



Public consultation on new Italian TP regulations

The Italian Ministry of Finance released for public consultation the drafts of new transfer pricing implementing measures (comments may be delivered within 21 March). The drafts were prepared by a team of representatives of the Ministry of Finance, the Revenue Agency and the Tax Police.

The purpose of such measures is to implement the recent changes to the transfer pricing rules introduced by Law Decree 24 April 2017, No. 50 (for details, see [Tax Alert 2/2017](#)). The draft documents consist of:

1. a decree setting out the general guidance for the correct application of the arm's length principle in line with international best practices;
2. an Italian translation of the latest version of the relevant sections of the OECD Guidelines;
3. the regulations implementing the new rules on unilateral corresponding adjustments.

1. The decree setting out the principles for application of the arm's length principle

The draft decree contains seven articles, which are mainly aimed at implementing the OECD Guidelines into the Italian tax system. In particular, the draft decree:

- provides for a definition of "associated enterprises", which covers both cases of control by voting rights and cases of *de facto* control;
- outlines the concept of "comparability" in compliance with Chapter III of the OECD Guidelines and lists the OECD five comparability factors;
- describes the transfer pricing methods and designates the criteria for selecting the method to be applied in the specific case, which appear to be in line with the "most appropriate" method rule upheld in the OECD Guidelines;
- introduces a specific definition of "arm's length range" as the range (not specifically the interquartile range) of values, which comprises all transactions comparable to the tested transaction. It is also indicated that, if the value of the tested transaction (or the margin of the tested party) falls outside the "arm's length range", the tax authorities shall

make an adjustment to bring that value within the range (there is no specification on which point of the range).

The decree contains a final clause which enables the Revenue Agency to issue further implementing measures taking into account the OECD Guidelines as amended from time to time.

2. The draft translation of the OECD Guidelines

As mentioned above, the Ministry of Finance also published a draft translation of the relevant sections of 2017 OECD Guidelines (some paragraphs and chapters of the Guidelines were omitted, for example paragraph B.2 and C of Chapter I on formulary apportionments and the entire Chapter IV and Chapter V on Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes and on TP Documentation).

The translation is defined by the Ministry as a "courtesy translation" and is described as aimed at simplifying the reading of the OECD Guidelines. Thus, it does not have the status of an Italian legal provision, but, in line with the position generally taken by the Revenue Agency and tax courts, it should represent a complementary means for interpreting and applying Italian transfer pricing rules. In this respect, it seems reasonable that, in cases of conflict of interpretation, the original language of the OECD Guidelines should prevail.

3. The draft regulations on unilateral corresponding adjustments

Finally, the set of draft documents released for public consultation contains the implementing regulations of new Article 31-quater of Decree 600/1973 (introduced by Law Decree 50/2017), which, *inter alia*, entitles taxpayers to apply for downward corresponding adjustments (even in the lack of a MAP) in cases of a primary transfer pricing adjustments made by foreign tax authorities.

The regulations set out the procedure to request such adjustments, which are subject to the following conditions:

- the primary adjustment must comply with the arm's length principle; and
- the State which has made the primary adjustment must have concluded a double tax treaty with Italy with an effective exchange of information provision; and
- the primary adjustment must be final in the other country. In order to demonstrate that the primary adjustment is final, the taxpayer must provide the Revenue Agency with a certificate issued by the foreign State confirming that this is the case.

The regulations set out the formalities for the filing of the application and specify that the deadline for the Revenue Agency to respond is 180 days. However, if the Revenue Agency decides to request information from the other jurisdiction, the deadline is suspended for the entire length of the exchange of information procedure.

Within the above-mentioned deadline, the Revenue Agency issues a motivated decision of acceptance or rejection. In the case of acceptance, the Revenue Agency shall determine the right of the taxpayer to get a refund (not a tax credit that may be used in the tax return) based on the amount of the corresponding

adjustment. No deadline has been indicated for filing the request for the corresponding adjustment.

In any event, if the relevant conditions are met, the taxpayer remains entitled to ask for a MAP under the relevant tax treaty or the Arbitration Convention.

Finally, the draft regulations provide for the right of the Revenue Agency to terminate the procedure (with no refund) in cases of lack of cooperation or transparency by the taxpayer.

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