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What is the current thinking with respect to your country's laws, regulations or other pronouncements that have been issued or proposed for the relevant BEPS Actions (8–10, 13)?

A. Actions 8–10

Apart from the recent additions mentioned below, no drastic changes to existing French rules under Actions 8–10 should be expected in the near future, since most significant principles in the BEPS reports on these activities are already embedded in French corporate income tax law. Actions 8–10 address transfer pricing issues relating to intangible assets, risk, and capital allocation, and other transactions that would not occur, or would only very rarely occur, between unrelated parties. Underlying all of these actions is the initial question of whether the transaction has commercial rationality, compared to uncontrolled arrangements under comparable economic circumstances. Despite a traditional "legalistic" approach to transactions, the French Tax Authorities as well as the French tax judges tend to seek the actual substance of the operations beyond their mere form, in line with OECD Actions' recommendations about identifying the "true" commercial relationship and transaction. Additionally, recent changes in the French tax legislation address this objective, for example, the anti-abuse provisions allowing to disqualify withholding tax exemptions or parent-subsidiary regime benefits in the event of an interposition of a purely passive entity. Finally, French tax law addresses certain exceptional actions, such as the abuse of law or the abnormal act of management to re-qualify certain transactions, and re-characterizes them based on the actual substance of the operations.

1. Intangibles (Action 8)

Regarding intangibles, the French tax law has been recently updated with some specific provisions which could, indirectly, address Action 8's recommendations and objectives:

- The transfer of intangibles out of France will trigger a corporate exit tax, and the attention of the French Tax Authorities is notably focused on the conditions under which already-developed intangibles can be transferred out of France (seeking the proper corresponding indemnification of the French transferor) or the conditions under which a French party may surrender its rights over intangibles it develops under an R&D subcontracting arrangement to another foreign related entity. It should also be noted that despite the fact that an "anti-business restructuring" provision voted in 2013 was ruled anti-constitutional by the French Constitutional Court in 2014, and therefore is no longer enforced, this aspect is still a key point of attention for the Authorities during tax audits;
- Any outbound income stream, notably for royalties arising from intangibles, will be considered as non-deductible for the French paying entity and subject to severe withholding tax if paid to a beneficiary located in a so-called non-cooperative state or in a tax haven, except, in summary, if the reality of the operations and the arm's length nature of the remuneration can be demonstrated (article 238 A and 238-0-A of the French Tax Code);
- French CFC rules can already apply to certain situations permitting the French Tax Authorities to repatriate the income from intangibles located abroad (article 209 B of the French Tax Code).

Concerning the valuation of intangibles, the French Tax Authorities have not enacted specific rules as such, notably to specify whether actual results (ex-post) or anticipated results (ex-ante) forecasts need to be used to value the transfer of intangibles, or whether certain methods ought to be used or not for price setting, price testing or both. However, from experience, the French Tax Authorities tend to use all available information, including ex-post information, when it comes to valuing intangibles.

At this stage, there is no official plan to address the specific issue of the valuation of intangibles under French tax law. The same can be said of the definition of intangibles and guidance on cost contribution arrangements, which are also pointed out under Action 8.[1]

2. Risks and capital (Action 9)

Since 2010, French tax law (article L 13 AA of the French Tax Procedure Code) has directly referred to functions and risks, since the companies subject to the documentation requirements (mainly MNEs) must provide two sets of files, in line with the EU Master File concept.[2] Accordingly, functional analysis (including an accurate description of functions undertaken and risks borne) is now expected to be provided by the companies concerned in support of TP transactions. The level of risk borne should be mentioned both at the Master File and the Local File levels.

In addition, since 2014, a new requirement under article 223 *quinquies* B of the FTC requires the filing of an annual TP form (No 2257-SD). However, to date, French administrative doctrine[3] has not detailed how the notion of risk should be reflected or developed in this concise form.

In light of the recent BEPS developments, it can be anticipated that these requirements of disclosure of risks and functions will increase, and the French TP documentation elements to be provided contemporaneously or on demand (depending on the size of the French company and the group it belongs to) may be amended accordingly.

Case law has also provided some illustrations where the level of returns of entities were (notably) assessed based on the risks assumed by the parties, e.g., in situations where a gross margin was split between two parties, the French one bearing most of the functions and risks on the transaction.[4]

With regards to the indirect aspect of the risk and capital recommendations under Action 9, it should be noted that the French tax law now includes anti-hybrid provisions. These anti-hybrid provisions disallow interest expense deductions on such instruments when the corresponding income is not taxed substantially or treated as capital by the foreign beneficiary, as well as denying the benefit of the French parent-subsidiary exemption on dividends, when this dividend is treated as a deductible interest expense at the paying entity level (article 212 I b and 145, 6-b of the French Tax Code, respectively). [5]

3. Other high-risk transactions (Action 10)

Similar to Actions 8 and 9, the French Tax Authorities have not yet enacted direct legislation aiming at the situations addressed to by Action 10.

However, the French Tax Authorities may already re-characterize transactions which would not, in normal circumstances, be contracted between third parties. As noted above, the abuse of law procedure and the abnormal management act theory enable the French Tax Authorities, for example, to discard an interposed entity without substance in order to tax the actual or effective beneficiary of a transaction, or qualify it in a different way, in order for a different, more appropriate tax treatment to apply. It should be noted that severe penalties generally apply when such procedures are undertaken: respectively 80% and 40% of the eluded taxes for abuse of law procedure and abnormal management act theory application.

Regarding the specific objective of providing "protection against common types of base eroding payments, such as management fees and head office expenses," the French Tax Authorities are, in practice, already very aware of these type of practices and almost systematically ask for justifications of such payments by French entities, including details on the services provided, to what extent they benefit the French company concerned and, when applicable, the method(s) of allocating costs between multiple related beneficiaries of these services. In addition, if such services are provided by entities located in a so-called non-cooperative state or a tax haven, the tax deductibility or the withholding tax treatment of any corresponding paid expenses could be impacted (denial of the tax deductibility, application of more severe withholding taxes).[6]

B. Action 13

1. Country-by-Country Reporting

France is among the first countries of the OECD to have implemented country-by-country (CbC) reporting norms in its own domestic legislation.

This provision (article 223 quinquies C of the French tax code) provides for some specific measures which will be effective from fiscal years that begin on or after January 1, 2016.

This measure applies to French resident companies that meet all of the following conditions:

- Draw up consolidated accounts,
- Hold foreign branches or control, directly or indirectly, one or more foreign-based subsidiaries,
- Generate an annual consolidated turnover of at least 750 million euros, VAT excluded,
- Are not held by one or several legal entities established in France already subject to the French CbC reporting requirement, or by legal entities established abroad that are subject to similar CbC reporting requirements pursuant to foreign legislation.

Entities established in France also are subject to the French CbC reporting requirement when this French entity is held, directly or indirectly, by a legal entity established in a foreign State or territory not included in a certain list (the French government plans to publish a list of States or territories that have a similar CbC reporting requirements and an automatic exchange of information agreement with France) and that would be subject to the CbC reporting requirement if established in France, in the following situations:

- The French entity has been appointed by the group to submit the report, or
- The French entity is not able to demonstrate that another entity, based in France or in a foreign State or territory included in the list (as already explained above), was appointed to do that.

The companies within the scope of the French CbC reporting will have notably to provide the following information on their CbC reporting form, per country:

- The description of the activities performed;
- The net turnover;
- The profit before tax;
- The corporate tax due and paid;
- The social capital;
- The retained earnings;
- The number of employees.

The required information will need to be submitted within 12 months of the fiscal year's close (in case of tax consolidation, the ultimate parent company must submit this report for the whole group).

This means that the first tax return concerned by CbC reporting will need to be filed by 2017.

These rules include a penalty of up to 100,000 euros for non-compliant companies.

These CbC reporting rules have been subject to much controversy, notably since many OECD countries have not adopted similar rules yet, so that certain tax payers and advisers consider that the information burden and the disclosure risks associated with CbC reporting are borne by French companies first, and without being tested at an international level in the first place.

In addition, a draft law (articles 45 bis and ter of "Sapin II") which may be subject to vote this summer provides for an extension to all companies having a turnover of at least 50 million euros, which would drastically both extend the French CbC reporting scope or also the corresponding burden for these companies. This low threshold might be introduced from July 1, 2020. The CbC reporting form may also be publicly available, which again creates some confidentiality or fair competition issues.

2. Master File/Local File

As of January 1, 2010, section L. 13 AA of the French Tax Procedure Code (FTPC) provides that, a specific transfer pricing documentation must be prepared by entities meeting certain thresholds and must be provided to the FTA in the course of a tax audit. In 2014, a new transfer pricing documentation requirement was implemented.[7]

The current French requirements are compliant with the OECD Transfer Pricing Guidelines and similar to the structure recommended by the European Union Code of Conduct of 2008. Companies have to prepare two categories of information on their transfer pricing policy (general information on associated companies and specific information on the audited company). Therefore, the French transfer pricing documentation very much follows the Master File / Local File pattern, requiring the Master File type of information to be provided by a French parent company, and only the Local File type of information for French subsidiaries of foreign parent company subject to Master File requirements locally. [8]

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NOTES

[1]For more detailed information on hard-to-value intangibles, please refer to the BNA Transfer Pricing Forum Issue 4, written by Guillaume Madelpuech from NERA.

[2]Code of Conduct on transfer pricing documentation for associated enterprises in the EU.

[3]BOI-BIC-BASE-80-10-20-20141117, n°410 and following paragraphs.

[4]Administrative Appeal Court of Bordeaux, December 8, 2005, No.02-1366, *Corail* , French Supreme Court, April 9, 2014, No 366493, *Sopebsa*.

[5]For more detailed information on the Risk aspects, please refer to the BNA Transfer Pricing Forum Volume 6, Number 04, issued on November 2015, written by the author.

[6]For more detailed information on these aspects, please refer to the BNA Transfer Pricing Forum Volume 6, Number 21, issued on November 2015 (specifically Issue 3) and BNA Transfer Pricing Forum Volume 5, Number 22, issued on November 2014 (on Services aspects), both written by the author.

[7]Section 223 quinquies B of the French tax code.

[8]For more detailed information on these aspects, please refer to Bloomberg BNA's Transfer Pricing Forum, Volume 05, Number 01, May 2014, written by the author.