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Introduction

Jacek Bajger
Partner in the Tax Advisory Department, Head of the Transfer Pricing Team at KPMG in Poland

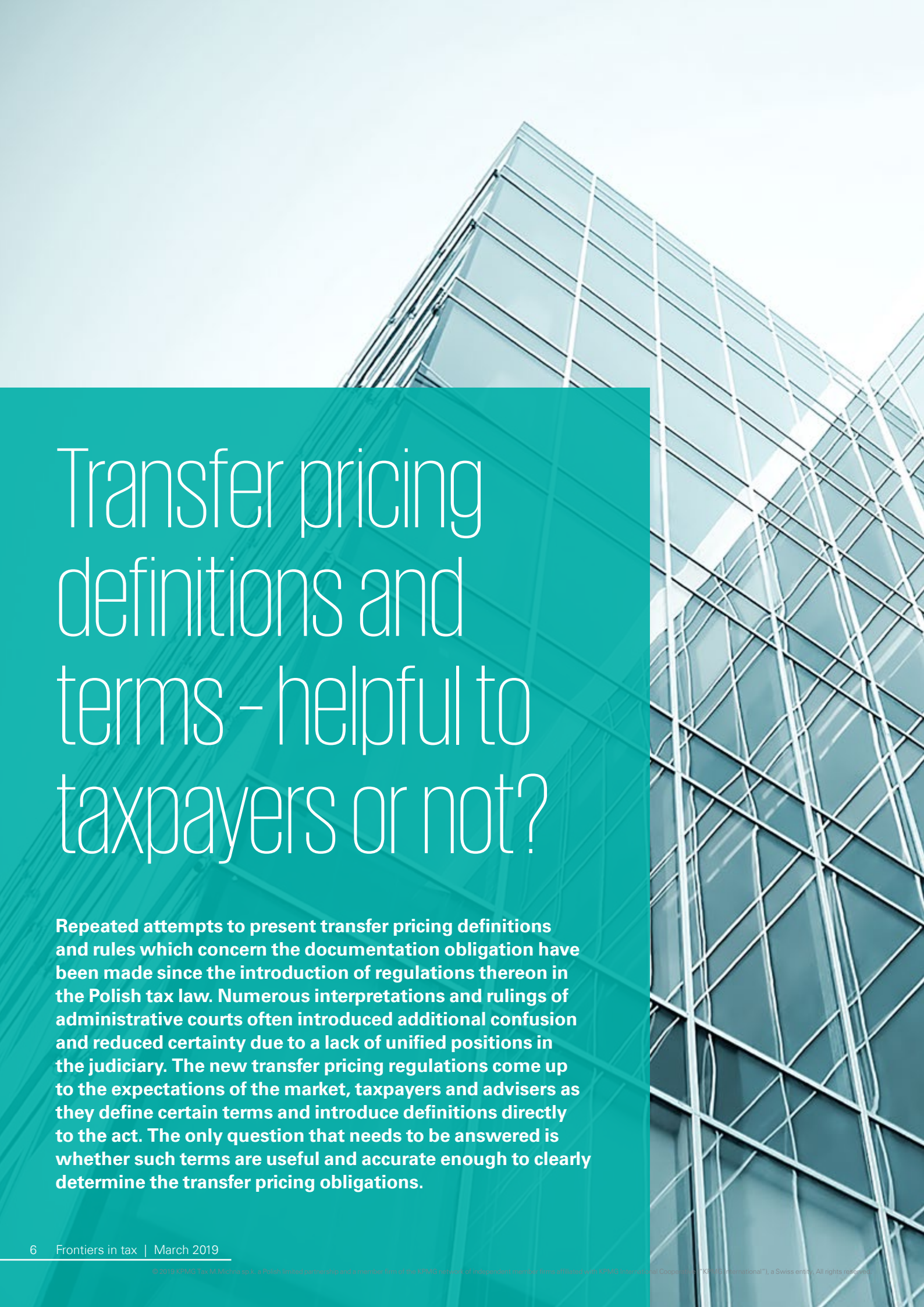
Monika Palmowska
Partner in the Tax Advisory Department in the Transfer Pricing Team at KPMG in Poland

All of us remember the emotions stirred up by the groundbreaking amendments to the transfer pricing regulations which became effective at the beginning of 2017. Our memories of the year 2018 are even more unforgettable as we had to expend a lot of effort on the preparation of documentation concerning transactions with related entities pursuant to such new regulations. We also remember the feeling of relief when we found out that the statements on possession of the documentation were not to be submitted after three but rather nine months after the end of the tax year. And, finally, we derive genuine pleasure from recalling the moment of satisfaction when the documentation was ready, and all the works in that scope - completed. It had a taste of victory!

Yet, we cannot forget that - as the old saying goes - victory lasts a day. And, therefore, on the very next day, we have to start preparations for the next challenges, the next battles that may happen in the future. Unfortunately, the same applies to the fulfilment of obligations arising from transfer pricing regulations. We have just witnessed the next amendments to the regulations which not only significantly modified obligations in the scope of the required tax documentation but also introduced new definitions, new approach to price verification methods, and even new sanctions and penalties. Yet, there are some exemptions and cases of relief from certain obligations, and some regulations which make it easier for us to substantiate prices in some transactions. Learning about the regulations as well as applying them in a correct manner will result in good preparation in case of any future questions raised by tax authorities in relation to transactions and their terms and conditions.

The current issue of the Frontiers in Tax magazine contains information on the changes introduced to the transfer pricing regulations as of the beginning of 2019. We have to remember that to subdue the enemy without fighting is the pinnacle of skill.

Wishing you a pleasant read!



Transfer pricing definitions and terms – helpful to taxpayers or not?

Repeated attempts to present transfer pricing definitions and rules which concern the documentation obligation have been made since the introduction of regulations thereon in the Polish tax law. Numerous interpretations and rulings of administrative courts often introduced additional confusion and reduced certainty due to a lack of unified positions in the judiciary. The new transfer pricing regulations come up to the expectations of the market, taxpayers and advisers as they define certain terms and introduce definitions directly to the act. The only question that needs to be answered is whether such terms are useful and accurate enough to clearly determine the transfer pricing obligations.

Terms and definitions

The new transfer pricing regulations are an attempt to clarify or give new meaning to terms which are the basis for settlements within a group resulting in numerous obligations stemming from such regulations. Many have been completely transformed, like the definition of related entities which caused a significant widening of a group of entities considered as related ones. Pursuant to the new definition, the threshold of at least 25% stake does not refer only to shares in the capital but also to instruments other than shares which determine ownership dependency. Beginning in 2019, such an instrument shall be, among others, the voting rights in controlling/management bodies, shares or rights to share in profits or assets, held participation units as well as investment certificates. The new wording was also given to the term of indirect relations or personal relations with great significance attached to the condition that a given person has the ability to influence the key business decisions taken by a given entity.

The catalogue of transfer pricing definitions was also extended by including the term of controlled transaction and transfer price which had not been defined previously in the Polish legal system. The reason for introducing both definitions was the need to minimise the doubts and difficulties in the area of interpretations related thereto. Pursuant to the new regulations, the term "controlled transaction" includes any and all business activities of which reorganisation, conclusion of a cost-sharing agreement, joint venture agreement or partnership deed are included. While the term "transfer price" is based on the importance of the financial result of the conditions determined as a result of existing relations, of which price, remuneration, financial result or ratios are included.

Special attention in the scope of terms and definitions should be paid to the new provisions referring to the nature of relations between the entities which form - for unjustified economic reasons - the structures aimed at the evasion of transfer pricing regulations. Pursuant to the new regulations, all entities participating in such a structure shall be considered as related entities in the aforementioned case.

Obligation to prepare transfer pricing documentation

The new transfer pricing regulations on the determination of documentation obligations introduce simplified rules when compared to elaborate formulas introduced by the legislator in the provisions which became effective on 1 January 2017.

The obligation to prepare tax documentation for transactions with related entities is imposed on taxpayers when the value of such transactions exceeds the statutory limits which are as follows:

a. PLN 10,000,000 for commodity transactions

b. PLN 10,000,000 for financial transactions

c. PLN 2,000,000 for service transactions

d. PLN 2,000,000 for transactions other than those mentioned hereinabove.

The documentation thresholds are set separately for cost- and revenue-

> The amended transfer pricing regulations provide not only for additional reporting obligations and obligatory benchmarking analyses, but also for a number of types of relief which enable taxpayers to reduce the administrative involvement in the process of preparing tax documentation.

generating transactions as well as for each transaction individually, through analysing its nature regardless of its assignment to the categories listed hereinabove. The nature of the transaction is assessed in terms of its economic effect on a given taxpayer and applicable benchmarking criteria and price verification methods.

What is important is that the amended provisions accurately determine what should be considered as value in a controlled transaction. For loans and credits - it is the value of the principal, for issues of bond - the nominal value of bonds, for guarantee - the amount of guarantee sum, and for other types of transactions - it includes other values determined on the basis of issued/ received invoices, agreements, and or made/received payments.

At the same time, it was indicated that the values taken into account for determining the documentation obligations should be net values, that is reduced by the amount of goods and services tax.

Types of relief

The amended transfer pricing regulations provide not only for additional reporting obligations and obligatory benchmarking analyses, but also for a number of types of relief which enable taxpayers to reduce the administrative involvement in the process of preparing tax documentation.

The first and most important relief that taxpayers are entitled to - pursuant to the new regulations - is the exclusion of the documentation obligation for transactions entered between two Polish companies. The possibility of qualifying for the relief is hedged around with a number of reservations. Still, the mere fact of introducing such type of limitations offers the possible space for more effective management of the number of documents to be prepared.

The relief also applies to transactions between the entities belonging to tax capital groups as well as transactions subject to decisions concerning advance pricing agreements (APAs).

Furthermore, the legislator intends to exclude the following from the documentation obligation: transactions which do not permanently constitute revenue or tax deductible costs, and transactions with prices set in a tender procedure.

What is significant is the absence of the documentation obligation in no case exempts from the necessity of performing the transactions in compliance with the arm's length principle. Such exemptions are only aimed at reducing the administrative involvement on the part of taxpayers and channelling the efforts to the transactions of key significance in terms of possible cross-border transfer of profits.

Katarzyna Olejnik-Długaszek
Senior Manager
in Transfer Pricing Team
at KPMG in Poland

Jakub Roszkiewicz
Manager
in Transfer Pricing Team
at KPMG in Poland

Elements of tax documentation and reporting obligations

The new regulations of the CIT Act effective from 1 January 2019 amended not only the elements of the Local File and Master File in transfer pricing documentation but also the content of the statement and information subject to reporting.

The scope of elements of transfer pricing documentation

The primary purpose of the documentation prepared pursuant to the new regulations is to evidence the arm's length character of a controlled transaction and not only to include all of its formal elements.

The objective of the amendments to the transfer pricing regulations introduced by the legislator from the beginning of 2019 is to unify the documentation elements effective in Poland with the international standards as described in the OECD Guidelines as well as to systematise them through including all the detailed information about the scope of a given type of documentation in one regulation. Such activities are aimed at, among others, reducing the taxpayers' costs and administrative duties related to the preparation of documentation.

Local File

Pursuant to Article 11q (1) of the CIT Act, the Local File of the transfer pricing documentation includes the following elements:

1. description of related entity;
2. description of transaction, of which analysis of functions, risks and assets;
3. analysis of transfer prices (benchmarking analysis or compliance analysis);

   It means that each transaction subject to documentation obligation should have the analysis of compliance with the arm's length principle prepared, that is regardless of revenues or costs earned/incurred by taxpayers.
4. financial information

4. financial and tax information of the group of related entities.

An important change is the possibility of preparing the Master File in English by another entity belonging to the group of related entities and the submission of its translation into the Polish language only upon a relevant request made by the tax authority. Yet, it does not exempt taxpayers from the liability for the compliance of such documentation with Article 11q (2) of the CIT Act.

The detailed scope of the elements of Local File and Master File which supports the taxpayers in the preparation of correct documentation was defined in the Regulation of the Minister of Finance dated 21 December 2018 on transfer pricing documentation related to corporate income tax.

> The primary purpose of the documentation prepared pursuant to the new regulations is to evidence the arm's length character of a controlled transaction and not only to include all of its formal elements.

The most important change seems to be the introduction of the regulation defining the purpose of preparing the documentation, that is evidencing that the transfer prices in the intra-group transactions were in compliance with those that would have been set by unrelated parties.

At the same time, it should be noted that the three-tier concept of transfer pricing documentation presented in Action 13 of the Base Erosion and Profit Shifting (BEPS) has not been amended and it still provides for the following division of the documentation: local file, master file and country-by-country report.

Master File

Pursuant to Article 11q (2) of the CIT Act, the Master File of the transfer pricing documentation includes the following elements:

1. description of the group of related entities;
2. description of significant intangible assets of the group of related entities;
3. description of significant financial transactions of the group of related entities;

Country-by-Country Reporting

The elements to be included in the information about a group of entities in 2019 have not been changed. Such issues are regulated in the regulation of the Minister of Development and Finance dated 13 June 2017 on the detailed scope of data provided in the information on the group of entities and the method of its completion and the regulation amending it dated 14 March 2018.

Wider scope of statement on the preparation of the Local File

For the first time, the statement on the preparation of the Local File, apart from the confirmation of its preparing, will have to include the statement on the application of arm's length prices.

Pursuant to new Article 11m of the CIT Act, related entities that are obliged to draw up the Local File submit - to Tax Offices, by electronic means of communication - the statement on its preparation by the end of the 9th month after the end of their financial year.

In addition to the existing information on the preparation of the documentation, the statement includes a new element being the confirmation that the transfer prices in controlled transactions included in the Local File are set pursuant to the terms and conditions which would have been agreed upon by unrelated entities, that is in compliance with the arm's length principle.

The legislator also makes the amendments in the scope of signing the statement. Pursuant to the new regulations, the statement on the preparation of transfer pricing documentation is signed by a manager of the undertaking, as interpreted in the Accounting Act, while specifying their function. When several people fulfil the criteria for a manager of the undertaking or their designation is not possible, the statement is to be submitted and signed by each person authorised to represent a given entity. What's important is that such a statement cannot be made by an attorney.

For the first time, the statement on the preparation of the Local File, apart from the confirmation of its preparing, will have to include the statement on the application of arm's length prices.

Information about the transfer prices reported via the expanded electronic TP-R form

The obligation to report a much wider range of information about transfer prices via the new electronic TP-R form may cause a lot of difficulties.

The amendments made by the legislator include, but are not limited to, reporting the information about transfer prices via the new electronic TP-R form which replaces the existing CIT-TP form. The deadline for the submission of the TP-R form by the entities obliged to report the information about transfer prices is by the end of the 9th month after the end of the tax year commencing after 1 January 2019. The information to be reported by taxpayers

via the new form includes, but is not limited to:

1. purpose of submitting the information and the period it is submitted for;

2. data identifying the entity submitting the information and the data of the entity for which it is submitted;

3. general financial information related to the entity for which the information is submitted;

4. information concerning the related entities and controlled transactions;

   The taxpayer shall be obliged, among others, to evidence the category of controlled transactions they have been a party to, their value, as well as to specify the country in the territory of which business partners in the transactions have their registered offices or management. When a given category of transactions is exempt from the obligation to prepare the tax documentation pursuant to Article 11n (1) of the CIT Act, that is when the transaction is concluded between two domestic entities and with the assumption of satisfying the specified criteria, of which - among others - the criterion of no tax loss incurred by the parties, then such information should be appropriately shown in the form.

5. information concerning methods and transfer prices;

   Another novelty is also the possibility of reporting the information about the selected method used to verify transfer price, transfer price applied in a controlled transaction, and the results of transfer pricing analysis as early as at the stage of TP-R form. Such an approach may cause a higher risk of transfer pricing control, especially for those transactions where the reference to the arm's length range alone is not sufficient and it is required to present additional arguments substantiating the arm's length character of the transactions which are included only in the documentation and cannot be added to the TP-R form.

6. additional information or notes concerning the data or information referred to in points 2-5.

As a result of the introduced amendments and when compared

The detailed scope of data and information submitted in the information about transfer prices, together with the notes as to its preparation, is described in the regulation of the Minister of Finance dated 21 December 2018 on information about transfer prices related to corporate income tax.

with the CIT-TP form, taxpayers have more work and are obliged to disclose much more information, especially the data concerning their financial result.

Summary

The new regulations are to make it easier for taxpayers to prepare correct transfer pricing documentation. A greater transparency of the regulations concerning the content of transfer pricing documentation, with the general scope of the elements included in the CIT Act, and the more detailed one - in regulations, is aimed at reducing the tax risk on the part of taxpayers. Furthermore, the legislator systematised and unified the regulations with the OECD Guidelines. Some of the major amendments are introduced in relation to the statement and the information about transfer prices as taxpayers will have to report more information.

Paulina Szemiel
Manager
in Transfer Pricing Team
at KPMG in Poland

Monika Bonikowska
Consultant
in Transfer Pricing Team
at KPMG in Poland

Simplified settlement rules (*safe harbours*)

When introducing the new transfer pricing regulations from 2019, the legislator withdrew from making the scope of documentation obligations conditional on the scale of the taxpayer's business activity. Thus, the benchmarking study is, as a rule, an obligatory element of tax documentation. The only exception from that rule includes the transactions to which taxpayers apply the so-called simplified settlement rules (safe harbours).

Grounds and reasons for the introduction

Provided that the requirements stipulated in the provisions of the CIT Act are satisfied, the application of simplified settlement rules in transactions related to services (Article 11f) or loans (Article 11g) results in considering the price (or its element) in a transaction with a related entity as compliant with the arm's length principle and, therefore, the tax authorities withdraw from the determination of the taxpayer's income or loss in that scope. Pursuant to the statement of reasons for the draft of the amended act, such a solution not only protects taxpayers against questioning the price by the tax authorities, but it is also aimed at limiting the scope of documentation obligations. For when taxpayers fulfil the conditions, they are exempt from the obligation to prepare the benchmarking study for a given transaction.

The solutions in the scope of safe harbours have been already applicable in many countries, and - as a rule - they are aimed at introducing simplifications in relation to simple routine transactions. To give an example, the entities in Switzerland and Russia apply the simplifications in the scope of intra-group financing, and in Singapore - the simplifications related to routine intra-group services and loans.

In Poland - pursuant to the amended regulations - safe harbours are applicable to two categories of transactions, that is low value-adding services and loans, credits and bond issues.

Low value-adding services

Simplified settlement rules related to low value-adding services will be applicable in relation to transactions where the mark-up for service has been determined with the use of cost plus method or transactional net margin method. The acceptable level of mark-up is defined at a level not higher than 5% for the purchase of services and not lower than 5% for the provision of services. In such a way, the application of simplifications in transactions between domestic entities will be possible only when the mark-up is determined at a level equal to 5%, which corresponds to the recommendations included in the OECD Guidelines and the conclusions of the EU Joint Transfer Pricing Forum.

Furthermore, service providers are entitled to benefit from the simplified settlement rules in transactions when they are not entities with their place of residence, registered office or management in a tax haven. While the service recipients are obliged to have a calculation including the information about the type and amount of the costs taken into account in the said calculation, the value of remuneration as well as the manner of applying - together with the justification - of the selected allocation keys for all related service recipients.

It should be emphasised that the regulation is to be applicable only and exclusively to the services listed in Annex No. 6 to the CIT Act which include, but are not limited to, accounting and auditing services, human resources services, IT, legal or administration and office services. Moreover, the services have to support the service recipient's business activities in character, and they cannot be the basic objects of the business activities pursued by the group of related entities. Furthermore, the value of services rendered by the service provider to unrelated entities has been limited to 2% of the total value of such services (provided to related and unrelated entities). In addition, such services cannot be resold by the service recipients, excluding their reinvoicing.

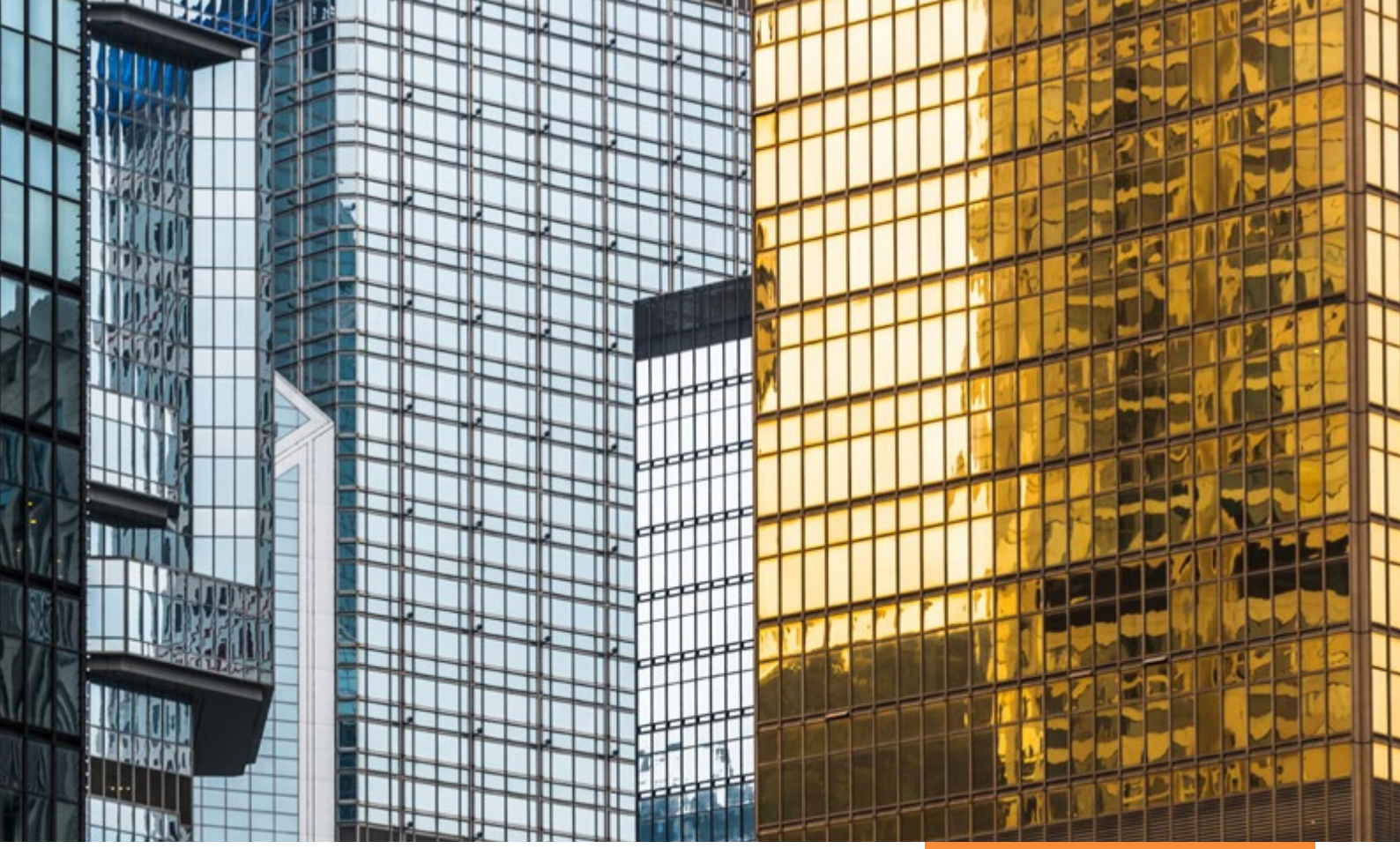
When the aforementioned criteria are jointly fulfilled, the authorities waive the determination of the taxpayer's income or loss in the scope of mark-up.

Loans, credits, bonds

It will be possible to apply simplified settlement rules to transactions consisting in granting or receiving a loan or credit or issuing or taking up bonds if the interest rate - upon the conclusion of the agreement - is determined based on a relevant type of base interest rate and margin provided for in an applicable announcement effective as at the day of concluding the agreement.

The information about the rules on the determination of the interest rate effective from the beginning of 2019 was included in the Announcement of the Minister of Finance dated 21 December 2018 which provides that the types of the base interest rate may be as follows, depending on the transaction currency: WIBOR 3M, LIBOR USD 3M, EURIBOR 3M, LIBOR CHF 3M or LIBOR GBP 3M.

> Provided that the requirements stipulated in the provisions of the CIT Act are satisfied, the application of simplified settlement rules in transactions related to services or loans results in considering the price (or its element) in a transaction with a related entity as compliant with the arm's length principle.



The base interest rate is increased by a margin of 2 percentage points, and when the value of the base interest rate is less than zero - the total of the absolute value of the base interest rate and 2 percentage points (in such a case, the ultimate value of the interest rate is at the level of the margin). The value determined in such a manner is the maximum margin for the borrower and the minimum margin for the lender.

An additional criterion which conditions the application of safe harbour is the conclusion of the transaction for the maximum period of 5 years. During the financial year, the total level of the payables or receivables of the related entity on account of the principal amount (without taking into account the interest value) with related entities cannot exceed PLN 20 million, provided that the value subject to that limit is determined separately for the financing granted and received, regardless of its form. The next condition for the application of simplified settlement rules is the absence of additional fees, except for interest, e.g. commissions or bonuses, and the financing cannot be granted by an entity from the so-called tax haven.

When the aforementioned criteria are jointly fulfilled, the authorities waive the determination of income or loss in the scope of interest rate value.

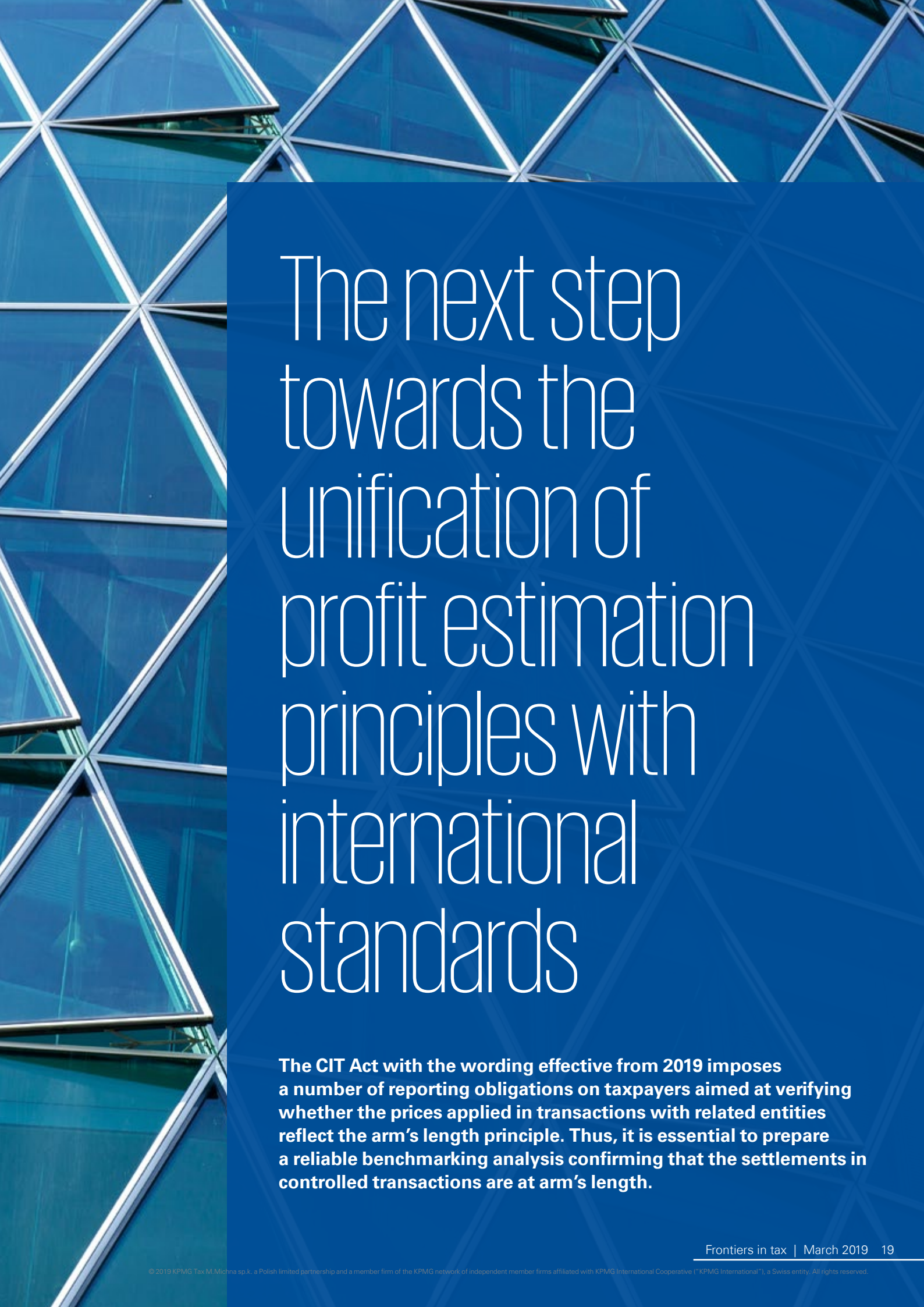
Effective date for regulations

In principle, taxpayers have the possibility of applying the amended regulations to transfer pricing documentation also in relation to 2018 but the regulations on safe harbours are effective only for the tax years which commence not earlier than on 1 January 2019

We hope that the discussed regulations will actually enable taxpayers to carry out safe tax settlements in the aforementioned scope and result in the reduction of administrative duties connected with documenting the transactions with related entities and evidencing that the applied pricing is compliant with the arm's length principle.

Tomasz Szczepanek
Senior Manager
in Transfer Pricing Team
in KPMG in Poland

Anna Pypkowska
Consultant
in Transfer Pricing Team
in KPMG in Poland



The next step towards the unification of profit estimation principles with international standards

The CIT Act with the wording effective from 2019 imposes a number of reporting obligations on taxpayers aimed at verifying whether the prices applied in transactions with related entities reflect the arm's length principle. Thus, it is essential to prepare a reliable benchmarking analysis confirming that the settlements in controlled transactions are at arm's length.

More reporting obligations

The new regulations impose the obligation to confirm that transfer prices applied in controlled transactions are set pursuant to the terms and conditions which would have been agreed upon by unrelated entities as well as introduce the TP-R form which is obligatory for taxpayers to report the detailed information concerning their transactions with related entities, applied transfer pricing methods and results of benchmarking analyses.

Thus, the legislator attached great significance to the issue of transfer pricing and imposed additional information requirements on taxpayers. In particular, the issue of the statement is of key importance in terms of liability for giving false information.

Therefore, the submission of the statement and the TP-R form should be preceded with a profound analysis verifying whether the prices applied in controlled transactions comply with the arm's length principle. The verification of the aforesaid items is possible through preparing benchmarking analyses or descriptions of compliance with the application of methods proposed by the legislator.

Amendments to profit estimation methods

Pursuant to the new regulations, the comparability is studied similarly to the methodology used in the previous years. The detailed information about the required content of the benchmarking analysis and the scope of its individual stages are provided for in relevant decrees of the Minister of Finance dated 21 December 2018.

The current wording of the transfer pricing regulations determines the necessity of the correct selection of transfer pricing verification methods in order to prepare adequate benchmarking analyses/descriptions of compliance. In practice, taxpayers encounter lots of problems when selecting and applying transfer pricing methods. It will probably change in some areas as the introduced definitions of methods have been unified with the OECD Guidelines and, currently, they seem to be simpler, more transparent and more accurate. The regulations also explicitly state that, when the taxpayer selects a method, the following terms and conditions should be taken into account: the terms and conditions that have been agreed upon or imposed between the related entity, availability of comparable data and specific criteria necessary for its proper application.

The regulations effective from the beginning of 2019 not only clarify the cases in which a given method may be applied but also allow the application of a new "sixth" method of transfer price verification. When it is not possible to use any of the existing five statutory methods, the CIT Act allows the application of another method which is more relevant to the given circumstances, such as valuation techniques, for example. Pursuant to the OECD Guidelines, they may be particularly useful for determining and verifying transfer prices in controlled transactions involving intangible assets and exit fees which are difficult to evaluate. The new methodology is aimed at allowing the correct assessment of the terms and conditions of transactions concluded by and between the related entities in terms of the arm's length principle.

New elements of benchmarking analysis

The legislator also introduces new elements to benchmarking analysis which arise mainly from the need to understand the pricing verification methodology applied by taxpayer. It takes the form of the obligation to

specify and justify the method applied for transfer pricing verification, justify the selection of search criteria for comparable entities or transactions, justify the selection of the financial ratio adopted for analysis as well as the form of taxpayer's obligation to make the comparable data available by electronic means in the form which enables the tax authorities to repeat the process of its selection.

Given the fact that the analysis is the key element in the local transfer pricing documentation and is aimed at evidencing the arm's length character of the transfer price applied in the transaction, it is also required to view the transfer price in terms of the result of the analyses, together with the explanation of possible deviations.

Introduction of comparability testing rules

The regulations effective from the beginning of 2019 also introduce the new rules on transfer price estimation which often implement the OECD Guidelines. An example includes the regulations concerning the rules on the estimation of the transfer price value by a tax authority. The main rule is an *ex-ante* approach which assumes that the comparable data which could not have been known to the transaction parties is not taken into account in the valuation. Yet, the legislator provides for the possibility of price adjustment based on the data unknown at the time of transaction if the taxpayer independently decided to apply such an approach.

Furthermore, the legislator implements the regulations in the scope of hard to value intangibles. When the difference in the amount of a transfer price is equal to at least 20% of the price calculated based on forecast data, the tax authorities will try to determine whether the unrelated entities would adjust the originally agreed price or would renegotiate the terms and conditions of the transaction.

The legislator also suggests other solutions: expands the scope of the existing regulations with the possibility of compensating the income in a three-year period or between two different transactions concluded with the same related entity, waives the obligation to prepare benchmarking analysis based on Polish comparable data as well as directly regulates that the application of the so-called secret comparables, that is the data undisclosed to a taxpayer, is not permitted.

The legislator also attempts to define and quantify the term of reorganisation of business activity as well as clarifies that it is necessary to carry out comparability study which includes, but is not limited to, the identification of relations between the entities before and after the reorganisation, description of tax effects, assessment whether the potential to generate profit has been transferred, determination whether the remuneration is due for the completed reorganisation and, if yes, the specification of its amount.

Summary

To sum up, the introduced amendments are aimed at supporting the tax authorities in the assessment of the taxpayers and the transactions concluded thereby with related entities. Yet, they are also a good step towards the unification of the rules on the transfer price estimation with the OECD standards.

> Submission of the statement and the TP-R form should be preceded with a profound analysis verifying whether the prices applied in controlled transactions comply with the arm's length principle.

Piotr Wierzejski
Senior Manager
in Transfer Pricing Team
at KPMG in Poland

Dominika Woźniak
Senior Consultant
in Transfer Pricing Team
at KPMG in Poland

Transfer pricing adjustments – time to prepare for new obligations

One of the most debatable issues in recent months has been the unclear approach to the tax consequences of related entities' profitability adjustments (the so-called "TP adjustments"). The solution of above-mentioned issues is introduction of new regulations which specify the terms, conditions and manner of making transfer pricing adjustments in detail. The overall assessment of the consequences arising from the new regulations will be possible after the analysis of the approach adopted by tax authorities. One thing is certain - taxpayers should prepare for additional obligations.

What is the purpose of the new regulations?

Profitability adjustment is a mechanism generally applied in tax practices in capital groups. The adjustment mechanism enables the adjustment of the transfer price level in a transaction to the arm's length profitability arising - to give an example - from the comparable data analysis carried out after the end of the year and after receiving the information about the price-influencing factors changing throughout the year.

By the end of 2018, the method of conducting TP adjustments was not regulated by the provisions of Polish tax acts, therefore it was necessary to apply general regulations concerning the revenues and deductible costs. The new provisions are aimed at regulating this issue and they implement, in addition, the detailed terms and conditions to be fulfilled by taxpayers in the scope of the TP adjustment. According to the justification of the amending act for the purpose of the introduced regulations is to limit the possibility of abusing transfer pricing adjustments and to "appropriately secure the interest of the State Treasury". Therefore, taxpayers have to prepare for some difficulties.

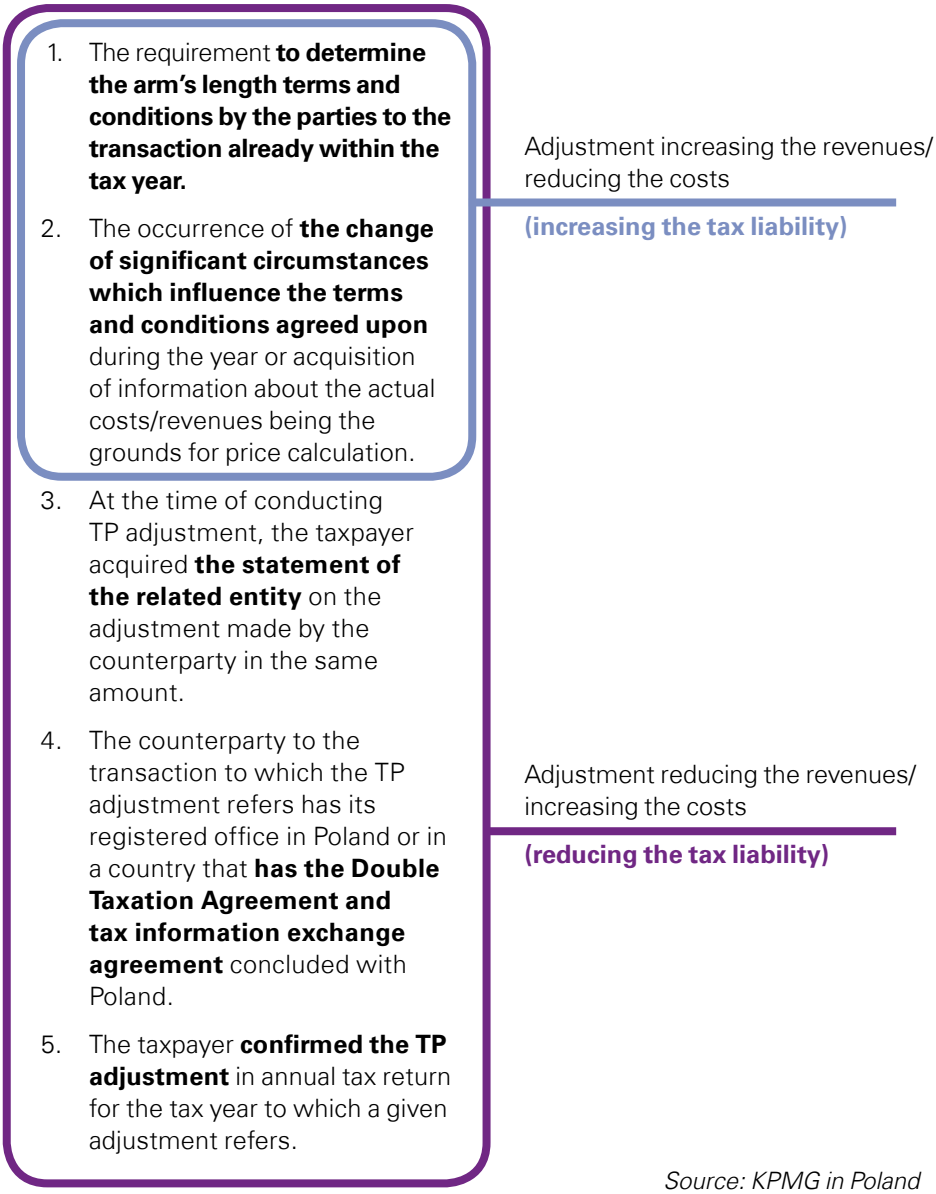
Lack of unified approach

The possibility of making TP adjustments and the relevant moment of their recognition have been an issue between taxpayers and tax authorities for a long time. In particular, the existing disputes arise in the scope of recognising the TP adjustments increasing the costs as the deductible expense - thus far, the administrative courts both approved and negated in their rulings the taxpayer's right in that scope through indicating the lack of relationship between such costs and revenues. Moreover, in its rulings issued in 2018, the Voivodship Administrative Court in Poznań challenged also the taxpayer's right to reduce the amounts of revenues as a result of applying the mechanism of TP adjustment reducing the profitability (*in minus* adjustment of the revenue).

The aforementioned lack of clarity negatively influenced the transparency of the tax law as it diversified the activities undertaken by tax authorities depending on the nature of transfer pricing adjustment and contributed to the appearance of doubts among taxpayers as to the correct accounting for and recognition of adjustments.

Terms and conditions for applying transfer pricing adjustments

The new regulations introduce a number of terms and conditions to be satisfied by taxpayers, especially in relation to the adjustments reducing the value of tax liability (that is decreasing the revenues or increasing the deductible costs). The list of requirements to be fulfilled by taxpayers is presented in the following figure.



Source: KPMG in Poland

> The new regulations introduce a number of terms and conditions to be satisfied by taxpayers, especially in relation to the adjustments reducing the value of tax liability (that is decreasing the revenues or increasing the deductible costs).

The fulfilment of the presented terms and conditions is necessary to obtain the right by the taxpayer to recognise the transfer pricing adjustment in the tax year to which the adjustment refers. Moreover, the new regulations exclude the application - in such a case - of general provisions concerning the moment of recognition of revenue or cost in connection with the issuance of a correcting invoice (that is Article 12 (3j) and (3k) and Article 15 (4i) and (4j) of the CIT Act).

The aforementioned means that - depending on the moment of fulfilling the said conditions - the taxpayer has the right to recognise the transfer pricing adjustment in the tax return for the year to which the said adjustment refers or to correct the tax return for a given year (when the terms and conditions were fulfilled after filing the tax return). In the course of the works on the new regulations, the legislator withdrew from the restriction of the right to recognise the transfer pricing adjustment by the expiry of the deadline for filing the taxpayer's annual tax return for a given tax year, which would be connected with significant difficulties for members of capital groups commencing the calculation of adjustment only after determining their financial results.

Not only simplifications, but also doubts

The solutions prepared by the legislator are connected with the appearance of a number of questions and doubts. The requirement to determine the terms and conditions complying with the arm's length principle already during the tax year may involve practical difficulties in the scope of ongoing verification or with increased administrative expenditures within the capital group. Furthermore, the content of the related party's statement concerning the making of transfer pricing adjustment was not specified.

The most important question concerning the new provisions refers to the activities undertaken by the taxpayer in case of failure to meet the statutory terms and conditions. Given the current jurisdiction, it cannot be excluded that the taxpayer - in such a situation - will be actually deprived of the right to reduce the revenues (*in minus* adjustment of the revenue) or increase the deductible costs (*in plus* adjustment of costs).

Attention should also be paid to the limited number of terms and conditions for making the TP adjustment increasing the amount of tax liability (as a result of increasing the revenues or reducing the deductible costs). The failure to fulfil the first condition (determination of the arm's length prices during the year) could be connected with an additional assessment of the taxpayer's income by the tax authorities, while the adjustments which are not made as a result of changes in significant circumstances may be difficult to prove for the taxpayer.

Undoubtedly, the introduced regulations contribute to the clarification of the issues connected with recognising the transfer pricing adjustments as tax revenues and deductible costs as well as the moment of their recognition. Regardless of the aforementioned, taxpayers have additional obligations which - when not performed - may be connected with the total impossibility of recognising the consequences of the made adjustment in the tax settlement.

Karolina Stępień
Senior Consultant
in Transfer Pricing Team
at KPMG in Poland

Tomasz Klusek
Senior Consultant
in Transfer Pricing Team
at KPMG in Poland

New instruments: recharacterisation and non-recognition of transactions

The amended regulations, which became effective on 1 January 2019, clarified the rights of tax authorities in the scope of recognising the terms and conditions being the grounds for related entities' business as complying with the arm's length principle. It means that the tax authority is entitled to state that in the specified conditions, a given transaction between related entities would not have been concluded (non-recognition) or that another transaction would have been concluded (recharacterisation).

Transfer pricing verification instruments

The said regulations make it possible for the tax authorities to correctly examine the actual controlled transaction (even if it is different from the transaction indicated by the taxpayer) and, if the need be, to replace the transaction between related entities with another transaction (relevant transaction) by the tax authority for the purposes of assessing the income or loss, or to the complete disregard of the tax consequences of the controlled transaction.

It should be emphasised that, when examining the transactions between related entities, the tax authorities take into account the actual course of the transaction and the circumstances of its conclusion as well as the actual conduct of the parties to the transactions, and not necessarily the contractual provisions or other arrangements.

What is the practical meaning of the new regulations for taxpayers?

As a result of examining the transactions between related entities, the tax authority may (1) recharacterise the transaction between related entities into another transaction and assess only the tax consequences arising from the latter one, or (2) completely disregard the tax consequences of transaction between related entities if it is found that unrelated entities would not have entered such a transaction at all. How can the said regulations be applied in practice?

Example 1. – recharacterisation of transaction[1]

An entity participates in the group liquidity management system (cashpooling). Yet, it always recognises a negative balance (which means that it has the deficit of current assets).

In such a situation, the tax authority may consider the specified transaction as a loan and apply the transfer pricing method relevant to loans.

Example 2. – non-recognition of transaction[2]

An entity has its production plan on a floodplain that is regularly inundated.

[1] *Source: Zmiany proponowane przez rząd ucieszą podatników – wywiad z dyrektor departamentu cen transferowych i wycen w Ministerstwie Finansów Joanną Pietrasik – Gazeta Prawna Daily – 10 August 2018*
[2] *Source: OECD Guidelines 2017, points 1.126-1.127*

> When examining the transactions between related entities, the tax authorities take into account the actual course of the transaction and the circumstances of its conclusion as well as the actual conduct of the parties to the transactions, and not necessarily the contractual provisions or other arrangements.

The said entity acquires from its related entity the insurance for its assets and pays a relevant premium for that.

In such case, the tax authority may try to prove that such a transaction would not have been concluded at arm's length, which means that no insurance company would have assumed such a risk, and, therefore, no such transaction would have been entered into.

New regulations?

At the same time, it should be emphasised that the anti-abuse clause has been already effective in the Polish legislation in the form of Article 119a and 199a of the Tax Ordinance, whereas it needs to be repeated after the Ministry of Finance that the instruments introduced in the most recent amendments to the regulations are applicable only to related entities, and the main reason for their application is not the tax benefit as interpreted in the Tax Ordinance but the compliance of the transaction with the arm's length principle, that is whether the conduct of unrelated entities would be similar to the conduct of related entities.

Limitations for tax authorities

It should also be noted that the legislator emphasises that the application of the provisions resulting in the recharacterisation or non-recognition of the transaction cannot result only from a difficulty in verifying the price in the transaction between related entities or the absence of comparable transactions concluded by and between unrelated entities in comparable circumstances in the market. Yet, it does not change the fact that the said regulations in their current wording raise doubts and reservations on the part of taxpayers. However, pursuant to the statement of reasons for the amended tax regulations, the recharacterisation of transaction or non-recognition of transaction do not constitute new tools in the Polish legislation. For, thus far, they could have been applied based on the arm's length principle specified in the regulations. Thus, they may also be applicable to the transactions concluded in the preceding years.

However, it should be emphasised that, through introducing the said regulations, the Polish legislator consistently implements the provisions included in Actions 8, 9 and 10 of the Base Erosion and Profit Shifting (BEPS) to the Polish regulations. Section D2. of the OECD Guidelines (July 2017) directly provides for the possibility of the recharacterisation or non-recognition of a given transaction between related entities.

Ewa Kasperkiewicz
Manager
in Transfer Pricing Team
at KPMG in Poland

New severer sanctions in transfer pricing

The new transfer pricing regulations which became effective on 1 January 2019 also amended the sanctions for failure to fulfil the transfer pricing obligations in relation to the taxpayers themselves and the managers of the undertaking, that is the persons forming the management board of a company in the case of legal entities.

Pursuant to the arm's length principle, which is directly provided for in Chapter 1a of the CIT Act, related entities are obliged to perform such transfer pricing which reflects the terms and conditions that would have been agreed upon by and between unrelated entities operating in the market. Pursuant to the amended provisions, when the terms and conditions of a transaction with a related entity do not comply with the arm's length principle, tax authorities - following tax inspection - may impose a penalty in the form of additional tax liability on the taxpayer.

entity with the arm's length principle, the additional tax liability is equal to 10% of the amount of overstated loss or understated income. The introduced amendments provide the tax authorities with the grounds for imposing penalties on the taxpayers who set the terms and conditions in controlled transactions which do not reflect the arm's length principle, even if they possess the tax documentation.

Pursuant to Article 58c § 1 of the Tax Ordinance, in the transfer pricing cases, the penalty rate of 10% is doubled when

Liability under the Fiscal Penal Code

Since 1 January 2019, the liability under the Fiscal Penal Code in the scope of transfer pricing has been regulated by amended provisions on the liability for making statements on preparation of local files of transfer pricing documentation (Article 56c of the Fiscal Penal Code) and information about transfer prices (Article 80e of the Fiscal Penal Code).

In case of failure to submit the statement or information about

Amendments to tax sanctions

Pursuant to the provisions effective by 31 December 2018, the penalty rate for the failure to submit tax documentation applicable to the additional assessment of income in the transaction with the related entity equalled 50%. Yet, pursuant to the opinion of the Ministry of Finance, the adopted solution proved to be ineffective as it did not fulfil the adopted assumptions of the preventive effect of influence. For there were no legal grounds for imposing penalties on taxpayers who - in spite of possessing the complete transfer pricing documentation - did not apply the arm's length principle in the scope of controlled transactions and, therefore, reduced the tax base.

The aforementioned issue was resolved through the introduction of institution of "additional tax liability" referred to in the Tax Ordinance (Chapter 6 - Article 58 and subsequent), replacing the penalty rate of 50% effective thus far under the CIT Act. Pursuant to the amended provisions of the Tax Ordinance, in case of issuing a decision stating the non-compliance of the price in the transaction with a related

the grounds for assessing additional tax liability exceed PLN 15,000,000 (applicable to the excess of the said amount) or when the taxpayer has not submitted tax documentation to relevant authorities.

Yet, the taxpayers can protect themselves against such 20% penalty rate imposed as a result of failure to draw up the tax documentation. Pursuant to the new regulations, if the taxpayer completes the incomplete tax documentation within the time limit set by the tax authority, not longer than 14 days, the application of the grounds of absence of documentation is waived. Yet, it is necessary to remember that the submitted tax documentation has to be completed and fulfil any and all formal requirements set by the legislator.

The rate in the amount of 30% of the base (Article 58c § 2 of the Tax Ordinance) is applied when the assessment of the additional tax liability arises from both grounds, that is when the basis for assessing the additional tax liability exceeds PLN 15,000,000, and when the taxpayer failed to submit the tax documentation to the tax authorities.

transfer prices, their submission after the deadline or certifying of false information as complying with the actual state, the penalty may be assessed up to 720 daily rates. When the offence is less significant, the authority may impose a fine for a fiscal offence. In the context of the certification of false information, it is important to note that the scope of the submitted statement is expanded from 1 January 2019 and includes not only the fact of possession of tax documentation but also certification that the terms and conditions in controlled transactions reflect the arm's length principle.

The risk arising therefrom is assumed by persons responsible for managing the affairs of the company, and not on the company itself. Pursuant to the introduced Article 11m of the CIT Act, the statement is made and signed by all who hold the function of the manager of the undertaking as interpreted in the Accounting Act, that is the members of the management board or another managing body, or when it is not possible to indicate the manager of the undertaking - the

statement is signed by each of the persons authorised to represent the undertaking under the entry into the National Court Register. Thus, the legislator directly names the persons responsible for the submission of the statement and excludes the possibility of its signing by taxpayer's attorneys or other employees, e.g. the chief accountant or the Chief Financial Officer.

Other forms of liability

Regardless of the introduced amendments, the persons authorised to represent the company may be still held liable also based on penal regulations.

Pursuant to Article 296 § 1 of the Penal Code, any person obliged to manage the assets or business of an entity who - by exceeding the granted powers or failing to perform their duties - causes the material damage to the company in the amount exceeding PLN 200,000, may be recognised as acting to the detriment of the company and be subject to a penalty of deprivation of liberty up to 10 years. The failure of the company to apply the arm's length principle in its transactions with a related entity and, therefore, the consequence of imposing the sanction rate of the tax in specified cases, may be classified as acting to the detriment of the company.

Submission of a statement on the arm's length prices in a controlled transaction versus imposing a sanction of additional tax liability.

An important issue in case of questioning the result of the analysis being the grounds for the statement is the liability of the members of the management board who made the statement of compliance of the applied prices with the arm's length principle.

The amended provisions do not directly state whether the members of the management board should be held liable also for the submission of the information which does not comply with the actual state in case of submission of the statement on arm's length prices and subsequent imposing of sanctions in the form of additional tax liability due to questioning of the study results. Given the fact that the new regulations became effective at the beginning of January 2019, there has been no practice in that scope yet.

However, it seems that when the taxpayers exercise due care and diligence in the scope of setting prices in a controlled transaction and carry out reliable analyses of comparable data as well as act in accordance with their best knowledge, the persons making the statement should not be held personally liable, and the submission of the statement - even in case of questioning the results of the analysis by the authority - should not involve the occurrence of the sanctions provided for the submission of false statements.

Yet, there are no doubts that, after the additional requirements in the scope of the submitted statements are introduced, taxpayers should pay particular attention to the qualitative aspect not only when documenting the controlled transactions but also at the stage of setting and studying the prices with related entity. It will result in a significant limitation of the risk of sanctions in the form of additional tax liability and of the liability assumed by the members of the management board for issues connected with transfer pricing.

> The introduced amendments provide the tax authorities with the grounds for imposing penalties on the taxpayers who set the terms and conditions in controlled transactions which do not reflect the arm's length principle, even if they possess the tax documentation.

Piotr Wodecki
Manager
in Transfer Pricing Team
at KPMG in Poland

Joanna Brodziak
Consultant
in Transfer Pricing Team
at KPMG in Poland

New transfer pricing regulations - when do they become applicable?

In principle, the amended CIT Act introducing significant changes in the scope of transfer pricing became effective on 1 January 2019. Nevertheless, the transitional provisions separately regulate the moment when the taxpayers should (or can) apply the amended regulations for a number of issues. What may be particularly important for many taxpayers is the possibility of applying the regulations on the obligation to prepare transfer pricing documentation also in the tax year commenced before the amended CIT Act became effective.

2019 - the year of changes

The basic principle adopted in the amending act states that the amended regulations should be applied to income (revenue) generated since 1 January 2019. The said principle was modified for those taxpayers whose calendar year commenced before 1 January 2019 and will end after 31 December 2018 - they apply the provisions of the CIT Act before its amending by the end of the adopted tax year. Thus, it should be assumed that the amended regulations are obligatorily applicable to a tax year commencing after 31 December 2018.

2018 - the year of decisions

The transitional provisions of the amending act provide for the possibility of applying selected amended regulations (on the obligation to prepare transfer pricing documentation) also for transactions entered in the tax year commencing after 31 December 2017. This means that for the year commencing after 31 December 2017 but before 1 January 2019, taxpayers may decide whether they prepare their transfer pricing documentation in compliance with the amended regulations or the regulations effective thus far.

If a taxpayer decides to prepare the transfer pricing documentation for the year 2018 in accordance with the existing regulations, such regulations are applicable both to the specification of the taxpayer's obligations (e.g. the obligation to prepare Local File, benchmarking analyses, and Master File, to submit the statement and CIT-TP) and to the specification of individual elements of the documentation and the scope of the statement on possessing the transfer pricing documentation.

In that scope, the following doubt was reported during the public consultations: whether the legislator - by amending the regulations - had not simultaneously eliminated the legal grounds for preparing the transfer pricing documentation, submitting the statement on its preparation, and submitting the CIT-TP form in relation to 2018 as the provisions of the CIT Act in that scope were repealed as of 1 January 2019. In response to the aforementioned doubts, the Ministry of Finance explained that the documentation and reporting obligations - in spite of being fulfilled after the end of the tax year - were the consequence of the tax obligation arising in the preceding year. Therefore, and in principle, the taxpayers should apply the regulations effective in 2018 to the specification of transfer pricing obligations for 2018.

Which amended regulations can be applied in relation to 2018?

Taxpayers may decide about the voluntary application of amended regulations to the documentation of controlled transactions entered in 2018. In such a case, Article 11a and Articles 11k-11r of the CIT Act in the wording provided in the amending act are applicable.

Thus, it means that the new regulations concerning the definitions may be particularly useful as they include, but are not limited to, the issues of defining the existence of relations between the entities. Other regulations that can be applied include those referring to the identification of transactions subject to the documentation obligation, of which the determination of the value of controlled transactions, and those defining the exemptions from the obligation to prepare documentation (e.g. the possibility that domestic transactions are not included in the documentation provided than certain circumstances are met). When the amended regulations are selected, it also entails the applicability of the standards defining the scope of the obligation to prepare the documentation (the grounds for preparing the Local File with the obligatory transfer pricing analysis and the Master File), and the standards determining the content of individual elements included in transfer pricing documentation.

Moreover, in case of selecting the application of amended regulations in relation to transactions concluded in 2018, it is also necessary to make the statement on preparation of transfer pricing documentation in compliance with the new regulations, which entails the amended content of the statement as well as the redefinition of the group of people obliged to sign the statement. In consequence, it is not possible to prepare the documentation according to the new regulations and make the statement on its preparation pursuant to the existing ones.

> Taxpayers may decide about the voluntary application of amended regulations to the documentation of controlled transactions entered in 2018.

Which amended regulations cannot be applied in relation to 2018?

Close attention should be paid to the fact that not all regulations introduced pursuant to the amending act can be applied in relation to 2018. In particular, the information about transfer prices (TP-R form) referred

to in Article 11t of the CIT Act can be submitted only in relation to a tax year commencing after 31 December 2018. Similarly, the application of the so-called safe harbours (Article 11g and 11g of the CIT Act) is not possible in relation to the transactions performed throughout 2018.

Effective date for the new regulations

For the amended transfer pricing provisions of the CIT Act to become effective, it is necessary that the Minister of Finance issues a number of regulations which allow the application of the new provisions. The majority of the regulations was issued and published already in 2018 and became effective at the same time that the CIT Act. They include, but are not limited to, the regulation of the Minister of Finance on information about transfer prices related to corporate income tax and the regulation of the Minister of Finance on transfer pricing documentation related to corporate income tax. Yet, the new regulation specifying the list of countries and territories applying harmful tax competition has not been published yet. For - pursuant to Article 46 of the amending act - the existing implementing provisions providing the list of the so-called tax havens are effective no longer than by 31 March 2019 and, therefore, we should expect that a new regulation on this issue will be published soon.

Obligatory from 2019, voluntary from 2018

The new regulations are obligatorily applicable for a tax year commencing after 31 December 2018. Yet, since the taxpayers have the possibility of deciding to apply those regulations also for preparation of transfer pricing documentation for controlled transactions entered during 2018, it is recommended to analyse the resulting obligations in both legal regimes.

As the new regulations do not include any references to the level of taxpayer's revenues/costs and exclude the documentation obligation for domestic transactions (provided that specified circumstances are fulfilled), some taxpayers may reduce their documentation obligations through applying the amended regulations. On the other hand, the scope of transactions subject to the obligation may increase for the biggest taxpayers. However, it should be noted that pursuant to the new provisions, the statement on transfer prices will include not only the information about the preparation of the documentation but also the statement that the terms and conditions set for the controlled transactions comply with the arm's length principle.

Barbara Popowska
Manager
in Transfer Pricing Team
at KPMG in Poland

Adrian Gurec
Consultant
in Transfer Pricing Team
at KPMG in Poland

KPMG Publications

The KPMG analyses and reports are an output of our expertise and experience.The publications take up issues important to enterprises operating in Poland and globally.

The Polish tax system according to the participants of the 9th KPMG Tax and Accounting Congress

The Report by KPMG in Poland entitled "The Polish tax system according to the participants of the 9th KPMG Tax and Accounting Congress" includes the results of the survey on the tax system in Poland conducted on 15 January 2019 among the participants at the 9th KPMG Tax and Accounting Congress, that is the representatives of the managing staff, Chief Financial Officers, chief accountants and those responsible for financial reporting and controlling. The survey was aimed at getting the information on how the Polish tax system is assessed by the top-level staff employed in enterprises from various industries throughout Poland. The questions were answered by 284 respondents.

Global Automotive Executive Survey 2019

The KPMG International "Global Automotive Executive Survey" report analyses the leading trends in the global automotive industry. The 2019 edition was based on the interviews with over 3,000 automotive industry executives, presidents, directors, members of the management board and managers. The survey was conducted between October and November 2018 with the use of online questionnaires. 1/3 of the respondents in the surveyed group come from companies operating in Western and Eastern Europe, and 14% from North America. About 10% of them come from South America, India, Southeast Asia, China, and the region of Japan and South Korea.

Automotive Industry. Edition Q1/2019

The quarterly report of PZPM and KPMG in Poland entitled "Automotive Industry. Edition Q1/2019" belongs to the series of quarterly reports which are aimed at presenting the current trends in the Polish automotive industry including automotive retail, manufacturing and financial services. The analysis is based on the most recent registrations, statistics and market data. The publication is a joint undertaking of the Polish Automotive Industry Association and KPMG in Poland.

Report by KPMG in Poland entitled "[Digital] customer is king. How do brands on the Polish market manage customer experience?"

Report by KPMG in Poland entitled "[Digital] customer is king. How do brands on the Polish market manage customer experience?" was prepared on the basis of the market survey conducted in the second quarter of 2018 by an independent surveying entity on a representative sample of more than 5,000 Polish consumers being the Polish citizens aged sixteen and older. The report by KPMG includes, but is not limited to, the list of TOP 100 Brands which offer the best consumer experience according to Polish consumers. The condition for including a given brand in the analysis was the achievement of the minimum required number of respondent's answers. The conclusions presented in the report on individual brands and their operation in the Polish market in the scope of managing the customer experience were prepared only on the basis of the consumer survey conducted by an outsourced surveying agency and publicly available information.

Poles buying on sale. Who actually manages the buying process - a consumer or a seller?

The Report by KPMG in Poland entitled "Poles buying on sale. Who actually manages the buying process - a consumer or a seller?" was prepared on the basis of the survey conducted between 5 and 10 December 2018 with the CAWI (Computer-Assisted Web Interview) method among digital consumers, that is the people with practically uninterrupted access to the Internet, the members of the Internet Panel of ARC. The survey was conducted on a representative sample of Web users in terms of gender, age and the size of locality and voivodeship they live in. The respondents were of full legal age and they had made purchases for the amount of PLN 150 or more in online or traditional stores within the last 3 weeks. The sample included 501 respondents.

The Luxury Goods Market in Poland. Edition 2018

"The Luxury Goods Market in Poland. Edition 2018" is the ninth edition of the publication prepared by KPMG on the luxury goods market in Poland. For the purposes of the report, it has been assumed that the luxury goods are any goods bearing a brand universally considered as luxury in a given market or those that, given their specific features (uniqueness, high price, etc.), become luxurious. The report also uses the data from such entities as Credit Suisse, Euromonitor International, Central Statistical Office, Ministry of Finance, National Bank of Poland, Polish Automotive Industry Association, Polboat, Poland Sotheby's International Realty, Civil Aviation Authority. The analysis was supplemented by the statements of specialists in the sectors analysed in the report.

Contact

Jacek Bajger

Partner in the Tax Advisory Department, Head of the Transfer Pricing Team at KPMG in Poland
E: jbajger@kpmg.pl

Monika Palmowska

Partner in the Tax Advisory Department in the Transfer Pricing Team at KPMG in Poland
E: mpalmowska@kpmg.pl

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KPMG Poland

KPMG offices in Poland

Warszawa
ul. Inflancka 4A
00-189 Warszawa
T: +48 22 528 11 00
F: +48 22 528 10 09
E: kpmg@kpmg.pl

Kraków
ul. Opolska 114
31-323 Kraków
T: +48 12 424 94 00
F: +48 12 424 94 01
E: krakow@kpmg.pl

Poznań
ul. Roosevelta 22
60-829 Poznań
T: +48 61 845 46 00
F: +48 61 845 46 01
E: poznan@kpmg.pl

Wrocław
ul. Szczytnicka 11
50-382 Wrocław
T: +48 71 370 49 00
F: +48 71 370 49 01
E: wroclaw@kpmg.pl

Gdańsk
al. Zwycięstwa 13A
80-219 Gdańsk
T: +48 58 772 95 00
F: +48 58 772 95 01
E: gdansk@kpmg.pl

Katowice
ul. Francuska 36
40-028 Katowice
T: +48 32 778 88 00
F: +48 32 778 88 10
E: katowice@kpmg.pl

Łódź
ul. Składowa 35
90-127 Łódź
T: +48 42 232 77 00
F: +48 42 232 77 01
E: lodz@kpmg.pl

kpmg.pl