

Unofficial Translation of the Decision
of the Commissioner of Italy Revenue Agency
dated September 29, 2010 (ref.2010/137654 29.09.2010)



Implementation of the provision endorsed in Article 1, paragraph 2-ter of Legislative Decree No. 471 of 18 December 1997, regarding the documentation requirements in order to verify the consistency of the transfer prices set by multinational enterprises (hereinafter, “MNEs”) with the arm’s length principle and approval of the technical specifications concerning the electronic filing of the communication regarding the adoption of the documentation requirements as provided for by article 26 of the Law Decree No. 78 of may 31, 2010 implemented - with amendments – by Law No. 122 of 30 July 2010.

THE COMMISSIONER OF AGENZIA DELLE ENTRATE

In order to allow enterprises resident for tax purposes in Italy - qualified as such according to the existing provisions in force within the Income Tax Code for direct tax purposes- falling within the scope of paragraph 7 of Article 110 of the Presidential Decree No. 917 of 22 December 1986 – to opt to the regime endorsed in article 1, paragraph 2-ter of the Legislative Decree No. 471 of 18 December 1997, and on the basis of the powers granted to him by the specific provisions herewith reported,

PROVIDES
AS FOLLOWS:

1. Definitions

The following definitions are provided for in order to apply the articles included herewith:

- a) the term “holding enterprise part of a multinational group of companies” shall mean an enterprise resident for tax purposes in Italy that:
 - is not controlled by any other enterprise, company or any other legal entity carrying out a commercial activity, wherever resident for tax purposes;

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- controls, also by means of a sub-holding, one or more enterprises non-resident for tax purposes in Italy;
- b) the term “sub-holding part of a multinational group of companies” shall mean an enterprise resident for tax purposes in Italy that:
- is controlled by any other enterprise, company or any other legal entity carrying out a commercial activity, wherever resident for tax purposes;
 - controls one or more enterprises non-resident for tax purposes in Italy;
- c) the term “subsidiary enterprise part of a multinational group of companies” shall mean an enterprise or company resident for tax purposes in Italy that:
- is controlled by any other enterprise, company or any other legal entity carrying out a commercial activity, wherever resident for tax purposes;
 - does not control other enterprises or companies not resident for tax purposes in Italy;
- d) the taxpayers referred to sub letters from (a) to (c) are qualified as “small or medium-sized enterprises” in the event their total turnover or revenue does not exceed the threshold of fifty million Euros. Notwithstanding this definition, the taxpayers referred to sub letters (a) and (b) do not fall within this definition should they control directly or indirectly at least one entity not qualified as a “small or medium sized enterprise” on the basis of the current decision;
- e) the term “OECD Transfer Pricing Guidelines” shall mean the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, approved by the OECD Council on 22 July 2010;
- f) the term “Code of Conduct” shall mean the Code of Conduct on transfer pricing documentation for associated enterprises in the European Union and the Annex thereof, approved by Resolution 2006/c176/01 of 27 June 2006 from the EU Council and government representatives of Member States;
- g) the term “traditional transactional method” refers to one of the transfer pricing methods described in Chapter II, Part II of the OECD Transfer Pricing Guidelines;
- h) the term “transactional profit method” refers to one of the transfer pricing methods described in Chapter II, Part III of the OECD Transfer Pricing Guidelines.

2. *Documentation allowing to verify that the transfer prices set by MNEs are consistent with the arm's length principle as endorsed by article 1, paragraph 2-ter of Legislative Decree No. 471 of 18 December 1997*

The documentation allowing to verify that the transfer prices set by MNEs are consistent with the arm's length principle (hereinafter "Proper Documentation") is the documentation that, if delivered during an audit process or any other fiscal activity, allows the taxpayer to access to the regime provided for by article 1, paragraph 2-ter of the Legislative Decree No. 471 of 18 December 1997. Notwithstanding the provisions included from Article 3 to 7 of the current Decision, the Proper Documentation is made of:

- a) a document called Masterfile;
- b) a document called Country Specific Documentation

2.1. Masterfile

The Masterfile collects information regarding the Multinational Group and it shall be organized in the following chapters, paragraphs and sub-paragraphs, each of them containing the information stemming from the corresponding heading and from the potential further indications included within square brackets. The submission of more than one Masterfile is allowed insofar as the Multinational Group carry out several industrial and commercial activities different from each other and regulated by specific transfer pricing policies.

1. a general description of the multinational group (history, recent developments, business sectors in which it operates and overview of relevant markets of reference)
2. Multinational Group Structure
 - 2.1 Organizational Structure [*including an organization chart, a list of group members, their legal nature, including reference to their shareholding percentages*]
 - 2.2 Operational Structure [*this paragraph contains a general description of the role that each of the associated enterprises carries out with respect to the multinational group's activities*]
3. Business strategies pursued by the Multinational Group [*with specific reference to its development and consolidations strategies*] including potential changes to the overall business strategies if compared to the previous tax year
4. Transaction flows [*in this paragraph an overview of the general transaction flows as described in the following chapter 5 must be provided for, including the invoicing flows and the amounts thereof and describing the underlying legal*

and economic reasons on the basis of which the activity has been structured as shown in the transaction flows. The transaction flows will have to be described in a flow-chart encompassing also those pertaining transactions not falling into the ordinary management activity]

5. Intra-group transactions

5.1 Sale of tangible or intangible assets, provision of services, financial services transactions *[each of the following paragraphs shall provide, for each set of transactions, (i) a description of the underlying nature of the intragroup transactions, with the option of excluding those involving transfer of goods or services between associated enterprises both resident for tax purposes in countries other than the European Union; (ii) a list of the entities part of the multinational group, between those indicated in the previous chapter 2, amongst which the transactions involving the above described goods and services were carried out. Similar categories of goods and services may be aggregated in accordance with the guidance provided for by the OECD Transfer Pricing Guidelines]*

5.1.1 Transactions type 1

5.1.2 5 Transactions type 2

5.1.n. Transactions type n

5.2 Intra-Group Services *[each of the following paragraphs shall provide in detail the features of intra-group services carried out by one or more associated enterprises to the benefit of one or other associated enterprises and the entities part of the multinational group, between those listed at chapter 2, between which the said services are carried out]*

5.2.1 Services type 1

5.2.2 Services type 2

5.2.n. Services type n

5.3 Cost contribution arrangements *[in this chapter a list regarding the actual cost contribution arrangements shall be provided, with an indication, for each arrangements, of the scope, duration, members of the arrangement, areas of activity and projects covered]*

6. Functions performed, assets used and risks assumed *[in this chapter the taxpayer will have to provide a general description of the functions performed, assets used and risks assumed by each of the enterprises involved in the transactions and of potential changes occurring in the functions, assets and risks if compared to the prior taxable year, with specific reference to changes triggered by business restructuring transactions]*

7. Intangible assets [*in this chapter a list of the intangible assets owned by each associated enterprise will have to be provided for, with a separate identification of any royalty payment, separated per recipient or payer respectively, and paid as a result of the exploitation of them*]
8. Transfer Pricing policy of the Multinational Group [*in this chapter a description of the multinational group's transfer pricing policy will have to be provided for, and of the underlying rationale that should support its consistency with the arm's length principle. In order to substantiate this information, it will be necessary to briefly refer to the contractual arrangements underlying the above mentioned transfer pricing policy*]
9. Relationships with the tax administrations of the Member States of the European Union regarding the Advance Pricing Arrangements (APAs) and transfer pricing rulings [*in this paragraph a brief description of the APAs and rulings signed by or released from the tax administrations of the countries in which the multinational group operates will have to be submitted, by describing the scope, content and duration of each agreements. The paragraph should be structured per country*].

2.2. Country Specific Documentation

The Country Specific Documentation contains information regarding the enterprise and it must be organized in the following chapters, paragraphs and sub-paragraphs, each of them containing the information stemming from the corresponding heading and from the potential further indications placed under square brackets:

1. General description of the enterprise (history, recent evolution and general overview of the relevant markets of reference)
2. Business Sectors
 - 2.1 Sector 1
 - 2.2 Sector 2
 - 2.n Sector n
3. Enterprise's organization chart [*the paragraph contains a general overview of the role that each of the enterprise's business units carries out within the general activity*"]
4. General business strategies pursued by the enterprise and potential changes compared to the previous tax year's [*the paragraph contains information regarding also specific strategies on specific sectors or markets*]
5. Controlled transactions (sale of tangible or intangible goods, provision of services, financial services transactions) [*the current chapter can be divided in a number of paragraphs (from 5.1. to 5.n and corresponding subparagraphs) corresponding to the different type of transactions carried out between members of the multinational group. Consistent categories of transactions may*

be aggregated in a manner consistent to the guidance endorsed by the OECD Transfer Pricing Guidelines. In each of these paragraphs the nature of transactions involving goods and/or services above mentioned will have to be described in detail, including the intra-group services. In the introductory part of the chapter a list of the transactions described in the following paragraphs together with a detailed chart of the transactions' flows have to be submitted, including the amounts, describing the underlying economic and legal reasons on the basis of which the activity has been structured as described in the flowchart.]

5.1 Type 1 transactions

5.1.1 Description of the transactions [*this section shall also indicate a list of the group members counter-part in the transactions. It will have to be expressly mentioned the circumstance whereby the same or similar transactions have been taking place between independent parties*]

5.1.2 Comparability analysis

- a) Characteristics of property or services
- b) Analysis of the functions performed, risks assumed and assets used [*in this section an indication of potential changes in the functions performed, assets used and risks assumed compared to the previous tax year will have to be provided for, with specific reference to changes if occurred in the context of a business restructuring*]
- c) Contractual terms [*this section requires to report the key elements of written contracts regarding the transactions, specifying if they have general validity among the group*]
- d) Economic circumstances [*this section shall contain references to the general features of the relevant markets, irrespective if they are relevant for supply, transit or distribution*]
- e) Business strategies

5.1.3 Selection of the transfer pricing method

- a) description of the selected transfer pricing method and of the underlying reasons determining its consistency with the arm's length principle [*this section shall also report the outcome of the comparability analysis that has determined the selection of the transfer pricing method deemed to be the most appropriate to the circumstances of the case. Should a transactional profit method be selected when a traditional transactional method could be applied in*

an equally reliable manner, it should be explained why the latter had been excluded. The same explanation applies in case of a selection of a method other than the CUP method, in the event the latter could potentially be chosen by the taxpayer]

- b) Criteria for the application of the selected transfer pricing method [*within this section an accurate description of the procedure followed by the taxpayer for the selection of comparable transactions will have to be provided for and, if needed, a clear description of the underlying reasons for identifying a specific arms' length range]*
- c) Results deriving from the application of the selected transfer pricing method

5.n Type n transactions [*additional paragraphs and following subparagraphs at 5.1., if needed, will have to be structured according to the above mentioned scheme]*

- 6. Intra-group transactions (Cost Contribution Arrangements or “CCAs” to which the enterprise is part of)
 - 6.1 Participants, scope and terms
 - 6.2 Activities' framework and projects covered
 - 6.3 Method used for the determination of the expected benefits for each participant, including expected results, partial outcomes and divergences
 - 6.4 Form and amount of each participant's contribution to the arrangement, including methods and criteria to determine them accordingly
 - 6.5 Formalities, procedures and consequences arising from the entry and withdrawal from the CCA by associated enterprises participating to it, including the termination thereof
 - 6.6 Contractual arrangements concerning balancing payments or amendments to the CCA stemming from a change of circumstances
 - 6.7 Changes occurred during the validity period of the CCA

ANNEX 1 Flowchart describing the transaction flows, including those falling out of the scope of the ordinary management activities.

ANNEX 2 Copy of written contracts on the basis of which the transactions referred to at chapters 5 and 6 are regulated

3. Proper Documentation for holding enterprises part of a multinational group of companies

For holding enterprises part of a multinational group of companies the proper documentation referred to in article 1, paragraph 2-ter of the Legislative Decree No. 471 of 18 December, 1997, is made of:

- a) a document named Masterfile, consistent with the same structure and contents as listed in article 2.1.; and of
- b) a document called Country Specific Documentation, consistent with the same structure and contents as listed in article 2.2.

4. Proper documentation for sub-holding enterprises part of a multinational group of companies

For sub-holding companies part of a multinational group of companies the proper documentation set referred to in article 1, paragraph 2-ter of the Legislative Decree No. 471 of 18 December, 1997, is composed of:

- a) a document named Masterfile, consistent with the same structure and contents as listed in article 2.1, although the information therein contained can be referred only the sub-group at the top of which the sub-holding is placed; and of
- b) a document called Country Specific Documentation, consistent with the same structure and contents as listed in article 2.2.

In lieu of the Masterfile mentioned in the previous paragraphs, the Masterfile regarding the entire multinational group can be adopted, even though it is prepared by a taxpayer resident in another State Member of the European Union, subject to the condition that it is consistent with the Code of Conduct.

In the event the Masterfile regarding the entire multinational group includes less information with respect to those indicated in this Decision, it will have to be integrated by the sub-holding accordingly.

5. Proper documentation for subsidiaries part of a multinational group

For subsidiaries part of a multinational group, the proper set of documentation referred to by article 1 paragraph 2-ter of the Legislative Decree No. 471 of 18 December, 1997, is composed only by a document entitled Country Specific documentation, that includes the same structure and contents as those listed at article 2.2.

6. Proper Documentation for permanent establishments in Italy of non-resident enterprises

For the permanent establishments in Italy of non-resident enterprises paragraphs 3, 4 and 5 apply, depending whether the non-resident taxpayer of which the permanent establishment is part qualifies as, respectively, holding, sub-holding or subsidiary part of a multinational group.

7. Proper documentation for small and medium-sized enterprises

Small and medium sized enterprises are entitled not to update the data referred to in paragraphs 5.1.3 of Article 2.2 with respect to the two taxable periods following the one the said documentation relates to, in case the comparability analysis is based on publicly available information sources, and insofar as the factors listed from paragraphs a) to e) of paragraph 5.1.2 of article 2.2. do not incur substantial changes during the above mentioned taxable periods.

8. Form, extension and conditions of the proper documentation

8.1. Form of the Masterfile and of the Country Specific Documentation

The Masterfile and the Country Specific Documentation must be drafted in Italian.

However, in the event the taxpayer submits the Masterfile regarding the entire multinational group as stated in article 4, it can be drafted in English.

It is allowed to include information in the Masterfile rather than in the Country Specific Documentation, to the extent that the said information are consistent to those set out sub Article 2.2 of the current Decision.

The Masterfile and the Country Specific Documentation must be signed on each page by the legal representative or by a delegate representing the taxpayer and officially signed on the last page by the same legal counsel or certified by means of electronic signature.

In the event an enterprise part of a multinational group having its holding company resident in one State Member of the European Union that has adopted the Code of Conduct submits the Masterfile regarding the entire multinational group as stated in article 4, the signature by the legal representative of the taxpayer certifies that the copy delivered to the tax authorities is consistent with the original document.

The Proper Documentation must be submitted in electronic format. The submission of the said documentation on paper version does not prevent the application of article 1 paragraph 2-ter of the Legislative Decree No. 471 of 18 December, 1997, insofar as the taxpayer will submit it in electronic format within a reasonable time frame assigned by the officials in charge of the audit activity.

8.2. Terms of delivery of the Proper Documentation

The submission of the Proper Documentation to the tax authorities must be executed within and not beyond 10 days upon request. In case, during an audit or any other assessment activity, supplementary information is needed if compared with that included in the documentation already submitted to the tax authorities and prepared according to the current Decree, the said supplementary information must be provided either within 7 days upon request or in a longer time period depending on the complexity of the transactions under analysis, to the extent that the above period is consistent with the time of the audit. Once these terms are elapsed, the tax authorities are not bound by the application article 1 paragraph 2-ter of the Legislative Decree No. 471 of 18 December, 1997,

8.3. Extent and conditions of validity of the Proper Documentation

The Proper Documentation must be drafted on a yearly basis with respect to the transactions carried out by the taxpayer falling into the scope of paragraph 7 of Article 110 of the Presidential Decree No. 917 of 22 December 1986 and it must be available in each of the taxable periods subject to audit according to the ordinary provisions.

The filing of the Documentation does not bind the tax authorities to the application of Article 1, paragraph 2-ter of the Legislative Decree No. 471 of 18 December, 1997, when:

- notwithstanding the compliance with the formal structure referred to in articles 2.1. and 2.2., the documentation delivered in the course of an audit is not complete and consistent with the provisions endorsed by the current Decision; or when
- the information provided for in the delivered documentation are not consistent, wholly or partly, with the reality.

Omissions or partial inaccuracies that do not hamper neither the activity carried out by the auditors nor the accuracy of the outcome of such analysis, do not impede the application of Article 1, paragraph 2-ter of the Legislative Decree No. 471 of 18 December, 1997. The same applies in case of omissions of the Annexes listed in article 2.2.

9. Communication of the availability of the Proper Documentation

9.1. Communication stating the availability of the Proper Documentation on the basis of article 1 paragraph 2-ter of the Legislative Decree No. 471 of 18 December, 1997

Taxpayers shall communicate to Italy Revenue Agency the availability of the Proper Documentation in the yearly income tax return.

9.2. Communication stating the availability of the Proper Documentation concerning past taxable years

For taxpayers having prepared the Proper Documentation relating to taxable years prior to that in force at the time the Law Decree No. 78 of 31 May 2010 was implemented, the communication to Italy Revenue Agency is electronically filed on the basis of the technical specifications included in Annex A of the current Decision. The data transfer to Italy Revenue Agency must be carried out through the electronic service Entratel or through the authorized intermediaries listed by article 3, paragraph 2-bis and 3, of the Presidential Dcree No. 322/1998, so as to the respect the term of 90 (ninety) days elapsing from the publication of the current Decision. Communications executed after the expiration of the said term, will also be deemed valid insofar as they have been transmitted prior to audits, inspections or other administrative procedures of which the taxpayer has been formally notified of.

Annex 1

Decree-Law No 78 of 31 May 2010, as amended by Law No 122 of 31 July 2010**Article 26****Implementation of the OECD guidelines on transfer pricing documentation**

1. In order to implement the guidelines issued by the Organization for Economic Cooperation and Development on transfer pricing documentation and the principles of cooperation between taxpayers and tax authorities, in Article 1 of Legislative Decree No 471 of 18 December 1997, after paragraph 2-bis, the following letters shall be added: “2-b. In case of adjustments under the arm’s length principle of the transfer prices charged for transactions referred to in Article 110, paragraph 7 of Presidential Decree No 917 of 22 December 1986, resulting in a higher tax or in a difference in the tax credit, the penalty referred to in paragraph 2 shall not apply if, during the access to the premises, the inspection or the audit or any other investigation activity, the taxpayer delivers to the Tax Authorities the documentation provided for by a specific Decision of the Director of the *Agenzia delle Entrate* (Revenue Agency) allowing to control that the transfer prices charged are consistent with the arm’s length principle. The taxpayer holding the records under the Decision mentioned in the above sentence, shall notify the Tax Authorities according to the terms and conditions herein specified. Failing such notification, paragraph 2 shall apply.”.

2. In order for the provisions under paragraph 1 to be immediately effective, the Decision of the Director of the *Agenzia delle entrate* shall be issued within sixty days from the date of entry into force of the law converting this decree. Notifications concerning tax years prior to that of the date of entry into force of ((this decree,)) shall in any case be sent within ninety days from the publication of the Decision of the Director of the *Agenzia delle entrate*.