

Informative Note

Financial securities and transfer pricing

22nd July 2020

Securities are instruments designed to ensure greater safety and coverage for the fulfilment of the obligations covered. For example, securities ensure the creditor institutions that the lender will comply with certain financial obligations in case the borrower is not able to bear the costs. In this case, additionally, the debtor of the main operation subject to the security would benefit, since they would have access to better credit conditions.

The creation of a security between entities of the same Group would be considered as a related-party transaction and that on certain occasions should be understood as remuneration, as an independent third party would not assume a potential risk without remuneration. On other occasions, however, this related-party transaction could be inherent in the shareholder's own activity and a detailed analysis should be made of whether it benefits the Group as a whole rather than the entity whose transaction is guaranteed.

The consideration of a related-party transaction is confirmed by multiple judgments/resolutions at the national level. Among others, we cite (1) the Supreme Court Decision of June 21st 2012, Third Chamber/Section 2, for Administrative Litigation, and (2) the National Court Decision of June 14th 2018, Section 2, for Administrative Litigation Matters.

On an international level, the related-party status is confirmed by the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereafter "OECD Guidelines") and the recent OECD Transfer Pricing Guidance on Financial Transactions (hereafter "OECD Financial Recommendations").

For the determination of the market value of security transactions, the usual transfer pricing methodologies (identified in Article 18(4) of the CITA, and Chapter II of the OECD Guidelines) would be applicable. In our experience, for the application of these methodologies, we generally have to look at the availability of internal and, in case of unavailability, external comparables through - for example - specialised databases, market references included in the head offices of public bodies, etc.

In addition to the usual transfer pricing methodologies, the OECD Financial Recommendations set out several applicable - but not exclusive - procedures for the analysis of financial collateral transactions:

- Comparable uncontrolled price method.
- Performance based approach.
- Costs approach,
- Expected losses valuation.
- Capital support method

Regardless of the above, it could be considered -provided each specific case is analysed in detail- that there would be no operation as guarantor in those cases in which the Group (through one of its companies) issues a comfort letter/letter of sponsorship. Section 10.163 of the OECD's Financial Recommendations states that - anything that does not involve a legally binding commitment, such as a comfort letter or other minor formulas of financial support, is not considered to be assuming the risk. This interpretation would be consistent with the section on co-benefits in Chapter VII of the OECD Guidelines, and the - also recent - ruling of the European Court of Justice of 31st May 2018, Case C382/16, Hornbach-Baumarkt AG v Finanzamt Landau).

At Andersen we have a team specialized in transfer pricing at your disposal to answer any doubts you may have.

For more information please contact:

[Rafael Leal](#) | Director in Andersen

rafael.leal@es.Andersen.com

[Andrea Pérez](#) | Consultant in Andersen

andrea.perez@es.Andersen.com

The above comments are for information purposes only and do not constitute professional opinions or legal advice, nor do they necessarily include the opinions of the authors. If you are interested in obtaining additional information or clarification of the content, please contact us by telephone on + 34 963 527 546/34 917 813 300 or by e-mail at communications@es.Andersen.com.

