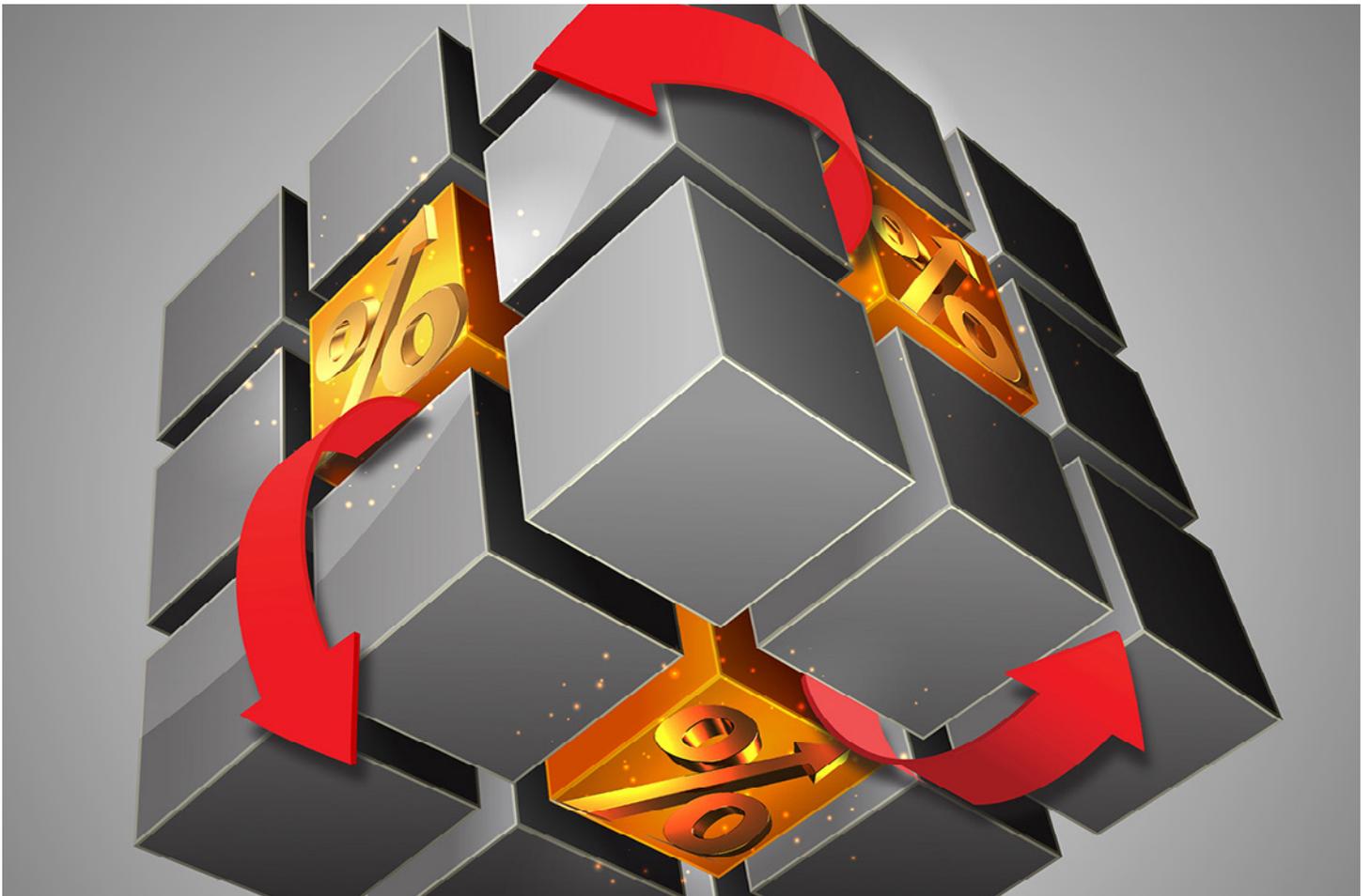


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Transfer pricing

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in transfer pricing.





Luxembourg ■

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A tax professional since 2003, Oliver R. Hoor has experience in Luxembourg and international taxation with a focus on alternative investments, including private equity, private debt, real estate, infrastructure, mergers & acquisitions and multinational groups. He advises clients on all direct tax aspects regarding deal structuring, maintenance, reorganisations and exit planning.

■ **Q. What do you consider to be the most significant transfer pricing changes or developments to have taken place in Luxembourg over the past 12 months or so?**

HOOR: The current global economic environment might be the single most critical factor from a transfer pricing perspective. While we have seen lockdown measures, quarantine mandates and other restrictions which had a direct impact on a whole range of businesses, the escalating inflation rates and supply chain disruptions are now a concern for many groups. These tendencies are only aggravated by sanctions against Russian natural resources that further fuel inflation in the West and have the potential to result in an energy crisis. All these factors need to be considered in the transfer pricing analysis and as the economic parameters are changing rapidly, transfer pricing documentation may need to be reviewed and amended more frequently than before. Overall, it can be anticipated that transfer pricing will remain the focus of scrutiny in the tax assessment process and during tax audits.

■ **Q. To what extent have the tax authorities in Luxembourg placed greater importance on the issue of transfer pricing in recent years, and increased their monitoring and enforcement activities?**

HOOR: In the past, tax audits have not been a common phenomenon in Luxembourg. However, since the creation of a new tax audit division, tax audits are now performed more systematically by Luxembourg tax authorities. As tax assessments in Luxembourg may generally be revised for a period of five years, potential tax risks may span several years, which requires an appropriate and active tax risk management function. Experience shows that transfer pricing is frequently put under the microscope during tax audits. Tax authorities can more easily challenge transfer pricing when no transfer pricing documentation has been prepared. For example, how could taxpayers make informed decisions if no transfer pricing analysis was performed before the pricing of intragroup transactions was determined? Therefore, transfer pricing should always be considered before agreements are concluded.

■ **Q. In your opinion, do companies pay enough attention to the challenges and**

complexities of maintaining compliant transfer pricing policies?

HOOR: Over the last few years, transfer pricing and related documentation has become a hot topic in Luxembourg taxation. This trend has been accompanied by the introduction of new transfer pricing legislation, a new circular on the tax treatment of finance companies and new reporting obligations in regard to intragroup transactions which place more emphasis on transfer pricing. As a result of all these developments, Luxembourg companies are paying attention to transfer pricing and related documentation.

■ **Q. What kinds of challenges arise in calculating appropriate transfer prices, both for tangible and intangible assets? How crucial is it to have consistent supporting documentation?**

HOOR: Luxembourg is a prime fund location and the jurisdiction of choice for many multinational groups when implementing a regional investment platform. As such, transfer pricing is often focused on financial transactions such as intragroup debt funding, financing



activities and guarantees where arm's length interest rates, finance margins and guarantee fees have to be determined. Moreover, intragroup services such as administrative services and, in a fund context, fund management services are of great importance. With regard to the transfer of assets, the fair market value of participations, debt instruments and intangibles are essential in Luxembourg transfer pricing. Luxembourg taxpayers are under a duty to cooperate with the Luxembourg tax authorities and are required to evidence facts and provide information in regard to statements made in the tax returns. As a matter of principle, the arm's length pricing of material intragroup transactions should always be substantiated in sound transfer pricing documentation.

■ **Q. Have you seen an increase in transfer pricing disputes between companies and tax authorities in Luxembourg?**

HOOR: With the increased focus on transfer pricing, disputes between companies and tax authorities are also becoming more common. Nevertheless, transfer pricing disputes are most likely to occur in situations where companies did not prepare appropriate transfer pricing documentation in regard to material intragroup transactions. Conversely, preparation of robust transfer pricing documentation is generally an efficient protection against challenges by Luxembourg tax authorities. Transfer pricing inevitably compels taxpayers to find a balance between a comfortable level of security and the costs for the preparation of relevant documentation. In practice, Luxembourg companies should screen major intragroup transactions in order to identify specific issues

that could raise suspicion on the part of tax authorities and assess the magnitude of related tax risks. On this basis, taxpayers can perform a cost-benefit analysis and weigh the costs of transfer pricing documentation against the amount of potential tax risks.

■ **Q. How should companies respond if they become the subject of a tax audit or investigation? What documentation needs to be made available in this event?**

HOOR: Taxpayers should ideally take a proactive attitude toward transfer pricing and prepare documentation, where appropriate, at the time they enter into a controlled transaction rather than waiting until a transaction is picked up during a tax audit. While transfer pricing documentation may also be prepared at the moment of a tax audit, the level of scrutiny regarding the assumptions, the transfer pricing approach and the benchmarking that may be expected is unequally higher. After all, it might be considered as a coincidence if transfer pricing analysis confirms the pricing of the intragroup transaction. When the Luxembourg tax authorities can reasonably evidence that the transfer pricing of an intragroup transaction does not adhere to the arm's length principle, it is the responsibility of the taxpayer to disprove this rebuttable presumption. However, in the absence of appropriate transfer pricing documentation, it is difficult to substantiate the arm's length character of intragroup pricing. When transfer pricing documentation is prepared for the purposes of a tax audit, potentially years after a transaction has been entered into, it might also be difficult to trace back all relevant information and relevant comparables data.



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■ **Q. In general, what advice would you give to companies on reviewing and amending their transfer pricing policies and structures?**

HOOR: Taxpayers should not consider the preparation of transfer pricing documentation as a compliance exercise. Instead, in the current international tax environment of heightened transparency and scrutiny, Luxembourg companies would be wise to take it one step further and to integrate the documentation of transfer prices in their wider tax strategy, using it as a means to reflect the business rationale behind their investment structures and intragroup transactions. It is also important

that transfer pricing policies are not disregarded after their implementation. As a matter of best practice, taxpayers should review their transfer pricing documentation at least once a year in order to assess whether the fact pattern is still consistent with reality and to determine whether an update might be necessary. ■

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ATOZ Tax Advisers, founded in 2004, is a high-end independent advisory firm based in Luxembourg offering a comprehensive and integrated range of tax, asset management and corporate services. The firm advises on and delivers solutions for sophisticated local and global professional clients. With over 150 highly skilled professionals, its team has in-depth experience of serving very demanding businesses and institutional clients in need of tailor-made advice. ATOZ is the Luxembourg member of the Taxand network, which provides high quality, integrated tax advice worldwide.

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