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Comparative analysis of Transfer pricing tax policy in Morocco in relation to OECD principles.

Analyse comparative de la politique fiscale des prix de transfert au Maroc par rapport aux principes de l'OCDE.

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Abstract:

The growth of multinational groups is a direct result of the internationalization of economies, this global trend has incentivized companies to seek opportunities and expand their operations beyond the confines of their home countries. As businesses become more globally interconnected, the need for comprehensive and strategic tax policies becomes evident. Among these, the transfer pricing tax policy plays a pivotal role. It is specifically formulated to deter corporations from engaging in the practice of artificially shifting profits from one subsidiary to another, a practice often attempted with the aim of minimizing the corporation's total tax liability across various countries. By ensuring that transactions between subsidiaries are conducted at arm's length – that is, in a manner consistent with transactions between unrelated parties – this policy aims to uphold the integrity of tax systems and prevent tax evasion, thereby promoting a more equitable distribution of tax obligations among multinational entities. This article conducts a detailed comparative analysis of the Moroccan transfer pricing tax policy against the principles established by the Organization for Economic Co-operation and Development (OECD). It also explores the evolution of Moroccan legislation and the proposed reforms in transfer pricing tax policy. The text addresses the traditional and transactional methods used to evaluate the commercial and financial relationships between associated enterprises. The article also highlights the challenges and limitations of advance pricing agreements in transfer pricing, offering a critical perspective on the efforts to align Moroccan regulation with OECD guidelines. The analysis showed that the Moroccan framework on transfer pricing diverges from the OECD's recommendations, notably due to a lack of precise guidelines and the absence of rules for specific cases. However, this Moroccan policy demonstrates partial alignment with the OECD guidelines, particularly through the adoption of the arm's length principle and the possibility of advance agreements.

Keywords: International taxation, Fiscal policy, Multinationals, OECD, TP (Transfer Pricing), Arm's length principle, Morocco.

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Résumé :

La croissance des groupes multinationaux est directement liée à l'internationalisation des économies. Cette tendance mondiale a encouragé les entreprises à rechercher des opportunités et à étendre leurs opérations au-delà des limites de leurs pays d'origine. Avec l'interconnexion croissante des entreprises à l'échelle mondiale, le besoin de politiques fiscales complètes et stratégiques devient manifeste. Parmi celles-ci, la politique fiscale en matière de prix de transfert occupe un rôle central. Elle est spécifiquement conçue pour dissuader les entreprises de se livrer à la pratique consistant à transférer artificiellement des bénéfices d'une filiale à une autre, dans le but de minimiser la responsabilité fiscale totale de l'entreprise à travers différents pays. En garantissant que les transactions entre filiales soient conduites à longueur de bras – c'est-à-dire, de manière conforme aux transactions entre parties non liées –, cette politique vise à préserver l'intégrité des systèmes fiscaux et à prévenir l'évasion fiscale, favorisant ainsi une répartition plus équitable des obligations fiscales parmi les entités multinationales. Cet article réalise une analyse comparative détaillée de la politique fiscale marocaine en matière de prix de transfert par rapport aux principes établis par l'Organisation de Coopération et de Développement Économiques (OCDE). Il explore également l'évolution de la législation marocaine et les réformes proposées concernant la politique des prix de transfert. Le texte aborde les méthodes traditionnelles et transactionnelles utilisées pour évaluer les relations commerciales et financières entre entreprises associées. En conclusion, l'article souligne les défis et limitations des accords préalables sur les prix de transfert, offrant une perspective critique sur les efforts déployés pour harmoniser la réglementation marocaine avec les directives de l'OCDE.

Mots clés : Fiscalité internationale, Politique fiscale, Multinationales, OCDE, APP, Principe de pleine concurrence, Maroc.

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Introduction

The internationalization of economies pushes compagnies to venture beyond their national borders, leading to the growth of multinational groups that operate through subsidiaries established in different countries. Concurrently, Cooper, J., et al (2016) highlight that multinational companies represent a significant source of innovation, growth, and public revenue globally. However, as the proportion of international trade between entities of these multinationals increases, their ability to exploit disparities between national tax regimes and consequently reduce their tax burden also grows. Thus, the internationalization of economies is a phenomenon that has been observed for several decades, and the growth of multinational groups is a direct result of this trend. Numerous studies and analyses have been conducted to understand the implications of this phenomenon on businesses and economies. In the absence of a formal definition in French law, we will refer to the definition proposed by the Organization for Economic Co-operation and Development to designate this typology of companies Carasco, P.-Y. (2017): « *Multinational companies include corporations and other entities, with private, public, or mixed capital, established in different countries and linked in such a way that one or more of them are able to exercise a significant influence over the activities of the others, and in particular, to share knowledge and resources with them. The degree of autonomy of each entity in relation to the others varies greatly from one multinational company to another, depending on the nature of the links that unite these entities and the areas of activity,* » (OECD, Transfer Pricing and Multinational Enterprises, year 1979). In his writing, Nguyen, N. T. (2019) mentioned that access to trade through the World Trade Organization (WTO) triggers the transformation of individual enterprises into multinational corporations that then penetrate the share of the global market. Multinational corporations are also associated with foreign direct investment in cross-border transactions; thus, they have policies that impact social and economic growth. These innovations are the basis for deciding on transfer pricing between related enterprises. Transfer pricing tax policy refers to the rules and regulations put in place by governments aimed at preventing companies from artificially shifting profits from one subsidiary to another in order to reduce their overall tax burden. Cooper, J., and al (2016) assert that transfer pricing regulation for tax purposes generally imposes specific standards or methods that must be followed when determining these prices. For example, transfer pricing regulation for direct tax commonly requires that prices related to transactions between associated enterprises be established based on the arm's length principle. Non-compliance with this regulation frequently results in tax adjustments as well as the imposition of corresponding penalties and interest. In Morocco, the transfer pricing tax policy is primarily regulated by the finance law and the directives of the tax administration. Companies must comply with the rules of the Organization for Economic Co-operation and Development (OECD) regarding transfer pricing, as well as the applicable Moroccan regulations. To achieve this goal, the government has implemented rules and methodologies to assess whether the transfer prices charged between subsidiaries of a multinational company are appropriate. For example, one of the most commonly used methodologies is the market price comparison method, which compares the prices charged between a company's subsidiaries to market prices for similar goods or services. Taking into account what has been mentioned previously, the main goal of this article is to assist the reader in better understanding the transfer pricing policy, a topic that is both extensive and at the heart of current economic and tax news. With this aim in mind, we have chosen to initially focus on the tax aspect of the theme, a dimension that holds crucial importance for both tax administrations and the taxpayer. This initial focus will pave the way for us to explore in depth the various dimensions of this policy, including alignment with the OECD principles.

This article is primarily aimed at Moroccan companies. Therefore, a significant portion is specifically dedicated to them, given that our country's legislation has undergone a distinctive evolution by adjusting to the international environment.

As a result, we will study the evolution of Moroccan legislation, the proposed reforms, and the initiatives of the transfer pricing tax policy in Morocco. We will also examine the challenges related to the advance pricing agreement and its limitations. Finally, to capture everything that has been said, this document conducts a detailed comparative analysis of the Moroccan tax policy on transfer pricing in relation to the principles established by the Organization for Economic Co-operation and Development (OECD).

In this context, we will address the following questions and inquiries:

- What is the role of the OECD in transfer pricing policy?
- What are the OECD guiding principles that are included in the transfer pricing tax policy in Morocco?
- What are the proposed reforms to improve the transfer pricing tax policy in Morocco?
- What are the challenges related to the advance pricing agreement in transfer pricing and what are its limitations?

Key points of the methodology used to conduct this work:

Our research is grounded in a practical perspective, aiming to understand and analyze the specifics of the Moroccan transfer pricing framework by comparing it to international practices,

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especially those recommended by the OECD. The methodology adopted for this work is multidisciplinary and combines several approaches in order to provide a comprehensive and accurate view of the subject:

Firstly, an extensive literature review was conducted, including the analysis of scientific publications, OECD reports, as well as Moroccan legislation related to transfer pricing. This approach allowed us to build a solid foundation of theoretical knowledge and to understand the international and national regulatory framework.

Secondly, a visit to the 3P tax consulting firm (audit, engineering, consultancy) enriched our research. The exchange with experts in the field provided us with concrete and current perspectives on the implementation of the transfer pricing tax policy in Morocco. These direct interactions with professionals in the field allowed us to complement our theoretical understanding with practical observations.

This combination of documentary research and interviews with experts follows an inductive approach, where data collected in the field serve to enrich and expand existing theoretical frameworks. Our methodological choice is based on the belief that integrating theory is crucial for deeply understanding the challenges and specificities associated with transfer pricing in Morocco.

This epistemological stance reflects our desire to grasp the Moroccan tax reality in all its complexity, taking into account both the regulatory frameworks and their application in the economic sector.

1. Literature review on transfer pricing tax policy:

1.1. Overview of transfer pricing:

In companies with multiple integrated divisions, it is generally necessary for various units or divisions to exchange goods and services. The prices associated with these transactions are referred to as transfer prices. Generally, transfer prices are defined as « The prices charged for any transaction carried out between affiliated companies, whether the transfer is commercial, financial, or technical. » Akkraoui, I. (2006).

In accordance with the study conducted by Freitas, M. G. (2010), the issue of transfer pricing arises when it is necessary to establish commercial relationships between subsidiaries of the same company. For example, a subsidiary A, responsible for manufacturing a component, sells it to subsidiary B, which uses it in an assembly process. The sale price of the component is determined between the subsidiaries and is referred to as the internal transfer price or transfer price.

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According to the Organization for Economic Co-operation and Development (OECD), transfer prices are « the prices at which a company transfers physical goods, intangible assets, or provides services to associated companies». According to another source, transfer prices can be defined as «the amount paid by one segment of an organization for goods or services provided by another segment of the same organization. » (Carasco, et al, 2017).

They can be more simply defined as the prices associated with transactions between related companies. These transactions may include transfers of tangible goods (*such as raw materials or finished products*), intangible assets (*such as intellectual property rights*), or services (*such as management fees or research and development*). It is a tax practice aimed at ensuring that commercial transactions between related parties (*for example, subsidiaries of the same multinational company*) are carried out at prices comparable to those that unrelated parties would have agreed upon under similar conditions. The goal is to prevent artificial transfers of profits between subsidiaries in different tax jurisdictions, in order to reduce the overall tax paid by the company**.**

According to the research conducted by Dembinski, P. H. (2005), from a broad perspective, transfer pricing encompasses all the operational rules that an organization puts in place to coordinate its internal exchanges. From a strictly economic viewpoint, we speak of transfer rather than transaction when a good, service, or right is moved between two legal entities belonging to the same group or owner. Unlike the transaction, the transfer does not result from a confrontation between two independent economic actors. Instead, these actors are part of the same organization and are subject to a single logic that simultaneously encompasses and transcends them.

1.2. The Role of the OECD in Transfer Pricing Policy:

The Organization for Economic Co-operation and Development (OECD) plays a significant role in shaping transfer pricing tax policies. It has developed guidelines for transfer pricing, which have been adopted by many countries. These guidelines provide a framework for the application of the transfer pricing valuation method, which involves determining whether the prices exchanged between subsidiaries of a company are consistent with the prices that would have been charged between independent parties.

This organization holds a leading role in the development of a new unified system of standards. Its Committee on Fiscal Affairs, the main body for international tax policy, regularly publishes reports, guides, and recommendations on the subject. In their work, Carasco et al. (2017) stated, « For instance, we will recognize the influence of a landmark document, titled OECD Transfer

Pricing Guidelines or OECD Principles, in the regulations currently applied by most governments. This document, presented in the form of a guide, is a reappropriation and an update of various reports published by the OECD on the subject ».

The OECD is at the forefront of implementing significant measures to combat abuse and fraud. Morocco, as an economic player on the international stage, is heavily involved in the issue of transfer pricing determination. Although it is not a member of the OECD, it belongs to the states that have chosen to collaborate regularly with this international institution. (Harici, M. 2019).

In his writing, Choyakh, F. (2019) stated that the major objective of these principles is to harmonize the practices of multinational companies and to minimize double taxation by trying to find an international consensus on the methods of setting transfer prices in international transactions.

1.3. Guiding Principles of Transfer Pricing Tax Policy:

1.3.1 The Arm's Length Principle:

According to the OECD principles, the arm's length price has been defined as the international standard which, as agreed by OECD member countries, should be used for the determination of transfer pricing for tax purposes. According to Boyer, M. (2007), the arm's length principle stipulates that the transfer prices applied between different units of the same company must be comparable to those observed in the external market. Given that these prices directly influence the profits of companies, and by extension on taxation, tax authorities in many states pay particular attention to this issue. The international standard is outlined in Article 9 of the OECD Model Tax Convention on Income and on Capital (2014) as follows : « Where conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have been accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly ».The application of the arm's length principle is based on a comparison between the conditions practiced for a transaction between associated enterprises and those practiced for a transaction between independent enterprises. In their study, Moumen et al. (2022) indicated that for such a comparison to be meaningful, the economic characteristics of the situations taken into account must be sufficiently comparable. In other words, there should not be differences between the compared situations that could influence the price or profit margin, or else adjustments can be used to eliminate the impact of the differences.

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This principle is based on the idea that transactions between affiliated parties should be evaluated using the same principles as transactions between non-affiliated parties and aims to ensure fair competition and prevent tax distortions within the same company (OECD, 2017).

In his publication, Harici, M. (2020) stated that it is, undoubtedly, one of the major principles in determining transfer pricing because it is the one that must ensure balance between the interests of tax administrations and those of taxpayers. It is to such an extent that an « international standard of arm's length » has been established.

To determine whether a particular transfer price complies with the arm's length principle, theoretically, one would need to refer directly to the price that would be practiced in comparable transactions between independent enterprises or between an enterprise of a group and an independent enterprise. This method is often called the «comparable uncontrolled price method» Rassat, P., & Monsellato, G., (1998).

The transfer price is established based on achieving the company's objectives in terms of transfer pricing. In this article, we present a list of transfer pricing methods used, which are based on the methods proposed by the OECD.

In their work, Horngren, C. T. et al (2012) state that Organizations use a variety of transfer pricing methods. They use cost-based prices for some transfers, market-based prices for other transfers, and negotiated prices for still others. Therefore, do not expect to find a single, universally applicable solution to the transfer pricing problem. There is no perfect transfer pricing system. Almost every manager in a decentralized organization has experienced transfer pricing systems that seem less than ideal.

There are mainly two categories of methods for developing a transfer pricing policy: traditional transaction-based methods and transactional profit-based methods. Each of these sets of methods is explored in more detail in the following two subsections. Boyer, M. (2007).

These two methods should be used distinctly depending on the conditions encountered in practice, and in accordance with the OECD's recommendations. The goal is to avoid over-taxation or under-taxation of profits, which could lead to competitive distortions among companies within the same group.

In summary, the determination of transfer prices is a major issue in international taxation, aiming to ensure a fair and equitable taxation of the profits of multinational companies. The methods for determining transfer prices must therefore be used with caution and rigor, in compliance with international recommendations on the matter.

1.3.2 Traditional transaction-based methods:

Traditional transaction-based methods are used to apply the arm's length principle. These include the Comparable Uncontrolled Price method, the Resale Price method, and the Cost-Plus method. Moumen et al. (2022), they are considered to be the simplest and most direct way of verifying whether the arm's length principle is observed in transactions between associated or dependent companies.

These traditional transaction-based methods provide the most direct approach for assessing whether the conditions of commercial and financial relations between associated enterprises comply with the principles of arm's length competition. This is why they are preferred over other methods. Dialigue, E. H. (2011).

For the use of the methods proposed by the OECD, it is necessary first to carry out an objective economic analysis, that is, an analysis of the functions, risks, and costs of each unit of the multinational group. This will allow for the identification of the characteristics of the controlled transactions, the functions undertaken by each party, the risks they bear, and the assets they employ. The functional analysis will enable the finding of an objective price independent of the wishes of the associated companies or the tax administrations. However, their interpretation allows a great deal of freedom to both the group and the tax administrations. De Freitas, M. G. (2010).

a) Comparable Uncontrolled Price method« comparable uncontrolled price method »:

The assessment of the conformity of commercial and financial relations between associated enterprises is based on a price comparison method. This involves comparing the price of a good or a service transferred under free market conditions with that of a comparable good or service conducted under a controlled transaction in similar conditions.

According to Rassat, P., & Monsellato, G. (1998), « It is a direct application of the principle of free competition. It involves comparing the price of a good or service transferred in an intra-group transaction to the price of a similar transaction under conditions of full competition ».

If a discrepancy arises between these two prices, it may indicate that the conditions of commercial and financial relations are not optimal in terms of full competition. The Comparable Uncontrolled Price (CUP) method, based on the independent price compared on the free market, allows for the identification of a price that will most closely approximate the ideal of full competition by searching for a comparable contract on the free market. The comparison criterion is therefore the market price. This method naturally results from the application of the

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principle of full competition stated in Article 9.1 of the OECD Model Convention De Freitas, M. G. (2010).

To implement this approach, it is essential to identify similar contexts, taking into account the particularities of the products and services involved, the functions performed, the risks incurred, the terms of the contract, the state of the market, and the strategy of the concerned companies. Dialigue, E. H. (2011) emphasized in his research that the comparative evaluation must consider various factors such as sales volume, price variations (especially for raw materials), seasonal fluctuations, as well as ancillary fees or service provisions whose cost may be included in the price, like warranties and transportation. Harici, M. (2020).

b) Resale Price Method:

In his publication, Harici, M. (2020) stated that this method considers the purchase price of a product by a controlled enterprise and resold by an independent enterprise, reduced by the gross margin. The gross margin represents the selling expenses and other operating expenses of the reseller. The price thus obtained could be considered an arm's length price and would constitute a fair value of the transfer of ownership of the good between the associated enterprises.

This approach is frequently adopted by companies engaged in marketing and distribution activities, focusing on the purchase and resale of products without undergoing any transformation. Menchaoui, I. (2015).

This method proves to be very effective for commercial operations without transformation. Indeed, it is possible to determine the selling price of a good by taking into account the usual expenses, the risks incurred, as well as a "reasonable" profit, a concept borrowed from the OECD doctrine. However, we believe that the notion of reasonable profit can sometimes be difficult to evaluate.

On the other hand, we consider that this method is less suitable for service provision operations, as the intervention of the reseller is a crucial element.

In their work, Rassat, P., & Monsellato, G. (1998) add that the resale price method also depends on the comparability of the functions performed. It may be less reliable in the presence of significant differences between the controlled transactions and those on the free market, as well as between the parties involved in these transactions. These variations can have a notable impact on the indicator used to assess compliance with the arm's length principle, which, in this context, is the margin realized on the resale price.

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c) Cost Plus Method:

This method involves first determining, for goods (or services) transferred to a related buyer, the costs incurred by the supplier in the context of a transaction between associated enterprises Dialigue, E. H. (2011). Then, a markup appropriate to these costs is added to the cost price, in order to obtain a suitable profit taking into account the functions performed and the market conditions (OECD, 1997).

The method of the cost-plus markup is often used to invoice costs with a margin to a related company. It is particularly suitable for situations where semi-finished products are sold between associated companies, where agreements for equipment sharing or long-term procurement have been made between associated companies, or when the controlled transaction involves a service provision. According to OECD commentary (2017), this method is a viable approach to ensure that costs are accurately invoiced and that margins are applied to costs appropriately in the context of transactions between related parties. It is most commonly encountered in sectors where the retail price is dictated by the producer who, in turn, is subject to market imperatives. (Rassat, P., & Monsellato, G., 1998).

In line with the findings of Boyer's study (2007), it is imperative for the application of this method that the calculation of the cost price be carried out according to the same criteria both for the division concerned and for comparable enterprises. This enables the correct application of the margin on the cost price of the enterprises comparable to the division in question. It is therefore crucial not only to identify comparable enterprises but also to ensure the availability of all necessary information to make the required adjustments in assessing the appropriate profit margin. The first three methods are traditional methods of controlling controlled transactions and are too rigid, impractical, and often ineffective given the operational constraints of groups or the objectives of auditing services. Thus, they are gradually being abandoned in favor of newer, more flexible, and more effective techniques. (De Freitas, M. G., 2010).

1.3.3 Transactional Profit Methods:

The development of these methods relies on evaluating the profits earned from transactions between companies within the same group, while adhering to the principle of full competition. Moreover, they must comply with the provisions of Article 9 of the OECD Model Tax Convention and meet the requirements of comparability analysis. Three groups of methods can be identified:

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a) The profit-sharing method:

The profit-sharing method involves distributing profit among companies that have connections with each other, as its name implies. This distribution is carried out on an economically justifiable basis, in an agreement made in full competition. According to Menchaoui, I. (2015), the purpose of the profit-sharing method is to establish the profits that would result from a similar transaction between independent enterprises. To do this, it is crucial to identify the overall profit generated by the transaction between dependent companies. Then, each party is allocated the share of profit that corresponds to its fair value in the transaction.

In his writing, Harici, M. (2020) stated that this method is used when transactions are so interconnected that it is impossible to treat them separately or when comparison with other operations is unfeasible. Such situations might be observed in transactions involving intangible assets (patents, trademarks) or globally integrated financial operations.

In a practical approach, the OECD stipulates that the overall profit can be defined as the total profit arising from the transactions or as a residual profit, supposed to represent the profit that cannot be readily attributed to any of the parties. The contribution of each company is evaluated based on a functional analysis and, where possible, using external criteria such as profit-sharing percentages or returns observed in relations between independent enterprises. Thus, the distribution of profits is based on the allocation of functions. Dialigue, E. H. (2011).

In summary, the profit-sharing method aims to ensure fair remuneration for each entity involved in intercompany transactions, thereby promoting equity and compliance with the principles of full competition.

b) The transactional net margin method:

The transactional net margin method is used to calculate the net profit margin of a company during a controlled transaction based on elements such as production costs, sales volume, or assets utilized. These data are considered highly objective, which enhances the reliability of this calculation method. This method involves evaluating the normal net margin achieved by independent enterprises and comparing it with the margin achieved by dependent companies. The price applied will be considered compliant with the principle of full competition by comparing the profit realized in this transaction with the profit realized by two independent enterprises in a similar transaction.

In his study, Menchaoui, I. (2015) states that the transactional net margin method involves the evaluation of the typical net margin observed among independent enterprises, in order to compare it with the margin achieved by dependent companies. Compliance with the principle of full competition is established by comparing the profits generated during the transaction with those generated by two independent enterprises in a similar transaction. This method, based on the net margin, has the advantage of being less influenced by functional variations that can generally impact operating expenses, given that these do not have a significant effect on net profit indicators. Mezouar, M. (2014).

c) The predetermined formula allocation method.

The predetermined overall allocation method involves the consolidated distribution of the total profits of a multinational group among affiliated companies located in different countries using an automated and predefined formula.

In his work, GHARBI, N. (2005) confirmed that this method differs from the profit methods previously examined, insofar as, as emphasized by the OECD, « *it uses a profit allocation formula that is predetermined for all taxpayers, whereas the transactional profit methods compare on a case-by-case basis the profits of one or more associated enterprises with the profit that comparable independent enterprises would have sought to achieve in comparable circumstances* ».

This method, also known as unitary taxation, involves the distribution of the group's total profits according to a defined allocation key. To apply this approach, three elements must be considered. First, it is necessary to define the scope of the group, that is, the various entities to be considered for the calculation of the group's revenue. Next, the total profit of the group must be precisely determined. Finally, it is essential to define a formula that will be used to equitably distribute the group's profits among its various entities. Mezouar, M. (2014).

2. Evolution of Moroccan Legislation on Transfer Pricing Tax Policy:

Morocco has established a legislative framework to tax control the transfer pricing tax policy, which pays particular attention to the practices of indirect profit transfer or the erosion of the tax base through the adjustment of prices between affiliated companies.

2.1 Presentation of the Moroccan legal framework related to transfer pricing:

In Morocco, the legislative framework of the transfer pricing tax policy places particular importance on practices involving the manipulation of prices between related companies, in order to indirectly reduce profits or decrease the tax base. Within this context, this section is dedicated to presenting the Moroccan regime on transfer pricing. First, we will briefly summarize the content of each article that frames this issue. Then, we will present our understanding of each provision of these articles.

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2.1.1 Tax authorities' discretionary powers:

According to the latest guide published in 2023 by the General Directorate of Taxes, the assessment of transfer prices in Morocco is outlined by Article 213-II of the General Tax Code[1]. This article grants the tax administration the power to adjust profits that have been indirectly transferred by a company with direct or indirect connections to companies located outside Morocco. This adjustment is made by attaching them to the tax results and/or the declared turnover. Thus, any adjustment of transfer prices is based on two prerequisites: the existence of direct or indirect dependency links and the reality of an indirect transfer of profits. General Directorate of Taxes. (2023).

Analyzing Article 213 of the General Tax Code (CGI), specifically its second paragraph[2], it is possible to identify several key elements:

- ✓ Dependency links between companies are taken into account.
- ✓ Indirectly transferred profits are included in the tax result or declared turnover.
- ✓ Means of profit transfer include increasing or decreasing purchase or sale prices.
- ✓ Indirectly transferred profits are compared to those of similar companies or estimated by the tax administration.
- ✓ Companies may have dependency links with companies located in Morocco or abroad, which can lead to indirect profit transfers.
- ✓ The adjustment of indirectly transferred profits aims to ensure that companies pay their fair share of taxes.
- ✓ The text does not mention the transfer pricing methods outlined by the OECD.

According to these legislative provisions, it is possible to understand that the tax administration can determine these indirectly transferred profits by comparing the profits of similar companies or using other information at its disposal. In other words, the text aims to prevent companies from avoiding paying taxes by transferring profits to other companies with which they have dependency links. Therefore, the tax authorities can make tax adjustments to correct the amounts declared by these companies.

In general, it can be asserted that two conditions must be met for the application of Article 213 II of the CGI.

- ✓ Existence of dependency links, either legal or factual

[1] CGI: General Tax Code. The CGI is the one that defines the legislative framework for taxation, control, and collection within Moroccan territory.
[2] Article 213 II of the General Tax Code.

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✓ Existence of a profit transfer.

For a better understanding of the conditions and an adequate comprehension of the terms of application of the article, it is essential to revisit the notion of dependency as it was presented in the first part. Rassat, P., & Monsellato, G., (1998) state in their publication that the whole issue of transfer pricing presupposes the existence of a group interest that transcends the interest of the parties involved.

The existence of such an interest is reflected in a dependency link between the companies. Without this link, the parties are then independent, and no transfer pricing issue could arise. The existence of such a link is thus an essential prerequisite for the administration to apply measures on transfer pricing.

2.1.1.1 The Dependency Link:

- **Legal dependency:**

This dependency refers to the traditional concepts of control as defined within the legal framework. In this context, dependency can be established either by the number of shares owned in the company's capital or by the level of control of the company within the contracting entity. Rassat, P., & Monsellato, G. (1998). This dependency can take a direct or indirect form.

- *Direct dependency links:* Direct dependency links refer to a relationship between:

✓ Parent companies and their subsidiaries.

✓ Non-resident companies and their establishments in Morocco.

✓ Companies and their branches[3].

It is noteworthy that the law on corporations provides a precise definition of a subsidiary as a company of which more than half of the capital is held by another company, called the parent company. According to AKKRAOUI, I. (2006), in his study, this means that even though a subsidiary has its own legal personality and its own assets, it remains linked to the parent company both legally, in terms of the number of shares held by the parent company in the subsidiary's capital, and economically, through close links governing various aspects of activities, such as dependency on raw material supplies, the provision of spare parts, the brand, and patents held by the parent company, etc.

- *Indirect dependency links:* Indirect dependency links are established particularly among related subsidiary companies within the same corporate group, which itself is under the control of a parent company[4].

[3] Note circulaire 717, Tome III
[4] Note circulaire 717,Tome III

At this level, there are financial dependency relationships between related companies either through reciprocal or cross-shareholdings or through a sub-dependency arrangement. General Directorate of Taxes. (2023).

- **Factual dependency:**

If the administration cannot prove legal dependency, it can nevertheless demonstrate that there is a dependency due to a factual situation. These dependency situations can be identified in cases where there is a monopoly, a quasi-monopoly, or common interests. They are characterized by factual dependency links. The existence of such a link is thus « an essential prerequisite for the application of measures provided for in terms of transfer pricing » Rassat, P., & Monsellato, G. (1998).

The same idea was conceived by Jadaud, B. (1970), who sees that « The notion of dependency expresses, not just a legal connection but primarily an economic relationship between legally distinct companies but linked by a certain subordination in their commercial or industrial policy. » Jadaud, B. (1970).

Circular Note 717, Volume III cites cases where certain company directors, through their financial participations in other companies, influence the management and decision-making within these companies, while being active members of the boards of directors or supervisory boards.

Factual dependency relationships can concretely manifest through contracts that grant a company a certain level of control, or through the nature of economic relations and the terms in which transactions are carried out between the concerned companies.

The tax administration has various means to establish the dependency link and, in practice, in Morocco, it frequently refers to legal dependency, whether direct or indirect, during tax audits. Generally, during tax inspections, multinational companies are often requested to provide the organizational chart of their group (CHRAIBI, M. 2005).

2.1.2 Right to communicate and exchange information on transfer pricing:

The documentation requirements include the documentation of transfer prices (Article 214-III-A), the right to communicate (Article 214-III-B):

- ✓ **Documentation of transfer prices: (Article 214-III-A):**

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Article 214 III - A of the General Tax Code[5], in its third paragraph, specifies that the required documentation, the modalities and procedures of which are defined by regulatory means, includes:

- A master file containing data related to the overall activities of the related companies, the general transfer pricing policy adopted, and the distribution of profits and activities on a global scale.
- A local file containing information specific to the transactions carried out by the audited company with the related companies. General Directorate of Taxes. (2023).

To comply with the rules regarding the determination of transfer prices and to reduce the associated tax risk, it is recommended that the company in question prepare appropriate documentation and provide it to the tax authorities during the accounting audit.

✓ **The Right to Information (Article 214-III-B):**

The third paragraph of Article 214 III - B of the General Tax Code states that the company must communicate any information or data considered useful for the adjustment of transfer pricing and to facilitate the task of the control by the Moroccan tax administration.

This provision is part of the application of the right to information, which aims to verify the existence of dependency links and, where applicable, to monitor the transfer of profits abroad.

2.1.3 Right to Control:

Referring to the recent amendment made to paragraph of Article 210 of the General Tax Code[6], the provisions establishing this right have been enriched with new rules applicable to companies that have dependency links with other entities based outside Morocco. This update reflects the legislator's intention to align general tax measures with those governing the determination of transfer pricing. (Harici, M., 2019).

This article concerns the right of the Moroccan tax administration to control companies that have business relationships with companies located abroad and that have a direct or indirect dependency link with these companies.

According to Moumen et al (2022), this article states that these companies must provide the tax administration with the necessary documentation to justify their transfer pricing policy. It refers to Article 214-III-A, which specifies that companies with direct or indirect dependency links with companies located outside Morocco must justify their tax policy. This justification must

[5] GENERAL DIRECTORATE OF TAXES. (2023). General Tax Code - Edition 2023

[6] Article 2010 of the General Tax Code 2023.

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be documented, and the companies must be able to provide this documentation to the tax administration at the start date of the accounting verification operation.

3. Advance Pricing Agreement on Transfer Pricing:

According to the OECD definition, the advance pricing agreement on transfer pricing is an agreement that sets, in advance of transactions between associated enterprises, an appropriate set of criteria (for example, regarding the method of calculation, comparison elements, adjustments to be made, and basic assumptions about future developments) for determining the transfer prices applied to these transactions over a certain period (OECD, 2017).

In their article, Benkendil et al. (2018) mentioned that in Morocco, starting from the year 2018, Advance Pricing Agreements (APAs) in the area of transfer pricing have seen significant development. Several Moroccan multinationals have already approached the Tax Administration to initiate the procedure for concluding APAs, in order to protect themselves from the risk of transfer pricing adjustments, which can also be seen as a protection against tax uncertainty in Morocco.

This mechanism is divided into two articles, 234 bis and 234 Ter:

- **Article 234 bis - Scope of the advance pricing agreement:**

Referring to the recently introduced Article 234 bis of the General Tax Code[7], which refers to a Moroccan tax law concerning companies that have dependency links with companies located outside Morocco. These companies can request the tax administration to conclude an advance agreement on the method of determining the prices of transactions mentioned in Article 214-III. This article thus allows companies with dependency links to companies located outside Morocco to request the tax administration to set in advance the method of calculating the prices of the concerned transactions for a maximum duration of four fiscal years. This helps to clarify the applicable tax rules and minimize the risk of disputes with the tax administration, which can aid in avoiding tax disagreements.

In their study, Moumen et al (2022) indicated that, prior to submitting their application, it is recommended for the company to approach the competent services of the tax administration to examine the conditions under which the agreement can be concluded, particularly the type and nature of information necessary for analyzing the transfer pricing policy, the provisional schedule of meetings, as well as issues related to the terms of concluding the agreement.

[7] Article 234bis of the General Tax Code 2023.

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- **Article 234 Ter- Guarantees and nullity of the agreement:**

The article mentions that the administration cannot challenge the method of determining the prices of the operations referred to in Article 214-III if a prior agreement has been concluded with a company, in accordance with Article 234 bis. More specifically, it stipulates that if a company has entered into a prior agreement with another company regarding the method of determining prices for specific commercial operations, then the administration cannot question this method of pricing.

In other words, if the two companies have reached an agreement on how prices will be set for their commercial transactions, then the administration cannot intervene to change this pricing method, in accordance with Article 234 bis.

In his article, Bouhank, M. T. (2017) stated that after concluding an agreement on the terms, taxpayers must submit an annual report to the General Directorate of Taxes to verify that the methods used are in accordance with the agreement. The report must contain the expected transfer pricing calculations, any changes in transaction conditions, the organizational structure and capital distribution of the associated companies, as well as the annual activity report of the associated companies.

However, this transparency carries risks in case of interpretation disagreements, as it is possible that the Moroccan tax administration may make adjustments for the past, which could be accompanied by penalties for bad faith. Therefore, it is recommended that any taxpayer wishing to undertake the advance pricing agreement procedure first conduct a thorough audit of its transfer pricing policy applied by its Moroccan entity.

3.1 The Beneficial Effects of Advance Pricing Agreements on Transfer Pricing:

For Advance Pricing Agreements (APAs) to be successful in Morocco, it will be crucial for the applicant taxpayers to adopt a positive attitude and demonstrate willingness. Indeed, companies will only be able to benefit from the guarantees offered by these agreements if they act in good faith and manage to maintain a constructive relationship with the tax administration.

According to the findings of Gdaihi, M. E., in his article published in 2021, it was observed that the inclusion of advance pricing agreements in Moroccan tax legislation is a logical follow-up to international success.

According to the OECD guidelines on transfer pricing (2017), establishing a policy of advance agreements for setting transfer prices can help avoid costly audits and legal disputes for both taxpayers and tax authorities. When an agreement is reached, the tax administration can allocate

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fewer resources to verifying the taxpayer's income statements, which can save time for both taxpayers and tax authorities compared to traditional audits.

3.2 Limitations Related to the Advance Pricing Agreement:

In Morocco, while Advance Pricing Agreements (APAs) can offer several benefits, they also have limitations and disadvantages. Firstly, their implementation can be costly in terms of time and money, often requiring the hiring of tax experts to conduct comparability studies and prepare the necessary documentation.

According to El Gdaihi, M. E. (2021), although advance agreements are very useful for preventing transfer pricing disputes, they nevertheless have certain limitations. Even though it aims to prevent issues, the procedure prior to the agreement can feel like a repressive measure because it shares some characteristics with tax audit procedures, without offering the same guarantees of control. Moreover, given that the primary objective of the conventional approach is not always achieved, this can compromise legal security.

The advance agreement mechanism is established unilaterally without consultation with the tax administrations of other concerned states. This can lead to significant divergences between the tax positions adopted by the different administrations, which does not eliminate the risk of increasing the taxable base at the group level.

According to the OECD (1995), unilateral APAs can pose serious problems for both tax administrations and taxpayers. From the perspective of other tax administrations, issues may arise if they disagree with the conclusions of the APA.

Overall, these limitations highlight the need to strengthen coordination among tax administrations of different countries to harmonize tax positions and achieve overall tax optimization.

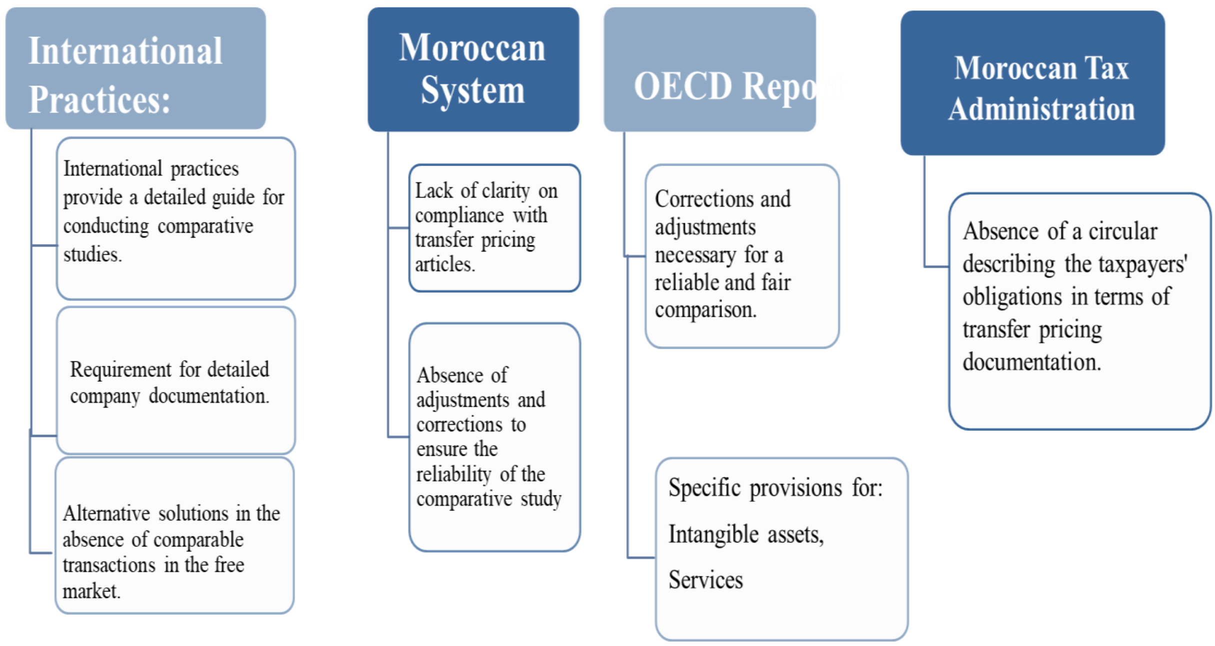
4- Results and Discussions:

- **Evaluation in Relation to International Standards:**

In this section, we will undertake an in-depth analysis of the differences and similarities between the transfer pricing approaches adopted by Morocco and the guidelines issued by the OECD. Our approach will be to present these elements methodically, through the development of a detailed framework divided into several distinct parts. These sections will include an exploration of international practices, an in-depth study of the Moroccan system in place, an analysis of the OECD report, and a specific examination of the Moroccan tax administration.

By breaking down our framework into these different parts, we will highlight the specificities related to the control and verification of transfer prices in each context. This visual approach offers increased clarity by allowing a detailed understanding of the nuances between Morocco's national practices and the international standards set by the OECD in the field of transfer pricing.

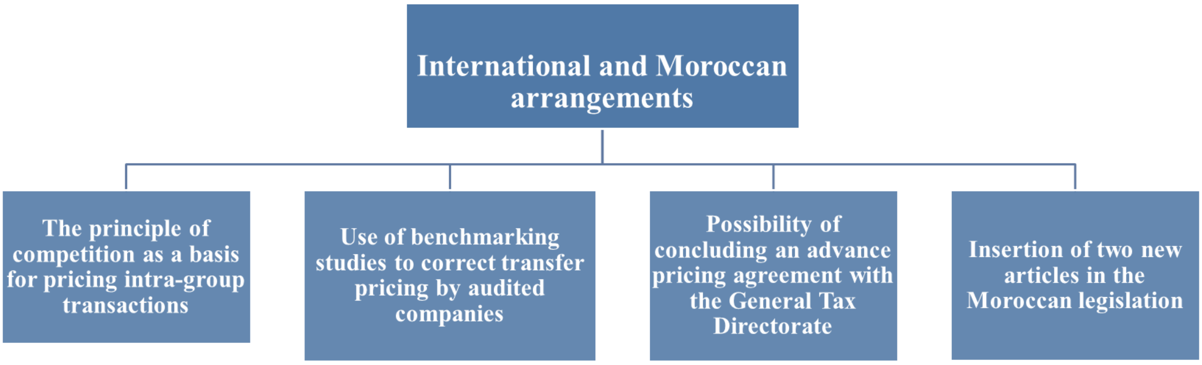
Figure 1: Divergence Points with OECD Practice:



Source: Developed by ourselves.

The Moroccan transfer pricing framework exhibits divergences from OECD practices. These differences include a lack of detailed guidelines for taxpayers, the absence of specific adjustments, sectoral considerations, a shortfall of precise documentation, no specific treatment for intangibles and services, and the lack of alternatives in the absence of comparable transactions. The application of the arm's length principle may be hindered by these disparities.

Figure 2: Points of convergence with OECD practice:



Source: Developed by ourselves.

The Moroccan framework and the OECD's practice in transfer pricing show points of convergence. Both adopt the arm's length principle as a reference to assess prices in intra-group transactions. The Moroccan tax administration also uses comparative studies to adjust prices during transfer pricing audits. Moreover, the Moroccan framework offers the possibility to conclude advance pricing agreements with the General Directorate of Taxes, marked by the introduction of two new articles for this purpose. These convergences indicate a certain harmonization between Moroccan and international approaches in transfer pricing.

The Moroccan regulatory framework on transfer pricing presents divergences from OECD practices, including the lack of detailed guidance and specific corrections. These differences pose potential challenges for a consistent application of the arm's length principle. Despite these divergences, points of convergence exist, with the common adoption of the arm's length principle to evaluate prices. The use of comparative studies by the Moroccan tax administration and the possibility of advance agreements indicate a certain harmonization. However, additional efforts to align procedures and requirements could strengthen this harmonization and facilitate international compliance.

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Conclusion:

As previously mentioned, it has been observed that Morocco has long given importance to various issues of international taxation, among which transfer pricing is a significant concern. It would probably be more prudent to consider this article as an attempt to contribute to the evolution of a problem that has not yet been definitively resolved for a long time.

Morocco has made significant efforts to combat profit shifting practices and base erosion through transfer pricing regulation. Establishing a legislative framework to enhance tax transparency and prevent profit shifting is a step in this direction.

However, despite the state's efforts to regulate transfer pricing, the tax policy used by the Moroccan tax administration has certain limitations and deficiencies due to a lack of objectivity and non-compliance with the rules and comparability criteria set out by the OECD. It is therefore important that tax policies are continuously evaluated and adapted to respond to the evolution of corporate tax practices and changes in the global economic environment.

Ultimately, an effective transfer pricing tax policy can contribute to maintaining a fair tax environment and encouraging economic growth while avoiding tax abuses. This requires international cooperation and effective regulation to ensure that the rules are applied fairly and consistently for all companies.

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