OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations

2017 Edition

and

Transfer Pricing Features of Selected Countries 2018
Why this book?
Transfer pricing is one of the most important issues for multinational enterprises today as they strive to ensure that each entity in the group earns a fair share of profits after considering its functions and risks. The concern of tax authorities, however, is that intercompany transfer prices may be used to reduce taxable profits in their jurisdiction. This has resulted in a continuous rise in transfer pricing regulations and enforcement, which makes transfer pricing controversies a major tax issue for enterprises, particularly in an era when base erosion and profit shifting (BEPS) issues take centre stage and new requirements for transfer pricing documentation and country-by-country reporting are implemented by governments.

This book contains the official text of the 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, together with information on the transfer pricing regime in selected countries. The countries were chosen on the basis of their geographical and economic importance as well as the amount of transfer pricing activity. Each country chapter provides a concise description of the current transfer pricing laws, guidelines and methodologies in practice in that particular country, and the information is presented in a domestic, as well as an international context.

This book provides a handy reference guide for those actively working in the field of transfer pricing, with a standardized country chapter outline allowing for quick and easy comparisons between countries.

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# Table of Contents

## Part A

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td>3</td>
</tr>
<tr>
<td>Table of Contents</td>
<td>5</td>
</tr>
<tr>
<td>Preface</td>
<td>15</td>
</tr>
<tr>
<td>Abbreviations and Acronyms</td>
<td>21</td>
</tr>
<tr>
<td>Glossary</td>
<td>23</td>
</tr>
<tr>
<td>Chapter I: The Arm’s Length Principle</td>
<td>33</td>
</tr>
<tr>
<td>Chapter II: Transfer Pricing Methods</td>
<td>97</td>
</tr>
<tr>
<td>Chapter III: Comparability Analysis</td>
<td>147</td>
</tr>
<tr>
<td>Chapter IV: Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes</td>
<td>171</td>
</tr>
<tr>
<td>Chapter V: Documentation</td>
<td>229</td>
</tr>
<tr>
<td>Chapter VI: Special Considerations for Intangibles</td>
<td>247</td>
</tr>
<tr>
<td>Chapter VII: Special Considerations for Intra-Group Services</td>
<td>319</td>
</tr>
<tr>
<td>Chapter VIII: Cost Contribution Arrangements</td>
<td>345</td>
</tr>
<tr>
<td>Chapter IX: Transfer Pricing Aspects of Business Restrukturings</td>
<td>365</td>
</tr>
<tr>
<td>List of Annexes</td>
<td>415</td>
</tr>
<tr>
<td>Appendix: Recommendation of the Council on the Determination of Transfer Pricing between Associated Enterprises [C(95)126/Final, as amended]</td>
<td>605</td>
</tr>
</tbody>
</table>

## Part B
Transfer Pricing Features of Selected Countries 2018

<table>
<thead>
<tr>
<th>Country</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>617</td>
</tr>
<tr>
<td>Argentina</td>
<td>619</td>
</tr>
<tr>
<td>Australia</td>
<td>631</td>
</tr>
<tr>
<td>Belgium</td>
<td>645</td>
</tr>
<tr>
<td>Brazil</td>
<td>655</td>
</tr>
<tr>
<td>Canada</td>
<td>665</td>
</tr>
<tr>
<td>Chile</td>
<td>677</td>
</tr>
<tr>
<td>China (People’s Rep.)</td>
<td>683</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>697</td>
</tr>
<tr>
<td>Egypt</td>
<td>707</td>
</tr>
<tr>
<td>Finland</td>
<td>717</td>
</tr>
<tr>
<td>France</td>
<td>727</td>
</tr>
<tr>
<td>Germany</td>
<td>741</td>
</tr>
</tbody>
</table>
OECD member countries
The OECD member countries are currently: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Rep.), Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.
IBFD

IBFD was established in the Netherlands in 1938, and is an independent, not-for-profit foundation with offices in Amsterdam, Beijing, Kuala Lumpur and Washington, D.C. IBFD is the world’s foremost authority on cross-border taxation, providing independent tax research, international tax information, education and government consulting. IBFD currently employs over 70 research specialists from over 30 countries to help you understand cross-border taxation problems and how to deal with them.

Catering to both the private and public sectors, IBFD fulfils the information needs of tax advisory firms, multinational enterprises, international organizations, ministries of finance, tax administrations, universities and other tax practitioners from all over the world.

Taxand

Taxand is the world’s largest independent tax organization with more than 400 partners and 2,000 advisers in 50 countries. Taxand focuses on delivering high quality, integrated tax advice worldwide, free from time-consuming audit work.

Our dedicated transfer pricing and business restructuring experts work as a team to help structure your business to ensure commercial and operational needs are met. It’s more than just risk management. You might need to adapt your pricing policies to meet legal and economic requirements, or restructure to improve efficiencies and drive business performance. Whatever your approach, we’ll guide you to the most logical arrangement.

Wherever you’re based, whatever your tax issues, our organization can help turn your tax challenges into strategic solutions that will work for you and your business, both today and in the long term.
Introduction

The following country chapters provide a brief description of the transfer pricing regime in 38 countries. Each country chapter is structured according to a standard layout, as follows:

1. Tax authority and law
2. Regulations and rulings
3. Methodologies
4. Comparability analysis
5. Disclosure/documentation requirements
6. Mutual agreement procedures (MAPs)
7. Advance pricing agreements (APAs)
8. Safe harbour provisions
9. Transfer pricing audits
10. Penalties

Under each of the above headings, the domestic situation is described and is intended to provide a general overview of the transfer pricing regime. The country chapters are based on information available as of 15 June 2018 in general, and every reasonable effort has been made to ensure the information is as up-to-date as possible.

It should be noted that under “Methodologies”, the prescribed methods in the countries are generally the (i) comparable uncontrolled price method, (ii) resale price method, (iii) cost-plus method, (iv) profit split method, and (v) transactional net margin method. These methodologies have not been elaborated on in the country chapters as they tend to follow the OECD’s Transfer Pricing Guidelines and a glossary of these methods is available at page 23. Where the domestic methodology includes methods other than what is prescribed in the OECD Transfer Pricing Guidelines, the details of such methods have been provided for in the respective country chapter, e.g. the United States.

Additionally, the latest transfer pricing developments, including case law, can be obtained from IBFD’s Tax News Service (online and e-mail service), while more comprehensive coverage of a majority of the countries can be found in other IBFD publications, most notably the online Transfer Pricing Database publication, which has detailed transfer pricing information on almost 60 countries.
1. Tax authority and law

The tax administration agency in Hong Kong is the Inland Revenue Department of Hong Kong (HKIRD). Hong Kong does not have specific legislation to regulate transfer pricing although the Inland Revenue Ordinance (IRO) does provide a legal basis for making transfer pricing adjustments, as follows:

– section 16(1) of the IRO restricts deductions of expenditure in arriving at assessable profits;
– section 17(1)(b) of the IRO restricts deduction for any disbursement or expenses not being expanded for the purposes of producing profits;
– section 17(1)(c) of the IRO disallows any expenditure of a capital nature; and
– section 61A of the IRO states that transactions entered into for the sole or dominant purpose of obtaining a tax benefit may be disregarded and/or an adjustment made.

On 20 June 2016, Hong Kong announced that it would join the OECD’s Inclusive Framework as an Associate for the implementation of the package of measures against base erosion and profit shifting (BEPS), and it has also committed to the comprehensive BEPS package, including Action 13 on transfer pricing documentation in respect of country-by-country (CbC) reporting requirements.

On 28 October 2016, the Financial Services and Treasury Bureau of Hong Kong published a consultation paper on its website on measures to counter BEPS. According to the press release, “Hong Kong is supportive of international efforts to promote tax transparency and combat tax evasion. Implementation of measures to counter BEPS signifies our commitment to international tax co-operation” and the “priority is to put in place the necessary legislative framework for transfer pricing rules which cover the latest guidance from the OECD, spontaneous exchange of information on tax rulings, CbC reporting requirement, the cross-border dispute resolution mechanism and the Multilateral Instrument”.

2. Regulations and rulings

2.1. Regulations, rulings and guidelines

In 2009, the HKIRD issued two Departmental Interpretation of Practice Notes (DIPN) on transfer pricing, i.e.:

– DIPN 45: Relief from Double Taxation due to Transfer Pricing or Profit Reallocation Adjustments; and

DIPN 45 which deals with double taxation relief of transfer pricing adjustments, does not specify any transfer pricing methods or principles to be followed in order to secure agreement between Hong Kong and its treaty partner on any initial and corresponding transfer pricing adjustment.

DIPN 46 issued in December 2009, provides further guidance to taxpayers on the application of the arm’s length principle, methodologies acceptable to the HKIRD
which can be used to determine the arm’s length price and administrative regulations including type of records and documentation which should be maintained by the taxpayer involved in transfer pricing arrangements.

Although Hong Kong is not a member of the OECD, DIPN 46 is generally based on OECD Transfer Pricing Guidelines, except where they are incompatible with the express provision of the IRO.

On 29 March 2012, the HKIRD issued DIPN 48, setting out the guidelines for taxpayers seeking an advance pricing agreement. It explains the advance pricing agreement process and the terms and conditions prescribed by the Commissioner.

It should be noted that the DIPN do not carry legislative authority.

On 10 July 2013, the Inland Revenue (Amendment) Bill 2013 was passed by the Hong Kong Legislative Council which enables Hong Kong to enter into tax information exchange agreements with jurisdictions with which a comprehensive double tax treaty has not been concluded, and to enhance existing exchange of information arrangements under its tax treaties.

With effect from 1 March 2018, companies incorporated under the Companies Ordinance in Hong Kong, including companies limited by shares, companies limited by guarantee and unlimited companies, are required to obtain and maintain up-to-date beneficial ownership information by way of keeping a significant controllers register. However, companies with shares listed on the Hong Kong Stock Exchange are exempt from such requirement.

2.2. Arm’s length principle

Although there is no definition in the IRO of what an “arm’s length principle” is, DIPN 46 does provide some clarity on the concept and application. DIPN 46 uses the OECD’s standard and accepts that the “arm’s length principle” uses independent transactions as the benchmark to determine how profits and expenses should be allocated for transactions between associated enterprises.

Based on DIPN 46, the arm’s length principle to be used is as contained in the “Associated Enterprises Article”, i.e. article 9, of the OECD Model Tax Convention.

2.3. Meaning of control and associated persons

The definition of “associate” is defined in section 21A(A) of the IRO, which relates to royalty and licence fees, but DIPN 46 does not refer the IRO.

In defining associates enterprises, DIPN 46 refers to the “Associate Enterprises” article of tax treaties or article 9(1) of the OECD Model Tax Convention, which permits the upward adjustment of profits of an enterprise subject to certain condition.

Two enterprises are associated enterprise with respect to each other if one of the enterprises meets the condition of article 9(1). In addition, DIPN 46 specifically states that no threshold (e.g. percentage ownership criteria) has been described to define an associate enterprise from a Hong Kong transfer pricing perspective.
3. Methodologies

3.1. Prescribed methods

The following methods can be used in determining the arm’s length price:
- comparable uncontrolled price method;
- resale price method;
- cost-plus method;
- profit split method; and
- transactional net margin method.

The HKIRD also accepts that multinational enterprises should retain the freedom to apply methods not described in the OECD Transfer Pricing Guidelines to establish prices provided those prices satisfy the arm’s length principle. However, alternate methods should be used to substitute any of the methods specified above if the use of one of the methods is appropriate based on the facts and circumstances of the case.

3.2. Priority of methods

The traditional methods (i.e. comparable uncontrolled price, resale price and cost-plus methods) are preferred to the transactional profit methods when both can be applied in an equally reliable manner.

4. Comparability analysis

4.1. Comparable data

DIPN 46 adopts the factors identified by the OECD in determining comparability and making adjustment, i.e.:
- characteristic of the property or services;
- function performed, assets or resources contributed and risks assumed;
- economic and market circumstances; and
- business strategies (e.g. market penetration, research and development commitments, market positioning, etc.).

4.2. Foreign comparables

There are no provisions for the use of foreign comparables.

4.3. Secret comparables

There are no provisions for the use of secret comparables.

4.4. Use of ranges

DIPN 46 does not specify a preference for a single figure or a range of figures. The use of ranges, such as an inter-quartile range, consistent with international standards, would be accepted in the determination of arm’s length price.
5. Disclosure/documentation requirements

5.1. Tax return disclosures

There are no specific disclosure or documentation requirements to be included in the tax return.

On 1 April 2015, the IRD released the revised Profits Tax Return 2014/15, in which item 7.7 was added to BRI 51 requiring companies to confirm whether they were parties to a merger under the Companies Ordinance during the basis period.

5.2. Transfer pricing documentation requirements

There are no specific transfer pricing documentation requirements under the IRO. DIPN 46 contains certain guidelines in relation to transfer pricing documentation and encourages the taxpayer to prepare such documentation.

In paragraph 85 of DIPN 86, the HKIRD states that although section 51C of the IRO does not expressly require taxpayers to prepare contemporaneous transfer pricing documentations, it does require taxpayer to create documents showing compliance with the arm’s length principle. In addition, HKIRD also states that as a matter of good business practice, taxpayers are “encouraged” to prepare transfer pricing documentation.

DIPN 46 also lists the type of information that would be required during a transfer pricing inquiry/audit or investigation, which includes details of:

- any relevant commercial or financial relations falling within the scope of the IRO;
- the nature, terms, prices, and quantum of relevant transactions, as well as the method(s) by which this information was achieved, including any comparability study undertaken;
- the manner in which the selected transfer pricing method resulted in (or not) an arm’s length price; and where it has not resulted in an arm’s length price, the computational adjustment required and how it has been computed; and
- the terms of commercial arrangements with both third party and related-party customers.

DIPN 46 also refers the documentation requirements provided in the OECD Transfer Pricing Guidelines as guidance on the type of information that would be useful.

5.3. Country-by-country reporting

Hong Kong participates in the OECD’s Inclusive Framework on BEPS and has proposed to implement CbC reporting. On 22 December 2016, the HKIRD published an announcement on CbC reporting. The implementation framework for CbC reporting in Hong Kong is provided under the Inland Revenue (Amendment) (No. 6) Bill 2017, which was published in the Gazette on 29 December 2017 and is subject to the scrutiny of the Legislative Council. The requirements for filing a CbC report are generally in line with those of Action 13 of the BEPS Action Plan. Subject to the necessary legislative amendments, a multinational enterprise (MNE) group will be required to file a CbC return, which includes a CbC report, in Hong Kong for ac-
counting periods commencing on or after 1 January 2018 if its annual consolidated group revenue is at least HKD 6.8 billion.

The deadline for filing a CbC return is 12 months after the end of the relevant accounting period or the date specified in the assessor’s notice, whichever is earlier. On 5 March 2018, the CbC Reporting Portal was launched by the IRD for the submission of notifications and CbC returns.

To facilitate MNE groups of which the ultimate parent entities are tax residents in Hong Kong (Hong Kong MNE groups) in fulfilling their CbC reporting obligations in other jurisdictions that have introduced CbC reporting requirements earlier than 1 January 2018, the HKIRD will accommodate parent surrogate filing as a transitional arrangement for the period between 1 January 2016 and 31 December 2017. Under this transitional arrangement, the Hong Kong ultimate parent entity of a Hong Kong MNE group will be allowed to voluntarily file its CbC reports for the early reporting period to the HKIRD for exchange with other tax jurisdictions. The ultimate parent entity of a Hong Kong MNE group seeking parent surrogate filing in Hong Kong should submit a notification, duly signed by its director, secretary or responsible officer, to the HKIRD containing information such as the name of the ultimate parent entity, its Hong Kong business registration number, the accounting period(s) for which the group’s CbC report will be filed to the HKIRD and information on the constituent entities to be included in the CbC report.

6. Mutual agreement procedures (MAPs)

MAPs are only available for double taxation relief pursuant to a tax treaty entered into by Hong Kong. The time limit for presenting a MAP to the competent authority is within 3 years from the first notification of the action resulting in the taxation which was not in accordance with the provisions of the treaty. The HKIRD’s view is that the first notification is usually the issuance of the relevant notice of assessment or loss computation by the HKIRD or the equivalent notification from a treaty partner state.

7. Advance pricing agreements (APAs)

On 29 March 2012, the HKIRD issued DIPN 48, setting out the guidelines for taxpayers seeking an APA. DIPN 48 sets out the guidance on the APA framework, application and negotiation process as well as other procedural guidance prescribed by the Commissioner.

DIPN 48 makes it clear that an APA is to reach an agreement on the methodology (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) used to determine the transfer pricing in controlled transactions but not to establish the actual profit to be taxed in Hong Kong in future.

For the purposes of DIPN 48, the scope of an APA is extended to cover transactions between a permanent establishment and its head office or between two permanent establishments of the same enterprise. Bilateral and multilateral APAs are preferred by the HKIRD at the initial stage, reflecting its intention to focus on international tax issues that can be solved via the mutual agreement procedures under article 25 of the
OECD Model Tax Convention. Therefore, for the time being, APA applications will only be accepted for cross-border related-party transactions involving countries that are treaty partners.

The HKIRD does not charge an APA application fee though taxpayers will first need to meet certain thresholds (which may be relaxed by the HKIRD on a case-by-case basis) per annum:
- HKD 80 million per annum for transactions involving the sale and purchase of goods;
- HKD 40 million per annum for transactions involving services; and
- HKD 20 million per annum for transactions involving intangible property.

DIPN 48 indicates a tentative time frame of 18 months from the acceptance of the formal application with a possible additional 6 months depending on the progress of negotiation with the competent authority of the treaty partner(s). Generally, an APA will apply for 3 to 5 years.

The APA process has five stages as commonly seen in other APA programmes around the world:
- pre-filing;
- formal application;
- analysis and evaluation;
- negotiation and agreement; and
- drafting, execution and monitoring.

8. Safe harbour provisions
There are no safe harbour provisions in Hong Kong.

9. Transfer pricing audits
9.1. Burden of proof
The burden of proof on the accuracy of information in the tax return, transfer prices and transfer pricing documentation lies with the taxpayer.

9.2. Statute of limitation
DIPN 46 is silent on the statute of limitation. In line with the general practice, the HKIRD has the ability to enquire into an enterprise’s tax filing positions going back to as much as 7 years.

9.3. Desk and field audits
There are no specific rules for transfer pricing audits in Hong Kong. DIPN 11 (revised) – Field Audit and Investigation was issued in October 2007 to provide general guidance to taxpayers and their tax representatives involved in field audit and investigation.

Field audits are carried out on taxpayers whose returns show signs of non-compliance. A field tax audit is conducted through a series of interviews and visits with the subject taxpayer. The HKIRD will inform the selected taxpayer by letter and an in-
Interview time is arranged. At the interview, the taxpayer is required to provide the tax auditors with details about the nature of their business, its accounting system, as well as information about their financial affairs. For serious cases will be referred to the Investigation Unit for a more detailed investigation.

For transactions involving a related company incorporated overseas, field auditors commonly examine the following issues:

– the deductibility of expenses or payments to the related offshore company;
– the extent to which the Hong Kong company’s expenses were incurred in the production of the profits of the related offshore company; and
– the chargeability to Hong Kong profits tax of the profits of the related offshore company.

10. Penalties

Although DIPN 46 does not prescribe penalties on transfer pricing adjustment, transfer pricing penalties can be applied under the IRO. Section 82A of the IRO deals with related penalties whereby penalties of up to 50%, 75% and 100% of underpaid tax (plus interest) can be imposed. The HKIRD can also apply penalties of up to 300% of underpaid tax.
1. Tax authority and law

The tax administration agency in Russia is the Federal Tax Service (FTS), under the Ministry of Finance. Administration of transfer pricing is carried out by the Department of Transfer Pricing and International Cooperation. The Department’s staff is drawn not only from public officials, but also from private businesses.

The provisions establishing the general principles for the determination of prices for taxation as well as rules of control in connection with transactions between related persons are established by section V.1 of the Russian Tax Code (RTC). From 2016, a check of transfer prices can be carried out only under the rules of section V.1 of the RTC. Automatic exchange of finance account information and the provision of threertiered transfer pricing documentation are regulated by section V.II.1. of the RTC.

2. Regulations and rulings

2.1. Regulations, rulings and guidelines

There are no general transfer pricing guidelines. The Ministry of Finance and the FTS have issued a significant number of clarifying letters regarding transfer pricing issues on particular matters. However, such clarifications are binding on lower level tax authorities, and not necessarily on taxpayers. Although the transfer pricing law has been operating for 6 years, there are still difficulties in appreciating the consequences and risks of the rules. During 2016-2017, the FTS issued several letters clarifying the current transfer pricing legislation; however, many of the rules have still not been clarified by the tax authorities. The first tax audits on transfer pricing matters started in 2014, but there is no information on the number of tax audits that have been conducted by the FTS up to 2018. There are several cases involving Russian companies, i.e. CJSC Dulisma Oil Company and Uralkali (decision А40-123426/2016 and decision А40-29025/17-75-227 of the Moscow Commercial (“Arbitration”) Court) in which taxpayers tried to challenge a decision of the FTS further to the results of tax control of transfer prices. In the Dulisma Oil Company case, the taxpayer renounced his claim against the FTS position during the legal procedure, but even so the court approved the position of the FTS in the text of the decision. In the Uralkali case, the court of the first instance supported the taxpayer, but the Appeal Court reviewed the decision and agreed with the position of the FTS.

In practice, transfer prices are initially checked by the regular tax offices, and not the FTS, on the basis of checking the economic justification of the expenses rather than doing a transfer pricing audit. Moreover, regular tax offices in practice also check the market level of revenues in transactions between related parties if they suspect the companies in question have an unjustified decrease in income. However, the Supreme Court in its decision of 11 April 2016 stated that such practice is illegal and only the FTS may check the market level of revenue.

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On 16 February 2017, the Supreme Court approved a review of the practice of consideration by courts of matters connected with the application of specific provisions of section V.1 and article 269 of the RTC.

Russia is not a member of the OECD and does not endorse the OECD Transfer Pricing Guidelines. However, the current transfer pricing rules are based on the OECD Transfer Pricing Guidelines, so the Guidelines may be a useful source of non-binding commentaries.

In addition, the Russian fiscal authorities have issued several clarifications, in which they comment on tax implications in Russia with reference to the Commentary on the OECD Model Tax Convention. These clarifications are particularly relevant because most Russian tax treaties are based on the OECD Model Tax Convention.

2.2. Arm’s length principle

The transfer pricing rules allow the FTS to make transfer pricing adjustments based on the arm’s length principle by means of imposing arm’s length prices. In general, the price of a transaction is considered to be the market price until the opposite is proven by the FTS.

With regard to the transfer pricing rules, the FTS controls:

- transactions between Russian related parties if:
  - the sum total of transactions is more than RUB 1 billion per calendar year,\(^2\)
  - one of the related parties is an extracting company;
  - one of the related parties benefits from some special tax treatment (unified tax on imputed income, unified agricultural tax or tax treatment of a resident of a Russian special economic zone, or a participant of a regional investment project), but the other does not;
  - one or both of the related parties is not a corporate income taxpayer or applies a 0% corporate income tax rate to its income;
  - at least one of the related parties is a corporate research centre referred to in the Law on the “Skolkovo” Innovation Centre which applies an exemption from the obligations of a payer of VAT; or
  - at least one of the parties claims an investment deduction for income tax purposes during the tax period (investment tax deduction is applicable for special categories of fixed assets and allows the taxpayer to reduce the amount of tax within special established limits);
- foreign trade transactions involving commodities traded on a global exchange market;
- transactions between entities, if one of the entities is a resident or is registered in countries (territories) mentioned in the “black list” of the Russian Ministry of Finance (offshore territories that can be used unlawfully to optimize a party’s tax position);
- transactions where an unrelated intermediate entity is used that does not perform any functions, bear any risks nor hold any assets; and

\(^2\) For 2012 the threshold was RUB 3 billion per annum and for 2013 RUB 2 billion per annum. Starting from 2014, the threshold is RUB 1 billion per annum.
transactions between foreign and Russian related parties, which are subject to FTS control irrespective of the volume of the transactions.

For some of the above listed specific types of transactions, there are several thresholds that need to be achieved in order for such transactions to be subject to transfer pricing provisions.

A number of transactions, in spite of the fact that they satisfy the conditions for control, are not subject to control. The list of such transactions is directly established in the RTC. Since 1 January 2017, transactions granting interest-free loans between Russian related parties are not subject to control. Transactions between members of a tax group (consolidated taxpayer group in Russia) are also exempt from transfer pricing control (except for transactions in respect of extraction operations).

2.3. Meaning of control and associated persons

The following are recognized as related parties for the purposes of the transfer pricing rules:

- organizations where one organization directly and/or indirectly has a participation interest in another organization and the share of such participation comprises over 25%;
- a natural person and an organization where such natural person directly and/or indirectly has a participation interest in such organization and the share of that participation comprises over 25%;
- organizations where one and the same person directly and/or indirectly has a participation interest in such organizations and the share of that participation in each organization comprises over 25%;
- an organization (including a natural person jointly with his relatives) possessing powers to appoint (elect) the single-member executive body of that organization (i.e. the Chief Executive Officer), or to appoint (elect) not less than 50% of that organization’s collegiate executive body or board of directors (supervisory council);
- organizations whose sole-member executive bodies or not less than 50% of whose collegiate executive body or board of directors (supervisory council) are appointed or elected by a decision of one and the same group of persons (of a natural person jointly with his relatives);
- organizations, in which over 50% of the collegiate executive body or board of directors (supervisory council) is comprised of one and the same group of natural persons jointly with their relatives;
- an organization and a natural person which exercises the powers of the organization’s sole-member executive body;
- organizations, in which the powers of the sole-member executive body are exercised by one and the same person;
- organizations and/or natural persons where the direct participation interest of every person in every subsequent organization comprises over 50%;
- natural persons where one natural person is subordinate to another natural person by virtue of his official position; and
- a natural person, his spouse, parents (including adoptive parents), children (including those adopted), full and half-brothers and sisters, his guardian (trustee) and ward.
Courts can recognize parties as related based on other facts and circumstances if relationships between them have an influence on the conditions and economic results of business activities and transactions made.

3. Methodologies

3.1. Prescribed methods

The transfer pricing law provides the following methods for determining the market price:

- comparable uncontrolled price (CUP) method;
- resale price method;
- cost-plus method;
- transactional net margin method; and
- transactional profit split method.

3.2. Priority of methods

Under the transfer pricing law, the first transfer pricing method that must be applied is the CUP method. In cases where it is not possible to apply the CUP method (e.g. where comparison is not possible) and also when it is impossible to determine the appropriate prices because of the absence or the inaccessibility of information sources to determine a market price, the other methods are applicable.

For resale activities the resale method has priority.

4. Comparability analysis

4.1. Comparable data

The transfer pricing rules provide that any sources may be used, including unofficial sources (for example, information from independent appraisers, a specialized database, ratings and information from the print media, etc.).

4.2. Foreign comparables

Foreign comparables (margins received by the foreign organization) may be used for Russian transfer pricing purposes if there is no information about the margin levels of similar Russian organizations. Generally, information on comparables and market prices from foreign sources may also be used for Russian transfer pricing purposes.

Foreign comparability data is adjusted (for example, figures from the financial reports of foreign companies must be given in a form comparable to reporting data under Russian legislation).

4.3. Secret comparables

There are no specific guidelines on the use of secret comparables in Russia. However, considering the principle of open and transparent court hearing procedures, as well as the requirement to support statements in court with verifiable proof, secret comparables would be difficult to use, at least as a first line of argument.
4.4. Use of ranges

The Tax Code establishes the rule for calculating the transfer pricing range. If the price actually applied in the transaction is within such a range, it is applied for tax purposes and recognized as valid. If the actual price is lower than the minimum price of the range, the minimum price of the range is applicable. If the actual price of the transaction is higher than the maximum price of the range, the maximum price of the range is applicable for tax purposes. The minimum or maximum values in the range are applicable for tax purposes only if such application does not lead to a reduction of the sum of the tax due, compared with the tax actually paid on such transaction, or an increase in the sum of a loss. Recently, the Ministry of Finance proposed to apply for tax purposes a price calculated as the median in the range for cases in which companies do not make a self-adjustment, so this will impose more serious charges for taxpayers.

5. Disclosure/documentation requirements

5.1. Tax return disclosures

The legislation does not require any transfer pricing disclosure in the tax returns.

5.2. Transfer pricing documentation requirements

Taxpayers should inform the FTS by special notification about every transaction that is subject to control:
– if the annual volume of transactions with: (i) a foreign affiliated entity exceeds RUB 1 (i.e. no threshold); and (ii) a Russian affiliated entity exceeds RUB 1 billion; and
– certain specific types of transactions with a Russian or foreign entity.

Such notification should be submitted by 20 May in the year after the year of the transaction.

In 2017, new rules regarding the three-tiered approach to international group documentation were implemented. The requirements are mandatory from the financial year 2017 onwards.

These rules are applied if the revenue of a multinational enterprise (MNE) group for the previous fiscal year was at least RUB 50 billion (approximately EUR 717 million) if the parent company is a resident of Russia, or the applicable amount established in the country of residence of the parent company if otherwise.

The three-tiered documentation consists of the following documents:
– a notification of participation in an MNE group;
– Master and Local Files; and
– a country-by-country (CbC) report.

Notification of the participation must be filed by all Russian taxpayers belonging to the MNE group. In some cases, one member of the group (generally the parent company or an authorized member) can present the notification on behalf of other members that are Russian tax residents. The official form of this notification is specified by the FTS.
The Master File and Local File are submitted by the Russian taxpayer belonging to the MNE group at the request of the competent tax authority. No specific forms for these documents have been established in the law.

The Tax Code describes the content of the Master File as comprising the economic substance of each transaction, the price applied and the transfer pricing method used, the structure of participation within the MNE group including a description of the market where the MNE group carries out its main business activity (in the form of schemes), the business activity of the MNE group, intangible assets, financial activity and other information (description of advance pricing agreements concluded, consolidated financial reports, etc.).

The Local File should provide information with regard to specific controlled intercompany transactions taking place between a local country affiliate (in Russia) and an associated enterprise(s) in a foreign country(ies).

There are also special guidelines issued by the tax authorities that describe in more detail the contents of the transfer pricing documentation.

**5.3. Country-by-country reporting**

CbC reporting rules become effective in 2018 and are applicable to the financial year 2017. Taxpayers can voluntarily provide CbC reports for the financial year 2016.

CbC reports must contain information relating to the allocation of income, the taxes paid, and indicators of economic activity (e.g. the number of people employed, amount of tangible assets). The report also requires information about other members of the MNE group, including the tax jurisdiction of incorporation, tax jurisdiction of residence and the main business activities carried out by these members.

Based on the law, the CbC report should be filed electronically within 12 months after the end of the relevant period in the form established by the competent authority.

Under general rules, the report is submitted by the parent company or by an authorized member of the group, if they are Russian tax residents. Alternatively, the CbC report may be submitted by a member of the group (a Russian taxpayer) at the request of the competent tax authority. The CbC report should be prepared in the Russian language, but in some cases (e.g. if the parent company is not a Russian tax resident) the report is allowed to be prepared in a foreign language.

**5.4. Other disclosures**

The Ministry of Finance signed the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information in 2016. Subsequently, the RTC has been amended to include new rules regarding automatic exchange of financial account information (Chapter 20.1 of the RTC).

Under general rules, financial institutions must request financial information from their clients and electronically provide them to the FTS. Russian rules correspond to the OECD Common Reporting Standard (CRS).
On 9 April 2018, the Government of Russia approved the rules regarding the transfer of financial information and CbC reports to the competent authorities of foreign countries and the receiving of such information by the Russian authorized offices, and also regarding requirements for the protection of information transferred. According to the Government decision, the FTS is responsible for the procedures and for the negotiations with OECD on this matter.

The intended date of the first exchange of information with partner jurisdictions is expected to take place in September 2018, so Russia will receive information from foreign tax authorities regarding foreign accounts of Russian tax residents as early as 2018.

6. Mutual agreement procedures (MAPs)

No separate program or guidelines with regard to MAPs are established by law. MAPs are regulated only on the basis of tax treaties. Deadlines for MAPs vary depending on the relevant tax treaty, and most agreements establish deadlines within 2 or 3 years from the first notification of the action that results in taxation not according to the tax treaty.

The competent authority responsible for MAP cases is the Ministry of Finance of the Russian Federation. According to the official information published by the Ministry of Finance, the purposes of MAPs are relief (elimination) of double taxation and resolving difficulties arising from the application of provisions of tax treaties that are not in accordance with their purposes and sense. Only tax residents or citizens of Russia can initiate MAPs in Russia.

No specific forms or documents are established. A taxpayer should provide a written request in a free form to the Ministry of Finance. There are no particular formal requirements, but the taxpayer has to provide appropriate documentation relating to the case (copies of contracts, copies of correspondence with tax authorities etc.).

7. Advance pricing agreements (APAs)

One of the elements of the current transfer pricing rules is the ability for taxpayers to conclude an APA. Unfortunately, only major taxpayers can be a party to such agreements, but the criteria for applying an advance pricing agreement may be amended to allow such agreements to be used more widely in future.

APAs can be unilateral, bilateral or multilateral and the agreement concluded can cover only issues relating to transfer pricing. The fee for the request for an APA is RUB 2 million.

According to the data of the FTS, since 2015, more than 25 APAs have been concluded with the 42 largest taxpayers.

8. Safe harbour provisions

There are no safe harbour provisions under the Russian transfer pricing law.
9. Transfer pricing audits

9.1. Burden of proof

In general, the price of the transaction indicated in the contract between the parties is considered the market price until the opposite is proven by the FTS. The burden of proof thus rests with the tax authorities.

9.2. Statute of limitation

A field tax audit conducted by the FTS may cover only the 3 calendar years immediately preceding the year in which the decision to conduct a transfer pricing tax audit was taken.

9.3. Desk and field audits

The Department of Transfer Pricing and International Cooperation will conduct audits specifically relating to transfer pricing and will examine the taxpayer’s tax returns, financial (accounting) documentation and relevant supporting documents which evidence how the taxpayer sets the relevant prices.

The FTS is not entitled to conduct two or more transfer pricing tax audits on any one controlled transaction for the same calendar year.

If the FTS disagrees with the taxpayer’s prices, it will reassess the taxpayer and charge underpaid taxes, penal interest and a fine (as a rule) on any shortfall in taxes paid.

10. Penalties

There are two special articles that fix penalties for applying non-arm’s length prices (40% of the tax not paid, subject to a minimum of RUB 30,000) and for not providing, or providing inaccurate, transfer pricing notifications to the FTS (RUB 5,000). The fine of RUB 5,000 for not providing, or for providing inaccurate, transfer pricing notifications does not depend on the number of transactions that have to be specified in the notifications. For 2012/13 no penalty was applicable, and for the 2014/16 period a fine of 20% of the unpaid tax was imposed.

Late payment interest is calculated at a rate of 1/300 (1/150 starting from the 31st day of delay) of the refinancing rate established by the Central Bank of Russia, which is currently 7.25% per annum (as of 2018).

Fines for not submitting the CbC report, Master and Local files, and financial account information are also established by law. Implementation of this law begins in 2020 and is not applicable during the transition period (years 2017-2019). The following fines may be imposed:

- with respect to financial information: RUB 500,000 for not submitting the information to the FTS within the time limit established; RUB 50,000 per each fact not included by the financial institution in the report to the FTS;
- RUB 50,000 for not submitting or providing inaccurate notification of participation in an MNE group; and
- RUB 100,000 for not submitting the CbC report, Master and Local File (per document).
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