

THE TRANSFER  
PRICING LAW  
REVIEW

FIFTH EDITION

Editors

Steve Edge and Dominic Robertson

THE LAWREVIEWS

THE  
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PRICING LAW  
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FIFTH EDITION

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# PREFACE

It has been a great pleasure to edit this fifth 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 is considering aligning its TP 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.

Given their economic importance, transfer pricing rules will be high on the corporate tax agenda (and the broader political agenda) for many years to come, and they are continuing to evolve at a rapid pace. Over the next few years, we expect the following to be among the main areas of focus.

First, the transfer pricing impact of the covid-19 pandemic still needs to be worked out by many countries, though the OECD should be commended for publishing clear guidance on this within a few months of the start of the pandemic. At this time last year, many advisers were arguing (in our view, rather optimistically) that companies that were rewarded on cost-plus or the transactional net margin method bases as routine service providers should, as a result of the pandemic, bear a share of the 'system losses' in groups that had been pushed into heavy loss-making positions by lockdowns or travel restrictions. The OECD guidance has largely rejected that approach, arguing that the existing arm's-length principle and the OECD guidelines remain fit for purpose during the pandemic. In particular, the guidance warns tax authorities to be sceptical of claims that a routine service provider should bear a share of residual losses, and notes (rightly, in our view) that this argument – if accepted – would likely require that entity to share in residual profits in happier times. 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 have recently held that transfer pricing rules are not limited to pricing adjustments alone; and Ireland has introduced rules that enable the Irish Revenue to impose a 'substance over form' principle. In contrast, the Canadian courts ruled, in the *Cameco* case last year, that TP recharacterisation was permitted only where the underlying transactions were 'commercially irrational'.

Third, many countries are strengthening the requirements for contemporaneous transfer pricing documentation, either aligning with the OECD master file or local file model (as in Israel), or potentially going beyond this (as the UK has proposed).

Finally, the OECD/G20 project to address the tax consequences of digitalisation continues to work towards agreeing a solution in 2021, which has become more likely following the arrival of the Biden administration in January 2021. Immediately before this preface was written, the G7 finance ministers confirmed that they have agreed to a global minimum tax rate of at least 15 per cent; and, more significantly for transfer pricing purposes, a pivot away from the arm's-length standard for large and highly profitable multinationals, under which a portion of their profits (above a 10 per cent hurdle rate) would automatically be reallocated to market jurisdictions. This is, of course, a radical shift away from the traditional arm's-length standard, but it is worth emphasising that the arm's-length principle will continue to play a crucial role for large businesses and tax authorities. This is, first, because it will take several years for the reallocation rule to become embedded in national laws and double tax treaties; and, more enduringly, because the arm's-length standard will continue to apply (1) to the vast majority of businesses that fall outside the reallocation rule, either because of size or profit margins; and (2) to the majority of the profits of those businesses that are subject to the reallocation rule. Clearly, there is much more detail to come on these changes, and we look forward to seeing this discussed in depth in the next edition of the *Review*.

We would like to thank the authors of all 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**

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In recent years, Steve has been heavily involved in several large-scale interventions under HMRC's high-risk corporate programme and in many in-depth tax investigations of specific domestic or international issues including transfer pricing in particular. He thus has considerable experience of negotiating and dealing with HMRC at all levels.

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