

TABLE OF CONTENTS

Acknowledgements.....	5
Table of contents.....	7
Foreword.....	21
Abbreviations.....	23

I. Introduction

1. What is transfer pricing?.....	29
2. The importance of transfer pricing.....	29
3. Transfer pricing developments in Luxembourg.....	30
4. The OECD and its Transfer Pricing Guidelines.....	31

II. Luxembourg Transfer Pricing Rules

1. Overview.....	37
2. Article 56 of the LITL (Arm’s length principle).....	37
2.1. Scope of Article 56 of the LITL.....	37
2.2. Tax adjustments under Article 56 of the LITL.....	37
2.3. Application of the arm’s length principle (Article 56bis of the LITL).....	39
3. The concept of hidden dividend distributions.....	43
3.1. Characteristics of hidden dividend distributions.....	43
3.2. Tax treatment of hidden dividend distributions.....	43
3.3. Triangular cases involving company groups.....	45
4. Hidden Capital contributions.....	48
4.1. Characteristics of hidden capital contributions.....	48
4.2. Tax treatment of hidden capital contributions.....	49
4.3. Triangular cases involving company groups.....	50

3. Recognition of the accurately delineated transaction	79
4. Losses	81
5. Other circumstances that may have an impact on arm's length pricing.....	82
6. Rejection of non-arm's length methods.....	83

IV. Comparability analysis

1. Overview	87
2. Performing a comparability analysis	87
2.1. Opening comments	87
2.2. Typical process	88
2.3. Analysis of the taxpayer's circumstances	90
2.4. Review of the controlled transaction and choice of the selected party	90
2.4.1. Opening comments.....	90
2.4.2. Evaluation of a taxpayer's separate and combined transactions	90
2.4.3. Intentional set-offs	91
2.4.4. Choice of the tested party	91
2.4.5. Information on the controlled transaction.....	92
2.5. Comparable uncontrolled transactions	92
2.5.1. Opening comments.....	92
2.5.2. Internal comparables.....	93
2.5.3. External comparables and sources of information	93
2.5.4. Use of non-transactional third party data.....	94
2.5.5. Limitations in available comparables	94
2.6. Selecting or rejecting potential comparables	95
2.7. Comparability adjustments	95
2.8. Arm's length range	96
3. Timing issues in comparability.....	97
4. Compliance issues	98

V. Transfer pricing methods

1. Overview	101
2. Traditional transaction methods.....	101
2.1. The comparable uncontrolled price (CUP) method	101
2.1.1. Application of the CUP method.....	101
2.1.2. Comparability	104
2.1.3. Strength and weaknesses	105
2.2. The resale price method	106
2.2.1. Application of the resale price method.....	106

2.2.2. Comparability	109
2.2.3. Strength and weaknesses	111
2.3. The cost plus method	112
2.3.1. Application of the cost plus method.....	112
2.3.2. Comparability	116
2.3.3. Strength and weaknesses	118
3. Transactional profit methods	118
3.1. Opening comments	118
3.2. The transactional net margin method (TNMM).....	119
3.2.1. Application of the TNMM.....	119
3.2.1.1. In general	119
3.2.1.2. Tested party.....	120
3.2.1.3. Search for comparables.....	120
3.2.1.4. Profit level indicators	120
3.2.1.5. Mechanism of TNMM.....	123
3.2.1.5.1. Related party distributor	123
3.2.1.5.2. Related party manufacturer.....	125
3.2.1.7. Determination of an arm's length range	126
3.2.2. Comparability	127
3.2.3. Strength and weaknesses	128
3.3. The transactional profit split method.....	128
3.3.1. Application of the profit split method.....	128
3.3.1.1. In general	128
3.3.1.2. Methods to split the profits	129
3.3.1.2.1. Contribution analysis.....	129
3.3.1.2.2. Residual analysis.....	130
3.3.1.3. Determining the combined profits to be split.....	130
3.3.1.4. Split of the combined profits	131
3.3.2. Strength and weaknesses	131
4. Selection of the most appropriate method	132
4.1. Opening comments	132
4.2. Selection process	133
4.2.1. Traditional transaction methods	133
4.2.2. Transactional profit methods	136
4.3. Use of more than one transfer pricing method	137

VI. Transfer pricing documentation

1. Overview	141
2. Review of transfer pricing and the taxpayer's duty of cooperation	141
2.1. Opening comments	141
2.2. The taxpayer's duty of cooperation	142

2.3. Burden of proof	143
2.4. The estimation of transfer prices	145
2.5. Country-by-Country Report.....	147
3. OECD guidance on transfer pricing documentation	149
3.1. Opening comments	149
3.2. Objectives of transfer pricing documentation requirements	149
3.3. Three tiers of documentation.....	151
3.3.1. Master file	151
3.3.2. Local file.....	153
3.3.3. Country-by-Country Report.....	154
3.4. Compliance issues	156
4. Best practice recommendations	159

VII. Intangibles

1. Overview	163
2. Identifying intangibles.....	164
3. Ownership of intangibles and DEMPE functions	165
3.1. Analytical framework	165
3.2. Legal ownership and contractual arrangements	165
3.3. Functions, assets and risks related to intangibles	166
3.4. Remuneration under the revised guidance	167
3.5. Application of the Chapter VI principles in specific fact pattern.....	168
4. Transactions involving the use or transfer of intangibles	169
5. Supplemental guidance for determining arm's length conditions in cases involving intangibles.....	170
6. Impact of the new guidance on contemporary IP structures.....	170
7. Critical analysis of the new guidance.....	171

VIII. Cost Contribution Arrangements

1. Overview	177
2. Concept of a CCA	177
3. Application of the arm's length principle.....	178
3.1. Opening comments	178
3.2. Determining participants.....	178
3.3. Expected benefits from the CCA	178
3.4. The value of each participant's contribution	179
3.5. Balancing payments.....	179

4. CCA entry, withdrawal or termination.....	179
5. Recommendations for structuring and documenting CCAs.....	180

IX. Intra-group services

1. Overview.....	183
2. Determining whether intra-group services have been rendered.....	183
2.1. Opening comments.....	183
2.2. Beneficial and non-beneficial services.....	184
3. Determining an arm's length price for intra-group services.....	187
3.1. Opening comments.....	187
3.2. Methods for pricing intra-group services.....	187
3.3. Charge for intra-group services.....	188
4. Low value-adding services.....	189
4.1. Opening comments.....	189
4.2. Definition of low value-adding intra-group services.....	189
4.3. Simplified determination of arm's length charges.....	191
4.4. Documentation and reporting.....	191
4.5. Withholding tax.....	192

X. Financing Activities

1. Overview.....	195
2. Intra-group financing activities covered by the Circular.....	196
2.1. Opening comments.....	196
2.2. Scope of the Circular.....	196
2.3. Substance requirements.....	200
2.4. Equity-at-risk requirement.....	202
2.5. Transfer pricing documentation.....	203
3. Application of the arm's length principle.....	204
3.1. Opening comments.....	204
3.2. Comparability analysis.....	205
3.2.1. Introductory comments.....	205
3.2.2. Identification of the commercial and financial relations.....	205
3.2.3. Contractual terms of the transaction.....	206
3.2.4. Functional analysis.....	206
3.2.4.1. General remarks.....	206
3.2.4.2. Analysis of the functions performed.....	207
3.2.4.3. Analysis of the risks in the financial relations.....	209
3.2.4.4. Analysis of the assets used.....	211
3.2.5. Transactions without commercial rationale.....	211

3.3. A remuneration model for financing activities	213
3.3.1. Introductory comments.....	213
3.3.2. Determination of the equity at risk.....	213
3.3.2.1. In general	213
3.3.2.2. Probability of default (PD)	214
3.3.2.3. Loss given default (LGD)	216
3.3.2.4. Exposure at default (EAD).....	216
3.3.2.5. Case study	216
3.3.3. Determination of the arm's length return on equity.....	218
3.3.4. Determination of the arm's length gross remuneration.....	219
3.4. Simplification measure for intermediaries	219
4. Transfer pricing adjustments	220
4.1. Opening comments	220
4.2. Case study 1: The arm's length financing margin	220
4.3. Case study 2: Interest rates below the arm's length standard	221
4.4. Case study 3: Excessive interest rates	222
4.5. Case study 4: Downward adjustments	223
4.6. Case study 5: Interest-free debt	224
5. Advance pricing agreements	226
5.1. Opening comments	226
5.2. Request for an APA	226
5.3. Validity of the confirmation	226

XI. Financial transactions

1. Overview	231
2. Interaction with the general guidance on the identification of commercial and financial relations (Section D.1 in Chapter I)	231
2.1. Determining whether a purported loan should be regarded as a loan	231
2.2. Accurate delineation of financial transactions	232
3. Treasury functions	233
4. Intra-group loans	234
4.1. General considerations	234
4.1.1. Opening comments	234
4.1.2. Two-sided analysis.....	234
4.1.3. Use of credit ratings	235
4.1.4. Effect of group membership.....	236
4.1.5. Use of MNE group credit rating.....	237
4.1.6. Covenants.....	238
4.1.7. Guarantees	238

4.2. Determining the arm's length interest rate of intra-group loans	238
4.2.1. Comparable uncontrolled price ("CUP") method	238
4.2.2. Loan fees and charges	239
4.2.3. Cost of funds	239
4.2.4. Credit default swaps	239
4.2.5. Economic modelling	240
4.2.6. Bank opinions	240
5. Cash pooling	240
5.1. Opening comments	240
5.2. Cash pool structures	240
5.3. Accurate delineation of cash pooling transactions	241
5.4. Determining the arm's length price of cash pooling transactions .	242
6. Hedging	243
7. Financial guarantees	243
7.1. Opening comments	243
7.2. Accurate delineation of financial guarantees	244
7.3. Determining the arm's length price of guarantees	244
8. Captive insurance	245
8.1. Opening comments	245
8.2. Accurate delineation of captive insurance and reinsurance	246
8.3. Determining the arm's length price of captive insurance and reinsurance	247
8.3.1. Pricing of premiums	247
8.3.2. Combined ratio and return on capital	248
8.3.3. Group synergies	248
8.3.4. Agency sales	248

XII. Attribution of profits to permanent establishments

1. Overview	251
2. The concept of permanent establishment	252
2.1. PEs under Luxembourg tax law	252
2.1.1. Opening comments	252
2.1.2. The general PE definition	253
2.1.3. PE examples listed in Section 16 (2) StAnpG	254
2.2. PEs under tax treaty law	255
2.2.1. Opening comments	255
2.2.2. Essential characteristics of PEs	256
2.2.3. Building sites, constructions and installation projects	257
2.2.4. Preparatory and auxiliary activities	258
2.2.4.1. Analysis of the 2010 version of the OECD Model	258

2.2.4.2. Analysis of the 2017 version of the OECD Model.....	259
2.2.5. Dependent and independent agents	260
2.2.5.1. Analysis of the 2010 version of the OECD Model.....	260
2.2.5.2. Analysis of the 2017 version of the OECD Model.....	262
3. The attribution of profits to permanent establishments	263
3.1. Overview	263
3.2. The “functionally separate entity approach”	264
3.3. Article 7 (2) of the OECD Model Tax Convention and the elimination of double taxation.....	266
3.4. Corresponding adjustments according to Article 7 (3) of the OECD Model.....	266
3.5. Attribution of profits to new dependent agent PEs	267
3.5.1. Opening comments.....	267
3.5.2. Activities of an intermediary.....	267
3.5.3. Relationship between Article 7 and 9 of the OECD Model.....	268
3.5.4. Functional analysis	268
3.5.5. Administrative approaches to enhance simplifications.....	269

XIII. Business restructuring

1. Overview	273
2. Business models	274
2.1. Opening comments	274
2.2. Principal entities	275
2.3. Manufacturing entities	275
2.3.1. Full-fledged manufacturer	275
2.3.2. Contract manufacturer.....	276
2.3.3. Toll manufacturer	277
2.3.4. Transfer pricing considerations	277
2.4. Distribution entities.....	278
2.4.1. Full-fledged distributor.....	278
2.4.2. Limited-risk distributor	279
2.4.3. Commissionaire.....	280
2.4.4. Transfer pricing considerations	281
2.5. Service providers	283
2.6. Intellectual Property (“IP”) companies.....	283
2.7. Procurement companies	285
3. Business restructurings.....	286
3.1. Opening comments.....	286
3.2. Traditional business model vs. supply chain business model.....	288
3.3. Business restructurings involving manufacturers	290
3.4. Business restructurings involving distributors	291

3.5. Business restructuring and Permanent Establishment (“PE”) risks	292
3.6. Supply chain management	294
4. Guidance provided in the OECD Guidelines	296
4.1. Opening comments	296
4.2. Part I: Arm’s length compensation for the restructuring itself	297
4.2.1. Introductory remarks	297
4.2.2. Understanding the restructuring itself	298
4.2.2.1. In general	298
4.2.2.2. Accurate delineation of the transactions comprising the business restructuring	298
4.2.2.3. Understanding the business reasons for and the expected benefits from the restructuring	299
4.2.2.4. Other options realistically available to the parties	300
4.2.2.5. Transfer pricing documentation for business restructurings	300
4.2.3. Recognition of the accurately delineated transactions that comprise the business restructuring	301
4.2.4. Reallocation of profit potential as a result of a business restructuring	301
4.2.4.1. Profit potential	301
4.2.4.2. Reallocation of risks and profit potential.....	302
4.2.5. Transfer of something of value	302
4.2.5.1. Tangible assets.....	302
4.2.5.2. Intangible assets	302
4.2.5.3. Transfer of activity (going concern).....	304
4.2.5.4. Outsourcing.....	304
4.2.6. Indemnification of the restructured entity for the termination or substantial renegotiation of existing arrangements	305
4.3. Part II: Remuneration of post-restructuring controlled transactions	305
4.3.1. Business restructurings versus “structuring”	305
4.3.2. Selection and application of a transfer pricing method for the post-restructuring controlled transactions	306
4.3.3. Relationship between compensation for the restructuring and post-restructuring remuneration	307
4.3.4. Comparing the pre- and post-restructuring situations	308
4.3.5. Location savings	309
XIV. Fund management services	
1. Overview	313
2. Fund management services	313
3. When does the arm’s length principle apply?	314
4. How to establish arm’s length transfer prices?	314

5. The importance of transfer pricing documentation	315
6. Selected case studies	317
6.1. Opening comments	317
6.2. Case study 1: The real estate fund	317
6.3. Case study 2: The real estate fund – Variation	319
6.4. Case study 3: The private equity fund	321
6.5. Case study 4: The infrastructure fund	322

XV. Transfer pricing adjustments

1. Overview	327
2. Tax adjustments under Luxembourg domestic tax law	327
2.1. In general	327
2.2. Article 56 of the LITL	328
2.2.1. Scope of Article 56 of the LITL	328
2.2.2. Tax adjustments under Article 56 of the LITL	329
2.3. Hidden dividend distributions	330
2.3.1. Opening comments	330
2.3.2. Characteristics of hidden dividend distributions	331
2.3.2.1. Key issues	331
2.3.2.2. Decrease (or averted increase) in the company's net equity	332
2.3.2.3. Motivation by the shareholding relationship	336
2.3.2.3.1. Opening comments	336
2.3.2.3.2. Existence of a shareholding relationship	336
2.3.2.3.3. Causation and the shareholding relationship	337
2.3.2.3.4. Triangular cases involving company groups	339
2.3.2.3.5. Burden of proof	343
2.3.2.4. Reduction of the company's taxable income	344
2.3.2.5. No regular distribution	351
2.3.2.6. Checklist: Hidden dividend distributions	352
2.3.3. Tax treatment of hidden dividend distributions	353
2.3.3.1. Overview	353
2.3.3.2. Tax treatment at the level of the company	353
2.3.3.2.1. Tax adjustments relating to hidden dividend distributions	353
2.3.3.2.2. Municipal business tax considerations	356
2.3.3.2.3. Dividend withholding tax	356
2.3.3.3. Tax treatment at the level of the shareholder	358
2.3.3.3.1. Opening comments	358
2.3.3.3.2. Tax adjustments relating to hidden dividend distributions	358
2.3.3.3.3. Considerations with regard to corporate shareholders	361
2.3.3.3.4. Municipal business tax considerations	362
2.3.4. Cross-border situations	363

2.4. Hidden capital contributions	366
2.4.1. Overview	366
2.4.2. Characteristics of hidden capital contributions	367
2.4.2.1. Key issues	367
2.4.2.2. The object of the hidden capital contribution	368
2.4.2.2.1. Opening comments.....	368
2.4.2.2.2. Assets	368
2.4.2.2.3. Liabilities	370
2.4.2.2.4. Services granted without valuable consideration	372
2.4.2.2.4.1. Introductory remarks.....	372
2.4.2.2.4.2. Past services versus future services.....	373
2.4.2.2.4.3. The rationale behind.....	375
2.4.2.3. Motivation by the shareholding relationship	376
2.4.2.3.1. Opening comments.....	376
2.4.2.3.2. Existence of a shareholding relationship	376
2.4.2.3.3. Causation by the shareholding relationship.....	377
2.4.2.3.4. Triangular cases involving company groups.....	378
2.4.2.3.5. Burden of proof	381
2.4.2.4. Absence of compensation to the shareholder.....	382
2.4.2.5. Check-list: Hidden capital contribution	383
2.4.3. Luxembourg tax treatment of hidden capital contributions.....	384
2.4.3.1. Introductory remarks	384
2.4.3.2. Tax treatment of the company	384
2.4.3.2.1. Valuation of hidden capital contributions	384
2.4.3.2.2. Tax adjustments relating to hidden capital contributions.....	384
2.4.3.2.2.1. Opening comments.....	384
2.4.3.2.2.2. Tax adjustments when making the hidden capital contribution	384
2.4.3.2.2.3. Tax adjustments following the hidden capital contribution...	388
2.4.3.2.2.4. Municipal business tax treatment	389
2.4.3.3. Tax treatment at the level of the shareholder	389
2.4.3.3.1. Tax adjustments relating to hidden capital contributions.....	389
2.4.3.3.2. Write-down in value of the participation	393
2.4.4. Cross-border situations	394
2.5. Hierarchy of norms	394
3. Tax adjustments under tax treaty law	395
3.1. In general	395
3.2. Article 9 of the OECD Model	395
3.2.1. Opening comments	395
3.2.2. Scope of Article 9 of the OECD Model.....	397
3.2.3. Tax adjustments under Article 9 (1) of the OECD Model.....	398
3.2.4. Corresponding adjustments under Article 9 (2) of the OECD Model	400

3.3. Tax treatment of excessive interest payments (Article 11 (6) of the OECD Model)	401
3.4. Tax treatment of excessive royalty payments (Article 12 (4) of the OECD-Model)	402
3.5. Non-discrimination rules	403
3.6. The relation between tax treaty rules and domestic tax law	404
4. Dispute settlement	405
4.1. Domestic dispute settlement process	405
4.2. Double tax treaties	406
4.3. EU Arbitration Convention	407

XVI. Managing the transfer pricing implications of the COVID-19 pandemic

1. Overview	411
2. Transfer pricing guidance on comparability analysis	411
2.1. Opening comments	411
2.2. Sources to be used to support the performance of a comparability analysis applicable for FY 2020	412
2.3. Considering the use of budgeted financial information	413
2.4. Considering timing issues	413
2.5. Practical approaches regarding information deficiencies	413
2.6. Considering the use of data from other crises	414
2.7. Establishing the period of data used to evaluate arm's length pricing	414
2.8. Considering price adjustments mechanisms	414
2.9. Evaluating the set of comparable companies or transactions used	415
2.10. Considering the use of loss making comparables	415
3. Transfer pricing guidance on losses and allocation of specific costs ...	415
3.1. Opening comments	415
3.2. Losses in the context of limited risk arrangements	416
3.3. Considering the modification of arrangements	416
3.4. Allocating operational and exceptional costs arising from the lockdown measures	417
3.5. Exceptional costs arising from the lockdown measures in the comparability analysis	417
3.6. Force majeure and the allocation of losses caused by the lockdown measures	418
4. Transfer pricing guidance on government assistance programmes.....	418
4.1. Opening comments	418

4.2. Government assistance as economically relevant characteristics	419
4.3. Government assistance and the allocation of risk in a controlled transaction	419
4.4. Government assistance and the comparability analysis	420
5. Advance pricing arrangements	420

APPENDIX

Appendix 1: Circular L.I.R. n° 56/1 – 56bis/1 dated 27 Decembre 2016	423
1. Définitions	423
2. Généralités	423
3. L'application du principe de pleine concurrence aux transactions de financement intra-groupe	424
3.1. L'analyse de comparabilité.....	424
3.1.1. Identification des relations commerciales ou financières entre des entreprises liées et détermination des conditions et circonstances économiquement significatives	424
3.1.1.1. Les dispositions contractuelles	425
3.1.1.2. L'analyse fonctionnelle	425
3.1.1.3. L'analyse des risques dans les relations financières.....	426
3.1.2. Comparaison de la transaction contrôlée et délimitée de façon précise avec des transactions comparables entre entreprises indépendantes et détermination de la rémunération de pleine concurrence.....	428
3.1.3. Transactions sans rationalité commerciale.....	429
4. Mesure de simplification	429
5. Contenu d'une demande de renseignements ayant pour effet de lier l'Administration des contributions directes en matière de prix de transfert dans le chef d'une société de financement de groupe	430
6. Décisions de l'Administration des contributions directes prises avant l'entrée en vigueur de l'article 56bis L.I.R.	431
Appendix 2: Glossary of terms	433
Appendix 3: Bibliography	451