

Transfer pricing rules in Belarus

Overview of the main Amendments in 2019

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Law of the Republic of Belarus "On amendments and additions to certain laws of the Republic of Belarus" No. 159-3 of 30 December 2018 came into force on 1 January 2019.

The Law stipulates amendments to the Tax Code of the Republic of Belarus (the Tax Code) by issuing a new edition of the Tax Code (the 2019 Tax Code).

This Alert reviews the main amendments pertaining to the transfer pricing (TP) rules, which became effective in Belarus as of 1 January 2019 and aimed on their harmonization with OECD TP Guidelines:

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However, it should be noted, that Belarus is not a part of the Inclusive Framework on BEPS and hence has not yet committed to apply the OECD TP Guidelines or the Action 13 (including 3-tier TP reporting).

1. Extension of the related parties list

The 2019 Tax Code extends the list of related parties as well as introducing the notion of the actual owner of an organization. Therefore, as of 2019, the following parties, among others, will be deemed related parties:

- ▶ Organizations if they have a common actual owner¹.
- ▶ Organizations if their founders (members) are related individuals² and the share of the direct / indirect interest of each individual in the organization is no less than 20%.
- ▶ Furthermore, starting from 2019, parties can be deemed related on other grounds by a court if the relationship between those parties can influence the terms and / or the results of their economic activity.

2. List of controlled transactions

The 2019 Tax Code reduces the controlled transactions list by raising value thresholds and excluding certain transactions from the list.

Therefore, the following transactions are subject to TP rules as of 2019.

Controlled transactions		Threshold above which transactions are regarded as controlled, BYN per year with the same counterparty	
		2016-2018	2019
Cross-border transactions	▶ With related parties	▶ 100,000 for all taxpayers ³	▶ 400,000 for all taxpayers except large taxpayers ▶ 2,000,000 for large taxpayers ⁴
	▶ With residents of offshore zones ⁵	▶ 100,000 for all taxpayers	▶ 400,000 for all taxpayers
	▶ With strategic goods ⁶	▶ 1,000,000 for all taxpayers	▶ 2,000,000 for large taxpayers
	▶ Transactions of large taxpayers with independent parties	▶ 1,000,000	▶ Not subject to TP rules
Domestic transactions	▶ With related parties entitled not to pay	▶ 100,000 for all taxpayers	▶ 400,000 for all taxpayers except large taxpayers

¹ An individual who, directly or through related parties, decisively influences the governance or operations of an organization.

² Individuals who are married to each other or related to each other by blood or by marriage or are connected by a relationship of adopter and adopted or guardian and ward.

³ BYN100,000 is approx. US\$47,000,
BYN400,000 is approx. US\$186,000,
BYN1,000,000 is approx. US\$465,000,
BYN2,000,000 is approx. US\$930,000,

(at the exchange rate set by the National Bank of the Republic of Belarus for 1 February 2019)

⁴ The list of large taxpayers is determined by the Ministry of Taxes and Duties. Starting from 1 January 2019, the company can be recognized as a large taxpayer if its revenue in the year exceeds BYN 180 mln and, simultaneously, its total annual amount of taxes paid exceeds BYN 14 mln or its total annual amount of VAT refund exceeds BYN 14 mln.

⁵ The list of offshore zones is determined by the Decree of the President of the Republic of Belarus dated 26 November 2014 №545 "On determination of the list of offshore zones" and includes, amongst others, such jurisdictions as British Virgin Islands, Liechtenstein, Puerto Rico, Delaware, etc.

⁶ The list of strategic goods is determined by the Decree of the Council of Ministers of the Republic of Belarus dated 16 June 2016 №479 "On determination of the list of strategic goods" and includes crude oil and oil products, liquefied petroleum gas, potassium chloride, timber, etc.

	profits tax / exempted from the said tax		▶ 2,000,000 for large taxpayers
Transactions with real estate and housing bonds	▶ With related parties	▶ No threshold	▶ No threshold
	▶ With taxpayers applying special tax regimes		
	▶ With independent parties		▶ Not subject to TP rules

In addition, starting from 2019, large taxpayers' foreign transactions with unrelated parties are not recognized as controlled for TP purposes, whereas previously they were subject to control if their total annual value exceeded BYN1m.

At the same time, as of 1 January 2019, bank transactions (credits, deposits, guarantees, currency trading, factoring, etc.) that were previously beyond the TP scope are subject to control.

3. Reporting period for TP purposes

The 2019 Tax Code includes a provision⁷ whereby taxpayers are required to provide the tax authorities with an economic justification of the applied price (hereinafter, the economic justification) / documentation justifying the economic appropriateness of the applied price (hereinafter, the TP documentation) pertaining to each analyzed transaction completed in the calendar year.

Earlier, the tax authorities were entitled to request the economic justification and TP documentation (hereinafter, TP reports) on a quarterly basis.

Therefore, starting from 2019, taxpayers are allowed to prepare TP reports for the whole calendar year, rather than quarterly.

4. Changes in TP methods

The 2019 Tax Code revises / specifies the description of TP methods so that the current application of the TP methods (as of 2019) has become closer to the TP methods applied in accordance with OECD TP Guidelines.

In addition, the 2019 Tax Code establishes a new priority for TP methods, namely:

- ▶ The comparable uncontrolled price (CUP) method retains highest priority over other methods.
- ▶ The resale price method (RPM) also retains priority over other methods except for the CUP method.
- ▶ Any priority in respect of the cost plus method (CPM) and the transactional net margin method (TNMM) is cancelled, meaning that a method which draws a more sustainable conclusion regarding the compliance or incompliance of the prices with the arm's length standard should be applied.
- ▶ The profit split method (PSM) is still applied as a method of "last resort" when it is impossible to use other methods.

Further, starting from 2019, a combination of two or more methods may be applied, whereas the previous edition of the Tax Code did not provide for the application of more than one method.

The 2019 Tax Code also specifies that, during tax audits, the tax authorities are required to apply the same TP method as that used by the taxpayer unless it is proved to be incorrect. Earlier, the CUP method used to be the priority for the tax authorities.

5. Selection of a tested party

For the purposes of TNMM, the selection of a tested party in a transaction has been introduced starting from 2019.

Pursuant to the 2019 Tax Code, the tested party in a transaction will be the party for which the following conditions are met:

- ▶ The one for which applying the selected TP method will be the most appropriate.
- ▶ The one which has the most comparable transactions / parties.

⁷ P. 1 Article 97 of the 2019 Tax Code.

- ▶ The one which performs less complicated functions, bears lower risks, and does not own intangible assets with a significant impact on profitability.

The previous edition of the Tax Code did not include any instruction regarding the selection of a tested party and, formally, only a Belarusian company could be the tested party irrespective of the results of functional analysis.

6. Search strategy for comparable companies

Use of a three-year period for analysis

In 2018, a single-year testing (the same year as the year of the controlled transactions) was required. If data for the same year was not available, the use of data for three years preceding the analyzed year was accepted in practice, although there was no direct reference in Belarusian TP regulations to the number of years to be analyzed for such cases.

The 2019 Tax Code stipulates that, when calculating an arm's length range of profit level indicators, data for three calendar years preceding the analyzed year or the year in which the prices of the controlled transaction were established should be used.

Search for comparable companies

Beginning 1 January 2019, the search strategy for comparable companies has been amended. In particular, a company may be deemed comparable in the event that it simultaneously meets all the following criteria:

- ▶ Conducts comparable operations (the company conducts operations comparable to those of the tested party).
- ▶ Has positive net assets (the company's net assets are not less than zero on December 31 of the final year in the period for which the profitability is calculated).
- ▶ Is not loss-making (the company has not registered a loss from sales for more than one year in the period for which the profitability is calculated).
- ▶ Is independent (the company does not hold a direct / indirect share of more than 20% in another company, nor does it have among participants in its share capital (shareholders) a company with a direct interest of more than 20%).
- ▶ Absence of transactions with related parties (the company does not conclude transactions, which are of the same as the type of analyzed transaction, with related parties (if such information is available)).

Further, if one is unable to identify four or more potentially comparable companies complying with all the aforementioned conditions, the independence criterion may be increased from 20% to 50%.

It is noteworthy that, pursuant to the previous edition of the Tax Code, in order to calculate an arm's length range, profitability was calculated only for companies who had positive net assets and no losses in all years of the arm's length range. Moreover, there was no possibility to change the independence criterion.

Arm's length range calculation

The 2019 Tax Code establishes a calculation methodology for the arm's length profitability range which uses several tax periods for the analysis, in particular, it stipulates the calculation of a weighted-average range, while earlier this was not mentioned.

Prior to 2019 the 20% deviation from an arm's length range was acceptable, but in case of any deviation over 20% from the arm's length range, tax liabilities should be adjusted to the minimum/maximum points in the range.

The 2019 Tax Code also removes the possibility of a 20% deviation from the range of arm's length prices / profitability. Therefore, beginning from 2019, the arm's length range is based on the minimum and maximum values of the arm's length range of prices (profit level indicators).

7. Grouping of transactions for TP analysis

It is noteworthy that the previous edition of the Tax Code required the preparation and provision to the tax authorities of the TP reports broken down by each contract, appendix to contract, and specification.

The 2019 Tax Code allows the taxpayer to prepare the TP reports broken down by "groups of analyzed homogenous transactions", rather than for each single contract or specification. In particular, for TP analysis, transactions may be aggregated into a group of analyzed homogenous transactions if:

- ▶ The taxpayer has completed two or more analyzed transactions, and

- ▶ Such transactions are linked to each other or have a continuous or regular nature, and
- ▶ The functions performed, risks borne, assets used, and methods for determining the arm's length prices are common to all the aforementioned transactions.

8. TP reporting

Types

According to the 2019 Tax Code there are 2 types of TP reporting:

- ▶ TP documentation – a full-scope TP documentation is to be prepared with respect to (1) transactions completed by large taxpayers with related parties, and (2) transactions with strategic goods if the total amount of such transactions with a single party exceeds BYN2m.
- ▶ Economic justification – a limited-scope TP documentation is to be prepared with respect to other transactions.

Starting from 1 January 2019, both the TP documentation and economic justification shall be provided to the tax authorities in accordance with special forms⁸.

The information required to be reflected in the TP documentation and economic justification is presented in the table below (marked as "X").

TP documentation	Economic justification	What information should be indicated
X	X	1. Information about the transaction (group of transactions) Contract details, type of transaction, purpose for its conclusion, terms of payment
X	X	2. Information about the counterparty to the transaction Name, name of the manager, country of registration and tax payer identification number (tax ID)
X	X	3. Information on the relationship between the parties to the transaction Direct / indirect interest
X	-	4. Holding (group) structure The structure, name and location of the managing company, the main business of the group
X	-	5. Industry analysis Description of the industry, state of competition on the market, the taxpayer's share of the market
X	X	6. Description of the subject of the transaction Product name and ten-character code in the EEU's Goods Classifier for Foreign Economic Activity, type of work, service (nine-character code in the National Product Classifier, cost, quantity, unit of measurement, price per unit of measurement, date of shipment, qualitative characteristics of goods, trademark

⁸ The forms are approved by Decree of the Ministry of Taxes and Duties dated 3 January 2019 No. 2 "On certain issues related to the calculation and payment of taxes (duties), other payments, control over the calculation and payment of which is carried out by the tax authorities" and entered into force on 16 February 2019

		information, country of origin, manufacturer's name, terms of delivery, place of loading / unloading, means of transport, etc.
X	-	7. Description of the business of the parties to the transaction Functions, risks, assets of the parties to the transaction; average number of employees for the year, other factors affecting prices
X	-	8. Information on sales strategy Information on the sales strategy of the taxpayer and its financial conditions
X	X	9. Information on income and expenses in the transaction (group of transactions) Revenue, resale price, cost of sales, gross profit (margin), administrative and sales costs, operating profit (margin)
X	X	10. Arm's length range of prices or profitability Information on prices or profitability of comparable companies with sources of information
X	-	11. Taxpayer's approach to determining the transaction price The TP method applied and the reasons for its selection, data on profitability in comparable transactions, data on prices in comparable transactions of the taxpayer
X	-	12. Information on amendments to the tax base Tax base before and after the amendment

Prior to 1 January 2019, TP reports had to be provided to the tax authorities in any format, but filled with all information required by Article 30-1 of the Tax Code.

Deadline for submission

Beginning from 2019, the tax authorities are entitled to request TP documentation during tax audits, but no earlier than 1 June of the year following the tax period during which the transaction is completed.

In terms of other controlled transactions, the economic justification shall be provided exclusively at the tax authority's request during tax audits by the deadline established in the request.

A taxpayer should provide TP documents during a desk tax audit within 10 working days, while the deadline for other types of audit should be set in the tax authorities' request and cannot be less than 2 working days.

The penalty for non-submission of required documents is up to 30 basic amounts (up to BYN765 starting from 1 January 2019).

9. Advance pricing agreements

Starting 1 January 2019, the advance pricing agreements (hereinafter, APA) program is available for large taxpayers and taxpayers who have conducted controlled transactions exceeding BYN2m per year. The Tax Code envisages the possibility of concluding unilateral APAs (i.e. no bi- or multilateral APAs are available).

APAs can be concluded for a term of up to 3 calendar years and may be extended for 2 more calendar years.

The effective period of the APAs may start from the first day of the calendar year in which a taxpayer applied to the Ministry of Taxes and Duties to conclude such APAs.

Taxpayers who conclude APAs do not have to prepare TP reports on an annual basis. However, the tax authorities retain the right to audit taxpayers' compliance with the APAs.

10. Implications

On the whole, it is clear that many of the amendments are quite significant, as they refine certain notions and provisions of the previous edition of the Tax Code, and serve the purpose of further improving the current TP rules and their harmonization with OECD TP Guidelines.

The aforementioned changes demonstrate once again that TP is a priority for the Belarusian tax authorities and will attract their particular attention during tax audits.

We recommend Belarusian taxpayers to revise their current TP policies in the light of the new TP rules and to prepare their TP reports in accordance with the new forms in order to serve as the first line of defense in case of tax audits, adjustments resulting in double taxation, or potential penalties.

EY teams will be happy to take your questions related to the 2019 Tax Code as well as any other TP issues at your convenience.

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