

France introduces updated transfer pricing regulations

December 22, 2023

In brief

What happened?

France's Finance Bill for 2024, adopted on December 16, through article 22, introduces four measures reinforcing the French tax administration's control of transfer pricing policies applied by multinational groups operating in France:

- Lowering of the thresholds for Master File/Local File requirements, now capturing a wider range of French subsidiaries of middle-sized groups.
- Higher penalties for missing or incomplete transfer pricing documentation.
- Shifting to the taxpayer the opposability and burden-of-proof rules for transfer pricing documentation and related reassessments.
- Adoption of the OECD's Hard-to-Value Intangibles (HTVI) *ex post* control approach, combined with an extension of statute of limitations to six years for transfers of HTVIs.

Why is it relevant?

The Finance Bill represents a continuation of the increased focus of the French administration on transfer pricing-related subjects. The new measures are effective January 1, 2024.

What to consider?

Given that the lower documentation thresholds apply to fiscal years starting from January 1, 2024, groups falling under the new thresholds should take steps to timely prepare documentation, particularly in light of the reinforcement of penalties.

For groups operating in France that have established transfer pricing documentation, a review of existing transfer pricing should be undertaken to confirm that there is alignment between the transfer pricing methods stated in the Local Files and actual application in statutory accounts, thereby mitigating the potential risk of reassessment based on the newly introduced notion of opposability of the transfer pricing documentation.

Finally, with the adoption of the new HTVI regime, taxpayers should document in detail the valuation method used at the time of the transaction to be prepared to respond to the new standard and limit the risk of challenge.

In detail

Background

Lower thresholds of documentation requirements

French transfer pricing documentation requirements are defined by article L13 AA of the Tax Procedure Code (“Livre des Procédures Fiscales,” or LPF). For tax years beginning from January 1, 2024, the Government proposes the following French entities be subject to transfer pricing documentation requirements:

- a. Entities with turnover or gross assets on the balance sheet exceeding **EUR 150 million** (reduced from the current EUR 400 million); or
- b. Entities that hold directly or indirectly more than 50% of capital or voting rights of a legal entity mentioned in (a); or
- c. Entities with more than 50% of their capital or voting rights held directly or indirectly by a legal entity mentioned in (a), above; or
- d. Entities that are part of a French tax group in which at least one legal entity of the tax group meets one of the requirements mentioned under (a), (b) or (c), above.

Article L 13 AA of the LPF continues to provide for transfer pricing documentation consisting of the Master File and the Local File, for which the content under French law is closely aligned with the OECD content.

The lower threshold is in response to the frequent situation where firms — while not directly or indirectly fulfilling the turnover or gross assets criterion — are yet involved in significant cross-border intragroup transactions with arguably sizable effects on the tax result in France.

Note: Companies that are out of scope still can be required to provide a detailed presentation of their intercompany flows and transfer pricing policies in the course of a tax audit under Article L13B of the Tax Procedure Code.

Higher minimum penalties for missing or incomplete documentation

An increase in the minimum penalties to EUR 50,000 from EUR 10,000 for missing or incomplete documentation will enter into force. The maximum penalties remain unchanged at the higher of (1) 0.5% of undocumented transactions or (2) 5% of the tax reassessments under Article 57 of the Tax Code (“Code Général des Impôts”).

Opposability of the transfer pricing documentation and burden-of-proof

Under current French burden-of-proof rules, the burden falls upon the tax administration to establish that the conditions of the transactions between related parties constitute an indirect transfer of profit abroad. To do so, the first possibility for the tax administration is to establish the existence of an advantage by nature, or of an advantage by comparison (of the conditions of intercompany transactions with the ones that would have been agreed upon between independent parties). In this case, a rebuttable presumption is established, which can be reverted if the taxpayer can prove that the apparent advantage is counterbalanced by equivalent counterparties. A second possibility is for the administration to establish the existence of a gap between the market value of the goods or services to the disadvantage of the French taxpayer. In this case, an irrebuttable presumption of transfer of profit abroad ensues.

The Draft Bill introduces a third means of proof for the tax administration. When the transfer pricing method deviates from that stated in the Local File, the difference between the result and the amount that would ensue had the method indicated in the Local File been rightfully applied constitutes a rebuttable presumption that an indirectly transferred profit occurs. In this case, the burden falls to the taxpayer to demonstrate by any means the absence of such a transfer.

Observation: With a third option for the tax administration, discrepancies between the Local File and the actual outcome of the transfer pricing policy in statutory accounts potentially could create a risk exposure. While the interpretation by the tax administration and the courts remains uncertain (e.g., when the conditions of the transactions, while diverging from those stated in the Local File, are still arm's length), taxpayers should review their transfer pricing policies in their Local Files as well as their actual application in statutory accounts.

Ex-post approach to Hard-to-Value Intangibles (HTVIs) and extension of statute of limitations

Lastly, the Finance Bill allows the administration to use *ex post* financial outcomes to inform its assessment of the arm's-length character of the *ex ante* pricing of arrangements involving HTVIs.

The definition of HTVI in French Law (article 169 AH of the Tax Code) follows the definition in the EU DAC 6 regulation and in paragraph 6.189 of the OECD Guidelines (i.e., intangibles for which, at the time of their transfer between associated enterprises (1) no reliable comparables exist and (2) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer).

De facto, the measure builds upon paragraphs 6.192 and 6.193 of the OECD Guidelines, stating that the *ex post* approach shall not apply when:

- The taxpayer provides detailed information on the *ex ante* projections used to determine the price, including how foreseeable risks are taken into account, the probability of occurrence, and establishes that any significant difference between these projections and actual results is due to unforeseeable events; or
- The gap between the value determined based on *ex ante* projections and the one which would ensue from actual results is less than 20%; or
- A commercialization period of five years has passed during which the gap between projections and actual results is less than 20%; or
- The transfer is covered by a bilateral or multilateral advance pricing agreement.

For fiscal years starting after January 1, 2024, the Finance Bill extends the statute of limitations for transfers involving HTVI to six years, from the standard statute of limitations for tax matters of three years and introduces a new exception to the guarantee of non-renewal of a tax audit (LPF, new 8° of article L. 51).

Let's talk

For a deeper discussion of how France's updated transfer pricing regulation might affect your business, please contact:

Transfer Pricing - France

Marie-Laure Hublot, Paris
+33 (0)6 11 15 55 89
marie-laure.hublot@avocats.pwc.com

Florent Richard, Paris
+33 (0)6 75 75 58 20
florent.richard@avocats.pwc.com

Deniz Arikan, Paris
+33 (0)6 68 49 71 99
deniz.arikan@avocats.pwc.com

Transfer Pricing Global and US Leaders

Horacio Peña, *New York*
Global Transfer Pricing Leader
+1 917 478 5817
horacio.pena@pwc.com

Paige Hill, *New York*
US Transfer Pricing Leader
+1 917 923 8412
paige.hill@pwc.com

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