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Transfer Pricing Overview

Poland | 2023



Introduction

The year 2023 will be the first in which the new simplified rules in transfer pricing will apply. The improved tools (TPR and CBC) will provide further information to tax offices, this is why transfer pricing will, as always, focus the attention of tax inspectors.

It is worth mentioning that tax authorities expect taxpayers to update documentations after the pandemic period and the upside-down supply chain caused by it.

In 2023 the documentation, as well as the TPR return (which will include, for the first time, a statement that documentation has been prepared) should be prepared on the new provisions. Key changes include new deadlines for preparation of the documentation and modifications in the tax haven transactions.

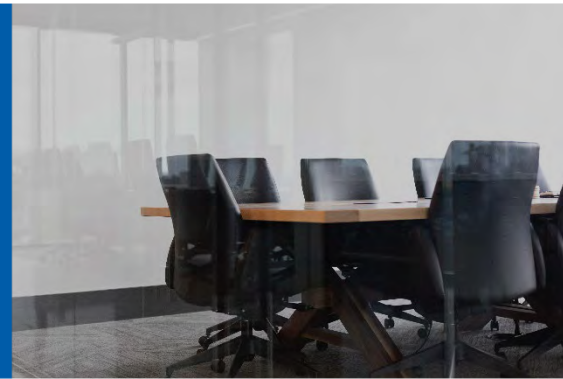
Below we present the key information in the area of transfer pricing area in Poland.



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Applicable legislation



- Corporate Income Tax Act of February 15th, 1992 (Chapter 1a)
- Personal Income Tax Act of July 26th, 1991 (Chapter 4a)
- Act of 16th October 2019 on resolution of double taxation litigation and conclusion of Advanced Pricing Agreements
- Tax Ordinance Act of August 29th, 1997 (Articles 58a-58e)
- Act of on exchange of tax information with other countries from 9th March 2017
- Regulation of the Minister of Finance of December 21st, 2018 on transfer pricing for corporate income tax
- Regulation of the Minister of Finance of December 21st, 2018 on transfer pricing documentation for corporate income tax
- Regulation of the Minister of Finance of December 29th, 2022 on transfer pricing information on corporate income tax
- Regulation of the Minister of Finance of December 21st, 2018 on transfer pricing for personal income tax
- Regulation of the Minister of Finance of December 21st, 2018 on transfer pricing documentation for personal income tax
- Regulation of the Minister of Finance of December 29th, 2022 on transfer pricing information on personal income tax
- Regulation of Minister of Finance of March 28th, 2019 on determination of countries and territories applying harmful tax competition in respect to corporate income tax
- Regulation of the Minister of Finance of January 9th, 2020 amending the Regulation on corporate income tax transfer pricing
- Regulation of the Minister of Finance of January 9th, 2020 amending the Regulation on personal income tax transfer pricing
- Regulation of the Minister of Finance of April 2nd, 2022 amending the Regulation on transfer pricing documentation for corporate income tax
- Regulation of the Minister of Finance of April 2nd, 2022 amending the Regulation on transfer pricing documentation for personal income tax
- Double Tax Treaties.

As an OECD Member State and an EU Member State, Poland adheres to the OECD Transfer Pricing Guidelines, especially OECD Report on counteracting BEPS (“Base Erosion and Profit Shifting”), in particular action 13: *“Re-examine transfer pricing documentation”* and to the EU Code of Conduct on Transfer Pricing documentation for associated enterprises.

Transactions subject to TPD



Entities shall be deemed to be related entities where, directly or indirectly, significant influence is exerted.

Significant influence according to the CIT Act means:



Direct or indirect holding of at least 25%:

- shares in the capital
- voting rights in the company
- shares or rights to share in profits or assets or their benefits.



The natural person's actual ability to influence key economic decisions of the legal person or a flawed legal person



Marriage or kinship or affinity to the second degree.

Entities deemed as related are required to prepare transfer pricing documentation if the volume of individual transaction exceeds the value:

10 000 000 PLN in case of goods transaction

10 000 000 PLN in case of financial transaction

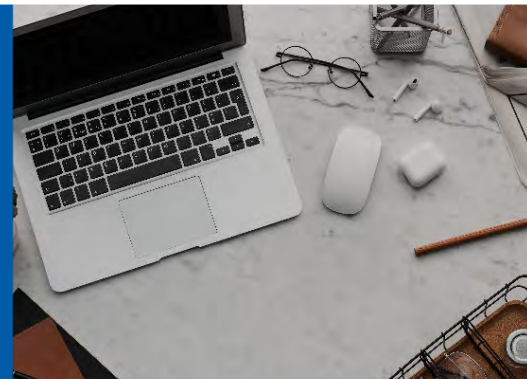
2 000 000 PLN in case of service transaction

2 000 000 PLN in case of other transactions

Regardless of the prerequisites for the existence of relationships between entities, transfer pricing regulations may be applied to transactions, agreements or undertakings with entities from tax havens:

- exceeding PLN 2 500 000 – in case of financial transaction
- exceeding PLN 500 000 – in case of transactions other than financial

Scope of TPD



The three-level concept

The general concept of the transfer pricing documentation has been maintained. The three levels of reporting consist of:



Local file + benchmarking study



Master file



Country by Country reporting

Local file + Benchmarking

Represents local documentation containing details of transactions or other events between the Polish company and other group companies disclosed in the accounting books.

The taxpayer is obliged to prepare transfer pricing documentation in the case of perform a controlled transaction with a related entity, if its value exceeds the threshold indicated in the Act¹.

The local file shall include in particular:

- Description of the taxpayer including description of the management structure and organisation chart
- Description of the main activities of the taxpayer
- Description of the transaction, including analysis of the functions, risks and assets
- Information about related entities (parties to the transaction)
- Transfer price calculation method
- Benchmarking analysis or compatibility analysis (obligatory part under the new regulations)
- Financial data

¹ PLN 2/10 millions, see page 5

- Description of any agreements or tax interpretations related to the transaction (including Advance Pricing Agreements)
- The source documents (i.e. contracts).

Benchmarking study is an analysis of the settlements between unrelated entities in transactions all over the market deemed as comparable to conditions established in controlled transactions. Benchmarking study is usually prepared based on specialized databases and market reports.

Comparability analysis' goal is to prove that the terms and conditions under which the controlled transaction was executed comply with those which would have been determined by unrelated parties (transaction complies with arm's length principle).

Entities obliged to prepare a TP documentation (local file + benchmarking study) are required to submit the statement that:

- The documentation has been prepared
- The prices applied to the controlled transactions are arm's length.

Under the changes effective January 1st, 2022, the statement is included in the TPR return.

The taxpayers who execute both transactions subject to the documentation obligation and transactions exempted under Art. 11n (1) of UCIT are obliged to submit TP-R report.

Master file

Master file should be prepared by taxpayers:

- Obligated to prepare TP documentation
- Members of a group of companies that consolidate the financial data with a full or proportional method, if the consolidated group revenues exceed PLN 200 000 000.

The master file shall include the following:

- Description of the entity preparing the documentation including the organizational structure
- the Transfer Pricing policy
- Description of the group's business activity
- the group's financial situation
- Detailed information on intellectual property (including especially the group strategy on creation, development and maintenance of intellectual property)
- Description of any agreements concerning income taxes made between the group components and the tax authorities in other countries (including unilateral APAs).

TPR

The new TPR return requires the taxpayers to provide a detailed overview of transfer pricing surrounding, including the financial indicators, ratios and information of a given entity based on financial statements.

TPR is an obligatory part for entities which conclude controlled related party transactions fulfilling the criteria for transfer pricing documentation (simply, as a rule: if you are obliged to prepare Local File – then you have to submit TPR), as well as (in a limited scope) entities qualifying for the so-called domestic exemption under which they are not obliged to prepare transfer pricing documentation.

It is worth mentioning, that the controversial regulations on documenting so-called indirect tax haven transactions have already been repealed at the end of 2022 with retroactive effect from the beginning of the year.

Country-by-country reporting (CbCR) and notification (CbCP)

The report on global allocation of income and tax within the group (required for groups in which the parent company consolidating the accounts is located in Poland). This document has to be filed by the holding company and if consolidated revenues of the group exceed EUR 750 mln.

The CBC-P is required to be submitted by each entity in the group to which the CbCR obligations apply. The CBC-P notification, under the new amended rules, can be submitted only electronically, with the deadline expiring within 3 months following the end of a tax year.

Exceptions

According to the current regulations, the following categories of transactions are not subject to Transfer Pricing documentation:

- Concluded by related parties having their registered office, place of residence, seat or management on the territory of the Republic of Poland, as long as they:
 - do not benefit from tax exemption under the Act on Special Economic Zones
 - do not benefit from a CIT exemption
 - do not benefit from the tax exemption on the basis of the Act on Support for New Investments
 - have not incurred a tax loss

- Concluded between foreign fixed establishments of related entities located in the territory of the Republic of Poland, having their place of residence, registered office or management board in the territory of a Member State of the European Union or another state belonging to the European Economic Area other than the Republic of Poland

- Concluded by a foreign fixed establishment, located in the territory of the Republic of Poland, of an entity having its place of residence, seat or management board in the territory of a European Union member state or another state belonging to the European Economic Area, other than the Republic of Poland, with an affiliated entity having its place of residence, seat or management board in the territory of the Republic of Poland

- For which APA has been concluded

- Whose value does not constitute revenue or tax-deductible cost on a permanent basis (exceptions - financial transactions, capital transactions, investment, fixed assets or intangible assets transactions)

- If the relationship results only from a connection with the State Treasury or local government units
- In which the price was determined by means of an open tender on the basis of the Public Procurement Law
- Consisting of the attribution of income to a foreign permanent establishment situated in the territory of the Republic of Poland by non-residents, if the regulations of relevant international agreements to which the Republic of Poland is a party provide that such income may be taxed only in a State other than the Republic of Poland
- Between companies forming a tax group
- Consisting only in making a settlement between related parties of expenses incurred for the benefit of an unrelated party, as long as they,
 - no added value is created and the settlement is made without taking into account the margin or profit mark-up
 - the settlement is not directly related to another controlled transaction
 - settlement occurred immediately upon payment to an unrelated party
 - the related party is not an entity that has its place of residence, registered office or management in a territory or country applying harmful tax competition
- Constituting low added-value services - if the conditions set forth in art. 11f of UCIT are met or
Concerning a loan, credit or bond issue - if the conditions specified in art.11g of UCIT are met



Are your transactions covered? Find out with our Transfer Pricing Compliance Checker!

Transfer Pricing Methods



Generally, the transfer pricing methods accepted by the tax authorities are based on the OECD Guidelines. These methods are:



CUP (Comparable Uncontrolled Price Method)



Resale Price Method



Cost Plus



TNMM (Transactional Net Margin Method)



Profit Split Method

When selecting a price calculation method, taxpayer should make sure it is appropriate for the transaction. Since 2019, there is no obligation to use traditional methods before profit-sharing methods.

The new regulations also allow for the use of another method, including a valuation technique, if none of the five above methods can be used.

Safe Harbours



Since 1st January 2019, the so-called Safe Harbour institutions is introduced into Polish transfer pricing regulations. Safe harbour means that some of the transactions executed by the taxpayer will not be subject to estimation, as long as they are executed under the conditions indicated by the legislator.

These transactions are:

- Low added-value services
- Loan (credit and bond) agreements.

Safe harbour for low value-added services could be applied where the cost mark-up for these services has been determined on the basis of the cost plus or TNMM method and is equal to:

No more than 5% of the costs in case of purchase of services

Not less than 5% of the costs for the provision of services

Moreover, the service provider does not have its place of residence, registered office or management in a tax haven and the recipient of the service should has a service price calculation including the type and amount of costs included in the, the manner of application and justification for the selection of allocation keys for all related parties who use the services and a description of the transaction, including an analysis of the functions, risks and assets.

The condition for the application of the safe harbour for loans, on the other hand, is that the interest rate of the loan is determined on the basis of the type of base interest rate and margin set out in the Minister of Finance notice. In addition, the loan agreement must not contain any provision for remuneration other than interest to be paid to the lender and the loan must not be concluded for a period exceeding 5 years.

The Ministry of Finance has decided that from January 1, 2023, for the purposes of safe harbour regulations for loan, credit and bond issues, the margin will be changed so that the maximum margin for borrowers will be 2.90 percentage points, while leaving the minimum margin for lenders at the current level of 2.40 percentage points.

It should be remembered that in order to benefit from the protection offered by the safe harbour for loan transactions, the total level of liabilities or receivables of the company with related parties cannot exceed PLN 20,000,000 or the equivalent of that amount, and the lender may not have a residence, registered office or management in a tax haven.

Deadlines



The regulations in force since 1st January 2022 have significantly modified the deadlines for the obligation to submit the TPR and to prepare the documentation itself. These obligations must be fulfilled until:

- the end of the 10th month following the end of the tax year – preparation of TP documentation
- the end of the 11th month after the end of the tax year (with the same rule – for transactions occurred in 2022 and next years) – submission of TPR return.

A separate TP statement will no longer be required.

3 years

In case of benchmarking study, the analysis should be updated at least once every 3 years (if the business circumstances change in a way affecting the analysis the benchmarking analysis should be reviewed earlier).

Moreover, according to the present regulations, the tax authorities may request the taxpayer to prepare documentation in respect of transactions / events even if the value does not exceed the limits, provided that the circumstances suggest that their value could have been underreported in order to avoid the documentation obligation. **In that case, Transfer Pricing documentation should be submitted within 30 days of the request. This obligation does not apply to micro-entrepreneurs.**

For the “standard” TP obligations (after exceeding the thresholds) taxpayers are obliged to present complete TP documentation within 14 days of the tax authorities’ request (previously : within 7 days).

Country by Country reporting



The Country by Country reporting obligation applies to:



Polish entities, which simultaneously:

- Are the ultimate (dominating) entities in their groups
- Are the entities consolidating financial reports
- Operate directly or indirectly outside of Poland
- Their last year's consolidated income within and outside of Poland is over the equivalent of EUR 750 Mio.



Entities not being the ultimate parent if there is no other entity designated to provide such information in the group if one of the following criteria are met:

- The ultimate parent entity is not obliged to file a CbCR for the reporting year in its tax jurisdiction
- The appropriate jurisdiction in which ultimate parent entity is resident for tax purposes has not undertaken to share information about the entity group within 12 months of the end of the given reporting year
- The tax jurisdiction of the ultimate parent entity suspended automatic sharing of CbCR or failed to fulfil the obligation without notifying the dominating entity.

In case the member of the group does not receive all required information about the group from the parent company, the information is presented based on the knowledge of the party or data obtained for this purpose (this fact should be disclosed in the CbCR file).



According to the present tax regulations members of groups of entities will be obliged to:

- Notify that they are the ultimate parent entity or designated entity (or a different entity obliged to file the CbCR), or
- Indicate the entity obliged to file CbCR together with its identity and tax residence.

The notification should be filed up to 3 months following the end of the reporting financial year of a group of entities. The new regulation² indicates what information should be included in the information about a group of entities.

The tax regulations provide fines for failure to fulfil these obligations (maximum amount: PLN 1 Mio).



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² The Regulation of the Minister of Finance of 13 June 2017 on the detailed scope of data to be included in the information about a group of entities.

Advance Pricing Agreements



Currently, the APA is up to the Head of National Fiscal Administration (KAS) decision, which is a confirmation of the selection and application of a method for determining transaction prices between related parties.

The main advantage of obtaining such decision is elimination of the risk of challenging transfer price methodology (assuming that the taxpayer complied with the APA provisions) and protection from penal and fiscal sanctions for individuals responsible for tax settlements.

Additional benefit of an APA is the right to recognize as a deductible cost subject to limitation under Article 15e of UCIT (low added value services). From 2022 onwards, art. 15e of UCIT has been repealed and the benefits of APA highly reduced.

Some further rules regarding APA are as follows:

- The possibility of applying for an APA by a foreign investor considering doing business in Poland by establishing a subsidiary company
- The APA is valid from the beginning of the tax year in which the application has been submitted
- Clarification of the elements of the application - following the model of local transfer pricing documentation
- Applying for APA covering transactions under proceedings or tax control during one of the last two tax years preceding the tax year in which the application is made is no more possible.

The fee is 1% of the value of the transaction covered by the APA limited by the following:

- For a unilateral APA referring to domestic entities only – min. fee: PLN 5 000 (approx. EUR 1 066) and max. fee PLN 50 000 (approx. EUR 10 661)
- An APA referring to a foreign entity - min. PLN 20 000 (approx. EUR 4 264) and max. PLN 100 000 (EUR 21 322)
- A bilateral or multilateral APA - min. PLN 50 000 (approx. EUR 10 661) and max. PLN 200 000 (approx. EUR 42 645)³.

Renewal fees are half of the amount of the fee for the renewed APA.

³ 1 EUR = 4,6899 PLN (ex. rate 31/12/2022)

Recharacterizations and disregard of transaction



The legislation in force since 1 January 2019 has introduced new mechanisms available to tax authorities when estimating revenue.

Possibilities are:

- Recharacterization of a transaction
- Disregarding of a transaction.

Recharacterization and disregarding of the transaction may be applied under the opinion of the tax authorities, if in comparable circumstances, unrelated parties guided by economic rationality would not have entered into the controlled transaction concerned.

In assessing these facts, the tax authorities shall take into consideration the conditions that have been agreed between related parties and the fact that the conditions agreed between them do not allow the transfer price to be set at a level that would have been agreed by economically unrelated parties based on considerations of realistically available options.

The effect of disregarding of a transaction by the tax authorities could lead to assessing the income or loss of the taxpayer without taking into account the controlled transaction, while the effect of recharacterization could lead to assessing the income or loss of the taxpayer with respect to the relevant transaction (i.e. the one that would be made by unrelated entities).

Tax authorities cannot use the above tools just because of:

- Difficulty in verifying the transfer price
- Lack of comparable transactions between unrelated parties in comparable circumstances.

Transfer Pricing adjustments



To meet the taxpayers' expectations, the legislator pointed out that a taxpayer can recognize a transfer pricing adjustment by changing the amount of revenues or expenses if the following cumulative conditions are met:

- Controlled transaction was performed at arm's length
- There was a change in significant circumstances affecting the terms of transaction or costs/revenues influencing the transfer pricing became known and the prices must be adjusted to comply with market terms
- The taxpayer has a statement from the related party that if has adjusted the transfer prices in the same way. Beginning in 2022, it was allowed to have a statement or accounting proof from the related party.
- The related party has its place of business in Poland or in a country or territory with which Poland has an agreement to avoid double taxation and there is a legal basis for exchanging tax information with that country
- The taxpayer does not have to confirm the transfer pricing adjustment in its annual tax return anymore since 2022.



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Cooperation agreements



The cooperation agreements have been introduced to the Polish tax system due to the Act on Resolving Double Taxation Disputes and Concluding of Advance Pricing Agreements of 14th November 2019.



The cooperation agreement is designed to ensure that a taxpayer complies with tax law in conditions of transparency of undertaken activities and mutual trust and understanding between the tax authorities and the taxpayer, taking into account the nature of the taxpayer's business.

The agreement may be concluded by taxpayers with revenues of at least 50 million EUR. The main benefits of the agreement are:

- Exemption from reporting of national tax schemes (MDRs)
- A 50% reduction of the fee for submitting an APA application
- Attributing good faith to the taxpayer.

The taxpayer, being a party to the cooperation agreement, has the opportunity to discuss (with the Head of the National Revenue Administration) important issues related to the tax settlements, such as:

- Interpretations of tax law
- Determinants of transfer pricing
- Non-applicability of the general anti-avoidance rule
- The amount of advance income tax
- Other, necessary to ensure the proper implementation of the cooperation agreement.

Penalties



At present, the sanctions for the use of non-market prices are as follows:

- 10%
basic rate** of the sum of the undue or overstated tax loss and not reported (in whole or in part) taxable income to the extent resulting from this decision

- 20%
increased rate**
 - if the basis for determining the additional liability is exceeding 15 000 000 PLN
 - in the case of failure to submit transfer pricing documentation

- 30%
increased rate** the cumulative fulfilment of both conditions above

Furthermore, the Fiscal Penal Code provides a fine up to 720 daily rates per day in the following situations:

- Late submission, factually incorrect or failure to submit a statement that the Transfer Pricing documentation has been prepared. Late submission, factually incorrect or failure to submit TP-R information.

On the other hand, 240 daily rates per day are provided in the following situations:

- Preparation of transfer pricing documentation after the deadline
- Late submission of the TP-R information.



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