Tax Flash

March 2021

General instructions for dealing with the transfer pricing effects of the pandemic

The Independent Authority of Public Revenues (IAPR) issued circular E.2054/2021 on March 10, 2021, providing general instructions for dealing with the effects of the COVID-19 pandemic on issues related to intra-group transactions (Transfer Pricing). In detail:

Reference to the OECD Guidelines

The circular is based on the OECD Guidelines published on 18 December 2020 on the impact of the COVID-19 pandemic on transfer pricing (the "COVID Guidelines") and provides that all issues addressed therein are interpreted based on the OECD Transfer Pricing Guidelines (TP Guidelines 2017) and/or the COVID Guidelines (https://read.oecd-ilibrary.org/view/?ref=1059_1059931-t94e20hrqo&title=Guidance-on-the-transfer-pricingimplications-of-the-COVID-19-pandemic).

This is essentially a well structured summary of the COVID Guidelines, which confirms their acceptance by IAPR and thus places them in the domestic transfer pricing context.

The circular addresses all 4 priority areas covered by the COVID Guidelines on issues related to (a) comparability analysis, (b) allocation of losses and COVID-19 specific costs, (c) government assistance programs and (d) Advanced Pricing Arrangements (APAs).

Comparability analysis

With regard to comparability analysis of the year 2020, indicative and in accordance with the COVID Guidelines, reference is made to information available on the financial impact of the pandemic on the examined transactions, as well as to the fact that any comparability adjustments made by the taxpayer on the controlled prices or profits or on comparable data should be sufficiently quantified and adequately justified as to their appropriateness and necessity. Furthermore, it is noted that local taxpayers may include in the economic analysis a comparison of the forecasted data relating to sales, costs and profitability, compared to actual results in order to enhance the comparability analysis.

Despite the fact that the reference to such information is indicative, the circular does not include the reference of the COVID Guidelines on the option of using comparable data of the current year (1 year comparables) that is not in line with Circular POL.1142/2015 stipulating that when benchmarking profit margins, the comparables should take into account the weighted average of the 3 preceding years compared to the tested one.

The circular reiterates, inter alia, the position of OECD that the use of information from previous financial crises (such as the global crisis of 2008-2009) is not recommended, as the pandemic crisis varies in size, characteristics and impact by business sector while reference is also made to the non-exclusion by definition of the possibility of using loss-making companies in benchmarking studies.

Allocation of losses and specific costs

With regard to the allocation of losses and COVID-19 specific costs, reference is made to the COVID Guidelines and the fact that even a "limited risk" entity could incur losses due to the pandemic and still be in line with the arm's length principle to the extent that such losses can be linked to risks that could be undertaken in the context of its functions.

An interesting reference in the circular that confirms the preference of the Greek tax authorities on the so called "traditional methods" provided by the TP Guidelines is the example used for a limited risk distributor incurring losses. It is mentioned that the Resale Price Method (RPM) testing gross profit can be used to link the losses incurred due to the pandemic with the drop the latter caused to the demand for its products.

Such reference is particularly interesting due to the fact that the Greek tax authorities have challenged in the context of past audits the use of gross profitability to test the arm's length nature of intra-group transactions on the basis that there are different accounting principles or practices followed when determining the cost of goods sold and as a result gross profits that can render any relevant external comparable as unreliable. It should also be noted that such an approach cannot be applied in cases of limited risk distributors the profitability of which are determined at the level of net profit and is impacted by contractually agreed charges not affecting the cost of goods sold and as a consequence not impacted by a potential drop in turnover.

Reference is also made to the option of related parties to consider revising their contractual relationships under certain conditions and to the extent that this could have been agreed between independent parties, under similar conditions, as well as to invoke or not reasons of force majeure to suspend, postpone or release from intra-group contractual obligations.

For extraordinary expenses incurred due to the pandemic, the circular follows the rationale of the COVID Guidelines as to the conditions that must be met and the circumstances that must be considered so that such expenses can be considered extraordinary or not but also allocated or not to the cost basis of each related entity involved.

The circular makes a positive reference that extraordinary expenses should generally be excluded from the net profit ratio, unless they are directly related to the controlled transaction as exactly described.

Government assistance programs

As regards government assistance programs linked with the pandemic, the circular follows the spirit of the COVID Guidelines stating that the extraordinary and temporary nature of such programs should make them distinct compared to other types of subsidies of a more permanent nature. Moreover, it is stated that the legal conditions under which the programs that related to the pandemic are granted should be analyzed thoroughly given that there may be cases that the granting of such programs presupposes that the beneficiary enterprises are restricted or precluded from changing their intra-group pricing policy and invoicing.

Advanced Pricing Arrangements (APAs)

Closing, with regard to Advanced Pricing Arrangements (APAs) and in line with the COVID Guidelines, the circular states that they are a distinct field of intra-group transactions that is also affected by the pandemic and that the relevant effect applies to APAs concluded in pre-pandemic times also covering the fiscal year 2020 (or subsequent years affected by the pandemic crisis), as well as those that have not been completed yet or are expected to begin.

It is emphasized that addressing the issues that arise in APAs relevant to the pandemic requires the cooperation of the taxpayers with the tax authorities, excluding the adoption of unilateral actions and that in general these agreements continue to be valid and binding on the parties, unless the specific conditions of the pandemic affect them to such an extent that a question of their annulment or revision is raised.

It is also clarified that the economic impact of the pandemic is not one of the factors that can lead to the revocation of an APA and that for applications that have been submitted and are being negotiated, taxpayers can take all the necessary actions to substantiate the need for revision of such applications or some of their terms, according to the available revision standards, without excluding the options, as the case may be, of submitting a separate application for the pandemic period and another for the subsequent period or the conclusion of the APA for the whole period with a clause allowing to modify the respective arrangement on an annual basis, where necessary.

It is important to note that each individual case needs to be examined based on its own merits, and that the above-mentioned general principles might not necessarily capture all possible eventualities. Our expert advisors are in a position to advise you on the implications arising from a Greek perspective in relation to your specific case.

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