



New rules on transfer pricing documentation



25/11/2020



TRANSFER PRICING, TAX

On 23 November 2020, the Italian Revenue Agency (IRA) released the Act n. 360494¹ ("Act") whereby certain domestic rules on Transfer Pricing (TP) documentation have been either amended or aligned to international principles. These include the rules on the eligibility to the penalty protection regime which prevents the applicability of administrative penalties in case TP adjustments proposed by the Italian Tax Authorities in the context of tax audits.

The Act will enter into force by fiscal year 2020 at that time superseding the rules enacted by act no. 2010/137654.

Looking through the Act, it seems that no changes occurred onto actions requested to in-scope companies to access the TP documentation regime - which therefore remains possible where: (i) a set of TP documentation complies with the Italian TP rules and is timely prepared (ii) the existence of docs under (i) is disclosed on corporate tax return (flagging section

RS106 of Form "REDDITI SC") (iii) the docs under (i) are timely delivered to Italian Tax Authorities up on their request – pursuant to the Act the **delivery deadline is extended from 10 up to 20 days**.

The **new standard set of TP documentation** consists of Masterfile and Country File. The content of the new standard is fully aligned to OECD Guide Lines on Transfer Pricing, therefore it includes more information, details and supporting documents (e.g., Financial data, financial statements, reconciliation between TP figures and financial statements ones, etc.).

Amid changes introduced by the Act, there are the SME requirements. These refer to conditions a company must met to qualify as SMEs and as such be entitled to update the TP benchmarking analysis only a three-year basis (rather than on ordinary annual basis). Under the new rules, whilst turnover requirements remain the same (i.e. >50mio€ in the relevant FY), a company

¹ Pursuant to Art. 1, para.s 6 and Art. 2, para 4-ter, of the Legislative Decree no. 471/1997 and the Ministerial Decree dated 14 may 2018 on "Guidelines on transfer pricing for the enforcement of Art. 110 para 7 of the Consolidated Income Tax Code dated 22 december 1986, no. 917".



cannot qualify as SME, if it either controls, directly or indirectly, a company that does not meet the SME requirement, or it is controlled an entity not qualifying as SME. As this change narrows in scope the SME definition, it would impact small and medium Italian subsidiaries of Multinational Enterprises which will be more likely to fall outside the SME definition therefore losing the benefit to update the *benchmarking analysis* on a three-year basis.

Moreover, the Act introduced substantial requirements that the TP documentation must meet in order to be considered compliant to the new rules (“appropriate”). Pursuant to the Act (§5.2), the set of TP documentation must be duly signed, within the deadline to file the tax corporate return, by a legal representative of the taxpayer (or by a person so empowered) through **an electronic signature with a time stamp**. As a result, any change/improvement of the TP documentation would be ineffective unless a supplementary corporate tax return is filed (see below). The implementation of this rule is, in principle, debatable especially if one takes into account the scope of the TP documentation as well as the good faith underlying the delivery of the TP documentation – and this also in view of the extension (up to 20 days) of the deadline to deliver to Italian Tax Authorities the TP documentation upon their request.

From a different perspective, the Act stipulates that companies holding appropriate TP documentation may be entitled to file a **supplementary corporate tax return** if in-scope transactions were not compliant with arm's length as a result of mistakes or omissions, so triggering higher corporate income tax (§6.1). In such a case, the companies are allowed to align the TP documentation owned and to electronically sign it with a new time

stamp (presumably on later date). The filing of a supplementary corporate tax return within 31 December 2020 may prevent transfer pricing penalties and interest for late payment relating to the FY 2019 backwards.

With reference to in-scope services, the Act legitimates the adoption of a “simplified approach” for documentation supporting **low value-added services** (§7)². It is stated that a 5% mark-up on services-related direct and indirect costs is an arm's length remuneration for the provision of these services. For these services it is requested to provide (i) a description, the rationale behind classification as low value-added services, and the reasons why are among intercompany services, (ii) the agreement(s) supporting these services, (iii) criteria adopted to price these services with its outcome.

From a structural point of view, it is something to welcome that IRA strives to streamline domestic rules on TP documentation with the OECD guidelines/principles. This seems to trigger twofold benefits: on the one hand, it eases the processing and flowing among MNES of their international TP documentation, on the other hands, it will permit constant monitoring and exchanges of information between jurisdictions. From a different perspective, we could not rule out that the injection of complexities to comply with new Italian standard of TP documentation increases the cases of non-compliance assessment by the Italian Tax Authorities. In such a circumstances the only way to try to secure the election to the penalty protection regime would be to start a tax litigations whose result is not always easily predictable.

The above considerations suggest to promptly test the consistency of the TP documentation with the new rules introduced by the Act so to

² Pursuant to Art. 7 of Decree 14 May 2018 low value added services are those services that: a) are of supportive nature; b) are not part of the main activities performed by the multinational group; c) do not imply the utilization of unique and valuable intangibles and are not involved in their creation; d) do not imply to bear or control a substantial risk by the supplier and do not give rise to such a risk in his hand.

change/improve (where required) any deviations from quantitative and qualitative new standards. In view of the entry into force of the new rules, it is

strictly advisable to test the TP documentation to be prepared for FY 2020 the soonest.



MILANO

Via San Paolo, 7 · 20121 Milano, Italia
T. +39 02 72554.1 · F. +39 02 72554.400
milan@dejalex.com

ROMA

Via Vincenzo Bellini, 24 · 00198 Roma, Italia
T. +39 06 809154.1 · F. +39 06 809154.44
rome@dejalex.com

BRUXELLES

Chaussée de La Hulpe 187 · 1170 Bruxelles, Belgique
T. +32 (0)26455670 · F. +32 (0)27420138
brussels@dejalex.com

MOSCOW

Ulitsa Bolshaya Ordynka 37/4 · 119017, Moscow, Russia
T. +7 495 792 54 92 · F. +7 495 792 54 93
moscow@dejalex.com

