

# Transfer Pricing in Intellectual Property and Intangibles: A perspective under new Brazil Transfer Pricing Law

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Recently, the Brazilian Congress voted on a new transfer pricing law, sanctioned last June 14, 2023, by President Lula - Law #14,596/2023, adapting Brazil to the OECD standards, with special implications regarding royalties on international operations, practiced between related parties, following international guidelines and the arm's length principle.

This new transfer pricing law formally introduces the Arm's Length principle, an English concept term, which establishes criteria for transactions between legal companies domiciled in Brazil and other companies related to them abroad to follow the same terms and conditions of transactions that would be made with unrelated companies (third parties).

In this regard, the law also expands the concept of related companies, with a broad list of examples representing the variety of currently existing business arrangements.

To determine the price of this type of transaction, the company must adopt the following parameters:

I – the contractual terms of the transaction, which derive both from the documents and formalized contracts and from evidence of the effective conduct of the parties;

II – the functions performed by the parties to the transaction, considering the assets used and the economically significant risks assumed;

III – the specific characteristics of the goods, rights, or services object of the controlled transaction;

IV – the economic circumstances of the parties and the market in which they operate; and

V – business strategies and other characteristics considered economically relevant.

After adopting all the cited parameters, the transaction must be compared with a transaction of the same type that could occur with an unrelated company in order to ensure and comply with the Arm's Length principle.

Previously, local companies had to deal with outdated rules and guidelines under Brazilian legislation, including a fixed percentage of royalties and a series of goods and services, especially technological ones, not foreseen by the legislation.

The new legislation has a direct impact on intangibles, such as copyrights, patents, trademarks, and others, with clear definitions of the concept of such intangible assets for the purposes of transfer pricing, as well as introducing the DEMPE concept - Development, Enhancement, Maintenance, Protection, and Exploitation - as a basis for pricing intangibles/royalties.

Moreover, it also brings the definition for intangible assets that are difficult to value, being those intangible assets for which it is not possible to identify a reliable comparator at the time of their transfer between related parties, and the projections of future income or cash flows or the assumptions used for their assessment are highly uncertain.

O this last case, the law provides that the uncertainties incident in pricing or in the assessment of the intangible assets that are difficult to value must be considered by the Brazilian Federal Revenue.

It is important that the contracting parties observe that the new rules have optional applicability for 2023, but are mandatory as of 2024 and that some provisions of Law No. 12,596/23 still depend on complementary regulation, for example, from the Federal Revenue.

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