

C/M/S/

Law . Tax

# Transfer Pricing

A strategic approach for global business performance

May 2010

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Multinational Enterprises (MNEs) have to adapt to rapidly changing commercial and economic environments:

- there is an increasing focus on compliance, enforcement and legislative approaches, and dealing with these complex issues is a significant challenge
- with local and global regulations becoming more prescriptive, the number and complexity of tax investigations being conducted by specialised teams within local tax authorities is rapidly escalating, and the quantum of tax adjustments is rising accordingly.

Within this framework, the design and implementation of internal pricing now represents much more than a compliance issue. Clear and practical advice is critical to the establishment of a robust, tax effective structure; transfer pricing is providing significant opportunities for MNEs to adapt internal remuneration policies to maximise tax effectiveness and ensure close alignment with business and commercial strategies.

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# A full range of services

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Our tax lawyers have extensive experience of dealing with tax authorities in many countries on transfer pricing cases and of successfully bringing such cases to a positive conclusion. This practical experience together with in-depth know-how in economics enables CMS firms to provide defensible, strategic advice. This expertise covers the full scope of transfer pricing issues, from the most advanced planning to the downstream management of tax audits, through global or local documentation, and integration of transfer pricing policies with other tax and legal issues. This includes:

## Local and global transfer pricing documentation

Almost all European countries have implemented provisions which require organisations to document their transfer pricing policies. In an increasing number of jurisdictions, there are severe penalties for failure to have certain documentary evidence in place in the event of a transfer pricing adjustment to a tax return. Consequently, as an MNE, you should ensure your transfer pricing policies are properly established, recorded and are subject to regular review. All major pricing decisions relating to intra-group transactions should be fully documented and such documentation should be carefully preserved according to local requirements. This should help avoid unpleasant surprises such as penalties and significant defence costs in the event of a tax audit.

## Financial and economic studies

Financial and economic studies have become essential to support an organisation's transfer pricing methodology and documentation requirements. It should be noted that tax authorities have established and use financial databases to justify their tax adjustments, with certain jurisdictions additionally using their own internal "secret" comparables, so detailed technical analysis is critical to support the data that an MNE uses to justify its pricing.

## Transfer pricing policies for intellectual property

Intangibles, such as trademarks and R&D activities, represent a significant component of the transfer pricing policy of an MNE as a tool for tax optimisation and cash repatriation. Location of intangibles and corresponding cross-border flows are therefore one of the major items to be addressed in a global transfer pricing scenario.

## Tax audits and litigation

Tax audits have, over the past years, increasingly focused on transfer pricing adjustments and often lead to double taxation. As a consequence, it may be imperative for MNEs to be able to robustly defend their current transfer pricing policy. Our CMS lawyers have substantial experience both in the field of tax audit and litigation and can therefore advise not only on the substance of the case but also on the procedural strategy to implement. This is becoming ever more important with transfer pricing litigation increasingly resting on determination of fine points of law and technical interpretation, as well as highly complex economic issues.

## Advance pricing agreements

MNEs may confirm in advance the arm's length nature of their intra-group transfer prices by entering into advance pricing agreements with one or more tax authorities. Such agreements can remain effective for a period of three to five years.

In some jurisdictions only unilateral agreements are available, while in others bilateral and even multilateral agreements have developed quite significantly. Our extensive expertise across Europe means we can offer detailed advice on the different opportunities for underwriting the transfer pricing position in each relevant country.

## Double taxation cases

Two procedures currently exist to resolve double taxation cases; the bilateral competent authorities' procedure and, within the European Union, the European Arbitration Convention. Both are the last actions that can be taken to avoid double taxation when a tax adjustment in one state is not taken into consideration by an automatic corresponding adjustment in the other state.

# An integrated tax and economics approach

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CMS firms have developed an integrated transfer pricing practice with its own economics resource. This team is able to provide you a full range of economic analysis from the most standard comparables searches to more complex studies such as activity-based costing, applications of the game theory, business or asset (including intellectual property) valuation.

As this Europe-based economics team has managed and coordinated the work of recognised local experts in North and South America and Asia, our practitioners are able to deliver truly global advice.

## A coordinated, international team

To better address your transfer pricing needs, we have developed a working group composed of tax lawyers and economists who regularly share expertise and experience.

With the objective of understanding all aspects of our clients business and bringing the additional value expected from advice of this nature, this group works closely with CMS lawyers specialised in other areas of law (such as intellectual property, customs and excise duties, and VAT). In addition, CMS commercial lawyers can assist in drafting the agreements necessary to formalise a client's chosen transfer pricing policy.

As a result of our extensive European presence, along with our worldwide network of transfer pricing correspondents, we are able to provide you with a single contact partner in your home jurisdiction, or other relevant country, who then coordinates the wider team of specialists on your behalf.

## A proven track record and a prestigious client base

CMS' expertise in transfer pricing allows our lawyers to negotiate with local, European and global authorities. We have been retained to negotiate Advance Pricing Agreement ("APA") procedures between many of the European countries and other jurisdictions, such as the United States and Singapore.

We are regularly involved in managing Competent Authority procedures between various countries including France, United Kingdom, Germany, Switzerland, Spain, Australia, Japan and United States. We have also successfully resolved a major case within the framework of the Italian procedure of "International Ruling".

CMS works for many MNEs on transfer pricing matters, including more than half of the French index CAC 40 and a number of FTSE100 companies. Our recent MNE engagements include:

- Implementation of license arrangements for technological know-how in countries throughout Europe, North and South America
- Design of a transfer pricing policy in relation to the licensing of international trademarks throughout Europe and the United States
- Advising on the transfer pricing implications of the reorganisation of supply chains
- Advising on the transfer pricing implications of outsourcing services to entities based in Europe, Asia and Asia-Pacific
- Successful defence of taxpayers in several cases with original tax adjustments exceeding EUR100 million
- Preparation of European-wide and worldwide transfer pricing documentation needed by International clients

# Where to find us

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Beyond the countries where we have dedicated CMS offices, we also enjoy very close relationships with specific networks of transfer pricing correspondents in North, Central and South America, as well as Middle-East and Asia-Pacific. This provides us the ability to deliver world-wide projects in optimal conditions, by selecting the best transfer pricing specialists in each country, with whom we enjoy long-lasting relationships.

A specific international team of CMS experts and correspondents would therefore be dedicated to your project depending on its characteristics, under the supervision of your CMS contact.

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