

Czech Republic v Hitachi Astemo Czech s.r.o. [2025, Czech Supreme Administrative Court; 2026, Regional Court of Ústí nad Labem]

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1. Facts

Astemo Czech s.r.o. (at the time of the facts, Hitachi Automotive Systems Czech, s.r.o.; “Astemo”, “the taxpayer” or “the plaintiff”) was incorporated in 2006 within the Hitachi group. Its board discontinued the LCD production in March 2009, and in 2010 the company's assets were written down to their expected realizable value².

In 2011, the Hitachi group revoked the termination decision and approved plans to reuse the plant within the group's activities. As part of the restructuring, still in 2011, Astemo's capital was reduced by CZK 1.45 billion to absorb accumulated losses – in 2009 alone, the year of the discontinuation decision, the company had incurred a tax loss of CZK 396,563 thousand, later excluded from the deferred tax calculation for 2013 due to the “low probability of its application in future years”³.

The parent's decision to resume operations at the plant was followed by a capital increase of CZK 522 million on 29 February 2012, expressly “for planned investments related to the new production”⁴.

Until the new operation started, the company's income remained limited to renting the idle premises and to intragroup services: during the pre-production

¹ The views expressed are the author's own and do not necessarily reflect those of the Receita Federal do Brasil.

² Hitachi Automotive Systems Czech, s.r.o., *Účetní závěrka a zpráva auditora k 31. březnu 2014*. Available at: <https://or.justice.cz/ias/ui/vypis-sl-detail?dokument=20053777&subjektId=21747&spis=563209>. Accessed 10 Jul 2026, Note 17.

³ Hitachi Automotive Systems Czech, s.r.o., *Účetní závěrka a zpráva auditora k 31. březnu 2014* [Financial Statements and Auditor's Report as at 31 March 2014], Czech Commercial Register, Note 11, available at: <https://or.justice.cz/ias/ui/vypis-sl-detail?dokument=20053777&subjektId=21747&spis=563209> (accessed 10 July 2026).

⁴ Hitachi Automotive Systems Czech, s.r.o., *Účetní závěrka a zpráva auditora k 31. březnu 2013* [Financial Statements and Auditor's Report as at 31 March 2013], Czech Commercial Register, Note 7, available at: <https://or.justice.cz/ias/ui/vypis-sl-detail?dokument=17167604&subjektId=21747&spis=563209> (accessed 10 July 2026).

period (1 January 2012 – 31 March 2013), revenue of CZK 22,338 thousand consisted of CZK 14,131 thousand from cross-border services performed by its workforce and invoiced to the group, and CZK 8,207 thousand from domestic rental income.⁵

Mass production of shock absorbers finally began in December 2013, followed by high-pressure pumps in January 2014.

Before the assessment that gave rise to the present litigation, the tax administrator had audited the first production year (2013/14), for which Astemo's financial statements indicated a preliminary tax loss of CZK 126,403 thousand. The resulting assessment cut the loss and applied a 1.99% markup based on the taxpayer's own TP documentation; Astemo did not challenge it. For the following periods, 2014/15 to 2017/18, the taxpayer filed supplementary tax returns applying the markup, revised to 2.18% from 2017/18 following a new benchmarking analysis⁶.

This first assessment, for the 2013/14 period, was based on the fact that, although the taxpayer's sales were directed to related parties (the parent company and other Hitachi companies in Germany and in the UK)⁷ and the group was reporting profits in the period due to strong demand in Europe, the taxpayer had reported a tax loss – a situation incompatible with its functional profile as a contract manufacturer. The taxpayer did not appeal against this assessment and corrected its tax returns for the following periods.

On 25 February 2019, the tax administrator called upon the taxpayer to file a supplementary return for the pre-production period (2012/13). The taxpayer refused, on the basis that without sales there was no intragroup price to test and that, as the start-up expenses had been incurred with unrelated suppliers, it had entered into no controlled transaction in that period. The first underlying question, in this context, is whether a period with no output can host a compensable transaction.

The Tax Office for the Ústí nad Labem Region (Finanční úřad pro Ústecký kraj) then opened a tax audit on 2 October 2019 and assessed the taxpayer for the 15-month transition period – presented in the financial statements as running from 1 January 2012 to 31 March 2013 – for which a tax loss of CZK 75,692,659 had been declared. The assessment, dated 19 October 2021, reduced the loss by

⁵ Hitachi Automotive Systems Czech, s.r.o., *Účetní závěrka a zpráva auditora k 31. březnu 2013* [Financial Statements and Auditor's Report as at 31 March 2013], Czech Commercial Register, Note 11, available at: <https://or.justice.cz/ias/ui/vypis-sl-detail?dokument=17167604&subjektId=21747&spis=563209> (accessed 10 July 2026).

⁶ NSS 3 Afs 165/2024-67, paras. 21-23; the same account appears in KS 15 Af 10/2023-128, paras. 17-19.

⁷ NSS 3 Afs 165/2024-67, para. 22; identical text in KS 15 Af 10/2023-128, para. 18.

CZK 71,391,595 – leaving a residual tax loss of CZK 4.3 million – and imposed a penalty of 1% of the reduction (CZK 713,915), based on Section 23(7) ITA and Article 9(1) of the DTA, on the basis that this amount corresponded to the compensation that the parent company should have provided.

After the Appellate Financial Directorate rejected the administrative appeal on 8 June 2023 (decision ref. No. 19331/23/5200-11431-711360), the taxpayer brought a judicial action against the Directorate before the Regional Court in Ústí nad Labem (Krajský soud – KS), which annulled the decision in the plaintiff's favour.

The Regional Court held (Case No. 15 Af 10/2023-76, judgment of 10 July 2024) that the TP rules apply only to contractual obligations and that, since there was no formal commercial or financial transaction with specified prices and conditions – but merely managerial decisions and orders of the parent company – no controlled transaction existed. According to the court, the parent derived no direct profit from the decision to start a new production, there was no evidence of damage to the controlled company, and the conduct under review could not be read as an attempt to unlawfully reduce the tax base. The court also noted that the decision averted the long-term negative consequences of the plant's idleness and agreed with the plaintiff that any compensation would only be due for losses incurred after the new production became operative.

The Appellate Financial Directorate – the defendant below, acting as complainant – challenged the Regional Court's judgment through a cassation complaint before the Supreme Administrative Court, which decided the case on 12 November 2025 under No. 3 Afs 165/2024-67. The parties' arguments and the court's decision are detailed below; their consequences are then analysed.

1.1. Arguments of the parties

The tax authority, as complainant, argued that the Regional Court had overlooked that tax rules on international transactions between related companies must be interpreted independently of corporate law, and that the focus should be not on whether there was tax-evasion intent, but on properly allocating the profit generated between jurisdictions within the group's intertwined operations, as it would be allocated between separate business entities under comparable conditions. In other words, if the terms of a transaction differ from what would be observed between independent parties, profits must be adjusted in accordance with the arm's length principle.

The tax authority characterized the taxpayer as a limited-risk contract manufacturer, whose operations should yield a low but stable profit, calculated as a markup on operating costs; an independent company would not start a new production without a corresponding economic benefit in every phase of the operat-

ing cycle. Future profit potential could compensate for the production costs only if the functional profile were that of a full-fledged manufacturer; the costs should therefore follow the risks and be borne by the party performing the decision-making function.

The tax authority further highlighted that the operational years had been assessed with the tax base adjusted by reference to the actual operating costs of each period only – the start-up costs having never been included in the cost base on which the markup was set.

It added that the OECD Transfer Pricing Guidelines (TPG) require all intra-group relationships to be tested under the arm's length principle, irrespective of the existence of a formal contract, and to be assessed at the level of the individual entity. The Regional Court's reasoning, by contrast, was built on the parent's – or the group's – economic rationality in managing the business, when the assessment should be made from the individual entity's perspective. In addition, the 2022 update of the TPG specifically addresses start-up costs, and Section 23(7) ITA is applicable to managerial decisions.

The taxpayer's counterarguments ran along four main lines: (i) no controlled transaction exists without a bilateral onerous relation; (ii) start-up losses are ordinarily accepted between independent parties; (iii) the reorganization costs were funded from the taxpayer's capital, in which the group had invested in pursuit of future profits; and (iv) the tax authority did not meet its burden of proof, as it never established a reference price and simply reproduced figures from the taxpayer's own books.

The taxpayer maintained that the TPG apply to clearly defined intra-group transactions – contractually delineated commercial or financial arrangements, with distinguishable obligations and compensation – and pointed to the Regional Court's concordant judgment. It argued that start-up losses are accepted under free-market conditions and that no reimbursement of pre-operational costs is required where the expected cash flows exceed the invested amount, since economic rationality stems from weighing the benefits and risks of the new investment.

The taxpayer further stressed that the investment was funded by its own capital, injected by the parent in expectation of future profits, and that the fact that decision-making is not its function does not mean that every strategic decision entailing costs must be compensated.

Finally, the taxpayer argued that a function and risk analysis must be followed by a proper pricing procedure: once the correct profile is established, the appropriate transfer pricing method must be selected and comparable transactions between unrelated parties identified, to determine the acceptable arm's length range.

2. Court decision

For the present analysis, both the Supreme Administrative Court (NSS) judgment and the subsequent Regional Court (KS) judgment are considered: the former established the applicable scope, confirming that the consequences of managerial decisions may qualify as controlled transactions for transfer pricing purposes; the latter, building on the binding legal opinion, required an adjustment methodology consistent with the TPG.

In Case No. 3 Afs 165/2024-67, of 12 November 2025, the NSS noted at the outset that the litigation turned entirely on the legal analysis, the factual framework being undisputed: the taxpayer was a contract manufacturer dependent on the parent's orders, and it bore the costs of the new production without any compensation from the parent, generating a tax loss.

As a premise, the NSS reproduced paragraph 1.33 of the TPG, which details the two steps of the ALP's application: first, the accurate delineation of the controlled transaction; and second, the comparison of its conditions and economically relevant circumstances with those of transactions between independent parties. On this basis, the ALP must also be observed in the case of managerial decisions of the parent company – as expressly acknowledged by General Financial Directorate Guideline D-34 (“Communication on the application of international standards in the taxation of transactions between associated enterprises – transfer prices”), which counts the “parent company's order” among controlled dealings – since the economic effects of the change in the production portfolio derive from that order; and the analysis must rest on factual reality rather than solely on the formal reality of contractual terms.

Turning to the case, the court recognized an obligation to bear costs imposed by the parent's decision without any direct compensation or other levelling market condition – such as a secured volume of sales for a certain period – and held the situation incompatible with the ALP, finding apposite paragraph 1.129 of the TPG, which contemplates the scenario in which an associated enterprise incurs “persistent losses” while the multinational enterprise group as a whole is profitable, as well as paragraph 1.150 of the 2022 TPG, invoked by the complainant, which recognizes that a TP adjustment may be required where an entity sustains persistent losses while the group benefits from its operations.

The court further invoked paragraphs 1.42 and 1.43 of the TPG to bring the parties' “actual conduct” into scope – beyond the restrictive perspective of written contracts – for delineating the transaction and defining responsibilities, risks and expected results. It also reaffirmed the autonomy of tax law in classifying private-law arrangements (“tax law implements an autonomous classification of the tax-law effects of private-law agreements”⁸), and concluded that an independent

⁸ Czech Republic, Supreme Administrative Court (Nejvyšší správní soud), judgment of 12 November 2025, Case No. 3 Afs 165/2024-67, *Czech Republic v Hitachi Astemo Czech s.r.o.*, para. 31; English

company would not have agreed to the terms in question, from which the uncompensated tax loss arose.

The case was then remanded to the Regional Court for further proceedings, bound by the NSS's legal opinion on the scope – the consequences of the managerial decision qualifying as a controlled transaction.

In Case No. 15 Af 10/2023-128, of 20 January 2026, once it stood established that the parent company's order falls under Section 23(7) ITA and that independent parties would have required some form of compensation for the start-up costs, the KS annulled the tax authority's decision on the ground that the assessment failed the quantification requirements of Section 23(7) ITA.

The Regional Court recapitulated the two limbs of the burden of proof in ALP cases: first, to identify a controlled transaction; and second, to identify comparable transactions between independent parties and to quantify how the controlled transaction's prices differ from those that independent companies would have agreed under the same or similar conditions.

The court then found that the tax administration had failed to discharge its burden of proving what the terms of the transaction would have been under market conditions, in which affiliation does not influence economic behaviour. It identified no comparable independent transactions and applied no appropriate TP method – an approach the court held inadmissible, since “the law does not provide for the determination of a reference price in the absence of at least essentially comparable transactions based on a hypothetical estimate”⁹.

In addition, the Regional Court noted that neither the tax administrator nor the Appellate Financial Directorate explained why it was impossible to determine a reference price or to select a comparison method, nor why they did not resort to the exceptional administrative price provided for in Section 23(7) ITA.

The Regional Court concluded that the direct adoption of the reported loss – which it refused to regard even as a “hypothetical estimate”¹⁰ – did not meet the transfer pricing burden of proof and did not comply with the arm's length principle, and ruled, reaffirming the mandatory sequence of the tax administration's burden of proof – to identify transactions at least essentially comparable to the controlled one and to select an appropriate method – or, failing that, to duly justify recourse to the administrative price¹¹.

translation by TPCases.com, available at: <https://tpcases.com/wp-content/uploads/3-Afs-165-2024-67-ENG.htm> (accessed 20 July 2026). Hereinafter “NSS 3 Afs 165/2024-67”.

⁹ Czech Republic, Regional Court in Ústí nad Labem (Krajský soud v Ústí nad Labem), judgment of 20 January 2026, Case No. 15 Af 10/2023-128, *Czech Republic v Hitachi Astemo Czech s.r.o.*, para. 46; English translation by TPCases.com, available at: <https://tpcases.com/wp-content/uploads/15-Af-10-2023-128-ENG.htm> (accessed 20 July 2026). Hereinafter “KS 15 Af 10/2023-128”.

¹⁰ KS 15 Af 10/2023-128, para. 52.

¹¹ KS 15 Af 10/2023-128, para. 55.

Thus, thirteen years after the relevant facts, the case returned to the tax authority for a new determination.

3. Critical analysis

3.1. *The ALP's historical swing between price correction and anti-avoidance*

To understand the tax authority's procedure and the Regional Court's reaction, a line must be drawn, or perhaps blurred, in the interpretation of the arm's length principle and of the transfer pricing adjustment procedures historically disseminated and enforced through Article 9 of the OECD Model Tax Convention: should the ALP be read as anti-avoidance-oriented, or as a price-revision procedure that fine-tunes profit allocation among associated enterprises? The historical development of transfer pricing balances both approaches and foreshadows the tension that materialized in the present case.

This distinction frames the analysis of the case: an anti-avoidance orientation supports an approach focused on economic substance and the consequent recharacterization for tax purposes, as performed by the tax authority, while a price orientation leads to a more mechanical pricing-and-verification procedure, as required by the Regional Court.

Although at first sight the two interpretations may seem directly opposed, both derive from the separate-accounting treatment of associated enterprises' transactions through the ALP, and both lead to a two-step procedure consisting of (i) the accurate delineation of an individual transaction between related parties from the observed conduct and (ii) its pricing as independent parties would have priced it under market conditions – at arm's length.

The ALP was originally conceived as an anti-avoidance rule¹² and was internalized as such by the jurisdictions that adopted it¹³. That original orientation was converted into a “price-correcting” reading by the 2010 OECD Transfer Pricing Guidelines, which “substantially narrowed the anti-avoidance focus of the ALP without offering a justification”¹⁴. The shift did not go unnoticed, having been acknowledged by the UK Court of Appeal in *BlackRock*¹⁵.

The reinterpretation was later partially reversed, reinstating the ALP's anti-avoidance role: the 2017 TPG introduced an entity-by-entity and commercial-rationality test for business restructurings in paragraph 9.38, rewording

¹² Eduardo Baistrocchi, Article 9: associated enterprises, in *Global Tax Treaty Commentaries* – Global Topics IBFD (last reviewed: 23 December 2025), p. 12 (accessed 31 March 2026). Hereinafter “Baistrocchi, GTTC Art. 9”.

¹³ Baistrocchi, GTTC Art. 9, p. 20.

¹⁴ Baistrocchi, GTTC Art. 9, p. 12.

¹⁵ *BlackRock HoldCo 5 LLC v HMRC* [2024] EWCA Civ 330, as discussed in Baistrocchi, GTTC Art. 9, p. 4.

paragraph 9.181 of the 2010 TPG¹⁶. These modifications illustrate that the purpose assigned to the ALP has swung throughout its history.

The methods evolved in a similarly uneven fashion: the “rule-based era” of the ALP allocation norm has recently given way to a “standard-based era”¹⁷. The rule era was inaugurated in 1933 by the League of Nations Carroll Report, whose main concern was profit shifting through abusive transfer pricing. During this era, the three traditional methods (comparable uncontrolled price, resale price and cost plus) were embedded into the allocation norm in 1979, followed by the transactional profit methods (transactional net margin and transactional profit split) in 1995¹⁸. Under this orientation contracts played the leading role, and re-characterization was cast as an exception.¹⁹

The 2015 OECD/G20 BEPS Report on transfer pricing, however, inaugurated a second phase, treating the ALP allocation norm as a standard rather than a rule and returning it to its origins²⁰. A relevant aspect of this reorientation lies in the unorthodoxy of core elements such as the “conduct-based approach”²¹, under which the delineation of the transaction may result from a “reverse engineering” that – rather than applying the two-step TP approach to the observed transactional features in order to determine the pricing outcome – allows the transaction itself to be adjusted in pursuit of an arm’s length outcome²².

The present case illustrates a collision of these eras and the discontinuities that may complicate the current application of the TP rules. On one side, the tax authority adopted a conduct-based approach and yet did not delineate the terms of the transaction – an incomplete application of the standard-era guidance. On the other, the court demanded a method-driven validation of the adjusted allocation in the tradition of the 1995 framework, confining a conduct-based approach within a rule-based orthodoxy.

3.2. *Substance over form: delineating the transaction from conduct*

The written terms of the contract are one of the economically relevant characteristics for the accurate delineation of the transaction under the 2022 TPG²³,

¹⁶ Baistrocchi, GTTC Art. 9, p. 55 and p. 48, note 289.

¹⁷ Baistrocchi, GTTC Art. 9, p. 12.

¹⁸ Baistrocchi, GTTC Art. 9, p. 12.

¹⁹ Richard Collier and Ian F. Dykes, The functional fallacy: the ALP and the limits of the conduct-based approach, *World Tax Journal* v. 17 (2025), no. 4, pp. 639-640, available at: <https://ssrn.com/abstract=5743178> (accessed 20 July 2026). Hereinafter “Collier and Dykes, The Functional Fallacy”.

²⁰ Baistrocchi, GTTC Art. 9, p. 13.

²¹ Baistrocchi, GTTC Art. 9, p. 13.

²² Collier and Dykes, The functional fallacy, p. 664.

²³ OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*,

and the actual conduct of the parties prevails over inconsistent contractual provisions²⁴. In this context, even the absence of a written contract may be supplied by conduct evidence, imputing or constructing contractual terms for transfer pricing purposes²⁵. In the case at hand, Guideline D-34 had already advised that “it is often the case that the parent enterprise’s orders are not explicitly contracted, are not accounted for, but still exist”²⁶.

In effect, the characterization of the managerial order implies not the mere recharacterization of a priced transaction but, in practice, the constitution of the missing terms. The recognition of the parent’s unilateral instruction as a controlled transaction therefore requires, at the next stage, the explicit and detailed disclosure of those terms for their accurate delineation – even though the TPG do not specify how to proceed²⁷.

Three main lines of interpretation of the controlled transaction can be identified in the case, each yielding its own terms and outcomes: (i) a shareholder act; (ii) commercial management; and (iii) a restructuring transferring functions, risks and profit potential.

The shareholder act – invoked by the taxpayer²⁸ in stating that the capital injections had supported the investments derived from the parent’s instructions, so that no compensation was due – would fall outside the scope of TPG Chapter IX (business restructurings), or indeed outside any TP adjustment at all, by force of the shareholder-activity provisions of Chapter VII (intra-group services)²⁹.

Although the first line of argument was never directly refuted, the NSS confronted the second – commercial management – with the autonomy of tax-law classification: whatever the corporate-law nature of the instruction, its consequences are classified independently for tax purposes, and from that standpoint independent parties would not have accepted the terms presented, demanding at least some contractual guarantee to compensate the start-up costs. ALP-based terms must therefore be inferred to ground the consequential adjustment.

Finally, the restructuring line. As the prior capital reduction absorbing accumulated losses indicates, Astemo had previously borne more risks than it would in

OECD Publishing (January 2022), ch. I, para. 1.36, available at: <https://doi.org/10.1787/0e655865-en>. Hereinafter “OECD TPG 2022”.

²⁴ OECD TPG 2022, ch. I, para. 1.45.

²⁵ Collier and Dykes, *The functional fallacy*, p. 652.

²⁶ Generální finanční ředitelství (General Finance Directorate), *Guidance D-34: Communication in respect of international standards application in taxation of transactions between associated enterprises – transfer pricing*, official English version, p. 11, available at: https://financnisprava.gov.cz/assets/en/attachments/t-taxes/Guidance_D-34.pdf (accessed 20 July 2026). Hereinafter “Guideline D-34”.

²⁷ Collier and Dykes, *The functional fallacy*, p. 664.

²⁸ NSS 3 Afs 165/2024-67, para. 15.

²⁹ OECD TPG 2022, ch. VII, paras. 7.9-7.10.

the context of its restructuring, in which the contract-manufacturer function was assigned to it – pointing to the limited functions and risks from which derive both the asymmetry in cost-bearing and the entitlement to compensation.

In summary: the NSS decided along the commercial-management line (through the autonomous tax classification of its consequences); the taxpayer's defence was built on shareholder-act premises; and the duty to compensate arose from the restructuring allocation of functions and risks – each line implying a different quantification. The terms would further depend on the baseline delineated: an idle plant facing termination, whose independent counterpart might well compromise profitability for the sake of continuity, or a continuous contract manufacturer executing the parent's directives – each option carrying different expected terms for an independent party.

3.3. The Brazilian transposition: scope, recharacterization culture and quantification

When the debate is transposed to Brazil, under Law 9,430/1996, a parent instruction without a contract or a determined price would have been invisible for TP purposes. With the delineation based on facts and actual conduct introduced by Article 7 of Law 14,596/2023 – privileging substance over formal contract terms, as provided by the 2022 TPG, and weighing the options realistically available (ORA) – a Brazilian case on the same premises would be cognizable. The assumption is particularly robust in view of Article 7, Paragraphs 3 and 4, which tie the risk analysis to the risks that significantly influence the economic results of the transaction and deem such risks assumed by the related party that exercises the functions relating to their control and has the financial capacity to bear them³⁰.

Considering the new Brazilian TP provisions – especially the broad treatment of business restructurings in Article 26 of the new Law³¹ – the NSS holding on the existence of a controlled transaction could plausibly be replicated, even though the outcome of future assessments may depend on overcoming the quantification challenges exemplified by the KS decision.

Despite the absence of an operative GAAR in Brazilian tax law – the general anti-avoidance clause of Article 116, sole paragraph, of the National Tax Code was never regulated – the substance doctrine has historically orbited the tax effects of business restructurings, motivating disallowances, disregards and reconfigurations for tax purposes, often supported by fraud allegations but also

³⁰ Brazil, Law No. 14,596 of 14 June 2023 (*Lei n. 14.596/2023*), art. 7, §§ 3 and 4, available at: https://www.planalto.gov.br/ccivil_03/_ato2023-2026/2023/lei/114596.htm (accessed 17 July 2026). Hereinafter “Law 14,596/2023”.

³¹ Law 14,596/2023, art. 26.

grounded on the proper identification of the taxable event and on tax law's inherent autonomy in determining the tax effects of economic and legal arrangements.

Even though TP legislation takes the form of a statutorily provided adjustment of the tax base, the convergence of the substance doctrine in both procedures may induce adjustments that resemble disallowances – precisely the quantification issue in the present case.

Considering the historical approach by Brazilian tax authorities under the former legislation, e.g., the *Marcopolo* cases³², where trading companies were disregarded on grounds of simulation, a reflex of disregarding arrangements rather than pricing them, special attention should be paid to the two-step approach, internalized by Article 6 of Law 14,596: applied to a case such as this, it would require the proper delineation of the transaction, followed by the comparability analysis and a quantification justified by reference to transactions between unrelated parties – or by the duly justified use of the law's alternative mechanisms where no comparable transactions exist under the same or similar conditions – in order to achieve the transaction's tax effect under the ALP.

Recharacterization, or even disregard, remains a legally accepted alternative, but once the transaction is marked as a TP controlled transaction, it should lock in the consequential procedure under TP provisions. The election of the legal basis carries its own methodological burdens: Article 6 sequences delineation and pricing, and even Article 8, which allows a controlled transaction to be disregarded or replaced, ends in pricing the substitute transaction – the regime offers no stopping point at the bare allocation. The conflict in the Czech case is sharpened by the fact that one of the available routes was documented in the file: the earlier assessments had applied the TNMM framework to the same taxpayer's subsequent tax periods – within which, as the KS itself noted, the start-up costs could have been factored into that method — but that possibility was not pursued,³³ and the tax administration opted to approach the start-up costs under the TP lens for delineation but chose a disallowance procedure for the quantification.

4. Conclusion

In light of the recent update of Brazilian TP legislation, the NSS decision is compatible with the broader scope: informal restructuring instructions with uncompensated economic effects may constitute controlled transactions. And although the KS decision imposes a rule-era requirement upon a standard-era, conduct-based TP approach, quantification must remain grounded on transfer

³² Marcopolo S.A.: First Taxpayers' Council (1º Conselho de Contribuintes), 5th Chamber, Decision 105-17.083 of 25 June 2008; CARF, Decisions 1402-000.752 (fiscal years 2000 and 2001), 1402-000.753 (fiscal year 2003) and 1402-000.754 (fiscal years 2004-2008), of 30 August 2011.

³³ KS 15 Af 10/2023-128, para. 53.

pricing premises: the goal is to adjust the price – or even the transaction – as if it had been concluded between unrelated parties, as a corollary of the arm's length principle, while accepting as systemic the limitations inherent in transposing a group-oriented decision into an individual entity's transaction.