VIETNAM'S IMPLEMENTATION OF THE OECD TRANSFER PRICING GUIDELINES: THE OECD EXPERIENCE ON TRANSFER PRICING AND COMPARISONS WITH VIETNAM

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Who Are Related Parties?

1. Introduction

Arguably, Vietnam's first comprehensive regulations on transfer pricing date back to 2005 when a Circular was issued "to guide on the determination of market prices in business transactions between associated parties"[2]. This regulation was fairly quickly updated in 2010[3]. In 2012, the Ministry of Finance ordered new regulations to be designed[4] and in 2013 a regulation was issued on Advance Pricing Agreements[5]. The next milestone came in 2017, when Vietnam introduced Decree 20 on transfer pricing, seeking to follow the Base Erosion and Profit Shifting Program ("**BEPS**") of the Organization for Economic Cooperation and Development (**"OECD"**)[6]. The update of Decree 20 came in 2020 with what we will refer to throughout this contribution as Decree 132[7], the present main regulation on transfer pricing in Vietnam. The current regulations are based on a statutory provision in the Law on Tax Administration that gives the authorities the authority to determine the income of taxpayers, when dealing with related parties, as if they had been dealing with third parties[8].

The OECD has played a very important role on the transfer pricing issue at least since its first report on the subject "Transfer Pricing and Multinational Enterprises" in 1979. The OECD's work on the issue has been complemented regularly with reports and modifications on various core and related issues such as Thin Capitalization[9], Advance Pricing Agreements and mutual agreement procedures[10], and the BEPS suite of actions[11]. The present most recent version of the OECD's main report, the "Transfer Pricing Guidelines" ("**TPG**") is that of 2020[12].

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[2] Circular 117/2005/TT-BTC of the Ministry of Finance dated 19 December 2005 (this circular was effective from 2006 to 2009).

[3] Circular 66/2010/TT-BTC of the Ministry of Finance dated 22 April 2010

[4] Ministry of Finance issued Decision 1250/QD-BTC dated May 21, 2012, to approve the action program to control the transfer pricing activities in the period of 2012-2015.

[5] Circular 201/2013/TT-BTC Ministry of Finance issued dated 20 December 2013 to guide on the application of Advance Pricing Agreements (APA) in tax administration

[6] Decree 20/2017/ND-CP dated 24 February 2017; For guidance of this Decree, the Ministry of Finance issued Circular 41/2017/TT-BTC dated 28 April 2017.

[7] Decree 132/2020/ND-CP Prescribing Tax Administration for Enterprises with Related Part Transactions dated 5 November 2020.

[8]Art 50 ,1 The Law on Tax Administration 2019: "*(dd) buys, sells, trades goods and record values thereof against their market prices".*

[9] OECD, Issues in International Taxation, Thin Capitalization, 1987.

[10] Guidelines for conducting advance pricing arrangements under the mutual agreement procedure, 30 June 1999.

[11] Report on BEPS Actions 8-10 Aligning Transfer Pricing Outcomes with Value Creation; Report on BEPS Action 13 Transfer Pricing Documentation and country-by-country reporting 1 October 2015.

[12] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2020.

As a non-OECD country, Vietnam's transfer pricing regulations, unsurprisingly, never mention the TPG as such[13]. As far as this author is aware, there are no public instructions or rulings from the Vietnam General Department of Taxation ("**the GDT**") discussing the relevance, if any, of the TPG for transfer pricing compliance or disputes in Vietnam.

Yet, we can say that Vietnam has demonstrated significant willingness on the public international level to associate itself with OECD solutions and interpretations. Vietnam has consistently agreed to include the OECD version of art. 9 "Associated Enterprises" in its Double Taxation Agreements ("**DTA's**") and it has ratified the OECD's Multilateral BEPS Convention, an initiative that has many issues in common with transfer pricing[14].

Furthermore, even more importantly, the vast majority of key terms, concepts and processes found in Vietnam's transfer pricing regulations have been and are the same as in the TPG. This is true for the central role of the arm's length principle, the various comparability factors, the different transfer pricing methods down to processes such as the "country-by-country" reports. There is no denying that the TPG have been the most important influence of Vietnam's present transfer pricing framework.

Just because the TPG is influential does not make them binding upon the GDT, or for that matter, the taxpayers. Even in OECD countries, the TPG are generally followed but not per se considered legally binding in nature[15], among other reasons because much in the practice of transfer pricing and in the TPG highly depends on the individual facts and circumstances anyway.

In this contribution, Vietnam's current key transfer pricing regulation is analyzed from the perspective of the TPG to highlight possible differences in approach and emphasis with respect to the practice of transfer pricing in Vietnam compared to OECD countries. To do so, some selected key elements of transfer pricing regulation are discussed, such as the concept of associated enterprises, the different methods and when to use them, the guidance on comparables, use of data and special transactions.[16]

2. Who is a related party or an associated enterprise?

Vietnam's Law on Tax Administration provides in a general definition of "related parties":

> *"related parties" means parties directly or indirectly participating in the management, control, capital contribution of enterprises; parties under direct or indirect management, control of an*

[13] Some OECD countries have done so. For example, Hungary in its Decree 22/2009 on the Obligation of Transfer Pricing Documentation, section 11, contains a "harmonization clause" with the TPG.

[14] https://www.oecd.org/tax/beps/viet-nam-deposits-its-instrument-for-the-ratification-of-the-multilateral-beps-convention.htm

[15] Vega, Alberto, "International Governance Through Soft Law: The Case of the OECD Transfer Pricing Guidelines", 2012, available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2100341

[16] Not necessarily all elements are systematically compared. Some issues that feature in the TPG but not in Decree 132, such as business restructuring, cost contribution arrangements and documentation, are not discussed.

organization or individual; parties whose capitals are contributed to by one organization or individual; enterprises managed, controlled by family related individuals"[17].

Decree 132 copies that general principle, but continues with a list of more detailed provisions referring to various specific circumstances, which can be seen as applications of the general rule.

The general rule to define a related party in Decree 132 begins as follows:

> *"A party is directly or indirectly participating in the management, control or capital in the other party";*

This is very much identical to the concept of "associated enterprises" in art. 9 of the OECD Model Tax Convention. But Decree 132 goes further. In its general definition, it adds:

> *" [O]r; a party is directly or indirectly affected by the management, control or capital in the other party*" (emphasis added).

The factor "being affected by" is not spelled out in Art. 9 OECD Model Tax Convention.

Decree 132 continues with a lengthy set of situations which are more or less applications of the main principle. A first group of related party applications refers to ownership or capital. Parties are related if:

- There is a direct or indirect participation of 25% of one party into the other;
- A third party holds 25% directly or indirectly in both parties;
- An enterprise has the largest single shareholding in the other enterprise of at least 10%;
- They are head office and permanent establishment ("PE"), or both are PE's of the same enterprise;

A second group of related party applications refers to management and control. Parties are related if:

- One enterprise appoints more than 50% of the board of the other enterprise;
- One enterprise appoints a member of the board of the other enterprise which has the right to decide the financial management of that enterprise;
- Both enterprises are managed or controlled by individuals who are spouses, parents and (natural and adopted) children, siblings, grandparents and grandchildren, uncles and aunts, nieces and nephews.
- One enterprise de facto manages and controls the other enterprise;

A third and final group of related party applications refers to financing: Parties are related if:

- An enterprise finances or guarantees (including through a third party) the other enterprise for at least 25% of the equity of the borrower and this enterprise constitutes more than 50% of the long and medium term debt of the borrower;
- A loan of at least 10% of the borrower's equity provided by a person holding executive office or a controlling interest in the borrower or one of the family relationships cited above;

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[17] Art. 3 par. 21 Law on Tax Administration. See also accounting law: Standard 26 on Related Party Disclosures (Issued and promulged in pursuance of the Minister of Finance Decision No. 234/2003/QD-BTC dated 30 December 2003).

The OECD Model Tax Convention defines "associated enterprises" as follows:

> *Where*
> - *an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or*
> - *the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,*
>
> *and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly*[18]*.*

As was already mentioned above, the basic three factors "management", "control" and "capital" are central in both OECD art. 9 and in Decree 132. The OECD Commentary or the TPG do not offer much in terms of additional guidance what constitutes "participation in management, control or capital"[19]. It has been argued that this "there is a broad understanding of what is meant" and more detail could be left to the treaty states[20].

It can be argued that Decree 132 mostly offers more detail, a threshold or concrete applications of OECD's general rule. For example, a participation of 25% in capital obviously falls within the notion of "a participation". It is merely setting a threshold to be used in Vietnam within the wide range the OECD has established, which can be read as "any participation". The same can be said for "participation in management", which is rendered more concrete in Vietnam by setting the threshold at appointment of 50% of board members. Decree 132's rule on family relationships could be seen as a form of "control" as stated in art. 9 of the OECD Model Tax Convention[21].

The Decree's reference to loans or guarantees as a factor that causes parties to be considered "related" is however as such not found in the OECD context. The OECD refers to capital, which most likely does not easily extend to "debt". That is not to say that Vietnam's reference to lenders is necessarily contrary to the OECD definition. It is namely conceivable that the OECD's "control", which is not defined in the Commentary or the TPG, is interpreted in Vietnam to include the kind of control a significant lender may have over a borrower.

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[18] OECD Model Tax Convention art. 9 (1).
[19] Ramon S.J. Dwarkasing, "The Concept of Associated Enterprises", Intertax, Volume 41, Issue 8/9 (2013) pp. 412 – 429.
[20] Vogel, K., Double Taxation Conventions, p. 525.
[21] See however Lehner, Martin, "Article 9 Associated Companies", http://www.steuerrecht.jku.at/ml/de/elemente_site/Kommentare-Sammelwerke/Lehner%20-%20Art%209%20OECD%20MC.pdf who argues that family ties are not taken into account; Vogel, K., Double Taxation Conventions, p. 525.

3. Internal or external comparables?

When a taxpayer has engaged in similar transactions with both related and unrelated parties, the use of the price or profit margin of the unrelated transaction for the related transaction is an obvious consequence of the arm's length principle and the Comparable Uncontrolled Price method (CUP). Tax authorities in Vietnam, a noted manufacturing hub, will in practice often focus quite quickly on price differences they notice on the export price of manufactured goods to the related party of the taxpayer and confront it with often minor domestic sales to a local third party purchaser at a higher price. Other local examples are found in the banking industry, as large Vietnam banks are often part of the business group of a local wealthy businessman, and such a bank will provide loans to the other entities of the group.

In these cases, to use the conditions of the unrelated sale or loan for the related one, the key question is how comparable these transactions really are. Simply put, it frequently comes down to the taxpayer trying to prove that his transaction with a third party (with likely a different price) significantly differs from the transaction with its related party.

The issue of comparability is not just a part of the discussion on comparables, but is of course fundamental to the entire arm's length approach, also having repercussions on choice of external comparable enterprises.

Traces of the fundamental rules on factors of comparability (contractual terms, functions performed/assets used/risks assumed, characteristics of property or services, economic circumstances and business strategies) of the TPG are mostly also found, albeit heavily summarized, in Decree 132.

But Decree 132 seems to provide a higher standing, a hierarchical priority for internal comparables over external comparables that is not found in de same way in the TPG. The TPG do provide that internal comparables "may have a more direct and closer relationship to the transaction under review than external comparables"[22] and "[i]t may be unnecessary to use a commercial database if reliable information is available from other sources e.g. internal comparables"[23]. But the TPG stops short of imposing a hierarchy. It does not provide that internal comparables trump external ones. In fact, the TPG state that:

> *"On the other hand, internal comparables are not always more reliable and it is not the case that any transaction between a taxpayer and an independent party can be regarded as a reliable comparable for controlled transactions by the same taxpayer[24].*

By contrast, Decree 132 does seem to give more weight to internal comparables. In 7 (1), Decree 132 provides some kind of -qualified- hierarchy by providing that:

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[22] OECD TPG 2022, 3.27
[23] OECD TPG 2022, 3.32
[2424] OECD TPG 2022, 3.28

"In case where there are no internal uncontrolled comparables, then the selection of comparables can be conducted with reference to comparables in the same country [Vietnam] or in the region" (emphasis added)[25].

The same theme is found in Decree 132's provisions related to use of external databases of financial information:

"Analysis and selection of uncontrolled comparables [...] must conform to the priority order in selecting comparative data as follows:
(a) internal comparables of taxpayers;
(b) Domestic comparables of the country of residence of the taxpayer [Vietnam]
(c) Comparables from countries in the region with similar economic conditions and growth"[26] *(emphasis added).*

This does not mean that under Decree 132 every uncontrolled price must be used to set every controlled transaction. In Vietnam the comparability of transactions is also central to the transfer pricing determination, as is the case in the TPG, and also in the case where the tax authority wants to use an uncontrolled price for a related party transaction. Notably, Decree 132 states that:

"Selection of internal uncontrolled comparables is the selection of transactions between taxpayers and unrelated parties, while ensuring the comparability in terms of price or profit margin or profit split ratio"[27]*. (emphasis added)*

The TPG offer more assurances to taxpayers who might, besides large related party sales, also have a minor, higher priced local transaction which tax authorities want to use as a yardstick to reassess its related party transactions:

"Assume for instance that a taxpayer manufactures a particular project, sells a significant volume thereof to its foreign associated retailer and a marginal volume of the same product to an independent party. In such case, the difference in volumes is likely to materially affect the comparability of the two transactions. If it is not possible to make a reasonably accurate adjustment to eliminate the effects of such difference, the transaction between the taxpayer and its independent customer is unlikely to be a reliable comparable"[28]

In conclusion, Decree 132 subscribes in general terms to the same comparability requirements as the TPG. This means that ultimately, also in Vietnam internal controlled transactions which are incomparable should not be used to price uncontrolled transactions. But, unlike the TPG, Decree 132 does provide (1) in an actual priority for internal over external comparables, and (2) does not offer any specific language to warn against use of minor uncontrolled sales transactions. Accordingly, taxpayers with minor but higher priced uncontrolled sales might be at a higher risk in Vietnam compared to OECD countries.

Internal comparables are only persuasive guidance if they are in fact comparable. A recent transfer pricing case in Spain illustrates the point that internal comparables may not always be determinative. In that case, a Spanish company resold products from an unrelated party to its Panamanian group

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[25] Decree 132, art. 7 (1)
[26] Decree 132, art. 17 (3)
[27] Decree 132, art 7 (1)
[28] OECD TPG 2022, 3.28

entity with a 4% mark-up. Spanish tax authorities reassessed that 4% to 26% based on the taxpayer's internal comparables. However, the court found that these transactions were in fact not very similar, as the third party transactions concerned sale and resale rather than agency, and because there was only one transaction at the higher profit margin[29].

4. Local or foreign comparables?

Searching for comparable companies on a regional or even global basis is common in transfer pricing benchmark efforts, including when using the Transactional Net Margin Method ("**TNMM**"). The more well-known transfer pricing tools have long included financial information from more than one country. In fact, most providers of financial information databases only offer packages per region and not per country.

The OECD recommends tax authorities to be open to the use of non-domestic financial data:

> *"Non-domestic comparables should not be automatically rejected just because they are not domestic"[30].*

Instead, the OECD believes that it all depends on the situation. If a case can be made that foreign data is appropriate, then it should be used even it is foreign:

> *"A determination of whether non-domestic comparables are reliable has to be made on a case by case basis"[31].*

The Vietnam position is, at least in theory somewhat less flexible. As already mentioned, Decree 132 sets forth a hierarchy of data to be used:

> *"Analysis and selection of uncontrolled comparables […] must conform to the priority order in selecting comparative data as follows:*
> *(a) internal comparables of taxpayers;*
> *(b) Domestic comparables of the country of residence of the taxpayer [Vietnam]*
> *(c) Comparables from countries in the region with similar economic conditions and growth"[32] (emphasis added).*

Thus, in Vietnam's approach, the taxpayer will in his analysis and documentation need to, lacking internal comparables, first search for data in Vietnam (or, if the foreign company is the tested party, that company's country of residence) before expanding the search to countries outside of Vietnam.

It is noteworthy in this context that private companies in Vietnam have a fairly well implemented obligation to lodge their financial statements with the commercial regulator. Although this data is not publicly available at no cost, there are several subscription-based and "per use" solutions offered by commercial publishers for this Vietnam data. The financial statements of public companies at one of Vietnam's stock exchanges are public and free. For comparison, although business enterprises in Cambodia have the obligation to prepare financial statements and lodge them with tax and

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[29] Spain vs Tomas Bodero, S.A., July 2023, Tribunal Superior de Justicia, Case No STSJ CL 3218/2023
[30] OECD TPG 2022, 3.35
[31] OECD TPG 2022, 3.35
[32] Decree 132, art. 17 (3)

commercial authorities, and many must be audited externally, none of this data is available to the public or to commercial publishers[33].

Assigning a priority rank to local data by the GDT can be seen in the context of the easy availability to taxpayers and officials of Vietnam financial data. In that light, Vietnam has chosen not to eliminate the use of foreign data, but to make it subsidiary to the use of local data.

Transfer pricing practitioners have often wondered which foreign countries would be deemed "comparable" enough to their own market, as is required by Decree 132. The TPG do not offer any set rules on how to determine if a foreign country is comparable, although it does recognize that a geographic market is an economic circumstance that may have an impact on comparability[34]. The OECD's special note on data comparability for developing countries sets out the example of the rather small economy of New Zealand, where parties often resort to data from Australia and the United Kingdom as "the same or similar markets"[35].

Vietnam's Decree 132 is less flexible in this regard. Even if use of another country's data is permitted under the priority order cited above, certain criteria must be respected notably: "where the sector's economic conditions and economic growth levels are comparable"[36]. Although it is reasonable for the GDT to require that the economy of the foreign data source is in some respects comparable to that of Vietnam, it is also true that this condition will actually complicate the analysis.

First of all, any kind of absolute condition related to the country itself rather than to the transaction or the company is somewhat difficult to justify from a conceptual standpoint. As the OECD states, the economic comparability should be the priority, not the "nationality" of the data. Furthermore, from a practical standpoint, there is the problem of availability[37]. Finally, a bias against foreign data exposes the taxpayer to an additional level of risk and scrutiny, one might argue as kind of a penalty, for using foreign country data. There is always a chance not everybody agrees that one or another foreign source is "not sufficiently comparable". This risk is not present if one sticks to Vietnam data.

[33] See also a ruling by the Vietnam tax authorities dated 29 March 2022 on acceptable foreign databases.
[34] OECD TPG 2022, 1.132. The OECD considers that the "relevant market" of the product or service may or may not coincide with a geographical market.
[35] OECD, Transfer Pricing Comparability and Developing Countries, 2014, par. 20.
[36] Decree 132, 17 (3) (c)
[37] Think about operations service of a nuclear plant, construction of artificial islands, developing artificial intelligence or laboratories for DNA research services.

5. Hierarchy or Most Appropriate Method

Between 1995 and 2010, the TPG featured a qualified hierarchy of methods[38]. That is to say, the TPG stated that the traditional methods CUP, Cost Plus and Resale Price were preferred over TNMM and Profit Split. Instead, the OECD recognized that more flexibility was needed and provides since 2010 that:

> *"The selection of a transfer pricing method always aims at finding the most appropriate method for a particular case"[39].*

However, the OECD does not mean that taxpayers are entirely free in choosing whatever method leads to the most desired result. The preference for CUP, Cost Plus and Resale Price remains palpable:

> *"Traditional methods are regarded as the most direct means of establishing whether conditions in the commercial and financial relations between associated enterprises are arm's length. [...] As a result, where, [...] a traditional transaction method and a transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable..."[40].*

But, the OECD falls short of creating an absolute hierarchy:

> *"There are situations where transactional profit methods are found to be more appropriate than traditional transactional methods"[41].*

In Vietnam, we see traces of the same ideas.

> *"On the basis of information that has been analyzed and availability of data [...], the transfer pricing method which is appropriate for the business, the commercial and financial functions and risks [...] must be selected"[42].*

> *"The transfer pricing method shall be selected amongst the methods prescribed [...] based on the characteristics of the related party transaction and available data"[43].*

However, upon closer examination, Decree 132 actually does impose a (qualified, "soft") hierarchy with CUP at the top[44], then Cost Plus and Resale Price, and if that is not possible to apply, only then the taxpayer may refer to TNMM and Profit Split. This is clear from the provisions "when to apply the method" for each of the methods.

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[38] "The "Most Appropriate Method" as the New OECD Transfer Pricing Standard: Has the Hierarchy of Methods Been Completely Eliminated?", Ahmadov, J., available at https://www.ibfd.org/shop/journal/most-appropriate-method-new-oecd-transfer-pricing-standard-has-hierarchy-methods-been
[39] OECD TPG 2022, 2.2.
[40] OECD TPG 2022, 2.3.
[41] OECD TPG 2022, 2.4.
[42] Decree 132, art. 11 (2) (b)
[43] Decree 132, art. 12
[44] Which is similar to the preference the OECD TPG expresses for CUP if it is "equally reliable"; OECD TPG 2022 2.3.

For Cost Plus and Resale Price, Decree 132 states that:

> *"[The method is to be applied when] taxpayers are unable to compare product based transactions [...] or fail to exercise their control over the entire business and production chain [...]"*[45].

For TNMM, Decree 132 also imposes a qualified priority as follows:

> *"The method for comparing the net profit margin shall be used in case the taxpayer does not have the necessary information to apply the [CUP] method, or does not have data about the accounting methods of the comparables, or if comparable products or business functions cannot be found, or does not have sufficient basis to apply the Resale Price or the Cost Plus method"*[46].

This hierarchy of methods in Vietnam could be referred to as a "soft hierarchy" because there are substantial qualifications to it that make the hierarchical sequence less rigid. In practice, most often, one could consider there is actually no strict hierarchy because of these qualifications.

For example, the taxpayer is allowed to refer to TNMM only when he does not have information available for CUP and no basis to apply Cost Plus or Resale Price. Of course, whether those conditions are met is highly subjective. In a sense, the entire transfer pricing challenge by a tax authority will center around the question which information is comparable in the first place. If a taxpayer wants to use TNMM, he will most often take the view that information for the traditional methods is not or not sufficiently available anyway. To put it another way, the GDT might challenge a taxpayer who has used TNMM instead of CUP, but that will not resolve or decide the dispute. The taxpayer will unavoidably take the view (probably has already taken that view in his documentation) that the information for CUP is not available as it is not sufficiently comparable.

So, to say that the Vietnam's Decree 132 does have a hierarchy of methods and the OECD does not (anymore) is not entirely fair from a practical perspective. One the one hand, the TPG also continue to include language that, all things being equal, the traditional methods remain preferable[47]. And on the other hand, Decree 132's purported hierarchy is significantly weakened by wide qualifications (such as not having data) and substantive rules on the situations that fit each method.

The international case law is divided on the subject. In a 2023 Swiss case, the Federal Court decided on a situation involving asset management services, that a 300US$ per hour rate for the service of creating a model portfolio which was available as an internal comparable should be considered as a CUP in that particular case, and that the CUP method has priority over other methods (in this case Cost Plus), citing the TPG at the time[48].

In a 2022 Italian case, the tax authorities claimed an Italian car manufacturer undercharged vehicles when selling them to the USA group entity. The manufacturer had in fact used the CUP method to determine the arm's length price. The tax authority claimed in this case TNMM was better suited. This surprised the appellate tax body, which pointed out that the same tax authority had in its own

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[45] Decree 132, art. 14 (1) (a) and (b); However, see also the notes Decree 132 provides on the situations that fit with each method.
[46] Decree 132, art. 14 (1) (c)
[47] OECD TPG 2022, 2.3.
[48] Switzerland vs "A AG", September 2023, Federal Administrative Court, Case No A-4976/2022.

regulations expressed that CUP was more reliable than TNMM[49]. The Supreme Court however found that the tax authorities need not prove tax avoidance, just lower than normal prices[50].

6. In which situations should the CUP method be used?

Both the OECD TPG and Decree 132 cite some examples of business situations which fit the CUP transfer pricing method. This comparative table provides an overview for the situations referred to with the CUP method.

Example situations for the CUP method cited in		
	Vietnam Decree 132[51]	Comparable reference in TPG
1	"Any type of products or tangible goods that are commonly transacted, traded on the market or which has prices published on domestic or international exchanges of goods and services"	The OECD refers to "transfer of commodities between associated enterprises" and "quoted prices […] obtained in domestic or international commodity exchange markets"[52]. The OECD also references "prices from Governmental price-setting agencies"[53].
2	Royalties on transactions to exploit intangible assets	The TPG on CUP method does not refer to royalties on intangibles.
3	"Interest for lending and borrowing"	CUP is referred in the TPG and in the OECD Transfer Pricing Guidance on Financial Transactions[54].
4	"Taxpayers who carry out both related and unrelated transactions regarding products that are similar in product characteristics and contractual terms".	The OECD clearly refers to the use of the CUP method for comparable transactions with unrelated parties[55], but takes into account additional factors besides "product specifications" and "contractual terms", such as business strategies of the parties and economic circumstances[56].
6	"Purchase of machinery or equipment from related parties […] [where] the related party has purchased it from an unrelated party"	No identical situation mentioned in the CUP method, but the OECD TPG do mention under the Resale Price method the situation where "there is a distribution of goods through an intermediate company, it may be relevant to look […] at the price such company pays to its own supplier"[57]

[49] Italian tax authorities Circular No. 32 of 22/09/1980; Although, a slightly later regulation corrected this and stated instead that a case-by-case analysis is needed; Circular No. 42/IIDD/1981
[50] Italy vs Ferrari SpA, September 2022, Supreme Court, Case No 26695/2022 and 26698/2022
[51] Decree 132, art. 13 (1)
[52] OECD TPG 2022, 2.18.
[53] OECD TPG 2022, 2.18.
[54] OECD, Transfer Pricing Guidance on Financial Transactions, 10.90; OECD TPG 2020, 1.9.
[55] OECD TPG 2022, 2.14
[56] OECD TPG 2022, 1.36
[57] OECD TPG 2022, 2.39.

Both regulations are in accordance when it comes to applying the CUP method to the related party sale of commodities for which prices are available by exchanges or with government prices. Vietnam has commodity exchanges for a wide range of products[58] and provides in price controls for various products[59].

Both the TPG and Decree 132 provide that the price charged by an independent enterprise can be used to price a sale between related parties, provided the product is identical, and both also provide that adjustments must be made for volume, contractual terms and other factors[60]. The OECD takes into account additional factors besides "product specifications" and "contractual terms", such as business strategies of the parties and economic circumstances[61]. These are not mentioned in the CUP section of Decree 132, but they are referred to as comparability factors in general[62] . The OECD also refers to independent enterprises selling the same product as between associated enterprises (external comparable CUP)[63].

Decree 132 provides that the CUP method should be used to price interest on loans, which also mentioned in the TPG itself[64] and, more extensively, in the OECD's Transfer Pricing Guidance on Financial Transactions. This document states that "the widespread existence of markets for borrowing and lending money and the frequency of such transactions between independent borrowers and lenders [...] make it easier to apply the CUP method to financial transactions than may be the case for other types of transactions"[65]. The OECD then elaborates on various (comparability) factors that affect the pricing of loans such as credit rating, security, subordination and project risk. Decree 132 does not provide reference to credit rating[66], security or subordination specifically, but the CUP method provision does feature some general language on comparability[67].

The mention of royalties for intangibles in the CUP category is noteworthy, as the TPG did not actually have any mention of royalties in the CUP method. Nevertheless, conducting a CUP-based comparison of royalty percentages on sales, revenue or production is common in OECD countries[68]. Most likely, this CUP comparison of royalty rates is what the GDT is targeting with this reference to intangibles.

7. In which situations should the Cost Plus Method be used?

Both the OECD TPG and Decree 132 cite some examples of business situations which fit the Cost Plus Method. This comparative table provides an overview in that regard.

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[58] Including for grains, metals, fuel, sugar, palm oil, coffee and rubber.
[59] Such as petrol, steel, livestock feed, transportation services, certain foods and medical equipment. Law on Prices, Law No. 16/2023/QH15.
[60] OECD TPG 2022, 2.24-2.26; Decree 132 art. 13 (2).
[61] OECD TPG 2022, 1.36
[62] Notably in Decree 132 art. 10 par. 3 e) and 4 a)
[63] OECD TPG 2022, 2.24.
[64] OECD TPG 2020, 1.9.
[65] OECD, Transfer Pricing Guidance on Financial Transactions, 10.90
[66] Even though Vietnam indeed has several credit rating systems and providers.
[67] Decree 132 art. 13 (2) (b).
[68] See for example the decisions of the Federal Supreme Court 2C_824/2021 and 2C_825/2021 in October 2022, which concerned a trademark license payment by a Swiss company to its sister company in Liechtenstein, a notable tax haven.
https://www.internationaltaxreview.com/article/2bhu8minznyuflmh4qn7k/sponsored/intercompany-trademark-royalty-fees-practical-experience-and-a-swiss-supreme-court-case

Example situations for the Cost Plus Method cited in		
	Vietnam Decree 132[69]	Comparable reference in TPG
1	"In cases where the taxpayer does not own intangible assets and bears little business risk, performs production functions under contracts, orders or processes, assembles, manufactures or processes products…"	The TPG refers to a number of concepts that are also mentioned in Decree 132 for the Cost Plus Method, such as "manufacturing operations"[70], "when semi-finished goods are sold between related enterprises"[71] and "assembly"[72].
2	"Installation of equipment" (with little risk and without owning IP)	There is no explicit mention of installation as such, but we can surmise that the general "provision of services" of the TPG applies here as well.
3	"Procurement and suppling products" (with little risk and without owning IP)	"[…] where associated parties have concluded joint facility agreements or long term buy and supply arrangements"[73]
4	"Provision of services" (with little risk and without owning IP)	"[T]he provision of services"[74]
5	"Research and development services" (with little risk and without owning IP)	"[C]ontract research services […] is a typical setup for applying a cost plus method"[75].
6	NOT: "Independent manufacturing companies"	
7	NOT: "Manufacturing companies which are performing several functions such as product research and development, brand building, devising market strategies, product warranty and customer care."	

Contract manufacturing is referenced explicitly in Decree 132 and the TPG. Other, additional types of services which may resort under the Cost Plus Method, such as installation, R&D and procurement, are listed in Decree 132 and referenced directly or implied in the TPG.

Contract manufacturing is well established internationally as a typical activity to which the Cost Plus Method applies. For example, a 2023 German court decision confirmed that the Cost Plus Method is the appropriate method for contract manufacturing (in this particular case, auto parts manufacturing), and added additional guidance on how the mark-up should be calculated[76].

[69] Decree 132, art. 14 (1) (b).
[70] OECD TPG 2022, 2.59.
[71] OECD TPG 2022, 2.45.
[72] OECD TPG 2022, 2.60.
[73] OECD TPG 2022, 2.45.
[74] OECD TPG 2022, 2.45
[75] OECD TPG 2022, 2.61.
[76] Germany vs "Cutting Tech GMBH", August 2023, Bundesfinanzhof, Case No I R 54/19 (ECLI:DE:BFH:2023:U.090823.IR54.19.0)

8. In which situations should the Resale Price method be used?

Both the OECD TPG and Decree 132 cite some examples of business situations which are appropriate for the Resale Price method. This comparative table provides an overview in that regard.

Example situations for the Resale Price method cited in		
	Vietnam Decree 132[77]	Comparable reference in TPG
1	"The taxpayer sells or distributes products purchased from a related party to unrelated customers and does not create IP associated to the products; does not participate in development, enhancement, maintenance and protection of the relevant IP owned by its related party, carry out processing, manufacturing or installation services that may change the nature or specifications of the product, or attach trademarks"	"[products] have been purchased from a associated enterprise are resold to an independent enterprise." "This method is most useful where it is applied to marketing operations"[78]. "a distribution company"[79] "An appropriate resale price is easiest to determine where the reseller does not add substantially to the value of the product"[80].
2	NOT: "distributors owning product IP with respect to brand names, trademarks, customer lists, distribution channels, logos or any other brand identity factors for market research, marketing or promotion, or are incurring expenses from the creation, setup of distribution, brands or after sale costs".	"…where the reseller contributes substantially to the creation or maintenance of intangible property associated with the product (i.e. trademarks or trade names)"[81]

The Resale Price Method is internationally well settled as the method of choice for marketing products bought from a related party, to third parties. In a recent Argentinian Supreme Court case, the tax authorities tried to argue that the TNMM should be used instead of the Resale Prime Method. Several levels of court decided that there was no evidence that only TNMM would work under the circumstances[82].

[77] Decree 132, art. 14 (1) (a).
[78] OECD TPG 2022, 2.27.
[79] OECD TPG 2022, 2.27.
[80] OECD TPG 2022, 2.35.
[81] OECD TPG 2022, 2.35.
[82] Argentina vs Productos Roche S.A., March 2024, Supreme Court, Case No CAF 56807/2017/1/RH1

Net Margin Methods for Transfer Pricing

9. In which situations should the Transactional Net Margin Method be used?

Both the OECD TPG and Decree 132 cite some examples of business situations which fit the TNMM. This comparative table provides an overview in that regard.

Example situations for the TNMM cited in		
	Vietnam Decree 132[83]	Comparable example in OECD TPG
1	Taxpayers do not have the necessary information to apply the CUP method	Somewhat related to this issue, the OECD TPG states that the TNMM method is less vulnerable to transactional differences than the CUP, differences in accounting rules and functionality[84].
2	Taxpayers do not have data about the accounting methods of external comparables	
3	Taxpayers unable to find comparable objects with similar functions and products, so there is not enough basis to apply the methods of comparing gross profit margin on revenue or cost of goods sold.	
4	Taxpayers engaged in distribution or manufacturing which do not own product IP or do not carry out development, enhancement, maintenance, protection and exploitation of IP, or does not fall in the scope of [profit split].	
5		Where there is no or limited publicly available reliable gross margin information on third parties[85]
6		Not: "Just because data concerning uncontrolled transactions are difficult to obtain or incomplete in one or more respects"[86].
7		TNNM is unlikely to be reliable if each party makes unique and valuable contributions[87].
		TNMM (or Cost Plus or Resale Price) may be applicable where one of the parties makes all the unique and valuable contributions, and the other does not[88].

It is fair to say that in practice, TNMM is the most popular method used by taxpayers. This is also the case in Vietnam. Although the OECD endorses TNMM as one of the valid methods, some tax authorities at times suspicious if the taxpayer really chose TNMM as the "best method", or just out of convenience. For example, the UK tax authorities state:

[83] Decree 132, art. 14 (1) (c).
[84] OECD TPG, 2022, 2.68
[85] OECD TPG 2022, 2.4.
[86] OECD TPG 2022, 2.5.
[87] OECD TPG, 2022, 2.65
[88] OECD TPG, 2022, 2.65

"TNMM is the OECD method most commonly used for justifying the transfer pricing of a company. In some cases the case for a TNMM approach is based on little more than a list of supposedly comparable companies, whose results are within a range that encompasses those of the company under review. It is then argued that the company's prices are arm's length"[89].

10. In which situations should the Profit Split Method be used?

The following table compares the situations best suited for the Profit Split Method.

<table>
<tr><td colspan="3">Example situations for the Profit Split method cited in</td></tr>
<tr><td></td><td>Vietnam Decree 132 art. 15 (1.a)</td><td>Comparable example in TPG</td></tr>
<tr><td>1</td><td>"Taxpayers participate in related, specific, integrated, and closed transactions within the group"</td><td rowspan="14">"highly integrated operations"[90]
"both parties to a transaction make unique and valuable contributions"[91]
"contribute unique and valuable intangibles"[92]
"taking into account unique facts and circumstances"[93]
"highly integrated operations"[94]</td></tr>
<tr><td>2</td><td>"New product development activities"</td></tr>
<tr><td>3</td><td>"Use of exclusive technology"</td></tr>
<tr><td>4</td><td>"Participate in the group's exclusive transaction value chain"</td></tr>
<tr><td>5</td><td>"developing, enhancing, maintaining or protecting and using proprietary intangible assets and have no basis to determine prices between affiliated parties "</td></tr>
<tr><td>6</td><td>"transactions closely linked or simultaneously performed"</td></tr>
<tr><td>7</td><td>"complex financial transactions related to multiple worldwide financial markets "</td></tr>
<tr><td></td><td></td></tr>
<tr><td></td><td>Vietnam Decree 132 art. 15 (1.b)</td></tr>
<tr><td>8</td><td>"Taxpayers participating in digital economic transactions and have no basis to determine prices between affiliated parties"</td></tr>
<tr><td>9</td><td>"Participating in creating added value obtained from synergies within the group;</td></tr>
<tr><td></td><td></td></tr>
<tr><td></td><td>Vietnam Decree 132 art. 15 (1.c)</td></tr>
<tr><td>10</td><td>"Taxpayer exercises functions with autonomy over the entire production and business process, and not resorts under the [CUP method] or the [Cost Plus or Resale Price methods]"</td></tr>
</table>

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[89] Internal Manual of the UK Revenue Authority: https://www.gov.uk/hmrc-internal-manuals/international-manual/intm421080
[90] OECD TPG, 2022, 2.120
[91] OECD TPG, 2022, 2.119
[92] OECD TPG, 2022, 2.119
[93] OECD TPG, 2022, 2.121
[94] OECD TPG, 2022, 2.120

The TPG are lengthy but rather general when it comes to setting out the situations where the Profit Split Method is appropriate. Decree 132 provides a longer list and more concrete applications, such as “new product development”, “complex financial transactions” and “developing IP assets”. For all of these applications it is very well possible, maybe even likely, that the Profit Split Method is also possible under the TPG.

11. Calculation of the arm’s length range

The TPG acknowledge that in many cases, the examination by taxpayers will not result in one single price or profit margin, but rather in a small cloud of data points. The OECD cites the use of the interquartile range as a possible tool to determine not a single acceptable point but a maximum and a minimum range:

> *“In such cases, if the range includes a sizable number of observations, statistical tools that take account of central tendency to narrow the range (e.g. the interquartile range or other percentiles) might help to enhance the reliability of the analysis”[95].*

Simply put, the OECD’s interquartile range takes into account the data points which are 25% lower than the median and 25% higher than the median.

In Vietnam’s earlier transfer pricing regulations, i.e. before Decree 132 also adopted this 25% to 75% range. But with the introduction of Decree 132, a remarkable change was introduced: the lower range may not be lower than 35% instead of not lower than 25%. Effectively this means that the prices or margins should be higher than with the traditional interquartile cited in the TPG.

Transfer Pricing for Costs, Services and Loans

12. Special rules for the deduction of costs and expenses

Decree 132 provides in some specific rules with respect to the deductibility of costs and expenses.

Firstly, a general rule sets out a number of rules prohibiting the deductibility of costs and expenses. Decree 132 states in this regard that costs of related party transactions which do not have a normal substance or which do not contribute to the sales or income of a taxpayer, are not deductible. This includes, Decree 132 continues, (i) payments to related parties which have no business or production activities or none that is relevant to the taxpayer’s business, (ii) payments to related parties that have a business activity but its assets, employees and functions is not commensurate with the value of the transaction and (iii) payments to an entity in a country or territory that does not levy corporate income tax and there is insufficient value contributed to the business of the taxpayer[96].

Vietnam’s Corporate Income Tax Law also has several rules on the deductibility of expenses. In general, enterprises can deduct all expenses (except for negative list of non-deductible expenses) if they are incurred for the production and business of the taxpayer, if they are evidenced properly and, except for small amounts, were paid through the banking system[97] .

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[95] OECD TPG 2020, 3.57
[96] Decree 132, art. 16 (1).
[97] Art 9 (1) of the Law on Corporate Income Tax No. 01/VBHN-VPQH dated 30 Jan 2023

The TPG do not provide an exact equivalent to this portion of Decree 132 on general deductibility of costs and expenses, but the same ideas are certainly found in the OECD universe. With respect to payments to related parties without any (relevant) business activity, an unrelated party is unlikely to pay a service provider that does not maintain a business, so the OECD's general arm's length principle applies.

13. Special rules for services

Specifically for services charged by related parties, Decree 132 provides a number of conditions for the deductibility of service fees[98]:

- The services have a commercial, financial or economical value and are directly used for the business or production of the taxpayer;
- Unrelated parties would also be charged for such services;
- The transfer pricing method for determining the price of this type of services must be applied uniformly throughout the group, as evidenced by contracts, invoices and documentation on the calculation, factor of allocation and pricing policy.

In case the group uses internal service centers, Decree 132 provides that the taxpayer must determine the total value of this function and calculate the allocation in proportion to each participant.

The TPG dedicate a chapter to intra-group services outlining which services should be disregarded, and how to calculate an arm's length compensation. The structure and degree of detail in the TPG's section on services is larger than the few provisions included in Decree 132. The key condition that there must be a benefit for the taxpayer from the service, and that the fee is in accordance with what an unrelated party would have paid, underlies both Decree 132 and the TPG. Furthermore, many of the key references in Decree 132 with respect to services are also found in the TPG. For example, Decree 132 and the TPG both refer to services which benefit other entities such as shareholders[99], which have duplicate charges[100], services without clear beneficial value to the taxpayer[101] and services which are in reality just benefits from being part of a corporate group[102], and a marked-up on a service that is run through a related party conduit without added value[103].

14. Special rules for interest on loans

Decree 132, in following of earlier regulations[104], provides in a maximum limit for the deductibility of interest on related party loans within the same tax year. The deduction for interest (except on loans within the year) may not exceed 30% of the net profit generated from business activities within the taxable period plus loan interest costs arising after deducting deposit interests and lending interests arising within the taxable period plus depreciation expenses arising within that period of a taxpayer. Specifically:

[98] Decree 132, art. 16 (2) (a)
[99] Compare with OECD TPG 2022, 7.9: "shareholder activities"
[100] Compare with OECD TPG 2022, 7.11: "duplication"
[101] Compare with OECD TPG 2022, 7.6: "benefits test"
[102] Compare with OECD TPG 2022, 7.12: "incidental benefits"
[103] Compare with OECD TPG 2022, 7.34: "an associated enterprise acting as an agent"
[104] Decree No. 68/2020/NĐ-CP amending Clause 3, Article 8 of Decree No. 20/2017/ND-CP

- Calculation of Loan Interest Cost (A) in period: (A) = Actual loan interest payment (-) deducting interest income (from deposit or lending)
- EBITDA (B)= Net profit from business activities + A + depreciation
- Deductible Loan Interest Expense in period = A or 30%*B whichever is lower.

Any excess interest which is not deductible in that tax year may be carried forward for up to 5 years. This limitation does not apply to loans from banks and financial institutions and loans for certain state projects.

The operation of the threshold calculation means that in case a borrower has no profit of the year, no interest can be deducted from related party loans at all, at least not in that year, regardless whether the loan has an arm's length character[105].

Note that Vietnam corporate tax law provides in other restrictions for the deductibility of interest. The interest deduction is capped or non-deductible in case the interest rate exceeds 150% of basic rate announced by the State Bank of Vietnam for loan with non-economic enterprise/non-credit institutions, the excess amount is not deductible (i.e. note the Civil Code limits the rate at 10% p a for VND). Furthermore, interest is not tax deductible in case the shareholders have yet to pay up their committed capital in full to the company.

In effect, with the cap on deductible interest, Decree 132 goes outside of the scope of the arm's length principle. Even if the related party lender has provided a loan to the borrower at arm's length conditions, the interest deduction remains capped for each tax year. Indeed, Decree 132's interest deductibility cap traces back to an earlier Decree[106], where the same cap applied regardless whether the loan is provided by a related or an unrelated party.

The TPG has no similar provision. From the OECD's perspective, just because a lender is a related party does not ipso facto mean that the interest paid should not be taken into account for the tax calculation of the borrower if it exceeds a threshold which is not based on the transaction itself, but entirely on the taxable income of the borrower.

But, disregarding the tax consequences of a loan, in whole or in part, are definitely within the OECD mindset. In the Commentary on the OECD Model Tax Convention Art 9, the OECD clarifies that this provision of the Model DTA is not meant as an impediment to domestic tax rules aimed at curbing tax avoidance through use of related party loans[107]. The OECD underlines this idea in 2020 in the context of the BEPS Actions:

> *"This guidance is not intended to prevent countries from implementing approaches to address the balance of debt and equity funding of an entity and interest deductibility under domestic legislation".*[108]

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[105] Official Dispatch No. 9662/ CTBDU-TTHT dated 5 June 2023
[106] Decree No. 20/2017/ND-CP
[107] See also the OECD Report on "Thin Capitalisation" adopted by the Council of the OECD on 26 November 1986 and reproduced in Volume II of the full version of the OECD MTC at page R (4)-1.
[108] OECD Transfer Pricing Guidance on Financial Transactions, 2020.

Differences and Similarities between the OECD Transfer Pricing Guidelines and Vietnam Decree 132

15. Conclusions

By way of summary, this is an overview of some comparative notes in transfer pricing guidelines between Vietnam and the OECD:

- **Related parties**: The central principle of the OECD "participate in management, control or capital" is also adopted in Vietnam. Decree 132 just offers more details and actual thresholds (such as 25% participation in capital, or 50% of the board) which arguably fall within the general principle anyway. One remarkable difference is Vietnam's characterization of a financing relationship as triggering parties to be "related" if certain thresholds are exceeded. In the OECD approach, a lender is not normally seen as a related party in and of itself, even if the loan exceeds certain financial thresholds of the borrower.

- **Comparables**: It is fair to say that both the TPG and Decree 132 have a preference for internal comparables over external comparables in many situations. But, unlike the TPG, Decree 132 (1) provides in an actual priority for internal over external comparables, and (2) does not offer any specific language to warn against use of minor uncontrolled sales transactions. Therefore, we conclude that in Vietnam reliance by the GDT on internal comparables, where available, may be stronger than in some OECD markets.

- **Foreign data**: Both Vietnam and the OECD allow the use of foreign data, for example for the TNMM. The difference is that in Vietnam, the preference for local data is stronger worded and part of an explicit priority of sources. It is possible for a taxpayer in Vietnam to use foreign data, but only if appropriate Vietnam data is lacking[109].

- **Hierarchy or Most appropriate Method**: The OECD has abandoned the hierarchy of methods in 2010 and calls for taxpayers to use the most appropriate method under the circumstances. Vietnam provides in a (qualified, "soft") hierarchy with CUP at the top[110], then Cost Plus and Resale Price, and if that is not possible to apply, only then the taxpayer may refer to TNMM and Profit Split. However, this hierarchy in Vietnam is perhaps more theoretical than practical. As the regulations confirm, it is subject to the circumstances of the situation. The taxpayer can justify his method of choice in Vietnam by claiming the data for other methods is lacking. Whether or not that statement on lack of data is acceptable to the GDT of course remains to be seen. In conclusion it is fair to say that even though in practice often the end result may be comparable, Vietnam imposes in theory more structure when it comes to methods than the OECD, which has real life consequences for challenges.

- **CUP Method**: The OECD and Vietnam agree that the CUP Method is best used when comparable products or services are freely available on the market, or for goods with "market prices" determined at international exchanges. Decree 132 also mentions interest rate on loans which is comparable to the OECD's Transfer Pricing Guidance on Financial Transactions. Vietnam includes royalty rates on licenses under the CUP Method, which is not

[109] Decree 132, art. 17 (3)

[110] Which is similar to the preference the OECD TPG expresses for CUP if it is "equally reliable"; OECD TPG 2022 2.3.

mentioned in TPG, but in many such cases the OECD would come to comparable outcomes for royalties. The OECD has some more explicit detail determining the comparability of a product than Decree 132.

- **Cost Plus Method**: The OECD and Vietnam provide both that the Cost Plus Method is often appropriate for services and contract manufacturing. The applications mentioned in Decree 132 are mostly also referred to quite clearly in the TPG.

- **Resale Price Method**: The OECD and Vietnam provide both that the Resale Price Method is best used for distribution to unrelated parties of goods purchased from related parties, without much added value. Decree 132 is more explicit or detailed in pointing out that this method should not be used if the taxpayer adds value or owns IP, which is in line with the TPG.

- **Transactional New Margin Method**: Vietnam is in agreement with the TPG in the basic view that a net-margin method such as TNMM is best suited when data about gross margins (for Cost Plus and Resale Price) is not available. The difference is that Vietnam, as was explained above, provides that Cost Plus and Resale Price are more explicitly prioritized over TNMM that is the case in the OECD context.

- **Profit Split Method**: This method can best be used for transactions which are highly integrated within a group of related enterprises, both Vietnam and the TPG agree. Decree 132 adds more detail and examples which may be consequential in actual practice. Vietnam puts more emphasis on the use of this method with complex financial transactions and development of intangibles.

- **Arm's length range**: One of the more remarkable deviations from the TPG in Vietnam is that the lower limit of the arm's length range is set at 35% instead of the usual 25% as in the interquartile range referred to in the TPG[111].

- **Related party expenses and service fees**: On this issue the text of Decree 132 and the TPG are not similar. Vietnam uses a transfer pricing regulation as an opportunity to provide restrictions on the deductibility of certain costs. Many of these restrictions fall within the scope the arm's length principle. For example, the mention in Decree 132 of "payments to related parties which have no business or production activities or none that is relevant to the taxpayer's business", such payments may very well fail the OECD's benefit test[112].

- **Interests paid to related parties**: Vietnam's inclusion in the transfer pricing regulations of a general cap in deductibility of interest paid to related parties is noteworthy, and without equivalent in the TPG. This Vietnam rule is more consequential than in many OECD member countries, because unlike Art. 9 of the Double Taxation Agreements, Decree 132 provides that certain lenders can be deemed related parties simply because the loan amount exceeds certain thresholds based on the equity of the company. From the OECD's perspective, if the interest is calculated on an arm's length basis, this would suffice. In Vietnam, even if the interest is at arm's length, the cap on deductibility may nevertheless (temporarily) eliminate the tax deduction.

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[111] OECD TPG 2020, 3.57.
[112] OECD TPG 2020, 7.6.

In conclusion, there is substantial alignment between Vietnam's transfer pricing regulations and the TPG. Decree 132, in following of its predecessors, has clearly been significantly inspired by the TPG when it comes to comparability factors, comparables, documentation, and the operation of the different transfer pricing methods. In several instances, Decree 132 provides more concrete details than the TPG, but the details provided are well within the general meanings set out in the TPG. For example, Vietnam's concrete definitions for "related parties" are, for the most part, just applications of the OECD's general rule "directly or indirectly participating in the management, control or capital". Vietnam's regulations on services are also very much in line with the OECD's "benefits test". Finally, it is noteworthy that there is substantial alignment between Vietnam and the OECD on which transfer pricing method is best suited for which situation.

But in some instances, Vietnam's rules are not the same as those set out in the TPG. Where there are differences, Vietnam's rules are usually stricter than the ones of the OECD. Obviously, one of the eye-catching differences is the determination of the lower limit of the acceptable arm's length range at 35% instead of the more usual 25%, referred to in the TPG. Furthermore, the Vietnam regime is in theory at least more structured or indeed stricter than the OECD's when it comes to the fixed hierarchy of transfer pricing methods and the stated priority for internal comparables. To a lesser degree, the same can be said for the use of foreign data. It is the OECD position that the "nationality" of the data does not matter, just the quality. On the other hand, Vietnam's policy is to prioritize Vietnam data. There are also significant differences on characterizing certain lenders (including individuals who are directors) as related parties and restricting the deductibility of interest paid to such lenders, even if the interest is at arm's length.