

Transfer Pricing Forum

Transfer Pricing for the International Practitioner

Transfer Pricing: A Year in Review

This year has been active in terms of global transfer pricing developments. The goal of this forum is to identify 2018 transfer pricing developments in your country and discuss how your transfer pricing practice has been impacted by these developments, as well as to look forward to 2019. Please share your thoughts, with a focus on the following general areas:

- **Legislation**
(e.g., new legislation or regulations that have impacted the transfer pricing landscape in your country.)
- **Cases and Rulings**
(e.g., recent transfer pricing cases or rulings, as well as changes in the volume or types of transfer pricing cases being litigated.)

THE TRANSFER PRICING FORUM

is designed to present a comparative study of typical transfer pricing issues by Country Panelists who are distinguished transfer pricing practitioners in major and emerging industrial countries. Their discussions focus on practical questions posed by guidance, case law and practice in their respective jurisdiction, with practical recommendations whenever appropriate.

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- **Transfer Pricing Documentation**

(e.g., new master file or local file requirements, as well as other documentation or reporting requirements.)

- **Transfer Pricing Examinations/Audits**

(e.g., any changes in the tax authorities' focus on transfer pricing issues during an examination or changes in the way tax authorities audit transfer pricing issues, as well as a discussion of any changes or enhancements to the MAP process.)

- **What can we expect in 2019?**

(e.g., any anticipated transfer pricing developments or issues that we should be aware of as we enter 2019.)

France

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Legislation (e.g., new legislation or regulations that have impacted the transfer pricing landscape in your country.)

The French transfer pricing documentation requirements were recently updated by Article 107 of the Finance Law for 2018¹ according to the standards set by the OECD. Please refer to the details of the new requirements below.

Cases and Rulings (e.g., recent transfer pricing cases or rulings, as well as changes in the volume or types of transfer pricing cases being litigated.)

In this section, we have identified the recent case law in relation to comparability and other transfer pricing issues:

- *SARL Property Investment Holding France, Conseil d'Etat*, 25 June 2018²

In this case, global fees were invoiced to a French company by a related foreign party. Some of the fees were related to investment strategy services and were considered performed in its corporate interest, while others, namely administrative services, legal, accounting, and financial, were considered not performed in this interest.

In the absence of a distinction between these two categories of benefits in determining the amount of these fees, it was the responsibility of the FTA to establish that the amount of the fees in dispute was unjustified with regard to the prices charged between independent companies for services such as those provided (in this case in the interest of the company) or that the amount of fees was excessive in terms of their market value. In the absence of such proof, and given that the company claimed that the amount of these fees was less than the value of the only services rendered by the supplier, the administration was not regarded as proving that the litigation fees constituted an indirect transfer of profits within the meaning of Article 57 of the FTA.

This judgment comes after a first referral pronounced by *Conseil d'Etat* (Administrative Supreme Court) of 12 December 2015.³ By demonstrating the lack of interest in the service for the French company

receiving it and being invoiced for it, the FTA establishes the existence of a transfer of income to the invoicing company.⁴ On the other hand, the mere fact that in the services invoiced to the firm, some are of interest to the firm, while others do not present any interest is not sufficient to establish the existence of an advantage equal to all amounts invoiced. The administration must establish that the price of the invoiced services is higher than their market value.⁵ In this case, the administration had not even attempted to establish that once the total market value of the only category of benefits of interest was deducted from the total remuneration, there would have remained a surplus of the amounts invoiced on that market value, constituting an indirect transfer of profits.

- *Société Ikéa Holding France*, Administrative Court of Appel of Versailles, 9 May 2017⁶

The administration cannot look at the difference between the total amount of commissions paid by a wholesaler in a furniture sales group and franchise fees levied to other retailers as a transfer of profits, since it gives no precise indication of the content of services rendered to franchisees of these brands, which are much less well known and are not comparable in terms of concept, commercial strategy, scope of range of products, and profitability.

The abnormality of the prices charged to the related companies results from a comparison with the prices charged by the French company (internal comparison) or similar companies (external comparison) to customers who are not dependent parties.

- *Société Philips France, Conseil d'Etat*, 19 September 2018⁷

Philips France was carrying out R&D activities, which were subsidized by the French state through direct public subsidies and the French R&D tax credit. The company concluded a service agreement with its Dutch parent company under which it transferred the right to non-patentable IP derived from these R&D activities at cost plus 10%. The French Tax Authorities challenged this approach, as the cost base was reduced by the subsidies and R&D tax credit, and considered that the corresponding decrease was an indirect transfer of profit to the Dutch parent company.

The *Conseil d'Etat* has censured this straightforward approach, as the burden of proof of such a trans-

fer is with the FTA, and would have required a comparison to similar transactions between independent parties.

- *SAS Studialis, Administrative Court of Paris*, 18 January 2018

The French company Studialis was paying interest expenses in relation to an intercompany loan granted by a related U.K. Company in the context of a LO. The loan featured a 10% interest, which was higher than the 2.8%–4.1% French “safe harbor” rates for the period.

The taxpayer provided an economic analysis prepared by an independent expert, as well as preliminary offers obtained from third-party banks. These analyses supported the interest rate applied.

The tax administration disregarded this material on the grounds that only a hard offer from a bank could be an acceptable reference for market conditions and reassessed the company under the provisions of Article 212-I of the French Tax Code.

The Administrative Court supported the administration’s position by stating that the company “did not provide any certain proof of the rate the company would have been granted by a credit institution or independent agency including, especially, an actual loan offer tailored to current operations and specific characteristics.”

Yet, it is still a possibility that the Conseil d’Etat could reverse the decision of the Administrative Court on appeal.

- *GE Healthcare Clinical Systems, Conseil d’Etat*, 6 June 2018

A French distributor member of the GE Group was distributing medical electronic products. The transfer pricing policy relied on the compensation of manufacturers under a cost plus 5%.

The Tax Administration reassessed the company on the grounds of a Return on Sales and prepared an economic analysis accordingly.

The French Supreme Court acknowledged that the Tax Administration, while it was effectively bearing the burden of proof, had successfully demonstrated that a transfer of profit had occurred.

This is a quite notable case, as most French case law reflects situations where the Tax Administration failed to meet its requirements in terms of the burden of proof.

Transfer Pricing Documentation (e.g., new master file or local file requirements, as well as other documentation or reporting requirements.)

Documentation requirements have been recently updated by Article 107 of the Finance Law for 2018⁸ according to the standards set by the OECD. This Article updated the content of the transfer pricing documentation on the basis of Action 13 of the BEPS project.

It should lead to much more significant and more detailed documentary work, but also, according to the explanatory memorandum, be a source of simplification insofar as the companies concerned already have to produce documentation which complies with this standard in a number of States.

The BEPS-standardized approach to documentation is based on a three-level structure:

- a main file with general and standardized information on the entire group. This file is identical in each State in which the documentation is presented;

- a file with information on intra-group transactions carried out by the company that presents the documentation. This file is specific to each State in which a group company is established;
- a country-by-country declaration, for large multinational companies, indicating the amount of their turnover, their profits before taxes, the taxes on the profits they paid, and those due, as well as the number of employees, share capital, undistributed profits, and tangible assets in each tax jurisdiction.

The obligation to prepare and maintain documentation according to this format applies to fiscal years beginning on or after January 1, 2018.

Decree 2018-554 of 29 June 2018 clarified the terms of presentation and the content of this documentation. An update of its Bofip⁹ base of 18 July 2018, includes the FTA plan for its developments relating to this documentation, illustrating by examples the implications of the decree.

The documentation now provided for in article L 13 AA of the LPF consists of two files: i) the Master File, which includes information about the associated group of companies and ii) the Local File, which contains information about the verified company. The content of this documentation is almost identical to the items in the OECD guidance.

In addition, the structure of the new documentation is comparable to the current documentation, which should already include, as mentioned above, general information on the group of companies (which can be likened to a main file) and specific information about the company being audited (similar to the Local File):

- The first part of the documentation consists of the main file (i.e., “Master File”). Five categories of information can be distinguished within this file:
 - The organizational structure;
 - Description of the group’s areas of activity;
 - Intangible assets of the multinational group;
 - Financial activities between related parties. This section is entirely new, and it is intended to allow the FTA to have immediate knowledge of important financing transactions of the group (i.e., a general description of how the group is financed);
 - Financial information of the group (i.e., the group’s annual consolidated financial statements for the fiscal year, a list and description of advance pricing agreements concluded by the group, and other decisions of the tax authorities concerning the distribution of profits between countries).
- The second part of the documentation consists of the Local File:
 - General information about the audited company: a description of the management structure and the organization chart of the company; description of the activities carried out; and the business strategy implemented, indicating, in particular, whether the enterprise has been involved in or affected by corporate reorganizations or transfers of intangible assets during the financial year or the previous financial year and explaining the aspects of these transactions that affect the business;
 - Transaction information: a description of significant transactions with associated companies and the conditions under which they are carried out. This description covers, in particular, purchases of manufacturing services, acquisition of goods, provision of services, loans, financial guarantees and performance guarantees, and licensing of intangible assets;
 - Financial information: the annual accounts of the audited company; information and tables of annual financial accounts of the audited company, indicating how the financial

data is used to apply the selected transfer pricing method; and summary tables of the financial data relating to comparable transactions used, with an indication of the sources from which these data are derived.

Critical takeaways in the regulation include:

- The provision for a prescriptive and very detailed structure for the Master File and the Local File;
- The provision for a detailed reconciliation between the statutory accounts and the financial statements in the reports (economic analysis, transactions amounts, etc.);
- The fact that the documentation should be held at the disposal of the tax administration in a soft format (e.g., Microsoft Office);
- An official reference to the OECD Guidelines;
- Confirmation that the documentation should include dealings with permanent establishments;
- The reference that “in principle” the reports should be prepared in French. Yet, the Bofip regulation suggests that in practice they may be prepared in English, as the regulation provides for the right of the administration to obtain a translation.

This measure applies to fiscal years starting on or after January 1, 2018. In practice, therefore, the new documentation will have to be produced for the first time during the tax audits beginning in 2019 that will cover the 2018 fiscal year.

Transfer Pricing Examinations/Audits (e.g., any changes in the tax authorities' focus on transfer pricing issues during an examination or changes in the way tax authorities audit transfer pricing issues, as well as a discussion of any changes or enhancements to the MAP process.)

While there is no reliable public study in the field of tax audits, we have witnessed several recent trends:

- Even more tax raids of French subsidiaries or representative offices to demonstrate the existence of a French permanent establishment of a foreign parent company, notably in the field of digital services
- Certain interpretations of contractual arrangements between related parties leading to transfer pricing reassessments, even if they can hardly be sustained from an economic perspective (e.g., maintenance of a remuneration to a French provider on the basis that a contract has not been terminated, even if the service is no longer provided; multiple mark-up remunerations on the same cost-base; etc.)

- Certain severe bank account seizures prior to or in the course of certain tax audits, specifically in relation to tax raids or transfer pricing reassessments

What Can We Expect in 2019? (e.g., any anticipated transfer pricing developments or issues that we should be aware of as we enter 2019.)

Currently, there is no formal plan for a future legislative amendment of the French transfer pricing provisions. However, depending on the evolution of the OECD standards in this respect and the globalization of the MLI through the tax treaty network, one could reasonably expect possible amendments/adjustments to these provisions in the near future.

Also, the changes to the French Intellectual Property (IP) Regime¹⁰ may possibly impact the future organization of multinational enterprises. The evolution of the French IP Regime is a result of the requirement to further align the regime with the OECD recommendations, in particular, the “nexus” approach. The current version of the text (being discussed in parliament) would enable (in certain circumstances) the application of a reduced (10%) corporate income tax on the profit earned by companies with respect to the exploitation of their patented or protected technology (e.g., software).

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NOTES

¹ Law 2017-1837 of 30 December 2017, art. 107.

² FR: CE 8e-3e ch. 25-6-2018 n° 407232, SARL Property Investment Holding France.

³ FR: CE 9-12-2015 n° 367897.

⁴ FR: CE 13-12-2017 n° 387975 and *Conseil d'Etat* 13-12-2017 n 387969.

⁵ FR: CE 15-4-2016 n° 372097.

⁶ FR: CAA Versailles n° 15VE00571, min. c/ Société Ikea Holding France.

⁷ FR: CE19-09-2018 n° 405779, Société Philips France.

⁸ Law 2017-1837 of 30 December 2017, art. 107.

⁹ BOI-BIC-BASE-80-10-40.

¹⁰ Currently Article 49 terdecies of the French Tax Code.