for MNEs as well as governments resulting from economic downturns. Among these issues, economic downturns have a relevant impact on the application of transfer pricing rules and the functioning of the arm's length principle. Current guidance on this topic is still scarce. Therefore, this work stream aims at analyzing the impact of economic downturns on transfer pricing and identifying possible practical solutions for developing countries.

**Dispute avoidance and resolution:**

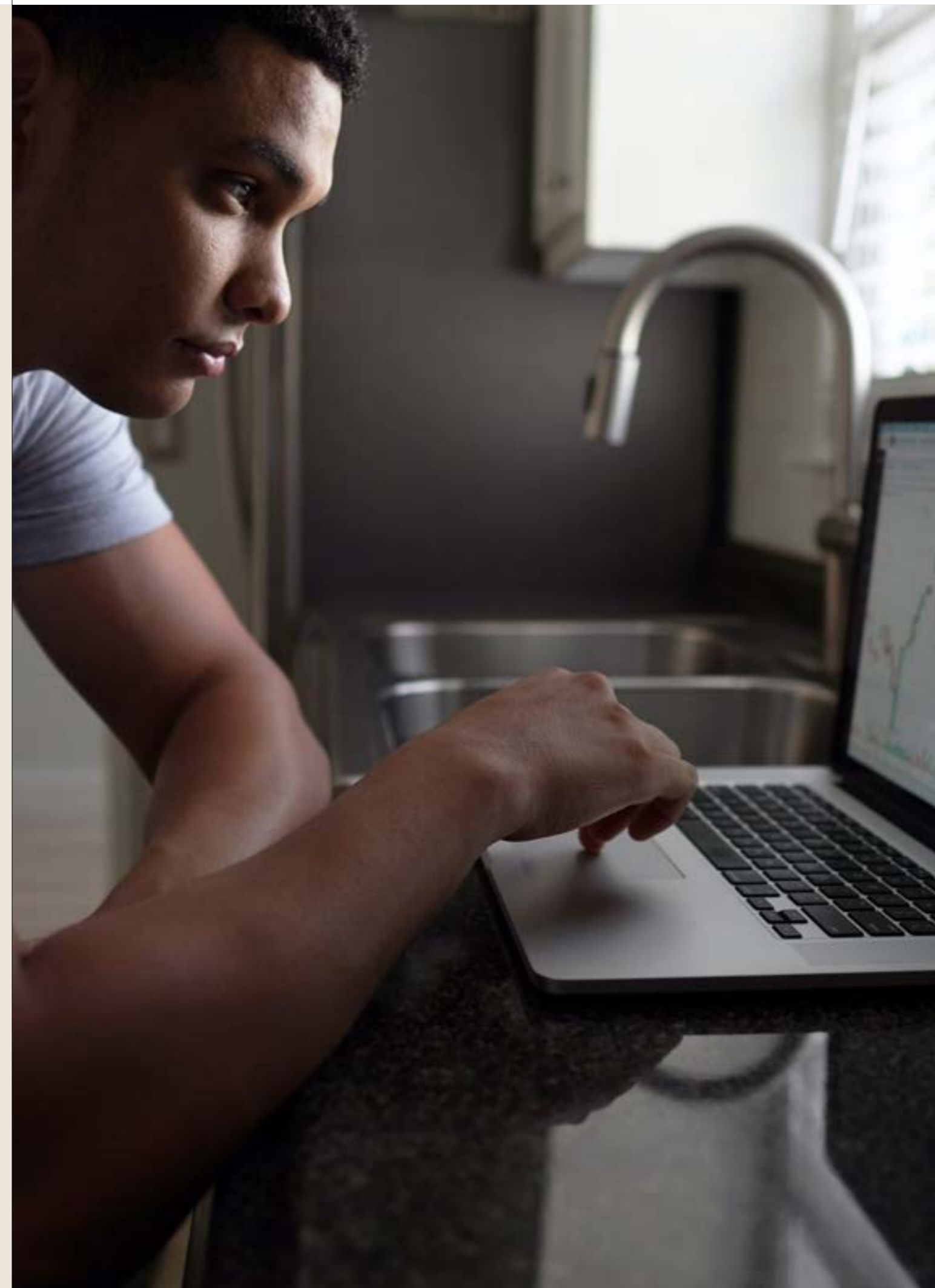
the Transfer Pricing Subcommittee proposes to focus on dispute avoidance and resolution in another work stream. In this context, it will discuss risk control mechanisms (such as ICAP), joint audits and advance pricing agreements to avoid and prevent transfer pricing disputes in collaboration with the drafting group working on toolkits and with a focus on their appropriateness for developing countries.

For these mechanisms as well as for the resolution of transfer pricing disputes, the Subcommittee will, in collaboration with the Small Group on Dispute Avoidance and Resolution, analyse whether further specific guidance for disputes regarding issues on transfer pricing or the allocation of profits to permanent establishments is needed and in what form the Committee should publish it. It will also discuss practical challenges in the application of dispute resolution mechanisms and reflect upon possible future work of the Committee.

**OECD REPORT ON TAX COMPLIANCE AND ILLICIT FINANCIAL FLOWS IN SA**

In April 2022, the OECD released a report on the status of tax compliance and illicit financial flows in South Africa<sup>10</sup>. It is interesting to note the observations arising from this collaboration between the OECD and the National Treasury of South Africa. The document provides context to certain tax and policy developments that Treasury has implemented over the past few years. It also indicates that there is likely to be continued collaboration between international organisations and local governments to analyse and identify the tax landscape in specific regions.

<sup>10</sup> <https://www.oecd.org/tax/assessing-tax-compliance-and-illicit-financial-flows-in-south-africa-e8c9ff5b-en.htm>



## Conclusion

It seems that 2023 is set to be an interesting year from a taxation and cross-border transaction perspective, with various changes in the works. We believe that TP and related issues are likely to remain priorities for revenue authorities on the African continent and that the role of the tax function continues to increase in importance with regards to mitigating and managing business risk. There is likely to be a bigger focus on data collection and management (to a more granular level), and changes to transaction models and information sharing processes. We expect a continuation in the increase in TP disputes and controversies. Organisations where TP is escalated to the attention of the CFO or board of directors are likely to be better placed to proactively adapt to the changing landscape, and to navigate any unexpected events that arise.

Our advice to MNEs from a cross-border transaction perspective is to develop a strategy that will enable them to actively manage their cross-border taxes. This involves determining how to achieve the various compliance requirements timeously (whether this involves hiring additional resources, outsourcing or co-sourcing), proactively identifying potential issues and collaborating with the company's operations to advise on tax matters at the time when transactions are being entered into, rather than after the event during and audit.

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