

Tax Management Transfer Pricing Report™

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More Multinationals Contemplating French Pricing Pacts

BNA Snapshot

- Tax directors use advance pricing agreements (APAs) to ward off massive tax risk
- Some practitioners believe French APAs are complex and inefficient



By Rick Mitchell

Multinational companies in France are showing more interest in negotiating intercompany pricing agreements with tax authorities to increase tax certainty, spurred by international rules to crack down on tax avoidance.

But French practitioners diverge on how useful the agreements are because of their complexity and the length of time it takes to complete them.

French tax professionals told Bloomberg Tax that since the release of international rules to combat base erosion and profit shifting, they are seeing increased interest from big taxpayers in a procedure called “advance pricing agreements,” or APAs. The APAs are meant to allow companies to negotiate appropriate transfer prices with tax authorities and prevent expensive tax disputes before they happen.

Many countries believe some multinationals use “abusive” transfer pricing strategies to move profits from high-tax jurisdictions into low- and no-tax jurisdictions. The base erosion and profit shifting (BEPS) rules that the Organization for Economic Cooperation and Development (OECD) published in 2015 require companies to tell tax authorities where and how they earn their profits, how they set their transfer pricing, and why they locate high-return intangible assets in certain jurisdictions. The dust is still settling on how jurisdictions, including France, will interpret those rules.

Transfer pricing rules require subsidiaries of a multinational company to price the sale of goods and services—that they sell to each other—as if they are acting as independent companies. Under a French bilateral APA, a multinational company enters into agreement with France, and one other country, to put in stone intercompany pricing for future years, when the multinational has subsidiaries in both jurisdictions.

Difficult Transfer Pricing Audits

France introduced an OECD-standard procedure for negotiating APAs in 2000. By the end of 2016, the office that handles them had taken on 273 cases, of which 63 percent (172) produced signed agreements, 22 percent are still under negotiation, and the rest have been dropped.

The government in February 2014 merged its separate programs for APAs and mutual agreement procedures into one office—the Mission d'expertise juridique et économique internationale (the Mission for International Legal and Economic Analysis), or MEJEI.

Jan Martens of EY in Paris cited two main drivers to request an APA in France: taxpayers want one to get them out of a “vicious circle” of frequent, very difficult audit discussions with the field tax auditor, and, second, they changed their transfer pricing policy because of a restructuring, or acquisition, which always creates risk.

Martens told Bloomberg Tax that he's recently seen a third kind of request: “an APA is the only way a taxpayer can get certainty on transfer pricing in France, and the BEPS project made them even more relevant. We've actually seen an uptick in

requests.”

Dentons partner Jesse Gaston agreed, saying that since BEPS, “a lot of companies have been looking to get more security on their transfer pricing cross-border. So we do see a trend of companies wanting to go that way, although it was not that popular of a measure before.”

‘Marginal Procedure’

There are challenges, however, for companies interested in negotiating APAs in France.

Arnaud Sage, the French competent authority, said new BEPS project rules require tax offices to more quickly settle Mutual Agreement Procedure (MAP) cases, which countries can negotiate on behalf of companies to resolve cross-border double-taxation disputes. That new pressure can cause competent authorities to neglect APAs, Sage said. He was speaking at the Bloomberg Tax-Baker McKenzie Global Transfer Pricing conference in April in Paris,

Antoine Glaize, a Paris-based partner at Arsene-Taxand, who until 2000 managed the French audit office that created the APA program, said that, “although about 10 years ago APAs were thought to be a good way to solve problems in France, it remains a very marginal procedure.” Glaize said the MEJEL is understaffed and swamped with MAP cases. The competent authority handles thousands of international transfer pricing-related audits in a year, and probably only a few dozen new APAs, although it maintains and renews existing APAs.

Gaston said an APA “should be in principle the most securing instrument for transfer pricing policy but in France they are lengthy and can get over-complicated as with other French procedures, involving many back and forths with the administration.”

“It is the rare case where the investment is worth the effort,” Glaize said. He said BEPS rules might have also taken the shine off APAs’ attraction by requiring companies to declare, in their transfer pricing documentation, the APAs and tax rulings they have received worldwide, and also requiring countries to exchange rulings and APAs among themselves.

Pre-Filing Meeting

Martens said there's no fee for the French APA procedure.

Glaize said the first step in France's APA procedure is a pre-filing meeting in which the taxpayer presents its case to the tax administration. If the case is accepted, then there's a process of discussion in both countries—with the taxpayer and then between the countries.

Martens said the pre-filing meeting is very important. In some countries, the pre-filing meeting is just to say “Hi,” and the process only really starts once you do the APA submission. “In France, authorities will request to receive materials two weeks before the pre-filing meeting, and will already have investigated the case” and be ready to ask questions. After pre-filing, it can take as long as 10 months to a year to get the first meeting between the competent authorities.

Glaize said APAs require a lot of input from taxpayers, while MAPs tend to be more “passive” processes for the taxpayer, where the administrations do the work.

‘Who's on the Other Side’

Martens said some APAs take longer because they are technically more difficult, with big amounts in play. He said a company's sector is less important than which country they're dealing with. “It's really a matter of who's on the other side, and do you have a level of trust sufficient to get to a fast conclusion?” His fastest new APA procedure, not a renewal, took six months from pre-filing to conclusion, a bilateral one between France and Switzerland. His longest took six years, with Canada.

In the digital sector, getting an APA is difficult because of the political issues at play, Martens said.

Glaize said process times are never less than two years. “We've noticed that even for renewals, when the agreement just needs to be updated, that can take two years.” That's because the department is overloaded, and swamped, and also because the procedure is inherently difficult and complex. “Even if France advances, they're waiting for their Italian colleagues to advance. Everyone has to wait for the others.”

Gaston said APA negotiations with some countries are quick and simple, but with other countries, they may take longer. For

example, "With Italy it's really, really, really complicated, and getting worse."

Martens said Brexit has put brakes on French APAs with the U.K.

Filing Deadline

Martens said an important consideration is that France requires requests to be made six months before the first day the APA will apply. So a company whose fiscal year ends Dec. 31 must submit by June 30 this year for the APA to apply for the year beginning Jan. 1, 2019.

Many taxpayers get caught by the "mismatch" of France's deadline with several other countries, including Japan, Germany, the U.S., and the U.K., which allow applying the APA for the same year the request is made.

Not for Simple Questions

Glaize said MEJEI in principle considers APAs to be for complex subjects.

Martens said APAs make sense when a case's uncertainty level makes it worthwhile going through the effort of obtaining one. The classic case is one involving a restructuring or change of transfer pricing method. And with questions involving contributions or residual profit splits, where "subjectivity inevitably creeps in, more than any other methods. Even if it is the most appropriate method, the application of the method itself can be subject to question and scrutiny during audit cycles," Martens said.

Martens said APAs are relevant for anything related to intangible assets, whatever the method used. "Everything that is intangible can change. Even if you've been audited once and it went through competent authorities, that still does not give you certainty going forward. There are several issues that for which even a MAP can't give you that. For those types of issues, an APA becomes the most valuable tool."

Gaston had a different take. She said intangible assets should be a subject for APAs, but "the real problem is that there is still a big question mark about the definition of an intangible including after BEPS." Complex questions remain about how to split the value of so-called know-how, particularly in the pharmaceutical industry, she said.

No 'Tick the Box'

Gaston said in her experience, the most common cases for APAs in France are for benchmarking analysis of general transfer pricing values, where comparability is not obvious, including for the distribution cycle. "It's never very precise and that's generally where you get the most audits."

She said the APA process in France is "inefficient" compared with some of its EU competitors, such as Luxembourg and the U.K. "In the U.K., you go onto your computer, tick the boxes for your case and submit your request. Then you wait a couple of months until you have a confirmation or not."

The French process takes a lot longer, she said. You have to apply six months before the end of fiscal year in which you intend to apply the system. "Then you wait, kind of hoping that within six months they are going to revert back to you. But they most likely won't. That's why people don't really use them that much."

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For More Information

MEJEI's November 2016 document on its APA program is available, in French, at: <http://src.bna.com/yvM>