

# transfer pricing

Russia | Kazakhstan | Belarus | Ukraine | Poland





**Ulf Schneider**  
Managing Partner

For over 14 years, SCHNEIDER GROUP has been providing international companies with back office services in Russia, Kazakhstan, Belarus, Ukraine, Poland and Germany. Our services include market entry support, accounting outsourcing, tax consulting, import, ERP systems and support in legal matters with a focus on migration, labor and corporate law.

In case a legal entity or a permanent establishment forming a part of a multilingual enterprise group is located in different taxing jurisdictions, the opportunity for the movement of income to a lower-tax jurisdiction arises. To prevent potential losses of income tax revenue, more than 60 countries have adopted transfer pricing (TP) rules and requirements. Hereafter, we consider the TP regulations in Russia, Ukraine, Poland, Kazakhstan and Belarus.

SCHNEIDER GROUP has experience in accounting and taxation in Russia, Ukraine, Poland, Kazakhstan and Belarus. Our teams of accountants and tax experts would be pleased to provide you with an analysis of your transactions which may be subject to TP control and help you to meet the TP requirements of these countries.

A handwritten signature in blue ink, appearing to read "Ulf Schneider".

aktau  
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astana  
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kyiv

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moscow  
st. petersburg  
warsaw

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# transfer pricing

The role of multinational enterprises (hereinafter – MNEs) in the world has increased significantly over the last 20 years. This growth involves progressively complex taxation issues for the enterprises themselves and for tax administrations within separate, country-specific taxation systems. Every time a legal entity or a permanent establishment forming part of a MNE group is located in different taxing jurisdictions, opportunities for the movement of income to a lower-tax jurisdiction arise. Here, transfer pricing (hereinafter – TP) comes into play. TP involves the terms and prices at which related parties sell (or should sell) goods or services to each other.

To combat potential losses of income tax revenue, more than 60 countries have adopted TP rules and requirements. With regard to international business transactions the questions of where the tax is paid can have huge financial impacts on both governments and companies. With more than half the world's trade occurring within MNEs and global trade continuing to rise, companies and governments are increasingly focused on TP matters. Governments need to ensure that the taxable profits of MNEs are not artificially shifted out of their jurisdiction and that the tax base reported by MNEs in their respective countries reflects the economic activity undertaken therein. Therefore G20 and OECD have started an initiative to combat BEPS (Base Erosion and Profit Shifting). For taxpay-

ers, it is essential to limit the risks of double taxation that may result from a dispute between two countries on the determination of an arm's length remuneration for their cross-border transactions with related parties.

The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter – OECD Guidelines) provide guidance on the application of the "arm's length principle", which is the international consensus on transfer pricing, i.e. on the valuation, for tax purposes, of cross-border transactions between related parties. In respect of TP in Russia, Ukraine, Poland, Kazakhstan and Belarus only the first three countries have TP regulations which are based on the OECD Guidelines. Poland and Russia are also part of the anti-BEPS initiative of G20/OECD and are already on its way to implement the anti-BEPS actions, including the Masterfile concept for transfer pricing documentations and the Country-by-Country reporting. Respective legislation will be adopted in Russia probably in 2017. In January 2017 Ukraine also officially announced that it will implement the anti-BEPS action plan. In 2016 Belarus made a big step towards getting closer to OECD-standards. To some of these countries TP is still a new phenomenon. This brochure provides the reader with all relevant information about current TP issues in Russia, Ukraine, Poland, Kazakhstan and Belarus

# transfer pricing methods

Most of the TP rules are largely based on the OECD Guidelines. We will give you a short overview of the most used methods which are stipulated for determining the conformity of prices applied to controlled transactions to "arm's length" prices:

## **Comparable market price / comparable uncontrolled price (CUP) method**

This method is based on comparing the price applied during controlled transaction with the price/price range in comparable uncontrolled transactions. In practice, this

method can be applied only in cases where the taxpayer performs similar transactions with both related and non-related parties, since it is difficult to collect information regarding prices which are used by other taxpayers performing similar transactions. In case a seller does not have a dominant market share, at least one transaction that matches the comparability criteria is sufficient for the application of the comparable market price method.

### **Resale price method**

The resale price method is applied by performing a comparison of the gross margin earned by the reseller in a controlled transaction with the respective gross margin range established on the basis of uncontrolled, comparable transactions. The resale price method prevails over other methods to confirm the prices at which the goods are acquired by a purchaser from a related party and resold to a non-related party. This method shall be applied if the reselling party does not have intangible assets significantly influencing its gross margin level. This method can be used solely when the purchaser resells the product.

### **Cost plus method**

The cost plus method is implemented by comparing the gross margin of costs of the party of the analyzed transaction to the market range of the gross margin of costs using comparable transactions. The cost plus method is generally applied to distinguish cases when, in the course of rendering the services, intangible assets are used which significantly influence the seller's gross margin level. The cost plus method is largely used in Western Europe, where most tax authorities announced that a markup of 5-10% is usually accepted. Such statement is missing in Russia and Ukraine, so that a benchmark study is required. Furthermore the Russian and Ukrainian transfer pricing rules require for the application of the resale price method and the cost plus method that the accounting data of the related party and the non-related party are brought into a comparable format. As the details of such data of non-related parties are usually not available, the applicability of these methods in Russia and Ukraine is fairly limited.

### **Transactional net margin method (TNMM)**

This method is currently applied in most benchmark studies and TP documentations in Russia and Ukraine. For the purposes of application of the TNMM, the following profitability indexes could be used: sales margin; cost margin; margin of commercial and management expenses; margin of assets; other margin parameters reflecting the correlation between the functions performed, assets used, economic (commercial) risks assumed and the level of remuneration.

### **Profit split method**

The profit split method is utilized by using a comparison of the actual split (distribution) of total profits gained between the parties to the split (distribution) of profit between parties of comparable transactions. The profit split method may be used in the following cases:

- If the other methods could not be applied and in the presence of a material interconnection of activities carried out by the parties to the transaction being analyzed (a group of homogeneous transactions being analyzed);
- If the parties to the transaction being analyzed own rights to intangible assets that significantly influence the gross margin level.

The analysis of the profit split (distribution) between parties of the transaction being analyzed shall be made based on the proportion of the contribution of a party (to the transaction) to the total profit received by that party from the transaction pursuant to the following criteria or a combination thereof:

- In proportion to their contribution to the total profit under the transaction being analyzed
- In proportion to the split between the parties of the transaction being analyzed of the return on invested capital raised with respect to such a transaction;
- In proportion to the split of profit between parties of a comparable transaction.

# transfer pricing in russia



On January 1, 2012 the new TP law in Russia entered into force. These new regulations are generally based on the OECD Model Convention and significantly differ from the previous regulations in Russia. The adopted law adds a new section to the Russian Tax Code provisions concerning TP rules and abolishes the previous ones. The purpose of the new regulations is to implement a tax administration system in order to determine whether the prices used in transactions between related parties, or persons equivalent to them, conform to the “arm’s length” principle. The legislation attempts to avoid the transfer of profit to foreign or Russian companies which enjoy a lower profit tax regime.

**Please note:** The TP regulations are new both for Russian business and the tax authorities and they are still far from being well established and fully developed. In recent years, the Ministry of Finance and the Federal Tax Authority have issued several clarifications and instructions. Among the most important instructions is Order № MMB-7-13/524@ dated July 27, 2012 of the Federal Tax Authority about the forms and instructions for the notification on “controlled” transactions. Controlled transactions are transactions that, based on given criteria, must be reported to the tax authorities. Also important is the letter of the Federal Tax Authority № OA-4-13/14433@ dated August 30, 2012, with recommendations on the preparation of TP documenta-

tion. The TP notification is a statutory report which notifies the tax authorities about controlled transactions performed by the tax payer and must be submitted to the tax authorities by May 20 of the year following the calendar year in which the controlled transaction takes place. There is no specific form in which the TP documentation must be prepared, but it should contain certain information and data foreseen by the Russian Tax Code. The TP documentation should be maintained by the company and submitted to the tax authority only upon request and within 30 working days after the receipt of the request.

The Russian tax authorities have still very limited practical experience with TP regulations that take into consideration the principles of the OECD Model Convention. The first TP audits only began in January 2014 and the very first court decision on TP matters was taken only in January 2017. It should be noted that the developed TP policy, as well as TP documentation, may need to be adjusted to new requirements of the regulatory authorities.

**Important:** The next deadline for submitting TP notifications is usually May 20.

## Main provisions and definitions of the TP law

### Related parties

In order to determine how companies might be affected by TP regulations, it is necessary to firstly determine if they are regarded as “related parties” in the context of TP rules. The TP legislation provides for a large list of criteria to determine if two parties are deemed to be related. In practice, the most important ones are the following:

- Two parties are deemed to be related if an organization or an individual directly or indirectly participates in the other company and their interest exceeds 25%. Therefore, if a foreign parent company holds more than 25% of the equity of a Russian subsidiary, these two companies are regarded as being related parties;
- Two parties are deemed to be related if one and the same person participates in such organizations directly and/or indirectly, and such participation in each organization amounts to more than 25%. So, two subsidiary companies are regarded as related parties if the same person holds more than 25% of the equity in each company;
- Two parties are deemed to be related if they have the same individual as the general director. So, if the general director of a Russian subsidiary is also the general director in another company, these two companies are regarded as being related parties.

There are some other criteria such as membership in the supervisory board of companies, etc. Accordingly, an analysis of the specific situation is recommended.

**Please note:** The courts have the right to recognize parties as being related for reasons which are not directly foreseen by the Tax Code if the relationship between the parties may influence the conditions of performed transactions.

It is important to note that even if independent companies which do not perform additional functions and do not bare any business risks faced by the related parties are included in the supply chain between the related parties, the transaction will be treated by the tax authorities as a deal between related parties and will fall

under TP control. Consequently, TP regulations will be applied even if a “middle-man” is included in a transaction between the parent company and its Russian subsidiary.

### Controlled transactions

The following transactions are regarded as “controlled transactions” and fall under the TP rules:

#### All cross-border transactions between related parties:

The applicable threshold for cross-border transactions between related parties has significantly changed since 2012, when it amounted to 100m RUB. In 2013, this threshold was reduced to 80m RUB. Since 2014, the threshold has been fully abolished, meaning that all cross-border transactions between related parties are subject to TP control and that TP notification shall be prepared and may be requested by the tax authorities for all such transactions. This applies even for the smallest of transactions.

Transactions within Russia: Domestic transactions between related parties will be controlled by the tax authorities if their amount exceeds 1bn RUB (since 2014).

**Exception:** Domestic transactions will not be subject to tax control if the transactions are performed between members of the same consolidated group of taxpayers or if all of the following criteria are met:

- Both parties are registered within the same region of Russia;
- None of the parties have economically autonomous subdivisions in other regions of Russia, nor pay income tax to the budgets of other regions;
- None of the parties have tax losses;
- The parties do not pay mineral extraction tax or other specific taxes.

**Please note:** There are some ambiguities with respect to controlled transactions of permanent establishments of foreign legal entities. According to letter N 03-01-18/9-183 of the Ministry of Finance from December 2, 2012, the threshold for cross-border transactions shall be applied to transactions between subdivisions of foreign entities in Russia (permanent establishments, branches, representative offices) and affiliated Russian legal entities. It should be noted that Russian subdivisions of

foreign legal entities are also Russian taxpayers, and therefore shall also prepare TP notifications and documentation. Only the allocation of profit between the foreign head office and the Russian subdivision is not yet fully subject to TP regulations. However, an amendment to the Russian Tax Code already indicates that the functions, risks and assets of a company shall be taken into account when determining the taxable income of such subdivisions in Russia. Hence, it is quite probable that the tax authorities will also, in the future, direct their attention to such expenses and income transfers. As Russia does not fully apply TP rules to the allocation of profit between foreign head office and Russian subdivisions double taxation problems might occur. Therefore careful structuring is recommended when larger projects in Russia are to be implemented via such subdivisions of foreign legal entities.

**Other Transactions:** Cross-border transactions between non-related parties, including transactions with exchange-traded commodities (crude oil, petroleum products, ferrous and non-ferrous metals, fertilizers, precious metals and gemstones) and transactions with foreign entities registered in low-tax ("offshore") jurisdictions blacklisted by the Russian Ministry of Finance, are subject to control if the income obtained under such transactions exceeds 60m RUB per year. Transactions within Russia are subject to TP controls if the aggregate income from such transactions exceeds 60m RUB per calendar year and if one party of a transaction is:

- A payer of mineral extraction tax and the transaction involves goods that are subject to the mineral extraction tax at a percentage rate;
- Exempt from profit tax or applies a 0% tax rate, while the other party is a payer of profit tax in Russia and does not apply a 0% tax rate;
- A resident of a special economic zone, while the other is not a resident in that special economic zone.

Transactions within Russia are subject to TP controls if the aggregate income from such transactions exceeds 100m RUB per calendar year, and if one party applies the unified agricultural tax or the unified imputed income tax while the other party pays profit tax under the general rules.

## TP Methods

Even though Russia is not an OECD member state, its recent TP rules are largely based on the OECD Guidelines. In the Russian Tax Code, the following methods are stipulated for determining the conformity of prices applied to controlled transactions to "arm's length" prices:

- Comparable market price method
- Resale price method
- Cost plus method
- Transactional net margin method (TNMM)
- Profit split method

*Please refer for the more detailed description of the methods to pages 4 and 5.*

**Please note:** Russian TP rules stipulate that the comparable market price method has priority over other methods and should always be examined. However, in practice the most applicable TP method in Russia is TNMM.

The following sources of information can be used to perform a TP analysis:

- Information on the prices and quotations of Russian and foreign commodity exchanges;
- Customs statistics on cross-border trade of the Russian Federation which is published or provided on request by a federal authority;
- Information on prices (or the range of price fluctuations) and exchange quotations contained in official information sources;
- Information from pricing agencies;
- Information on transactions performed by the taxpayer.

**Please note:** The above list of information which may be used to determine market prices is not exhaustive. However, data from Russian legal entities shall be used first and foremost, and only in case the information is not available are taxpayers are allowed to apply foreign information sources.

## TP Notification

In the order № MMB-7-13/524@ dated July 27, 2012, the Federal Tax Authority provided the format requirements of the TP notification and detailed instructions on what kind of data to fill in and how to file the notification. The notification consists of the following parts:

Title page with details of the taxpayer;

### Form 1A — information regarding the controlled transaction:

- Basis for TP control of the transaction;
- Information on the controlled transaction;
- The amount of income received and expenses incurred regarding the controlled transaction;
- Information on the applied TP method and information sources used (not obligatory).

### Form 1B — information regarding the subject of the transaction:

- Detailed information about the transaction (description, TN VED, OKP, OKVED codes, number of buyers / sellers, contract number and date, country of origin, place of delivery, conditions of supply, amount, price, etc.);

### Form 2 — details about the counterparty:

- Company name, registration details, tax number, registered office.

## TP Documentation

In the letter № OA-4-13/14433@ dated August 30, 2012, the Federal Tax Authority clarified the format requirements of the TP documentation. According to this letter, the TP documentation shall consist of the following parts:

- Title page with details about the parties of the transaction;
- Description of the company's activities regarding the formation of prices of the controlled transaction. This section shall include details about the goods / works / services of the controlled transaction to determine comparable goods/works/services and information on the level of competition in the respective market of the company, including information on major

competitors of the company;

- Details about the group of companies including information on major competitive advantages of the group of companies and details about tangible and intangible assets influencing its competitiveness;
- Details of the controlled transactions and functional analysis;
- Selection and justification of the applied TP methods: In this part, the taxpayer shall indicate the selected TP method, justify the selection, specify the used information sources and make an economic analysis by calculating the price range in the market or profit margin range;
- Range of prices or profitability in the market, including:

*- Description of the approach used for the selection of the comparable transaction or organizations with an indication of the information sources used;*

*- Description of the functions, risks, and assets used in the comparable transactions or organizations;*

*- Description of adjustments to ensure compliance with the "arm's length" principle;*

*- Calculation of the profit range in the market taking into account the details of the controlled transaction;*

Other information might be specified in the documentation if the taxpayer desires. The amount of extra information provided should correspond to the complexity of the transaction.

It should be also noted that a separate TP documentation package shall be prepared for each type of controlled transaction.

**Please note:** The Russian tax authorities generally cannot request TP documentation until June 1 of the year following the calendar year when the controlled transaction took place. Requested documents shall be submitted to the Russian tax authorities within thirty working days after receipt of the relevant request.



## TP Audit

The local tax authorities have no power to perform an audit on prices applied by a taxpayer since such an audit is performed by a separate government body. A special department has been established by the federal tax authorities for TP audits purposes.

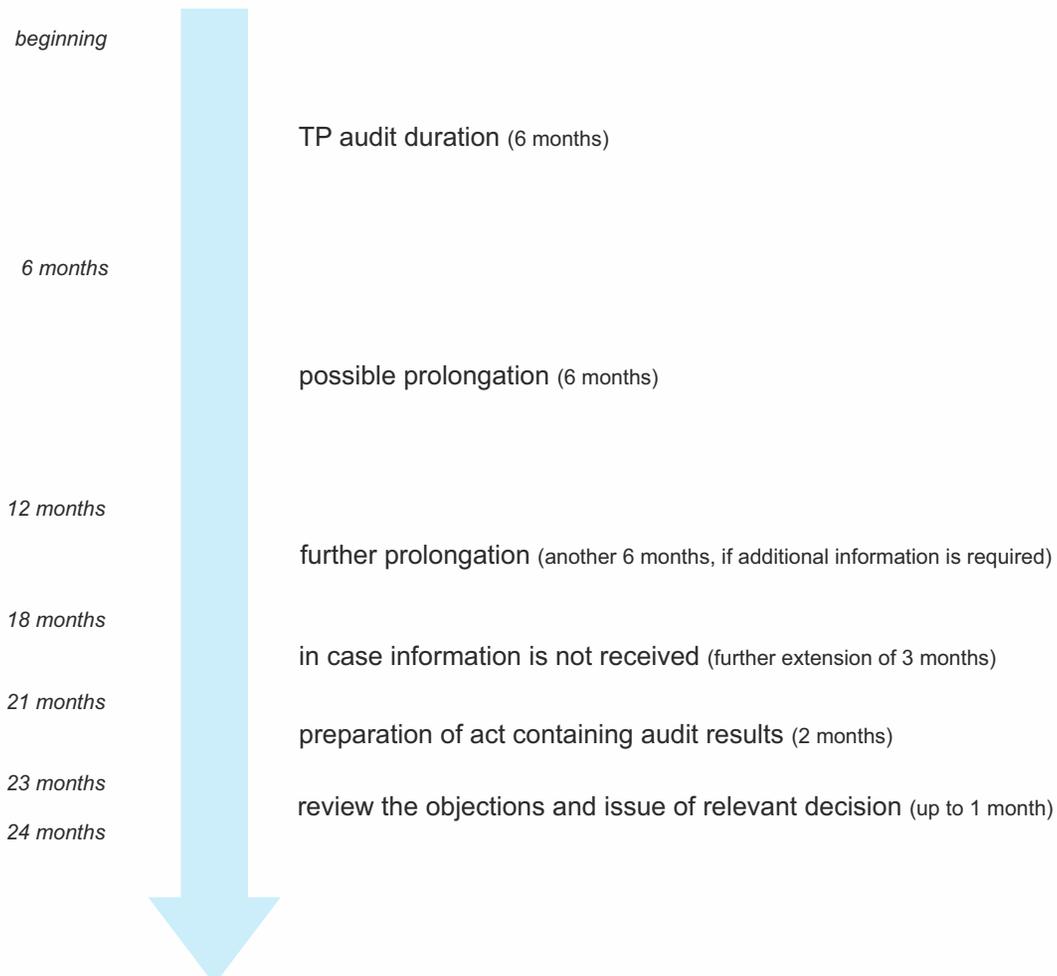
A local tax authority which has received notification from a taxpayer regarding controlled transactions shall submit the notification to the federal tax authorities within 10 days of receipt. Based on the provisions of the Tax Code, we consider that the TP tax audit may be a lengthy procedure.

The duration of a TP audit shall not exceed six months. However, the tax authorities may prolong the duration of the tax audit in exceptional cases for another six months.

The tax audit may be prolonged for an additional six months period if information from foreign tax authorities, experts, translation of documents, etc. is required. In case the requested information is not received from the foreign tax authorities, the TP audit may be extended for another three months.

Provided that the tax authorities identify deviations between the price applied to the transactions and the market price, which led to an understatement of tax, they have two months for the preparation of an act containing the audit results.

**Please note:** The taxpayer has the right to appeal the audit results within twenty working days after receipt of the act. The tax authorities then have between ten days and a month to review the objections and issue a relevant decision. Therefore, the total duration of a TP audit can be up to two years.



## Penalties

For 2014 – 2016, the penalty is 20%, and starting from 2017, 40% of the outstanding tax liabilities.



## Software Solutions in 1C, SAP or MS Dynamics

Many companies which have transfer pricing reporting requirements face the question of how to prepare all the required notifications for the state bodies.

The following versions of 1C enables the preparation:

- 1C Corporate
- 1C ERP
- 1C Enterprise

These software packages are standard solutions for preparation of the notification. However, they are not ready-to-use products, but simply tools for uploading data in the required format in order to send it (via TAXCOM or some other provider) electronically to the relevant institutions. Before the electronic submission, specialists must process, correct and adapt this data.

## Should thousands of customs tariffs be booked manually?

Nobody wants to manually enter tariff numbers into templates or to prepare an entire package of notification documents themselves. That is why companies must first make an analysis of the version of 1C they should use and, if necessary, update it or change to a new version (1C Accounting version, for example, does not offer the integral solution for the preparation of transfer pricing notification).

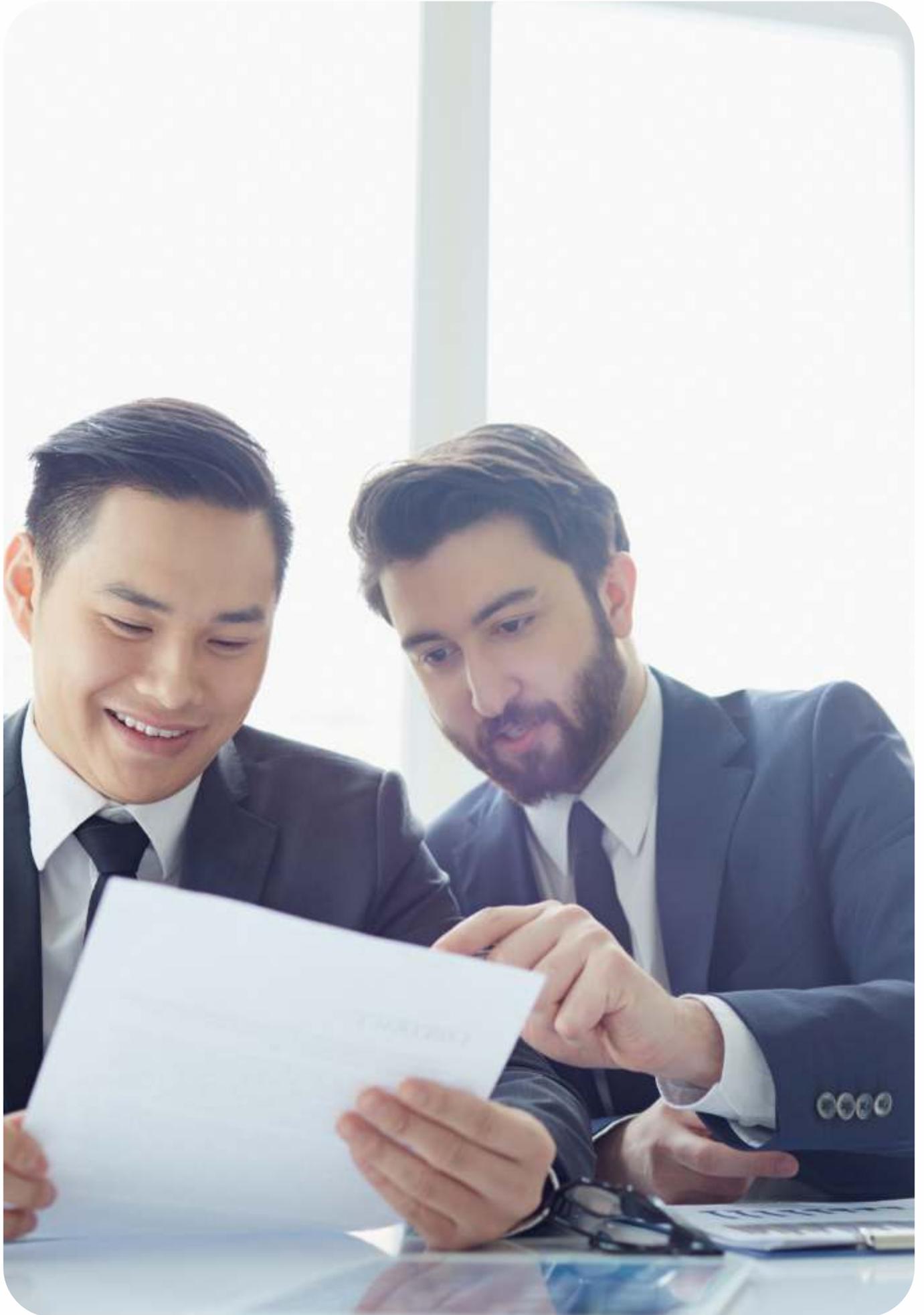
## What to do if a Russian subsidiary works in SAP or MS Dynamics?

Different SAP consulting companies already offer software solutions for the preparation of TP notification. Nevertheless, they, like 1C solutions, will not help your company to get around the need for preliminary and further processing of the generated data which must be submitted to the state authorities. The costs of such solutions often exceed the budgets set by companies. Furthermore, nobody can guarantee that it will not be necessary to make additional modifications or costly program updates in case of changes in legislation or state body requirements.

MS Dynamics still does not have a corresponding software solution and companies do not know how to fulfill the requirements of the Russian legislation using this software.

## Our solution

SCHNEIDER GROUP has developed for SAP and MS Dynamics a tool that allows to export all required data from SAP and MS Dynamics in EXCEL-format and import the data to 1C for the preparation of the TP notification.



# transfer pricing in ukraine



On September 1, 2013, a new TP law came into force in Ukraine. Starting in 2013 right up until recently, Ukraine's Verkhovna Rada (Parliament) has been adopting further reforms and improvements regarding TP regulations.

The new TP legislation has changed the “rules of the game”, which are still something of a novelty in Ukraine. That is to say, before September 2013 there were no comprehensive TP rules in Ukraine at all. Compliance with the new reporting rules requires a comprehensive effort on the part of taxpayers. The new law was implemented in the Ukrainian Tax Code as a new section (Tax Code of Ukraine, Article 39) and is generally based on the OECD Model Convention.

The principal features of the improved system of TP control will be outlined hereinafter.

The purpose of the implementation of the TP law is:

- (a) to have control over the prices in transactions between related parties (i.e. to check whether they are in line with the “arm's-length principle”), and;
- (b) to cease the tax-driven transfer of profit to foreign companies.

Notwithstanding the number of decrees and instructions, further adjustments were necessary as the TP regulations were far from being coherent and properly developed. Aiming at improving the situation, Ukraine's Parliament adopted several laws amending the TP rules in Ukraine during the years 2014 – 2016. The last amendments to the TP legislation have been adopted by Ukraine's Parliament on December 21, 2016 and became effective as of the January 1, 2017.

**Please note:** The TP regulations are challenging for Ukrainian businesses and for the state fiscal (tax) authorities due to their novelty and constant modification.

Currently, the Ukrainian fiscal (tax) authorities still have quite limited practical experience with TP regulations that take into consideration the principles of the OECD model. Therefore, it should be noted that a developed TP policy as well as TP documentation may need to be adapted to the specific requirements of the regulatory authorities.

Even from this short introduction you may see the complexity and dynamics of the development of TP regulations in Ukraine. Many gaps and uncertainties still exist regarding TP procedures, TP reporting and TP audit.

## Recent Changes

### **Extension of controlled transactions types**

New criteria for the intercompany transactions to be recognized as the controlled ones have been added.

### **New threshold for controlled transactions**

The threshold for recognizing transactions to be “controlled” has been increased.

### **New rules for transactions comparability**

The provisions of transactions comparability as well as the terms for selection of comparable companies have been specified.

### **Sources of information**

New sources of information for TP purposes have been added.

### **Grouping of controlled transactions**

The possibilities of grouping of certain controlled transactions within the TP documentation, as well as the criteria for such transaction which can be grouped have been introduced.

### **TP reporting**

The deadline for TP report filing has been changed.

### **TP documentation**

The list of information to be included in the TP documentation has been extended

### **Penalties**

New types of penalties for the delayed provision of TP report, TP documentation and declaration of controlled transaction in TP report have been introduced. Penalties in the area of TP will be calculated on a different principle.



## Main Provisions of and Definitions of the TP Law

### Related parties

In order to determine how companies might be affected by TP regulations, it is necessary to firstly determine if they are regarded as “related parties” in the context of TP rules.

Related parties in the context of the TP rules are both legal entities and individuals who are in specific relationships that may influence the conditions or results of their business activities.

Namely, under the following circumstances parties are recognized as related:

- If one of the parties (legal entity or individual) owns (directly or indirectly) 20% or more of the shares in the other party (legal entity);
- If a legal entity (through related parties) owns (directly or indirectly) 20% or more of the shares of other legal entity;
- If a legal entity or individual has the authority to assign the sole executive body of the legal entity; or at least 50% of the executive board of the legal entity; or at least 50% of the legal entity's supervisory board;
- In legal entities where at least 50% of the executive board and/or supervisory board is represented by the same individuals;
- In legal entities whose sole executive body is assigned by the same legal entity or individual (by the owner or by a supervisory board authorized by the owner);
- If an individual is considered to be closely related to another party, such persons are considered to be related (spouses, parents, children, brothers and sisters, etc.);
- If the overall amount of all loans / non-refundable financial assistance offered by a legal entity / individual to the other legal entity and / or all loans/non-refundable financial assistance offered by third parties exceeds the equity capital of the borrower by more than 3.5 times (10 or more times for financial institutions conducting leasing activities).

**Please note:** There are certain other criteria which are not directly prescribed by the law, but can be considered by the local tax authorities for TP purposes. Therefore, each specific case requires close analysis from a TP perspective. The definition of related parties also

envisages the right of the Ukrainian fiscal authorities to prove in court that an entity implemented practical control over decisions of another entity, though formally independent.

### Controlled Transactions

Since 2015 transactions between Ukrainian related parties are not regarded as controlled for TP purposes, whereas they previously were, in some cases.

The new rules apply only to cross-border transactions. Likewise, the new TP rules are not supposed to apply to value-added tax but only to corporate income tax.

Controlled transactions with non-residents: The list of controlled transactions subject to the Ukrainian TP regime has grown. Since January 2017, TP rules apply to the following transactions:

- Transactions with foreign companies involving the sale / purchase of goods / services through non-resident commission agents;
- Transactions with non-residents registered in low-tax jurisdictions according to the list adopted by the Cabinet of Ministers of Ukraine. Under the new rules, the list of these jurisdictions will serve as the definitive source of what are deemed to be low-tax jurisdictions. This rule deviates from the previous regulations.
- Transactions with non-residents who do not pay corporate profit tax, including the one levied on the profit received outside of the country of registration, and/or are not the tax residents of the country of their registration. The list of organizational forms of such non-residents is to be approved by the Cabinet of Ministers of Ukraine.

For the purposes of TP, transactions can be defined as follows:

- Operations with goods, such as raw materials, finished products, etc.;
- Operations on sale (purchase) of services;
- Operations with intangible assets, including royalties, licenses, payments for patents, trademarks, know-how, other intellectual properties;
- Financial operations, including leasing, investments, loans, commissions, guarantees, etc.
- Operations with capital, including sale / purchase of shares or other investments, sale / purchase of long-term tangible and intangible assets.

- Transactions between related parties with the involvement (as intermediaries) of the independent persons provided that such a person:

(1) does not perform any significant functions and

(2) does not use significant assets and/or does not bear significant risks in transactions between related parties. This provision is aimed at preventing evasion of the transfer pricing rules by involving third parties in controlled transactions.

New threshold for controlled transactions: Starting from January 1, 2017 business transactions with the same counterparty will be treated as controlled transactions, provided the following two conditions are met:

- The annual income from all sources of a taxpayer, determined based on the applicable accounting rules, that is reported for corporate profit tax purposes exceeds UAH 150 million (excluding indirect taxes) for the corresponding fiscal calendar year, and;
- the volume of such transactions of a taxpayer with the one counterparty, determined based on the applicable accounting rules, exceeds UAH 10 million (excluding indirect taxes).

**Please note:** There are many other specific cases which are not directly outlined either by the basic law or by the relevant clarifications. Given this, a rather “broad” and “inconsistent” approach is taken by the local tax authorities, so it can be in the interest of a tax payer to obtain consultation from tax consultants and / or clarification from the tax authorities prior to making a decision on whether or not to file TP reports.



## TP Methods and Information Sources

The general rule (subparagraph 39.3.2.1. of Article 39 of the Tax Code of Ukraine) provides that a taxpayer may choose any TP method which he deems appropriate for the pertinent transaction. However, the comparable uncontrolled price method (CUP method) should be used if it can be applied with at least the same degree of certainty as any other method. The resale price and cost plus methods should be given preference over the transactional net margin method (TNMM) and the profit split method.

The Tax Code of Ukraine prescribes the following methods for determining the conformity of prices in controlled transactions to the arm's length principle:

- Comparable uncontrolled price method (CUP method)
- Resale price method
- Cost plus method
- Profit split method
- Transactional net margin method (TNMM)

*Please refer for the more detailed description of the methods to pages 4 and 5.*

**Please note:** In Ukraine, the method chosen by the taxpayer is obligatory for the fiscal authority during the audit, unless the authority proves that the method used by the taxpayer does not allow determining the conformity of prices correctly.

According to Article 39, paragraph 39.5.3 of the Tax Code of Ukraine, a taxpayer may use the following information for establishing whether or not prices are in line with the arm's length principle:

- Information on uncontrolled comparable transactions of a taxpayer and of the entity which is the other party to the controlled transaction;
- Any information sources, which contain open information and provide information on comparable transactions and entities;

- Other information sources from which the taxpayer obtained information in a way compliant with the legislative requirements, and which provide information on comparable transactions and entities, provided that the taxpayer has provided the controlling authority with such information;
- Information has been received by controlling authorities in accordance with international treaties concluded by Ukraine.

In case a taxpayer proves the correspondence of the price to the arm's length principle using data from the above mentioned sources, the fiscal authority is required to use the same sources of information in their analysis. The only exception is for cases when it is proved that other information sources ensure a higher level of comparability.

This abovementioned rule is one of the most significant improvements of the TP legislation, since the previous system implied that the state-controlled "official" sources of information had priority over any other sources. The following sources of information may be used to perform a TP analysis:

- Information on the prices and quotations of Ukrainian and foreign commodity exchanges;
- Information on prices (or the range of price fluctuations) and exchange quotations contained in official information sources;
- Information from pricing agencies;
- Information on transactions performed by the taxpayer.

**Please note:** The abovementioned list of information which may be used to determine market prices is not exhaustive.

## TP Reporting

Taxpayers that have conducted controlled transactions during a reporting year are required to submit information on such transactions as an annex to the corporate profit tax return.

### Reporting specifications 2017

The new reporting requirements, introduced on January 1, 2017, can be summarized as follows:

- If the volume of the controlled transactions of a taxpayer with one counter-agent exceeds UAH 10 million (net VAT) during a calendar year, such a taxpayer shall report electronically to the fiscal (tax) authorities before October 1 of the following calendar year (para.39.4.2. of Article 39);
- Tax payers which use any method other than the “CUP method” to confirm that the price of the controlled transactions with non-residents from special jurisdictions are in line with the arm’s length principle shall inform the fiscal (tax) authorities about such transactions before May 1 of the following year. The information has to include details of all related parties involved in the sale/purchase chain up to the first unrelated counter-agent. The information about the indexes of the profitability of the related parties involved is mandatory.
- For the determination of a comparable price for the arm’s length principle, the taxpayer should use the average price on the commodity exchange for the 10 days prior to the day on which the controlled transaction occurred;
- A list of the relevant commodity exchanges will be adopted by the Cabinet of Ministers of Ukraine;
- If a taxpayer does not provide the required information, or provides information which is not sufficient to confirm compliance with the arm’s length principle, the fiscal (tax) authorities are entitled to determine the price for the controlled transactions themselves, applying the “CUP method”.

The new TP law introduces the following three types of TP reports:

- TP documentation. The term for submission has been reduced to one month from the date of receiving the relevant request from the state authorities (the previous rules allowed up to two months for the provision of transfer pricing documentation by large taxpayers);
- Report on controlled transactions if the volume of controlled transactions with the same counterparty exceeds UAH 5 million in one tax period (the previous version required submission of the report on all controlled transactions).

In Decree № 8, dated January 18, 2016, the Ministry of Finance of Ukraine outlined the format of the TP report as well as detailed instructions on the data requirements, as well as on how to file the report.



## TP Documentation

The new rules of the Tax Code of Ukraine (para.39.4.3. of Article 39) stipulate the obligation of taxpayers who are engaged in controlled transactions to prepare and make available TP documentation. Upon the request of the Ukrainian tax authorities the taxpayer is obliged to provide the supporting documentation regarding the transactions directly indicated in the request. Taxpayers are required to submit TP documentation within the 30 calendar days from the day of receipt of the request (para.39.4.4. of Article 39). The tax authorities may request such information from the taxpayer at any given time, but not earlier than May 1 of the year following the year when the respective controlled transactions were carried out.

The list of information that has to be provided is directly stipulated by the Tax Code of Ukraine (paragraph 39.4.6).

There is no pre-defined format for the preparation of TP documentation, however the set of documents or a single document shall contain the following information:

- details on the related parties;
- general description of the group (including parent company and its subsidiaries), as well as the organizational structure of the group, description of business activities of the group, transfer pricing policies, information on persons to whom the taxpayers provides local management reports;
- description of the taxpayer's management structure, its organizational structure;
- description of the taxpayer's activities and business strategy, in particular economic business conditions, analysis of respective markets of goods (services, works), on which the taxpayer conducts its business activity, list of the main competitors;
- information on taxpayer's participation in the restructuring of business or transfer of intangible assets in the reporting or previous year including clarification on aspects of these operations which influence or have influenced the taxpayer's activity;
- description of the controlled transactions, copies of respective agreements (contracts);
- description of the goods / works / services of the controlled transaction including their technical

characteristics, quality and reputation in the market, the country of origin and the manufacturer, trademark and other information related to the quality of the goods / works / services;

- information on settlements actually conducted within the controlled transaction (amount and currency of payments, date payment documents);
- factors influenced on forming and setting up the price, namely business-strategies of the parties to the controlled transactions (if any) which significantly influence the on the price of the goods (services, works); functional analysis of the controlled transaction;
- economic and comparable analysis;
- information on self-correction and proportional correction made by the taxpayer (if any).

A separate set of TP documentation shall be prepared for each related entity that has concluded transactions with the tax payer.

In cases where the provided information is not sufficient, the fiscal (tax) authorities may require additional information which must be submitted to the fiscal (tax) authorities within 10 days following the date of receipt of the additional request.

According to the Tax Code of Ukraine, the profitability ratio for the purposes of TP shall be defined based on the accounting data and financial statements displayed in accordance with the national or international accounting standards, in accordance with the accounting standards and financial reporting used in Ukraine, with a corresponding adjustment to enable comparability.

**Please note:** A "Big taxpayer" (defined as a taxpayer with income of over UAH 1 billion, or more than UAH 20 million of paid taxes during four consecutive reporting quarters) is allowed to negotiate the TP arrangement with the tax authorities and sign an advanced pricing agreement (for a certain period of time) confirming that the tax authorities approve the taxpayer's approach to estimating the "fair market price" for the transactions of such a "Big tax payer" (paragraph 39.6.1.1 of the Tax Code of Ukraine).

## TP Audit

The reasons for a TP audit are:

- Obtaining of the TP documentation from a taxpayer;
- Failure by a taxpayer to file the TP report (or filed without compliance with the requirements of the law);
- Failure by a taxpayer to submit (or submitted without compliance with the requirements of the law) the TP documentation.
- Obtaining of the documentary confirmed information regarding the violation of the arm's length regulations by a tax payer.

Since 2015, the duration of the TP audit shall not exceed 18 months (compared to 6 months before January 1, 2015). The TP audit may be extended for an additional 12 months if the information from foreign tax authorities, experts, translation of documents, etc. is required.

If deviations of the price applied to the transactions from the fair market price have led to an underestimation of tax liabilities were identified, State tax authorities have 2 working days following the last day of the TP audit to prepare an act containing the audit results.

The taxpayer has a right to pass to the fiscal (tax) authorities its objections within 30 calendar days after receipt of the act. The fiscal (tax) authorities then have 30 working days to review the objections and issue a relevant decision.

## Penalties

In case the tax authorities assess an additional tax liability in connection with the taxpayer's understatement, the taxpayer will be fined as follows:

- 25% of the understated tax liability for the first violation;
- 50% of the understated tax liability for the second violation.

In case the taxpayer by himself detects an underpayment of his tax liability, makes a self-adjustment and discloses and resolves understatement on a voluntary basis, the fines will be as follows:

- 3% of such understated liability, provided that it is identified through the adjusted tax return and paid prior to its filing;
- 5% of such understated liability, provided that it is identified through the consecutive tax return and paid thereafter.

The new TP rules envisage penalties for non-submission of TP report and/or mandatory TP documentation as well as for non-reporting of the controlled transactions.

These penalties are as follows:

- 300 times the minimum living wage for the persons capable of work as of January 1 of the reporting year (min. living wage since 1 Jan. 2017: UAH 1 600; thus UAH 480 000 ) for non-submission of the controlled transactions report;
- 1% of the amount of transactions not included in the controlled transactions report, but no more than 300 times the minimum living wage;
- 3% of the amount of the controlled transactions, for which no documentation was submitted, but no more than 200 minimum living wages (UAH 320 000) for all undeclared transactions, for failure to submit transfer pricing documentation;
- 5 living wages for each calendar day of non-submission after expiration of 30 calendar days – for failure to submit the report on controlled transactions or transfer pricing documentation after the 30 days following the deadline for payment penalties has expired;
- 1 living wage for each calendar day of the delay, but no more than 300 living wages – for delayed submission of report on controlled transactions;
- 1 living wage for each calendar day of the delay, but no more than 300 living wages – for delayed reflection of the controlled transaction in the respective report;
- 2 living wages for each calendar day of the delay, but no more than 200 living wages – for delayed submission of transfer pricing documentation.

There is a risk that the new fines will apply to TP violations regarding transactions performed before the law took effect, that is, in 2013 and 2014.

# transfer pricing in poland



The transfer pricing regulations in Poland generally follow the OECD Guidelines and are applied to transactions between domestic entities (where both parties are Polish tax residents), as well as to transactions between a Polish tax resident and a foreign entity. Regardless of whether the parties to the transactions are related entities, all transactions with entities based in tax haven countries are subject to TP documentation requirements if a certain value threshold is exceeded. The scope of application of the rules with regard to related party transactions is wide and covers goods, services and financing transactions, as well as the licensing and sale of intellectual property. Excluded however, are transactions where both parties are domestic residents / entities operating within a special vehicle – capital tax group.

Since 2014 the tax authorities conducted an increasing number of TP audits. Both the taxpayer's transfer pricing documentation and the actual terms of the intercompany transaction, including the calculation of prices and the profitability of the related parties, were subject of the tax authorities' investigations. Furthermore, several court

rulings issued recently specify that the analysis justifying the arm's length character of prices applied is an essential part of the transfer pricing documentation.

Since January 1, 2015, transfer pricing regulations were also extended to transactions with partnerships which were outside of transfer pricing restrictions before that date.

Since January 1, 2017, amendments of the Personal Income Tax and Corporate Income Tax acts are introduced in Poland, making significant changes to the Polish TP regulations and affecting transactions and events occurring from this date. The key changes concern i.a. the TP documentation content, reporting, benchmarking analyses and group documentation (master file). A further change regards the related parties definition: two entities will be deemed related if one of them holds (directly or indirectly) 25% of the share capital in the other entity (in contrast to 5% in the current regulations applicable until the end of 2016).

## Recent changes

On January 1, 2015, significant amendments on some provisions of the CIT and PIT Acts related to TP regulations came into force. These amendments include:

- Organization units who do not possess a legal personality (like partnerships) are now subject to arm's length requirements;
- An extension of documentation requirements which now makes partnerships and joint ventures between related parties subject to documentation requirements;
- An implementation of income adjustments which requires dealings between a Polish taxpayer and its permanent establishment (PE) abroad to be at arm's length;
- An implementation of documentation requirements with regard to dealings between a Polish taxpayer and its foreign PE;
- An introduction of an exemption to income adjustments and documentation requirements with regard to agricultural producers groups as well as fruit and vegetable producers groups;
- An introduction of procedures for double taxation elimination in domestic transactions.

## Main Provisions and Definitions of the TP Law

### Related parties

In order to determine how companies might be affected by TP regulations, it is necessary to first determine if they are regarded as "related parties" in the context of TP rules. The TP legislation provides a large list of criteria to determine if two parties are deemed to be related. In practice, the most important ones are the following:

- Two parties of a transaction are deemed to be related if they are under common control or management. The control can be exercised directly or indirectly by individuals, partnerships as well as companies. A share in capital of 5% or more is enough to lead to a capital relation (since 2017 this threshold shall be 25%).

- Two parties are deemed to be related if both parties to the transactions are Polish resident entities and one of the following conditions is met:

- *Family relationships (i.e., marriage, consanguinity or affinity up to the second degree);*

- *Relationships resulting from employment or property between Polish residents or between persons performing managerial, inspection or supervisory responsibilities in Polish residents.*

From the year of the tax payment, the tax settlements are open five years from the end of the calendar year for TP audits. TP rules apply to permanent establishments in Poland as well as foreign permanent establishments of Polish taxpayers.

### Transactions subject to control

Polish TP rules apply to Polish and foreign parties as well as to domestic and cross-border transactions.



## TP Methods and Information Sources

Under the Polish tax regulations, the following methods are stipulated for determining the conformity of prices applied to controlled transactions having “arm’s length”:

- Comparable uncontrolled price (CUP) method
- Resale price method
- Cost plus method
- Profit split method
- Transactional net margin method (TNMM)

**Please note:** In Poland, the tax authorities determine which method to use based on several factors, such as the course of the transaction, the availability of reliable information, etc. Transaction-based methods (CUP method, cost plus method and resale price method) are preferred over the transactional methods.

*Please refer for the more detailed description of the methods to pages 4 and 5.*

For the determination of prices with the arm’s length principle, comparable data from commercial databases are available and usually accepted in practice.

Commercial databases are available and usually accepted as a valid way to compare prices and, therefore, determine their compliance with arm’s length principles. The Amadeus database, for instance, is used by tax authorities in the APA process. Besides that, other sources of data, such as the Polish Central Statistical Office, are also used. If multiple data sources are available, local databases are preferred over pan-European or global ones.

## TP Documentation

### Minimum documentation requirements

According to Article 9a of the Corporate Income Tax Act and Article 25a of the Personal Income Tax Act, the minimum required TP documentation should currently contain:

- Identification of the functions to be performed by the parties participating in the transactions (including assets used and risks undertaken by the parties);
- Specification of all anticipated costs associated with

- the transaction including form and date of payment;
- Method and manner of profits calculation and specification of the transaction price;
- Determination of the economic strategy in case the strategy adopted by the party to the transaction has influenced the value of the transaction object;
- Indication of other factors, when the parties to the transaction took such factors into account to regulate the value of the transaction object; and
- Indication of the expected benefits by the parties to the transaction in case of contracts relating to intangible performances (including services).

**Please note:** The prices agreed between related parties should be determined on the market level. In case of performing transactions with related parties, taxpayers are obliged to note this fact to the tax authorities in an annual tax declaration and prepare a detailed TP documentation when transactions between related parties or transactions connected to tax heavens exceed the following threshold:

- 50 000 EUR in general cases;
- 100 000 EUR if the transaction value does not exceed 20% of the share capital recalculated for the purposes of the thin capitalization regulations;
- 30 000 EUR if services were performed or intangible assets were sold / made available; and
- 20 000 EUR if tax haven transactions are affected.

TP documentation should be prepared annually for partnerships in which the total value of partners' contributions to the partnership exceeds 50 000 EUR. With regard to joint ventures, only those with a value determined in an agreement (or, if not determined, the predicted value of the undertaking) over 50 000 EUR are subject to prepare the TP documentations annually.

### Additional documentation requirements

The documentation should be prepared in Polish and the records must be preserved for five years from the end of the year in which tax payment for the period concerned was due.

TP documentation has to be filed only if requested by the tax authorities but in such a situation the documentation shall be presented within 7 days (if this deadline is not met, tax authorities charge a penalty 50% tax rate on the income understated due to violation of the TP rules).

### **Advance Pricing Agreements**

Currently taxpayers may also apply for the advance pricing agreement (APA) in order to confirm with the Minister of Finance that the material terms and conditions agreed between related parties are comparable with data for unrelated party. In addition APA confirms that the taxpayer has chosen correct method of setting the prices and contains in particular functional profile description of the related parties participating in an analyzed transactions and algorithm for the transfer price calculation.

The agreement could be made for the period of up to 5 years and later it could be renewed for period not longer than 5 years. The decision confirming APA should be issued within 6 months since the procedure started.

In the process of procuring APA also tax authorities from other countries may be formally involved, however, such proceedings can take longer (statutory deadlines are respectively 12 and 18 months depending if one or more countries participate in the process).

### **TP audit**

TP audits in Poland could be performed as part of Corporate Income Tax (CIT) audit. A TP audit may also be initiated as a result of an audit carried out in the related entity.

In practice, in the course of CIT audits, intercompany service fees usually attract the most attention of the Polish tax authorities, whereas the documentation of the results of the intercompany services purchased by Polish entities is of special interest to the authorities. The audits focus also on cross-border business restructurings resulting in the transfer of business functions from Poland.

With respect to the procedure, the tax authorities begin a TP enquiry with a request for TP documentation as well as other information which relate to intercompany transactions. This documentation does not include an economic analysis. In case the tax authorities conclude that a transaction was not concluded at market value, they issue a tax decision declaring the correct amount of assessed tax. It is crucial to provide tax authorities with formal TP documentation within 7 days since receiving the request (see also Penalties section below).

### **Penalties**

- 19% of the outstanding tax liabilities for transactions below the threshold for mandatory documentation
- 19% of the outstanding tax liabilities for transactions above the threshold when the documentation is presented and accepted
- 50% of the outstanding tax liabilities for transactions above the threshold when documentation is not presented to the tax authorities within 7 days since receiving the request (or it is presented to the tax auditors but they disregard it since it does not satisfy the formal requirements).



## **Overview of Amendments from 2017**

With regard to the recent changes mentioned previously, which shall come into force as of January 1, 2017, Polish taxpayers are supposed to review their related party transactions, consider their arm's length character and make any adjustments necessary prior to the introduction of the new documentation requirements. In detail the key changes will affect i.a.:

### **TP documentation content**

The information required to be included in Polish TP documentation will be changed and extended. In the future it will cover – beside the description of a transaction itself – “other events included in the accounting books” between related parties, provided that they influence the Polish taxpayer's taxable income or loss. Taxpayers will not only have to indicate the applied TP method but also to justify the selection of that method, including presenting the algorithm for settlements of the transactions. Hitherto it was enough for a taxpayer to indicate the TP method applied without an obligation to prove that the TP method complies with the arm's length principle.

### **Reporting**

Within the deadline to submit the annual tax declaration taxpayers shall prepare TP documentation and file with the tax authorities a statement confirming that it has been prepared. TP documentation itself is not submitted to the tax authorities.

Since 2017 the introduction of the amendments will terminate a long-lasting debate between taxpayers, tax authorities and the Courts with respect to the timeframe for the preparation of TP documentation. This should be done within the deadline to submit the annual tax return, i.e. by the end of third month following the tax year-end date.

### **Benchmarking analyses**

TP documentation requirements will increase for Polish taxpayers whose revenue or expenses exceed 10m EUR. Such taxpayers in the future will be obliged to present a benchmarking study to verify the arm's length nature of their related party transactions. The benchmarking study will consider Polish companies conducting comparable activities.

### **Limitation of entities obliged to prepare TP documentation**

The amendments entering into force since 2017 do not require the preparation of TP documentation for:

- taxpayers whose revenues or expenses are lower than 2m EUR in a given year;
- transactions that are covered by an agreed Polish Advance Pricing Arrangement (APA). These transactions are subject to simplified documentation, containing only limited information; and
- transactions where a price is dictated or required by another acts or legal provisions.

### **Group documentation (master file)**

A more extensive documentation (master file) presenting the overall nature of a groups' activities and transactions will be required since 2017 from taxpayers whose annual revenues or expenses exceed 20m EUR.



# transfer pricing in kazakhstan

TP in Kazakhstan has not undergone many notable changes in 2015 and 2016; only a small number of legislative changes, TP reforms and enforcement actions have been implemented. However, there was a noteworthy change with regard to the structure in the governmental system through the implementation of a reform which combined the tax and customs authorities into a single State Revenue Committee.

In the course of 2016, discussions have been taken place between the authorities and different taxpayer associations, as well as industry specific bodies concerning future reforms in TP. They focus for instance on i.e.:

- The cancellation of the mandatory requirement for the submission of the annual monitoring report by large taxpayers (in lieu thereof the monitoring report would be submitted to the authorities upon explicit request);
- The introduction of stricter requirements relating to transfers/receipts of funds for transactions via offshore bank accounts.

Even though Kazakhstan does not belong to the list of OECD member states, its contemporary TP law has some common features with the OECD Transfer Pricing Guidelines (OECD Guidelines). On January 22, 2015, Kazakhstan signed a two-year memorandum of understanding with the OECD, which covers various matters, including taxation. Thus, there is the possibility of future convergence between the Kazakh tax legislation and OECD programs, frameworks and principles.

However, one of the key differences from the OECD Guidelines is the fact that the Kazakh TP legislation applies to all international business transactions without distinguishing between related and unrelated parties.

**Please note:** Even though an approach in tax matters between Kazakhstan and the OECD took place, the TP law in Kazakhstan in certain aspects significantly differs from the key principles laid down in the OECD Guidelines as it contains a number of unusual concepts.

The arm's length principle introduced by the Kazakh tax law focuses mainly on the transaction price rather than on the financial results of the transaction in general. This results in a restriction of the application of this principle with regard to profit-based transaction methods, which are included in the law. Furthermore, although the profit split method and transaction net margin method is recognized by TP Law, there is no any clear guidance on the approach or application of these two methods, so in practice these methods are rarely applied in Kazakhstan.

Kazakhstan's TP legislations are considered one of the most detailed within the Commonwealth of Independent States. The relevant laws on TP in Kazakhstan are laid down in the Law of the Republic of Kazakhstan № 67-IV (dated 5 July 2008) on "Transfer Pricing", which entered into force on January 1, 2009 as well as in the Code of the Republic of Kazakhstan "On taxes and other obligatory payments to the budget" (the Tax Code).

## **Kazakhstani TP regulations, rulings and guidelines**

- Law of the Republic of Kazakhstan № 67-IV (dated July 5, 2008) on “Transfer Pricing”.
- Law of the Republic of Kazakhstan № 377-IV (dated January 6, 2011) “On State Control and Supervision in the Republic of Kazakhstan”.
- Order of the Minister of Finance № 129 (dated March 26, 2009) “On approval of the regulation on the procedure of interaction of the authorized bodies during transfer pricing control”.
- Order of the Minister of Finance № 194 (dated March 19, 2015) “On approval of the list of goods (works, services) international transactions that are subject to monitoring”.
- Resolution of the Government № 292 (dated March 12, 2009) “On approval of the list of officially recognized sources of information on market prices”.
- Resolution of the Government № 74 (dated February 3, 2011) “Concerning the approval of Regulations (methodology) on pricing of natural uranium concentrate”.
- Resolution of the Government № 741 (dated June 30, 2011) “Concerning the approval of Regulations (methodology) on pricing of sponge titanium, titanium ingots and elementary magnesium ingots”.
- Resolution of the Government № 1197 (dated October 24, 2011) “On approval of the rules for concluding an agreement on application of transfer prices”.
- Resolution of the Government № 1324 (dated November 11, 2011) “On approval of the reporting forms for monitoring of transactions and rules for conducting monitoring of transactions”.
- Resolution of the Government № 848 (dated June 26, 2012) “On approval of rules for identifying of market price of goods under production sharing agreements, including transactions with parties registered in tax havens”.
- Rules for correction of cost for imported goods from members of Customs Union № 1249 dated November 28, 2010.
- List of exchange goods adopted by government regulation, № 638 (dated May 6, 2009).
- List of countries with concessional tax regime adopted by government regulation, № 595 (dated December 29, 2014).

## Main Provisions and Definitions of the TPLaw

### Applicability of TP rules

TP control applies in Kazakhstan regardless of whether the parties to a particular transaction are related. Hence, local TP rules apply to related and unrelated parties regarding international business transactions as well as to certain domestic transactions related thereto. According to TP law “related parties” are individuals or entities whose special common relations may influence the economic results.

The term “international business transactions” is defined as incorporating:

- Export and / or import transactions for the purchase and sale of goods;
- Transactions for the execution of works and rendering of services, when one of the parties is a nonresident carrying out activities in Kazakhstan without a permanent establishment;
- Transactions undertaken by residents of Kazakhstan that are executed outside Kazakhstan for the purchase and sale of goods, the execution of works, and delivery of services.

The scope of TP law is extremely broad due to the fact that TP control includes certain transactions which affect unrelated parties. Revenue authorities are authorized to control transfer prices applied for the following types of international business transactions:

- Between related parties;
- Barter / exchange transactions;
- Involving counter-claims and reducing claims;
- With parties registered in tax havens;
- With legal entities that have taxation privileges;
- With legal entities that have reported losses in their tax returns for two tax years previous to the transaction

Control by the state authorities can further be carried out with regard to domestic intercompany transactions within the territory of the Republic of Kazakhstan if they are directly related with international business transactions:

- When minerals are sold by a subsoil user,
- If one of the parties benefits from tax exemptions,
- If one of the parties has losses for the two last years preceding the year of the intercompany transaction.

## TP Methods and Information Sources

In order to determine the market prices, one of the following five methods has to be applied:

- Comparable uncontrolled price method (CUP)
- Cost plus method
- Resale price method
- Profit split method
- Transactional net margin method

*Please refer for the more detailed description of the methods to pages 4 and 5.*

The above methods should be applied in hierarchal order. The primary method is the CUP method, which must be used in first instance. Any next method can be applied only if taxpayer can prove that the preceding method is not applicable.

**Please note:** In the course of 2015 – 2016, discussions about potential future reforms are taking place between the authorities and different taxpayer associations as well as industry specific bodies. The discussions concern, among others, the change in the order of the pricing methods to be applied. In case the CUP method is not applicable, taxpayers would be allowed to apply any of the other four methods that is most appropriate for a particular case. However, these discussions are not successful so far.

Resolution of the Government № 292 (dated March 12, 2009) “On approval of the list of officially recognized sources of information on market prices” introduced a list of international bulletins, magazines and other sources of information which are officially recognized sources of information on market prices. This list takes precedence over other sources.

Other sources of information may be used in the following hierarchal order:

- Officially recognized sources of information;
- Information on stock exchange quotations;
- Information of governmental bodies, authorized bodies of other states and organizations;
- Information provided by special TP software, information submitted by the parties to the transaction and other sources of information.

Like with the TP methods, taxpayer can refer to a particular source of information only if it proves that the preceding source is not applicable.

## Advance Pricing Agreements

Advance pricing agreements (APA) are possible. APA is signed between the tax authority and its duration is limited to three years. By law the process takes approximately 90 days, but in practice is much longer. In practice, only a handful of companies have succeeded in arranging an APA because of an extensive list of documentation requested by authorities and their overall reluctance to enter into APAs.

## TP Documentation

Taxpayers are required to maintain documentation justifying the prices used in international business transactions. In Kazakhstan, documentation requirements are established for two categories of transactions:

(1) Transactions with goods / work / services which are subject to monitoring:

The Rules for Performance of Monitoring Transactions were introduced in Kazakhstan in February 2009. In compliance with these rules, particular taxpayers, who are involved in intercompany transactions, are supposed to submit a special pricing monitoring declaration by May 15, following the financial year after the controlled transactions occurred. Additional supporting documents for monitoring purposed may be requested and have to be submitted within 30 calendar days after receiving the request. In order to fall under the abovementioned requirement the following two conditions have to be met:

- The taxpayer is on the list of the 300 largest taxpayers, which is approved and issued by the Ministry of Finance on annual basis.
- The bargain item is on the officially approved list, i.e. only transactions with certain goods and/or works and services should be reported.

(2) All other transactions with goods / work / services which are subject to TP control:

Formal TP documentation requirements apply to international business transactions and domestic transactions related thereto and oblige taxpayers to keep and maintain documentation verifying the applied transfer prices. Reporting includes:

- Financial Statements;
- Documentation confirming the justification of prices used;
- The TP method used to determine the market price and the source of information;
- A description of the goods/work/services, terms of the contract and business strategy and information on the trade broker's margin; and

- Other documents and information which provide the accordance of used prices with market prices. Upon request of the relevant tax authority, taxpayers have to submit the necessary documentation within 90 days of the date of the competent authority's request. The tax authority also has the right to request information from banks, financial institutions, insurers, auditors, stock traders.

**Please note:** The law stipulates an extensive list of information that has to be included into the TP documentation. It is of high importance to comply with the relevant rules and requirements.

Acceptable languages for documentation are Russian and Kazakh. However, the reporting for TP monitoring is supposed to be in Russian.

TP control is carried out by the relevant authority using the following means:

- Monitoring of certain transactions;
- Carrying out of TP audits;
- Enquiries of the parties of the transaction and any third parties directly or indirectly involved in the transaction as well as the competent authorities of the other jurisdictions involved.

**Please note:** The TP law does not allow for any deviation of a transaction price from a comparable arm's length price except for agricultural products where deviation of up to 10 percent is tolerable.

Furthermore the TP law stipulates the rules that specify pricing of uranium, titanium and magnesium products. The recent updates to the law refer to the implementation of the rules on pricing of oil and gas products being sold under production-sharing agreements.

## Penalties

The failure to provide documents or monitoring reports by the specified deadline is subject to an administrative fine of up to 350 MCI. MCI is the monthly calculation index determined for a relevant year by the Law "On the Budget of the Republic of Kazakhstan." The MCI in 2017 is KZT 2,269.00 (approximately EUR 7 at current exchange rates).

If as a result of a TP audit the tax authorities detect price deviations resulting in additional taxes, an administrative fine of up to 50% of the amount of underreported taxes applies. This fine is not levied if taxpayer voluntarily reports additional tax liabilities arising from non-arm's length transaction before TP audit commences. Interest charge on underpaid tax of 2,5 times the refinancing rate established by the National Bank for each day the tax obligation remains overdue still applies in either case.

# transfer pricing in belarus



At the end of 2011, over two hundred amendments were made to the general and special sections of the Tax code of the Republic of Belarus (the Tax Code) via Law No 330-Z. Amendments to the general section introduced TP rules in Belarus, which entered into force on January 1, 2012 and are outlined in Article 30-1 of the Tax Code. It is worth mentioning that no TP control existed in Belarus before these amendments were made. The adoption of legislation relating to TP control formed an integral part of the law harmonization process within the Eurasian Economic Union, as TP rules had already been adopted by the Russian Federation in 2012 and by the Republic of Kazakhstan in 2008. TP control established a new form of tax control over taxpayers, and attempts to prevent tax evasion through price manipulation.

In 2015, the TP rules provided for in the Tax Code saw a few changes and amendments. Foreign trade transactions being subject to TP control were extended from transactions with goods only to transactions with goods, works and/or services. The biggest change made was in regards to the threshold of transactions falling under TP control. The threshold was reduced from 6m Belarusian Rubles (BYR) to 100 00 BYR. The comparable profit method was also introduced as an accepted TP method. The consequences of these adjustments were an increase in the number of transactions that fall under the TP control and further convergence with the approaches followed by the legislation of OECD member states.

In line with the Government initiative to develop national TP rules to avoid the transfer of profit to foreign or local companies benefiting from tax incentives or lower tax rates, further changes to the Belarusian Tax Code covering, amongst other things, Belarusian TP rules, were made effective as of January 1, 2016.

These new regulations (i) further expanded the list of the transactions subject to TP control, (ii) introduced the profit split method as an accepted TP method, (iii) obliged taxpayers to report controlled transactions to the tax authorities and prepare documents to support the arm's length nature of the prices they apply, and (iv) provided much greater TP controlling power to the Tax Authorities.

**Please note:** Notwithstanding the fact that some years have passed since the first TP provisions were introduced to the Tax Code of Belarus, TP rules are still far from being well developed, and most of the provisions are unclear and quite ambiguous, especially for the taxpayer. Currently, the Belarusian tax authorities have insufficient practical experience with TP regulations that take into consideration the principles of the OECD Model Convention. However, since 2016, taxpayers are obliged to notify the tax authorities on controlled transactions they have made, while the tax authorities will be entitled to request from the taxpayers TP documentation and confirmation of the economic feasibility of the prices for such transactions. While in Russia and Ukraine such notification is a separate report, in Belarus the notification is done via the new electronic VAT invoice system. So no separate annual report is required.

It should be noted that a group's TP policy, as well as TP documentation of a particular Belarusian taxpayer, if prepared, may need to be adjusted according to the new requirements of the Belarusian TP rules.

## Main Provisions and Definitions of the TP Law

### Related parties

For TP purposes, the concept of related parties mainly refers to legal entities and / or individuals whose relationships directly impact the conditions or economic results of their mutual activities or the activities conducted by the persons they are representing. These relationships include the following:

### Relevant transactions

The law provides (three) different types of transactions, which fall under the control of tax authorities:

- Between the shareholders (founders) of a single company;
- in case one person or a party directly or indirectly holds at least 20% of shares / participation interest in the other company;
- in case one person or party is subordinated to the other due to the official position it occupies or one person is under the direct or indirect control of the other person;
- in case the parties jointly control (directly or indirectly) the third party;
- Between spouses, kinships or close relatives, adoptive parents and adoptees, custodian and ward.
- Between trustees and beneficiaries, trustee and trust management companies.

### Controlled transactions

The Tax Code envisages three separate groups of transactions which fall under the TP control of the tax authorities in Belarus:

Real estate transactions, if the transaction price deviates by more than 20% from the market price as of the date of the sale or acquisition, including cases when the transactions are made by means of residential bonds and co-funded construction;

Foreign trade transactions (goods / works / services / property rights):

- if the total price of the transactions performed with a single qualifying party within one tax year exceeds 100 000 Belarusian Rubles (BYR) as of the date of the transaction, excluding indirect taxes:

*- with a related party;*

*- with a party (an individual or a company) from a tax haven jurisdiction / offshore zone (the list of such territories is currently prescribed by the President Decree of the Republic of Belarus);*

*- with a related party and a party (an individual or a company) from a tax haven jurisdiction / offshore zone made with participation of an independent third-party intermediary (intermediaries) via a set of transactions, provided such party neither performs any additional functions nor is involved in this transaction with any assets;*

- if the total price of the transactions performed with a single qualifying party within one tax year exceeds one million Belarusian Rubles (BYR) as of the date of the transaction (major transaction), excluding indirect taxes:

*- on transactions regarding sales and (or) acquisition of certain strategic goods (oil, gas, other hydrocarbons, some wood products, etc.) according to the list defined by the Belarusian Government);*

*- on sales and (or) acquisition related to transactions made by companies qualifying for the so-called "major taxpayers".*

Local (onshore) transactions (goods / works / services / property rights):

- if the total price of the transactions performed with a single qualifying party within one tax year exceeds 100 000 Belarusian Rubles (BYR) as of the date of the transaction, excluding indirect taxes:

*- with a related party being a Belarus resident (including transactions made via a set of transactions with participation of an independent third-party intermediary (intermediaries)), who has been benefiting from tax incentives and not paying corporate income tax for the respective tax period in line with the legislation (e.g. High Tech Park residents, the residents of Free Economic Zones, taxpayers under simplified taxation regimes, taxpayers registered with or conducting activities on specific territories, etc.).*

**Please note:** A major taxpayer is a local company with annual revenue declared for corporate income tax purposes for the previous tax year exceeding the equivalent of EUR 50m. (Paragraph 3 of Article 64-1 of the Belarus Tax Code).

For the abovementioned purposes “foreign trade” is defined as:

- The sale (including commission and agency agreements, as well as similar civil law contracts) of goods / works / services / property rights to foreign legal entities and/or individuals;
- The acquisition (including commission and agency agreements as well as similar civil contracts) of goods / works / services / property rights from foreign legal entities and/or individuals.

According to the Tax Code, the following transaction prices in are not subject to TP control in Belarus:

- Prices set in accordance with the International Treaty;
- Prices for securities, forwards, futures and other financial instruments;
- Prices set according to the requirements of the antimonopoly bodies;
- Prices for banking operations as specifically listed in the Banking Code of Belarus;
- Prices formed by trade sessions at a registered commodity exchange or in the course of public sale (tender);
- Prices as set in accordance with Belarusian or foreign legislation;
- Prices set by a state control body, or when there are limits to prices, markups or discounts, or when there are other limitations on profitability.

## TP Methods

Belarus is not an OECD member country yet, and Belarusian legislation does not provide for any reference to OECD methodology or approaches. Nevertheless, recent changes to the Tax Code (taken effect as from January 1, 2016) established new TP rules and methods that are quite similar to those as outlined in Chapter II of the OECD Guidelines. Current Belarusian TP legislation enumerates five TP methods that shall be consistently used when determining, for tax purposes, the conformity of transaction prices to market prices. These are as follows:

- **Comparable uncontrolled price method (CUP):** This method is the most commonly applied by the Tax Authorities in Belarus.
- **Resale price method**
- **Cost plus method**
- **Comparable profits method:** This method is the same as the Transactional net margin method (TNMM). The comparison is based on the annual financial statements and attachments thereto prepared in accordance with Belarusian accounting legislation. This method is widely applied by the taxpayers and professional services companies due to availability of the information on profitability by independent parties performing comparable transactions on similar markets (databases Amadeus, Orbis and etc.).
- **Profits split method:** This method can be applied to check transfer prices in any transactions to be made by the taxpayers starting from January 1, 2016.

**Please note:** Each method indicated above is used if the market price of goods cannot be determined by the application of one of the previous methods.

*Please refer for the more detailed description of the methods to pages 4 and 5.*

For the comparison of transactions with market prices, the tax authority may use information:

- On prices used for transactions involving identical (homogenous) goods/works/services in the Republic of Belarus;

- On prices based on foreign trade statistics of the Republic of Belarus that were published or obtained from customs or statistics authorities at the request of a tax authority;
- On prices used for transactions involving identical (homogenous) goods / works / services in foreign states;
- On prices on exchange of quotations from official information sources of government bodies of the Republic of Belarus or foreign states (<http://www.belstat.gov.by>; <http://www.butb.by>);
- On prices used for identical (homogenous) goods / works / services from competent bodies of foreign states, as requested by state bodies of the Republic of Belarus;
- Data from price-information agencies.

In cases where these information sources cannot be used, the Belarusian Tax Code prescribes the following sources:

- Information on prices and quotations from published and/or publicly available information systems and publications;
- Information of the market value of objects as determined under the valuation laws of the Republic of Belarus or foreign states;
- Information on the market value of identical (homogenous) goods / works / services obtained from Belarusian or foreign state statistic agencies;
- Information obtained from organizations' financial statements and state statistical reporting, including information from publicly available information systems;
- Other information that the tax authorities have at their disposal.

## TP Reporting

The TP notification on controlled transactions shall be submitted via the system of electronic VAT invoices. Separate reports, like in Russia or Ukraine, are not yet required.

## TP Documentation

Changes to the Tax Code of Belarus (which came into effect on January 1, 2016) introduced the obligation for taxpayers who are engaged in controlled transactions to prepare and make available upon the corresponding request of the tax authorities:

- Economic justification for the price of the transaction, which should be provided by the taxpayers with respect to each controlled transaction (regardless of deviation in transaction price from arm's length prices), and (or)
- TP documentation – should be provided by qualifying major taxpayers to support the prices applied in major transactions performed.

**Please note:** A major transaction is a foreign trade transaction performed by a major taxpayer with a single party within one tax year of an amount exceeding one million Belarusian Rubles (BYR) as of the date of the transaction (excluding indirect taxes) (Subparagraph 1.3. paragraph 1 of Article 30-1 of the Belarus Tax Code).

The abovementioned supporting documentation shall be provided only in relation to the transactions directly indicated in the relevant request (notification) of the tax authorities and within the following deadlines:

- For the purpose of an off-site (desk) tax audit – within the deadline specified in the request of the tax authorities, but not earlier than in 10 business days as from the date the request is sent.
- For the purpose of tax audits other than off-site tax audit – in line with the time limit as provided for in the tax audit order but not earlier than in 5 business days as from the date of its receipt.

There is no pre-defined format for the preparation of TP documentation, however the Tax Code of Belarus enumerates the set of documents or a single document that can be prepared by the taxpayer as TP documentation, provided these comprise of the following data/information:

- Full details of the counter-party to the transaction, including related party or a party registered in a tax haven jurisdiction (an offshore zone), including description of their business operations, market sector and business reputation, purpose for the goods, works, services or property rights acquisition or sale,

identification of the functions to be performed by the parties participating in the transactions (including assets used and risks undertaken by the parties), and other relevant information;

- General description of the group (including parent company and its subsidiaries), as well as the organizational structure of the group, description of business activities of the group, transfer pricing policies;
- Description of the transactions, including the subject and conditions for their implementation (price, time frames, INCOTERMS 2010 references, payment conditions and other specific terms set by the Belarus legislation binding for agreements or contracts);
- Information on sales and management strategy of the taxpayer in the corresponding tax period;
- Description of the goods / works / services of the controlled transaction including technical characteristics thereof, quality and reputation on the market, the country of origin and the manufacturer, trademark and other information related to the quality of the goods / works / services.
- Results of the comparison study of commercial and financial conditions of the transaction;
- Selection and justification of the applied TP method: in this part, the taxpayer shall indicate the selected TP method, justify the selection, specify the information sources used and make an economic analysis by calculating the market price range or profit margin range;
- Any corporate income tax adjustments and amounts thereof due to application of the Belarus transfer pricing rules, if any;
- Range of market prices or profitability on comparable transactions with independent parties,
- Any other information to support that the prices in the controlled transactions are consistent with the arm's length prices applied in controllable transactions.

In cases where the provided information is not sufficient, the tax authorities may require the taxpayer to submit additional information which must be filed within a deadline as specified in the corresponding request.

**Please note:** According to the Belarusian Tax Code, the profitability ratio for the purposes of TP control shall be defined based on the accounting data and financial statements prepared in accordance with local accounting

standards and financial reporting applied in Belarus. TP documentation should be prepared in Belarusian / Russian.

Major taxpayers have to prepare and keep TP documentation on any controlled transaction qualifying for the requirements as set forth in the Tax Code of Belarus. TP documentation only has to be filed if requested by the tax authorities, and in within the deadlines set in a relevant notification

## TP Audit

As a result of the introduction of TP control, the tax authorities are empowered to compare prices used in certain transactions with the market prices and, provided that these prices differ, adjust the corporate income tax base if this results in an increase in profit (corporate income) tax. This empowerment is due to the fact that the Tax Code stipulates that market prices used for TP control must be comparable.

Under the Tax Code, a tax authority revises the profit tax base as follows:

- In the first step it compares the terms of the analyzed transaction with information on market prices for identical (homogenous) goods / works / services / property rights that it has at its disposal and that meets the requirements of Article 30-1 of the Tax Code;
- In case such information is not available, the tax authority consequently applies the following methods; (1) resale price method, (2) cost plus method and (3) comparable profits method.

The following transactions can currently be reviewed by the tax authorities exercising TP control:

- Sales of real estate in 2012 - 2015, irrespective of the transaction price;
- Foreign trade transactions on sales of goods, including those with related parties, which amount exceeds the threshold of:

- 20bn BYR – for the transactions completed in 2012, and  
- 60bn BYR – for the transactions made in 2013 - 2014.

- Foreign trade transactions on sales / acquisition of goods (works, services), including those with related parties, which amount exceeds the threshold of:

- 1bn BYR – for the transactions performed in 2015

Starting from 2016, the following transactions will be subject to TP audit:

- Foreign trade transactions on sales / acquisition of goods (works, services, property rights) which exceed the threshold of:
  - 100'000 BYR – for transactions with related parties and residents of tax haven jurisdictions (offshore zones) as per the list specified by the President of Belarus;
  - 1 million BYR – for transactions involving sales and (or) acquisition of certain strategic goods as per the list to be defined by the Belarusian Government, and for transactions performed by major taxpayers.
- Sales and acquisition of real estate provided the transaction price deviates by more than 20% from the arm's length price.

For profit tax purposes, the correctness of calculation of the tax base from the controlled transactions is checked during the tax audit of a particular taxpayer. Adjustments to the tax base, if made due to the application of TP control, do not involve any taxes other than corporate income tax.

**Please note:** Since 2016 taxpayers are required to report electronically to the tax authorities any controlled transaction they have performed in the corresponding tax period. Hence, the tax authorities are able to perform TP control on the transactions based on the information contained in the relevant reports of the taxpayers.

## Penalties

If a TP adjustment results in additional tax liability, the taxpayer is subject to late payment interest of 1/360th of the refinancing rate established by the National Bank of the Republic of Belarus effective for each period of delayed payment (the current annual rate applicable from March 15 is 15 %).

The penalty for underpayment of tax arising from non-compliance with the transfer pricing regulations (as well as non-compliance with any other tax regulations) is 20 percent of the underpaid tax.

According to Article 13.6 of the Belarus Code of Administrative Offences, the recalculation of profit tax may result in administrative liability.

Criminal liability may occur in cases where the underestimation of the tax base was made deliberately or the tax base underestimation causes major damage (exceeding 1000 basic units; approx. 11'500 Euros). The penalty in such cases is up to 7 years of imprisonment in addition to confiscation of property.

In order to know exactly to what extent TP penalties can be enforced, please refer to Chapter 5, Article 52 (Penalty interest) of the Belarusian Tax Code and Chapter 13 (Administrative offences against taxation) of the Code of Administrative Offences of the Republic of Belarus.

# what does this mean for you?

We consider that with the enforcement of the (new) TP regulations in Russia, Ukraine, Poland, Kazakhstan and Belarus, the matter of TP in the different countries will attract the increased attention of the relevant tax authorities. Therefore, the management of the company's pricing policy and documentation of transactions will require additional consideration by taxpayers.

The following steps should be undertaken in order to be prepared for a TP audit:

1. Examine intercompany transactions in order to prepare a list of transactions which are subject to TP control and verify whether or not you are above the relevant thresholds and need to prepare TP notifications and TP documentation.
2. Select the appropriate TP method under the local law.

3. Analyze the performed functions, involved risks and used assets in order to prepare a functional analysis.

4. Carry-out a benchmark analysis.

5. Prepare the TP notification / report and TP documentation.

It should be taken into consideration that the preparation of the TP documentation is a time-consuming procedure. Therefore, it is important to calculate what additional personnel should be hired or to outsource the process to external consultants. However, preparation for the TP policies implementation should start as soon as possible in order to meet legislative requirements.

**Please note:** Due to country-specific differences in TP law, the TP methods used in the abovementioned countries might differ significantly.

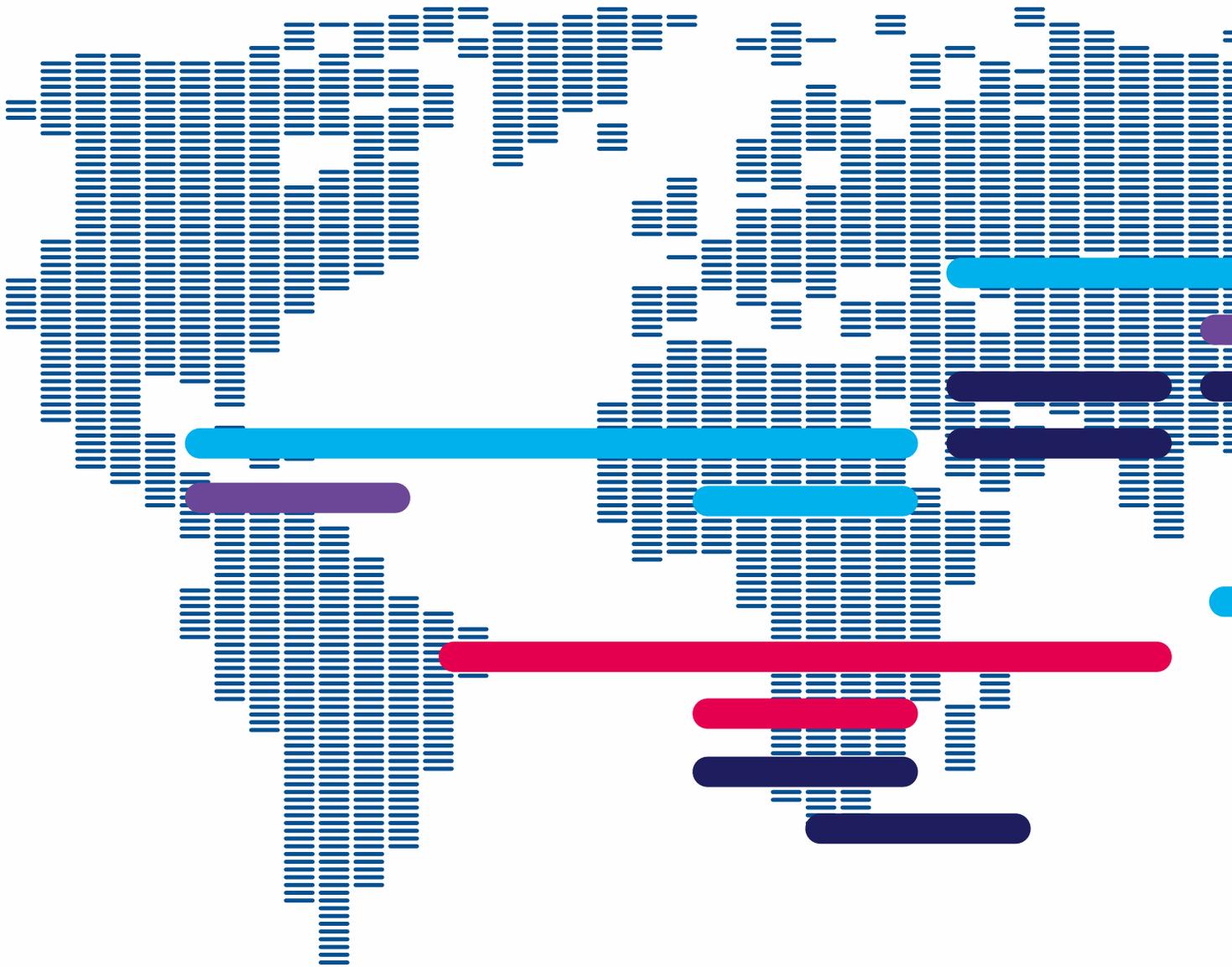
## how we can help you

SCHNEIDER GROUP has a team of accountants and tax experts with extensive experience in accounting and taxation in our offices in Russia, Ukraine, Poland, Kazakhstan and Belarus, who will be pleased to provide you with:

- An analysis of your transactions which may be subject to TP control;
- A benchmark study to check if your intercompany prices comply with the "arm's length" principle

- Preparation of the TP documentation for your controlled transactions;
- Preparation of the notifications/reports to the tax authorities about controlled transactions;
- Support to your in-house team in preparing TP documentation and notifications.

Please feel free to contact us to discuss your individual TP requirements.

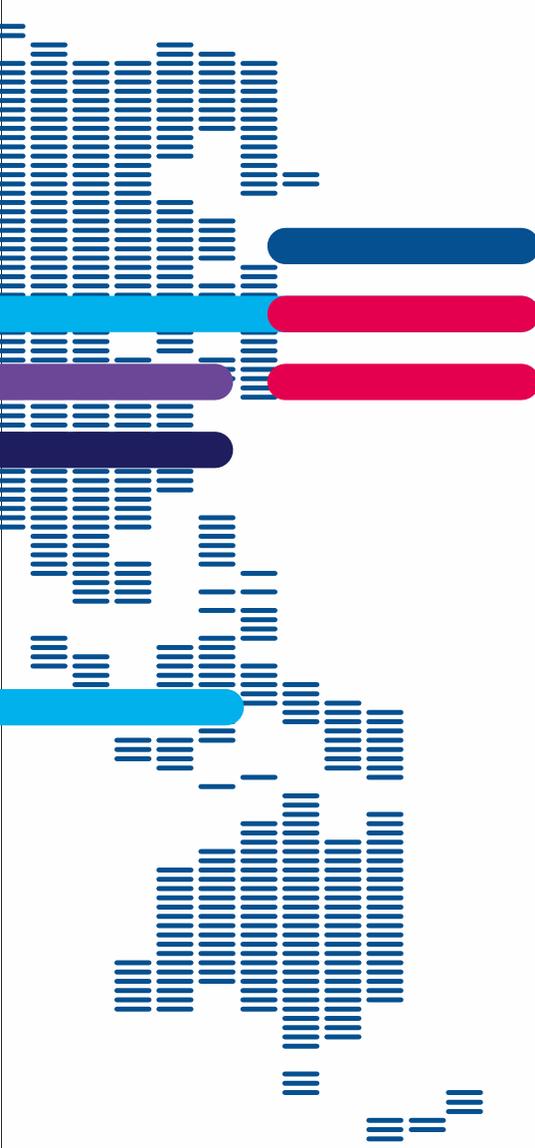


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This brochure is a summary and partly schematic overview of the rules and requirements provided by the legislation in Russia, Kazakhstan, Belarus, Ukraine and Poland. It is for information purposes only and does not offer any legal advice. It is recommended to receive an individual consultation on the matter before making a transaction. Copying or distribution of this brochure in any form whatsoever is possible only after a prior approval of the copyright owner.

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