

New Italian Transfer Pricing Regulations

On 21 February 2018, the Italian Ministry of Finance invited interested parties to provide comments on the discussion drafts related to the implementation of the Italian Transfer Pricing rules. In particular, three documents were released: **(a)** a Draft Ministerial Decree providing guidelines for the application of the arm's length principle; **(b)** a Draft Revenue Agency Regulation implementing the request for unilateral downward Transfer Pricing adjustment (so called corresponding adjustment); **(c)** a Draft translation into Italian of the 2017 OECD Transfer Pricing Guidelines.

Such measures, jointly with an announced specific training of the Italian tax auditors on Transfer Pricing issues, are aimed to obtain an application of the arm's length principle more compliant with the OECD Transfer Pricing Guidelines.

(a) Draft Ministerial Decree providing guidelines for the application of the arm's length principle

The Italian Transfer Pricing rule provided by art. 110(7) of the Italian Tax Code was recently amended by article 59 of the Law Decree n. 50/2017. The new provision basically rephrases the arm's length principle as is contained in article 9 of the OECD Model Tax Convention.

The Draft Ministerial Decree, which supersedes the previous clarifications contained in the Revenue Agency letter n. 32 dated 1980, is aimed at providing guidelines for the application of the arm's length principle in line with the 2017 OECD Transfer Pricing Guidelines. In particular, the Draft Ministerial Decree:

- provides for a definition of "Associated enterprises" which, in line with the Glossary of the 2017 OECD Transfer Pricing Guidelines and art. 9 of the OECD Model Tax Convention, includes the following two cases which both involve an Italian and a foreign enterprise. In particular, two enterprises are considered as associated: (i) where an enterprise participates directly or indirectly in the management, control or capital of another enterprise, or (ii) where the same "person" or more "persons" participate directly or indirectly in the management, control or capital of the two enterprises (in this respect, it seems that also companies under the control of the same "individual" would fall within the definition of associated enterprises);
- the participation in the management, control or capital is deemed to exist in all cases when the person or the enterprise directly or indirectly holds directly or indirectly more than 50% of the capital or when the person or the enterprise has a dominant influence on the commercial and financial decisions of the other enterprise;
- provides for an explanation of the "comparability principle" and of the five comparability factors described in paragraph 1.36 of the 2017 OECD Transfer Pricing Guidelines;
- describes the five transfer pricing methods providing guidance, in line with Chapter II of the 2017 OECD Transfer Pricing Guidelines, for the selection of the most appropriate method to be used in the circumstances of the case;
- recognises the portfolio approach for comparability analysis purposes, in compliance with Chapter III of the 2017 OECD Transfer Pricing Guidelines;
- qualifies, as arm's length range, the range of values resulting from the application of the most appropriate method to independent comparable transactions. In addition, the Draft Ministerial Decree states that if the value of the controlled transaction falls outside the arm's length range the Revenue Agency can make a Transfer Pricing adjustment in order to bring such value in the arm's length range. However, the Draft Decree does not specify the point within the arm's length range to which the Revenue Agency must refer in order to make the consequent adjustment (e.g. median or any point in the range);
- states that the Revenue Agency will issue further implementation guidelines in line with the latest version of the OECD Transfer Pricing Guidelines.

(b) Draft Revenue Agency Regulation implementing the request for unilateral downward Transfer Pricing adjustment

According to the recently introduced article 31-quater of Presidential Decree 600/1973, in case of a foreign primary Transfer Pricing adjustment, the Italian Revenue Agency can recognize a downward adjustment not only in execution of a Mutual Agreement Procedure but also upon formal request by the taxpayer.

The Draft Revenue Agency Regulation specifies that such request is subject to the following conditions:

- the foreign primary Transfer Pricing adjustment is final, i.e. not subject to modifications;
- the foreign primary Transfer Pricing adjustment is compliant with the arm's length principle;
- the foreign Country has concluded a double tax treaty with Italy which allows an adequate exchange of information.

In addition, the Draft Revenue Agency Regulation sets out the procedure to ask for such downward adjustment specifying that the deadline for the Revenue Agency's answer is 180 days, unless an exchange of information procedure is activated.

The taxpayer retains the right to ask for a Mutual Agreement Procedure in case the Revenue Agency rejects the possibility to perform a unilateral adjustment.

(c) Draft translation of the 2017 OECD Transfer Pricing Guidelines

The draft translation into Italian of the relevant parts of 2017 OECD Transfer Pricing Guidelines shall be welcomed with favour since it should allow an application of the arm's length principle more in line with the OECD guidelines by all the parties involved (taxpayers, tax auditors and tax courts).

If further information is required, please refer to your **LED Taxand** contact or to sbognandi@led-taxand.it or eiascone@led-taxand.it

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