

Tax Flash

“Clarifications as to Greek transfer pricing rules, by reference to L.4172/2013 and L.4174/2014”

Ministerial Circular 1142/July 2 2015

Clarifications as to the notion of direct or indirect management dependence

Clarifications as to the notion of direct or indirect control or the possibility for one person to exercise to the other decisive influence, or of a third person to do so in both of them

A new Ministerial Circular was issued on July 2 2015 (Ministerial Circular 1142/02.07.2015 – “the Circular”), which provides clarifications as to the Greek transfer pricing (“TP”) rules, by reference to L.4172/2013 and L.4174/2013

The Circular begins by replicating the definition of “affiliated persons”, as prescribed in sub-par. z of Article 2 of L. 4172/2013.

The Circular goes on to provide clarifications as to the indirect holding of shares, parts or quotas, or to the notion of indirect participation; in essence, the Circular clarifies that indirect participations are calculated by multiplying the relevant direct holdings in each successive level.

Furthermore, the Circular provides clarifications as to conditions whereby two persons are deemed as “affiliates”, by reference to the notion of direct or indirect management dependence; the following indicative examples are provided in this respect:

- More than half of a taxpayer’s board of directors or one or more of its managing directors or administrators are appointed by the other person,
- The same individual(s) that participate in the management of one person, as a managing director or administrator, also participate in the management of the other person, in the aforesaid capacity,
- A third person appoints to two other persons more than half of each of the latter’s members of board of directors, or one or more of their managing directors or administrators.

Moreover, the Circular provides clarifications as to the conditions whereby two persons are deemed as “affiliates”, by reference to the notion of direct or indirect control or the possibility for one person to exercise to the other decisive influence, or of a third person to do so in both of them; the following indicative examples are provided in this respect:

- One person (with the exception of financial and credit institutions) has lent or provided guarantees for another person’s credit, whereby the capital loaned or the guarantees provided (on an aggregate basis) exceeds 50% of the borrower’s total assets,
- A third person (with the exception of financial and credit institutions) has lent or provided guarantees for the credit of two persons, whereby the capital loaned or the guarantees provided (on an aggregate basis) exceeds 50% of the borrowers’ total assets,
- One person supplies or appoints the supplier(s) of another person, by reference to at least 90% of the raw and secondary materials required by the latter in order to manufacture finished products, whereby the former also determines, as this emanates from an agreement (oral or written), the end sales’ prices of the aforesaid products,

- The franchisor – franchisee business relationship does not in itself render the relevant persons affiliates; the same goes for commercial relationships regarding the supply of finished goods, even if such a supplier is not exclusive but still primary, as well as by reference to the provision of services from one person to another: such business relationships do not in themselves render the relevant persons affiliates.

We note the emphasis made on the determination of the sales' price of end finished products, as this emanates from an agreement, as a parameter that indicates association, particularly as regards cases involving the supply of at least 90% of the raw/secondary materials required by the recipient of such materials.

Clarifications as to the taxpayers that are required to prepare a transfer pricing documentation file

The Circular provides clarifications as to the nature of the taxpayers that are required to adhere with “the arm’s length principle”, prepare transfer pricing documentation file and submit the relevant summary information table of intercompany transactions. In particular, the Circular clarifies that such requirements are only borne by legal persons and/or other bodies of persons, and do not extend to individuals, irrespective of whether the counterparty to a transaction is a legal person, a body of persons or an individual.

This provides the necessary explanation as to whether individuals should prepare documentation file and submit the relevant summary information table.

The Circular clarifies that joint ventures also assume such TP compliance requirements. Moreover, it is also noted that legal persons that are exempt from the Greek Income Tax Code, either by reference to L.4172/2013 or by reference to a special regime, are also exempt from the obligation to document their transactions with affiliated persons from a transfer pricing perspective.

As regards the latter, in particular, although perceived as a step in the right direction, we still note that it does not explicitly derive from the relevant provisions in force.

The Circular provides that foreign legal persons who receive income from real estate property in Greece also assume such TP compliance requirements, irrespective of whether they have a permanent establishment in Greece or not.

Still, the Circular does not clarify as to whether the relevant requirements regard the transactions of the said foreign legal persons, which are exclusively associated with the aforementioned real estate property.

Clarifications as to the nature of the transactions that need to be documented

The Circular provides explanations with respect to loans or credit provided between affiliated persons, including facilities and deposits, clarifying that only the interest accrued (debit/credit) should be documented. Similarly, it is only the guarantee commission or fee that is required to be documented from a TP standpoint, and not the principal to which such guarantee fee refers.

Moreover, the Circular clarifies that dividends paid out to shareholders, as well as fees earned by members of boards of directors are not within the scope of Greek TP rules.

In the event whereby two persons cease to be affiliated in the course of a certain fiscal year, the Circular clarifies that the said persons should document their transactions both as of the cut-off date of their association, as well as for the remaining of the said fiscal year, to the extent that the transactions effected

Clarifications as to the use of databases and the determination of quartile

during the latter period are realized due to contracts signed during the former period. From this it emanates that such requirements solely regard the transactions which were effected in the fiscal year during which the affiliation was terminated, and not transactions realized in the following fiscal years.

The Circular replicates current TP rules by reference to the taxpayers' ability to employ their database of choice in order to retrieve comparable data, insofar that all information regarding the said database is referenced in the TP documentation report; further, the Circular provides that in the event that comparables were not retrieved through an established database, the competent authority will not disregard such information in advance, but will have to assess its reliability.

Moreover, the Circular links the use of database comparables with the application of the interquartile range.

This is the first time whereby Greek TP rules provide guidance as to the determination of quartiles, through the consistent application of a particular methodology. The way of calculating the interquartile range that it provided in the Circular is statistically sound. Still, we consider that the application of a particular way of calculation may result to discrepancies between the approach followed by a multinational enterprise group and its domestic affiliate(s).

To be noted that this is also the first time whereby Greek TP rules also make reference to the requirement to apply the weighted-average method in order to determine the relevant interquartile range.

Clarifications as to the period covered by comparable data, as well as to the accounting principles used in determining the tested margins

In the event that the "comparable uncontrolled transaction" method is applied, the Circular explicitly states that comparables have to regard the same fiscal year during which the controlled transaction is effected. In the event that another method is selected and applied through the use of external comparables, the latter will have to regard the 3-year period that preceded the fiscal year of the tested transaction. The Circular also provides that results of a search for external comparables may also be applied for the subsequent fiscal years, to the extent that the financials of the initially accepted set are updated accordingly, as well as that the accepted companies are reassessed with regards to comparability and independence. The Circular notes that, in every case, a new search for comparables will have to be performed every 3 fiscal years, through the application of all relevant criteria.

The reference made to the "comparable uncontrolled transaction" method and not to the "comparable uncontrolled price" method is most likely unintentional.

The timeframe provided by the Circular in order to perform the relevant searches for external comparables seems not to fully adhere with the domestic and international framework, according to which transactions should be priced at arm's length at the time they are effected ("ex-ante approach"). To the extent that the Circular requires that the database versions that may be used are the ones available upon the fiscal year end during which the relevant transaction is effected, this creates a slight discrepancy as to how an assessment of the arm's length standard will be effected, given that the Circular requires that searches are, in every case, performed retrospectively.

The Circular clarifies that, whatever the case may be, profit margins regarding the tested transactions are to be determined by reference to the Greek tax

framework, also noting that, in every case, such profit margins should not be outside the relevant arm's length range, irrespective of the accounting standards used by the relevant entity.

We understand that references to the accounting standards used by the relevant entity regard instances where the Greek company is selected as the tested party”.

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