# THE TRANSFER PRICING LAW REVIEW

FOURTH EDITION

**Editors**
Steve Edge and Dominic Robertson

THE LAWREVIEWS

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk



ISBN 978-1-83862-511-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARENDT & MEDERNACH

BAKER MCKENZIE

BMR LEGAL ADVOCATES

BPV HUEGEL

CHEVEZ, RUIZ, ZAMARRIPA Y CIA, SC

CMS RUI PENA & ARNAUT

DDTC

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STUDIO LEGALE E TRIBUTARIO BISCOZZI NOBILI PIAZZA

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UDO UDOMA & BELO-OSAGIE

ZEPOS & YANNOPOULOS

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# PREFACE

It has been a great pleasure to edit this fourth edition of *The Transfer Pricing Law Review*. This publication aims to give readers a high-level overview of the principal transfer pricing rules in each country covered in the *Review*. Each chapter summarises the country's substantive transfer pricing rules, explains how a transfer pricing dispute is handled, from initial scrutiny through to litigation or settlement, and discusses the interaction between transfer pricing and other parts of the tax code (such as withholding taxes, customs duties, and attempts to prevent double taxation).

Other than Brazil, all the countries covered in this *Review* apply an arm's-length standard and adhere, at least to some extent, to the Organisation for Economic Co-operation and Development Transfer Pricing Guidelines (the OECD Guidelines); and Brazil itself has recently launched a project to align its transfer pricing rules with the OECD norm. However, as the chapters make clear, there remains significant divergence, both in countries' interpretation of the arm's-length standard (e.g., the transactions it applies to, the pricing methods preferred and whether secondary adjustments are imposed) and in the administration of the rules (e.g., the documentation requirements imposed, and the availability of APAs). Transfer pricing practitioners, therefore, cannot simply assume that the OECD Guidelines contain all the answers but must in fact engage with their detailed application within each country.

As we have said in earlier editions of the *Review*, transfer pricing rules will be high on the corporate tax agenda for many years to come, and they are continuing to evolve at a rapid pace. Over the next year or so, we expect the following to be among the main areas of focus.

First, as in so many other areas of endeavour, the covid-19 pandemic raises new challenges for transfer pricing, and may in some cases invert the 'normal' argument between taxpayers and tax authorities. For example, will tax authorities which have previously argued that a company is not a routine service provider, and should be rewarded through a profit split, now accept that the company therefore needs to bear a share of the group's covid-19 losses? Looking further forward, the experience from the 2008 financial crisis suggests that, in the medium term, the need for tax revenues is likely to push tax authorities towards a more assertive approach in transfer pricing cases.

Second, a number of countries may see disputes over the extent to which transfer pricing can be used to recharacterise transactions, rather than merely to adjust the pricing of transactions. For example, the German courts held last year that transfer pricing rules are not limited to pricing adjustments alone; and Ireland introduced rules that enable the Irish Revenue to impose a 'substance over form' principle.

Third, the long-awaited OECD Transfer Pricing Guidance on Financial Transactions was published in February 2020. Although its immediate impact has been rather overshadowed by the covid-19 situation, many taxpayers, and tax authorities, will need to get to grips with the potential impact of this guidance on them.

Finally, the OECD/G20 project to address the tax consequences of digitalisation continues to work towards its target of presenting an agreed solution by the end of 2020. The current Pillar One and Pillar Two proposals would, if enacted, be the most far-reaching change to transfer pricing principles in close to 100 years, and would mark a significant shift away from the arm's-length principle. The desire to shore up tax revenues in light of covid-19 may well encourage the countries that expect to be 'winners' from the proposals to push for an agreed outcome. It is worth noting, however, that the reforms will not be a silver bullet for public finances. The OECD expects the reform to increase corporate tax revenues by 4 per cent; in the UK, for example, that would raise enough money to fund the National Health Service for only one week.

We would like to thank the authors of all of the country chapters for their comprehensive and illuminating analysis of each country's transfer pricing rules; and the publishing team at Law Business Research for their diligence and enthusiasm in commissioning, coordinating and compiling this *Review*.

**Steve Edge and Dominic Robertson**
Slaughter and May
London
June 2020

Chapter 2

# BELGIUM

*Ahmed El Jilali and Heleen Van Baelen*[1]

## I OVERVIEW

Although the arm's-length principle, which forms the basis of the framework of transfer pricing rules, has had a long international history, it was only explicitly introduced into Belgian legislation in 2004.[2] The Belgian legislature used the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations Guidelines (the OECD Guidelines) and the OECD Model Tax Convention as inspiration.

Belgium does not incorporate all OECD principles and guidelines into law. Nevertheless, the tax administration recognises that the latest version of the OECD Guidelines is especially relevant in practice. The tax authorities use continuously revised and updated guidelines whereby the most recent version of the OECD Guidelines was issued in 2017, including the outcomes of the final 2015 Base Erosion and Profit Shifting (BEPS) Reports on Actions 8–10 'Aligning transfer pricing outcomes with value creation' and on Action 13 'Transfer pricing documentation and country-by-country reporting'. In that respect, in the recently published Circular Letter concerning transfer pricing,[3] the Belgian tax authorities confirmed the application of the 2017 version of the OECD Guidelines. The tax authorities even go one step further given that the date of entry into force of the Circular Letter, published in February 2020, is set retroactively for intercompany transactions taking place as from 1 January 2018. By way of exception, some paragraphs of the Circular Letter enter into force as from 1 January 2020, mainly parts related to interpretation by the Belgian tax administration or Belgian-specific issues.

Article 185, Section 2 of the Belgian Income Tax Code (ITC) allows for a unilateral adjustment of a company's taxable basis, both upwards (Article 185, Section 2(a) ITC) and downwards (Article 185, Section 2(b) ITC). This provision is aligned to Article 9 of the OECD Model Tax Convention for transactions whereby conditions are made or imposed between two enterprises in their commercial or financial relations that differ from those that would be made between independent enterprises. Article 185, Section 2 ITC has been

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1 Ahmed El Jilali is a senior associate at Tiberghien Lawyers and Heleen Van Baelen is a senior manager at T/A Economics.

2 Article 185, Section 2 ICT, introduced by Article 2 – 21 June 2004; Law amending the Belgian Income Tax Code 1992 and the Law of 24 December 2002 amending the system for companies with regard to income taxes and instituting a system of advance decisions on tax matters, Belgian Official Gazette 9 July 2004 (ed. 1); Parl. St. Chamber, 2003–2004, 1079/1.

3 Circular Letter 2020/C35 dd. 25 February 2020 concerning guidance with regard to transfer pricing for multinational enterprises and tax administrations.

slightly revised, applicable as of 1 January 2018, to eliminate the basis for granting excess profit rulings (EPRs), which the European Commission has considered to be state aid.[4] The General Court of the European Union decided in February 2019 that the EPR regime is not a state-aid scheme.[5] The story is, however, not over since the European Commission launched in September 2019 in-depth investigations to determine whether the EPRs granted to 39 companies are in breach of the EU state-aid rules. In addition, the European Commission appealed the General Court judgment before the Court of Justice of the European Union.[6] In any case, the Belgian tax authorities will not re-introduce such rulings in favour of Belgian taxpayers.

The arm's-length principle is an integral part of Belgian tax legislation and applies to both legal entities and permanent establishments. In addition, Belgian law covers all types of transactions without differentiation of the nature of the transaction between associated companies, including those between two Belgian taxpayers. In this regard, it is interesting to note that some form of fiscal consolidation, impacting the level of direct taxes of Belgian taxpayers in the same group of companies, has entered into force as of fiscal year 2020.[7] In practice, the tax authorities tend to focus on transactions with related foreign parties.

The Belgian concepts of 'associated enterprise' and 'control' are not comparable to the terms used in the OECD Model Tax Convention and must be explained by Belgian company law. The definition of associated enterprise in the EU Arbitration Convention requires direct or indirect participation in the management, control or capital of the other enterprise. Control can be described as a power to decide or to have a decisive influence on the appointment of the majority of the directors or managers, or the course of corporate policy, whether legally or factually. Further, reference should also be made to Belgian company law[8] and case law for more guidance on the notion of control and other concepts, such as 'parent company', 'subsidiary', 'consortium' and 'affiliated enterprise'.

In addition to Article 185, Section 2 ITC and the recently enacted transfer pricing documentation rules,[9] other articles of the ITC[10] are relevant when performing a transfer pricing analysis in Belgium. Reference can be made to Article 26 ITC dealing with the possibility of the Belgian tax administration to add abnormal or gratuitous advantages granted to an individual or enterprise located in Belgium or abroad to the taxpayer's taxable base. Article 49 ITC sets general rules for tax deduction of expenses which require, inter alia, that the expenses relate to the taxpayer's activity and that they are incurred to maintain or increase taxable income. Articles 54 to 56 ITC contain specific rules for tax deduction of interest, royalties and some other fees. Article 79 and 207 ITC together form a specific anti-abuse provision preventing that 'abnormal or gratuitous advantages' obtained can be offset against certain tax deductions (e.g., carried-forward tax losses). High court case law

4 Article 4 of the Programme Law dd. 17 December 2017 containing various fiscal provisions, Belgian Official Gazette, 22 December 2017.

5 Judgment in joined cases T-131/16 *Belgium v. Commission* and T-263/16 *Magnetrol International v. Commission*.

6 C-337/19 P – *Commission v. Belgium and Magnetrol International.*

7 Fiscal consolidation in Belgium is similar to a Scandinavian consolidation model whereby each group member retains its own taxable basis, but can contribute to the losses of other group members.

8 Articles 1.14–1.23 Belgian Company and Associations Code.

9 Articles 321/1–321/7 ITC.

10 These Articles were already included in the Belgian ITC before the arm's-length principle itself was included in 2004.

has confirmed that any non-arm's-length advantage received by a Belgian taxpayer has to be subject to Belgian corporate income tax in any event.[11] This rule may result in double taxation.

Other sources of law are the Royal Decree of 10 August 2009 and official Circular Letters,[12] which are administrative guidelines issued by the Belgian tax administration. These guidelines are, however, not binding sources of tax law.

## II FILING REQUIREMENTS

Belgium has introduced specific transfer pricing documentation requirements applicable as of 1 January 2016.[13] The Program Law, which introduced these documentation requirements, includes a three-tiered approach, aligned, allegedly (i.e., according to the legislator) with the OECD BEPS Action 13 Final Report, consisting of a Master File Form (Form 275MF), a Local File Form (Form 275LF) and country-by-country reporting. This section II will only deal with Form 275MF and Form 275LF, particularly focusing on the latter as it is to be considered an integral part of a company's tax return.

Statutory transfer pricing documentation requirements currently exist for a Belgian entity or permanent establishment when one of the following thresholds is exceeded based on its annual (unconsolidated) financial statements for the accounting period immediately preceding the most recent accounting period:

*a* operating and financial revenues[14] of €50 million (excluding non-recurrent revenue);
*b* a balance sheet total of €1 billion; or
*c* an annual average number of employees of 100 full-time equivalents.

Hence, the assessment of the statutory thresholds and the requirement to submit Forms 275MF and 275LF should be fulfilled every year. The content of Form 275MF is similar to the OECD content requirements. The Belgian legislator has indicated that this form can be filed by reference to a separate Group Master File, to be attached to Form 275MF. Form 275MF is not part of a taxpayer's corporate income tax return, but it should be filed with the Belgian tax authorities no later than 12 months after the final day of the applicable reporting period for the group concerned.

Form 275LF is considered an integral part of the corporate income tax return and, consequently, has a different filing due date than Form 275MF. The Belgian legislator stipulates that it followed the OECD three-tiered approach with regard to documentation requirements, notwithstanding the content of Form 275LF, which deviates significantly from the content requirements of the local file under the OECD Guidelines. In particular, Form 275LF contains three parts: two mandatory (Parts A and B) and one optional (Part C).

11 Cass., 10 March 2016 TFR No. 507, p. 736.

12 Circular Letter AFZ/98-0003 dd. 28 June 1999; Circular Letter AFZ/INTERN.IB/98-0170 dd. 7 July 2000 (and addendum AFZ 6/2003 dd. 25 March 2003); Circular Letter Ci.RH.421/580.456 (AOIF 40/2006) dd. 14 November 2006; Circular Letter 2020/C/35 dd. 25 February 2020.

13 Programme Law dd. 1 July 2016, Belgian Official Gazette 4 July 2016 incorporating Articles 321/1–321/7 ITC; Royal Decrees dd. 28 October 2016 with regard to CbCR, Local File and Master File. The Programme Law is supplemented by Circular Letter 2017/C/56 dd. 4 September 2017 concerning the additional declaration obligations with regard to transfer pricing. Royal Decree dd. 29 June 2019 concerning administrative penalties; and Circular Letter 2019/C/14 dd. 8 February 2019.

14 Reference has to be made to gross revenues.

The information to be reported in Part A concerns general company information, and includes:

*a* a description of the managerial and organisational structure;
*b* an overview of the reporting structure with a focus on the reporting lines for fiscal purposes;
*c* an overview of the activities of the Belgian company based on the identification of business units (relevant for Part B);
*d* a list of the entity's most important competitors; and
*e* key data, such as identification of the entity's ultimate parent entity.

The information to be reported in Part B concerns the intra-group transactions between the local entity and its foreign affiliates, including, in particular, financial data, comparability analyses checkboxes and a selection of the most appropriate transfer pricing methods, mainly presented in table formats. The requirement for completing Part B (i.e., the detailed information form) only applies when at least one business segment of the Belgian group entity has cross-border intra-group transactions exceeding €1 million in total.[15]

In the optional Part C, the taxpayer may add any information that 'may be useful', such as transfer pricing studies. Looking forward, the benefits of Part C should become apparent in evaluating the level of documentation to be added by a taxpayer, as the requirements currently in place (e.g., completing lists of tables) do not provide sufficient room for the correct amount of 'storytelling', which is a key item in the revised OECD Guidelines whereby more focus is put on the global value chain within a multinational group context.

All statutory transfer pricing documentation should be electronically filed in an XML format via the 'MyMinfin' platform. This is a platform developed by the Belgian tax authorities specifically for transfer pricing documentation purposes. Guidance exists with regard to submission format and those authorised to file the transfer pricing documentation because it differs from the 'BizTax' platform (which is used for the filing of corporate income tax returns).

## III PRESENTING THE CASE

### i Pricing methods

The Belgian legislator does not include specific provisions in tax law regarding the use of transfer pricing methods. As mentioned, Belgium follows the OECD Guidelines and, consequently, the five transfer pricing methods described in these OECD Guidelines (comparable uncontrolled price (CUP) method; resale price method; cost-plus method; transactional net margin method (TNMM); and transactional profit split method) are generally accepted in Belgium.

For the selection of the most appropriate transfer pricing method, no hierarchy is in place; however, in line with the OECD Guidelines, there is preference for the selection of traditional transaction methods given that they are regarded as the most direct means of establishing whether conditions in the commercial and financial relations between associated enterprises are at arm's length. The CUP method is the most preferred method where it can be

15 The Part B questions are mandatory as of 1 January 2017.

applied in a reliable manner, but based on experience, the TNMM method is used in many cases since it often proves to be the only method that can be applied in practice. TNMM is also accepted by the tax authorities, in particular for tangible goods and services transactions.

The tax authorities accept both internal and external comparables provided the degree of comparability can be proven. During a transfer pricing audit, the tax inspectors typically ask for a benchmarking study as underlying support for compliance with the arm's-length principle; comparables are therefore of great importance in Belgium. There is no specific preference for local comparables, but pan-European benchmarking studies are commonly used, even by the tax authorities, who sometimes also perform benchmarking studies themselves during an audit to support their position.

The importance of business sense or economic justification in supporting adjustments made to comparables cannot be underestimated, as the tax authorities are open to enter into these discussions to evaluate the appropriateness of the reasons invoked by the taxpayer.

### ii Authority scrutiny and evidence gathering

The Belgian tax authorities are increasingly interested in global tax transparency as it would ease their access to the relevant information thanks to the successful exchange of information between various jurisdictions and the availability of the information included in country-by-country reporting, which is mandatory in Belgium for multinational group companies with consolidated annual group turnover equal to or exceeding €750 million. The impact of the huge flow of data available at the level of the tax authorities will become apparent in the coming years. Similarly, an increased number of joint or multilateral transfer pricing audits can also be expected.

Taxpayers must be attentive to the information requested by the tax authorities, especially in relation to information for which they have no need-to-know basis, such as group information documented outside Belgium. The tax authorities tend to request group information regarding multinational groups headquartered abroad, or specific company information on foreign group companies that are Belgian counterparties. Specific procedures exist regarding such requests for information, regulating the exchange of information between the tax authorities concerned, which are carried out through Federal Public Services Foreign Affairs. Therefore, in certain circumstances, the taxpayer can refuse to provide the requested information to the tax authorities, although this may negatively impact the relationship between the taxpayer and the tax authorities (who therefore may want to scrutinise the taxpayer's situation more deeply).

Further, the tax authorities mainly use publicly available information. In addition, they can visit the premises of a taxpayer subject to a tax or transfer pricing audit. During this visit, they have access to the premises and the taxpayer's information within the boundaries of what is reasonable. Taxpayers cannot be forced to hand over all information; nevertheless, they should think carefully about cooperation, as it could affect the relationship with the tax inspectors. Likewise, during their visit, the tax authorities might have an interest in interviewing employees of the targeted taxpayer. This may contribute to a better understanding of its business, including the relevant functions performed, assets used and risks assumed. There is, however, no obligation for a taxpayer to cooperate during such interviews.

Furthermore, based on Belgian tax law,[16] witnesses can be heard. Although hearing witnesses is not common practice in transfer pricing cases, it is possible from a legal perspective. The same applies for the use of expert witnesses – other than the taxpayer's own advisors – in pre-litigation transfer pricing discussions. Hence, during pre-litigation (or even litigation) transfer pricing discussions, the advice of expert witnesses might be invoked in theory, but note that transfer pricing litigations before a court are rather uncommon in Belgium.

## IV INTANGIBLE ASSETS

Neither Belgian tax law nor administrative guidelines include specific provisions with regard to dealing with intangibles from a transfer pricing perspective. Nevertheless, the development, enhancement, maintenance, protection and exploitation (DEMPE) functions, as recently introduced by the OECD in the framework of the BEPS project, are taking precedence when assessing the correct transfer price to be applied, especially given that Belgium closely follows the OECD Guidelines. Therefore, it is highly recommended that taxpayers ensure a transfer pricing set-up in accordance with the DEMPE functions with regard to intangibles. Consequently, a taxpayer having only the pure legal ownership of an intangible, without being the economic owner significantly involved in the DEMPE functions, should be entitled to a relatively small (passive) return. The economic owner, assumed to have sufficient substance to demonstrate it is actively involved in the DEMPE functions, should be entitled to intangible-related (non-routine) returns.

## V SETTLEMENTS

Settlements outside a formal advance pricing agreement procedure with the tax authorities are not commonly used, except during transfer pricing audits as the majority of the audits are closed with a settlement between the local tax inspector and the targeted taxpayer.

The Service for Advanced Decisions, an autonomous service of Federal Public Service Finances (FPS Finances), provides advance decisions on all questions relating to the application of tax law, including transfer pricing provisions. An advance decision provides legal certainty as it is binding for all services of FPS Finances (including the inspection services).[17]

A formal advance pricing agreement can only be requested for a transaction that that has not yet taken place, namely, a transaction related to a fiscal year that is not formally closed. Therefore, a settlement outside the formal advance pricing agreement cannot automatically be incorporated in an advance pricing agreement.

## VI INVESTIGATIONS

A typical transfer pricing investigation in Belgium starts with a written request for information (RFI) issued by the tax authorities, often by the special transfer pricing team (STPT), consisting of subject matter specialists, since 2006.

This RFI, in general consisting of a standard questionnaire, is sent annually to approximately 250 multinational companies, mostly in the first months of each year. As of

16 Article 325 ITC.

17 For more information on the procedures of obtaining an advance decision in Belgium, see www.ruling.be.

the beginning of 2020, new tax and transfer pricing audits have been initiated, and there is a tendency to limit the traditional standard questionnaires but to have tailor-made questionnaires on information included in the transfer pricing documentation and country-by-country reporting filed (and therefore at the disposal of the tax authorities). As a consequence, the bulk of questionnaires will be spread more evenly throughout the year instead of being sent within the first months. To select companies, the Belgian tax authorities use data-mining techniques and employ software tools to carry out a risk-assessment exercise. The indications are that companies incurring structural losses, undergoing business restructurings or having a presence in tax havens or low-tax-rate countries, or companies with declining results, are potential targets. Nevertheless, all taxpayers might be subject to a tax or transfer pricing audit and receive a RFI, going from large multinational companies to small and medium-sized enterprises. The likelihood of being selected as a targeted company increases each year given that the STPT is growing by hiring additional inspectors. Furthermore, inspectors of the Large Companies[18] team will be responsible for both transfer pricing and international tax audits. The STPT trained them to get up to speed on transfer pricing-related issues. Finally, the Special Investigation Squad has also been trained by the STPT to cover transfer pricing-related matters.

Going forward, the selection of targets for a transfer pricing audit will remain based on data-mining techniques and software tools. It is, however, expected that this selection process will be further fine-tuned as a consequence of the transfer pricing documentation requirements given the access of the tax authorities to the information contained in Form 275MF, CbCR and most notably in Form 275LF being based on the standard questionnaire.

The audited taxpayer should generally reply to the RFI within one month. In practice, an extension of this deadline can be requested if the taxpayer is able to provide legitimate reasons for the non-timely provision of the requested information. Usually, an extension of a maximum of one additional month is granted; however, no formal timing is included in Belgian tax law on this matter. The taxpayer can, therefore, only count on the willingness of the tax inspector.

Before formally submitting the requested information, the taxpayer can request a pre-audit meeting with the inspector to define and discuss the scope of the transfer pricing audit. This pre-audit meeting might give an interesting opportunity for the audited taxpayer to set the scene of the audit and to provide an oral presentation of the company and its business, which may help the tax inspector in the reading and interpretation of the written reply to the RFI. Nevertheless, one should be careful, as the pre-audit meeting cannot serve as a fishing expedition and the inspector might invoke all information received or noticed during the meeting (e.g., when visiting the audited company). This pre-audit meeting should take place within the initial term of one month (or the extended period) as it does not suspend this term.

Once the written reply to the RFI has been submitted, there is no period fixed in Belgian tax law for the tax authorities to take a position in the transfer pricing audit. In general, there is a back-and-forth communication between the inspectors and the audited taxpayer, consisting of additional information requests, follow-up meetings, etc., before a final position is taken. Typically, this process takes almost one year, but may be longer or

18 A company is considered a large company (and thus falling within the purview of the Large Companies team) when it exceeds at least two of the following thresholds: annual average full-time equivalents of 50 employees; annual turnover, excluding VAT, of €9 million; or a balance sheet total exceeding €4.5 million.

shorter depending on the complexity of the file. This can lead to uncertainty for the taxpayer. Again, there is no time limit within which the tax inspectors should take their final position; they are bound only by the Belgian statute of limitations, which is of three years.[19]

The next and, in principle, last step in the audit process is the receipt of the notice of adjustment, sent by the tax authorities to the audited taxpayer. This notice amends the taxpayer's taxable base as declared in its tax return.[20] The taxpayer then has one month to react promptly to this notice of adjustment, a term that can be extended if there are legitimate reasons. The tax inspectors' final position is made available in the final assessment, which includes the justification of their opinion and should take into account any relevant comment made by the taxpayer.

Thereafter, the taxpayer has six months to file an administrative claim before the General Administration of Taxes. The decision of the General Administration of Taxes, explaining sufficient and sound reasons for the taxation, is addressed to the taxpayer. Notwithstanding the fact that the taxpayer has a strict time limit to lodge the administrative appeal, again, the General Administration of Taxes is not bound by any time limit. This may again cause uncertainty at the level of the taxpayer. To avoid further delay, the taxpayer can start a judicial procedure before the Court of First Instance after a six-month term passed without final decision of the General Administration of Taxes. If the General Administration of Taxes did not process the administrative appeal during the six-month period and assuming that the taxpayer launched the judicial procedure, the General Administration of Taxes is no longer competent to decide, and the case is submitted to the opinion of a judge.

## VII LITIGATION

### i Procedure

There is no specific litigation procedure in place for transfer pricing issues. The general judicial procedures existing in Belgium are available if the taxpayer disagrees with the decision of the tax authorities. Hence, a dispute can be brought before the Court of First Instance to examine the merits of the case, and the taxpayer has three months within which to pursue this course of action. An appeal against the Court's decision can be made to the Court of Appeal within one month of the notification of the contested decision. Appeals against judgments of the Court of Appeal are brought before the Supreme Court, which does not evaluate the substance of the case but is limited to the evaluation of questions of law and procedural questions (i.e., whether the law has been applied correctly). The Supreme Court can refer the case again to a competent Court of Appeal that then re-examines the merits of the case. In contrast, when the Supreme Court is of the opinion that the law has been applied correctly, the judgment under review becomes final and binding for all parties involved.

19 Pursuant to Article 354, Paragraph 1 ICT the period during which the tax authorities are authorised to perform a tax audit and adjust the taxable basis is three years (with the exception of cases of fraud, where the statute of limitations is extended to seven years), starting from the first day of the assessment year, at least for companies whose financial year correspond to the calendar year.

20 Article 346 ITC.

### ii Recent cases

Belgium does not have a long history of transfer pricing in its tax law. Therefore, court decisions on this subject are rather scarce. In most cases, in part because taxpayers do not want to enter into an open-ended (and, for sure, long) process, transfer pricing audits are closed by an agreement. From a legal perspective, all parties are allowed to invoke expert witnesses during the litigation, but the court will take the final decision.

## VIII SECONDARY ADJUSTMENT AND PENALTIES

The Belgian tax authorities cannot impose secondary adjustments, as Belgian tax law does not contain any provision allowing this. Hence, transfer pricing adjustments only affect items actually included in the corporate income tax return; no deemed transactions in the form of constructive dividends, constructive equity contributions or constructive loans that might trigger that secondary adjustment can be made. Therefore, if there is an adjustment requiring an increase or decrease of the taxable base, a Belgian taxpayer may have to consider certain payments as non-deductible expenses or adjust the position of the taxable reserves.

Failure to submit statutory transfer pricing documentation on time may result in administrative penalties ranging from €1,250 to €25,000. These penalties will only apply as of the second infringement, unless it can be proven that the violation is made in bad faith or with tax avoidance purpose. Moreover, it is expected that the likelihood of a transfer pricing audit increases by non-compliance with the new transfer pricing documentation requirements. Further, specific consequences are inherently linked to the non-submission of Form 275LF, as it is considered by the Belgian tax authorities to be an integral part of the corporate income tax return. As well as administrative penalties or tax increases that may apply in cases of late or incomplete filing, there may, from a procedural perspective, be significant consequences (e.g., if the local form is incomplete, the tax authorities could consider that the corporate income tax return is not correctly filed). In such cases, the Belgian tax authorities could send *ex officio* assessments to the taxpayer which add an incomplete Form 275LF to its corporate income tax return.[21]

Except for non-compliance with statutory transfer pricing documentation requirements, Belgian tax law does not include specific penalty provisions with regard to transfer pricing. Transfer pricing adjustments imposed by the Belgian tax authorities fall under the general tax penalty framework applicable in the event of any violation of the provisions of the ITC. Consequently, additional taxes might be applied by the tax authorities in the form of a penalty, generally ranging from 10 per cent to 50 per cent of the corporate income taxes due, and even an increase to 200 per cent in exceptional cases of fraud, repeated infringement, etc., depending on the degree of intent to avoid tax or the degree of the taxpayer's bad faith. Furthermore, late-payment interest is due on the additional tax assessments (including assessments resulting from a transfer pricing adjustment) and penalties are not deductible for tax purposes.

Recently, a new measure was introduced as part of the Belgian corporate tax reform. As of financial year 2018, the tax adjustments imposed by the tax authorities after an audit will be effectively taxed, since the increase of the taxable basis linked to an audit can no longer

21 *Ex officio* assessment is made by the tax authorities based on the estimated amount of taxable income. The tax authorities estimate the taxable income based on information available to them. It is the taxpayer's responsibility to prove otherwise if they do not agree with the *ex officio* assessment.

be sheltered with available tax deductions (e.g., current year losses). This rule applies if a tax increase of at least 10 per cent is effectively applied. However, current-year dividend-received deduction on inbound dividends can still be offset against the increase of the taxable basis.

As a rule, the statute of limitation for tax matters is three years. In the case of fraud, this term is extended to seven years.

## IX BROADER TAXATION ISSUES

### i Diverted profits tax and other supplementary measures

Belgium does not have any diverted profits tax in its legislation. The recent introduction of controlled foreign company (CFC) provisions in Article 185/2 ITC seems to capture partly the same goal, given the increasing focus on substance and, hence, taxable presence as one of the criteria to determine that the applications of CFC are relevant key functions.

### ii Double taxation

There is no doubt that transfer pricing adjustments can trigger double taxation in the case of an upward adjustment. Belgian taxpayers facing the issue of double taxation can invoke the relevant double-tax treaties (DTT), which have been concluded by the Belgian state with foreign jurisdictions explicitly for the avoidance of double taxation. Most of the DTTs entail a mutual agreement procedure (MAP), whereby the treaty partners are encouraged to endeavour to resolve the case by mutual agreement by entering into negotiations with their respective competent authorities. Despite encouraging both treaty partners' efforts towards achieving resolution, the majority of DTTs do not stipulate an obligation to come to an agreement effectively eliminating double taxation. As a precaution against the possibility of disagreement between the competent authorities of the treaty partners, some DTTs (although these are the exception rather than the norm, notwithstanding the Belgian model tax convention) include an arbitration clause whereby a final and binding decision on the elimination of the double taxation is taken by an independent arbiter. In this respect, when ratifying the multilateral instrument, Belgium opted to implement mandatory binding arbitration as a dispute resolution mechanism in the event no solution is found through a mutual agreement procedure within a certain timeframe.

For EU Member States, the arbitration resolution mechanism is regulated in the EU Arbitration Convention, whereby taxpayers can impose the binding opinion of an independent advisory body upon the competent authorities of the treaty partners.

### iii Consequential impact for other taxes

Despite the fact that transfer pricing is related to direct taxation and value added tax (VAT), while custom duties are categorised as indirect taxation, it should be clear that they are inherently linked to each other, especially in the framework of transfer pricing adjustments.

Overall, VAT and customs duties are based on the consideration (i.e., the price that is paid) for the supply of goods or services. First, the determination of the correct consideration from a VAT and customs perspective is not necessarily in accordance with how an arm's-length price would have been established from a transfer pricing perspective. Second, if transfer pricing adjustments are performed, for example, quarterly or annually, impacting the price of goods or services or creating a separate supply of services in itself, VAT and customs duties consequences cannot be ignored with regard to these adjustments, and action should be taken. It is recommended that Belgian taxpayers, when planning to perform transfer pricing adjustments, consider up front the impact on their VAT and customs duties to avoid difficult discussions with the VAT and customs tax authorities, as these issues are gaining increasing attention from the Belgian tax authorities. In this respect, the Circular Letter concerning customs value[22] provides additional guidance on the interaction between transfer pricing and customs value, stating, for example, that a transfer pricing study can serve as proof that the transaction value is not affected by the fact that parties are related.

## X OUTLOOK AND CONCLUSIONS

The key outlook for future transfer pricing concerns the significantly increased focus of the Belgian tax authorities on: (1) the access to a huge data flow from the exchange of information with foreign jurisdictions and statutory documentation requirements; (2) the additional number of trained members of the STPT; (3) the involvement of the large companies' team to perform tax and transfer pricing audits; and (4) the training of the Special Investigation Squad. Therefore, it is crucial to not consider transfer pricing as a (tax-) juridical or economic issue, but consider from the outlook one's optimal legal-economic position in an integrated manner.

Further, substance will become of incremental importance when evaluating transfer pricing methods for which a taxpayer opted and their alignment with the arm's-length principle based on, for example, the DEMPE functions as introduced by the OECD and the CFC provisions with regard to key functions.

In conclusion, Belgian taxpayers are urged to put transfer pricing high on their agenda. The OECD's work on developing proposals to address the challenges of the digitalised economy – better known as Pillar One and Pillar Two proposals – should also be closely monitored by taxpayers. As an OECD member, Belgium contributes to the discussions held at the Inclusive Framework level, but will probably not take any individual initiative to implement a digital tax (unlike, e.g., France, Italy and Spain). Belgium will more than likely follow the EU law initiative in this respect.

22 Circular Letter 2018/C/9 concerning customs value dd. 24 January 2018.

**Appendix 1**

# ABOUT THE AUTHORS

## AHMED EL JILALI

*Tiberghien Lawyers*

Ahmed El Jilali joined Tiberghien in 2019 as a senior associate within the corporate tax team, advising companies on Belgian and international corporate taxation.

Ahmed started his career as a corporate tax consultant, working for one of the Big Four consulting firms in Belgium. He joined the Brussels Bar in 2013 and worked as a tax lawyer within a leading international law firm in Brussels where he gained experience in corporate and international taxation. Before joining Tiberghien, Ahmed was seconded to the London headquarters of an international consulting firm to join a think tank on European and international taxation.

## HELEEN VAN BAELEN

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Heleen Van Baelen has been a senior manager at the boutique transfer pricing firm T/A Economics since 2018, serving clients as a transfer pricing and valuation manager. Before joining T/A Economics, Heleen worked in the transfer pricing team of a Big Four company.

Heleen assists and manages multiple transfer pricing projects for large and smaller multinational entities, providing tax, transfer pricing and valuation services. Furthermore, she is involved in global transfer pricing design and overall alignment, conversion of business operations and overall transfer pricing documentation. In addition, Heleen assists in the negotiation of APAs and rulings and is involved in assisting companies during transfer pricing audits.

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ISBN 978-1-83862-511-5