

Rödl & Partner

EXPERT ADVICE

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TRANSFER PRICING 2021 AND 2022



Dear Sir or Madam

The Polish Deal brings further significant changes to transfer pricing. We present to you this study in which we briefly describe documentation and reporting obligations, as well as sanctions related to transfer pricing.

Our experts describe the key requirements and steps necessary to fulfil the transfer pricing obligations for 2021 and take into account legislative changes to be introduced next year. We recommend planning a comprehensive review of the obligations and getting ready to fulfil them well in advance.

If you are interested in details, you are welcome to contact our specialists.

Yours faithfully

Rödl & Partner

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1. LOCAL FILE



ENTITIES CONCERNED

Entities which make controlled transactions with associated enterprises in the meaning of the CIT Act and PIT Act in 2021 must prepare the Local File required under law once the value of their transactions exceeds the statutory thresholds.



DOCUMENTATION THRESHOLDS

The Local File is prepared for uniform controlled transactions whose value, net of VAT, exceeds the following documentation thresholds in the financial year:

10 million zł	2 million zł	100 thousand zloty	500 thousand zloty
for financial transactions or transactions in goods	for transactions in services and for other transactions	for transactions made with an entity residing, established or having a management board in a territory or country applying harmful tax competition	for indirect transactions with tax havens (see chapter 4 of this brochure for details).



COMPONENTS OF THE LOCAL FILE

The Local File includes, invariably since 2019, the following components:

- 1) a description of the associated enterprise;
- 2) a description of the transaction, including the analysis of functions performed, assets used and risks assumed;
- 3) a transfer pricing analysis;
- 4) financial information.

In the case of direct and indirect transactions with tax havens, the Local File should additionally include an economic justification for the transaction, in particular a description of expected economic, including tax, benefits.

Detailed substance of the Local File has been specified in the PIT/CIT Acts and the regulations issued by the Minister of Finance with reference to the individual components.



PREPARATION DEADLINE

The Local File must be prepared by the end of the ninth month of the end of the financial year.

So in the case of taxpayers whose tax year is the same as the calendar year, the deadline for preparation of transfer pricing documentation for 2021 expires on 30 September 2022.

Pursuant to the government's amending bill, the deadlines for meeting transfer pricing obligations are to be extended:

- **until 30 September 2022** – if the deadline expires between 1 January 2022 and 30 June 2022;
- **by three months** – if the deadline expires between 1 July 2022 and 31 December 2022.

2. THE POLISH DEAL – IMPACT ON THE SCOPE OF THE LOCAL FILE FOR 2021



EXEMPTION FROM THE OBLIGATION TO PREPARE BENCHMARKING STUDY

Since 2021, the Local File no longer has had to include benchmarking study or conformity analysis in the case of:

- transactions made by micro or small enterprises;
- transactions other than controlled transactions (direct and indirect transactions with tax havens).



ENTITIES CONCERNED

Microenterprise is an enterprise which met all of the following conditions in at least one of the last two financial years:

- employed less than 10 staff members (on an annual average) and
- generated a PLN equivalent of no more than 2 million euro in net annual revenue from the sale of goods and services and from financial transactions or the balance sheet total of assets as of the end of one of those financial years did not exceed a PLN equivalent of 2 million euro.

Small enterprise is an enterprise which is not a microenterprise and which met all of the following conditions in at least one of the last two financial years:

- employed less than 50 staff members (on an annual average) and
- generated a PLN equivalent of no more than 10 million euro in net annual revenue from the sale of goods and services and from financial transactions or the balance sheet total of assets as of the end of one of those financial years did not exceed a PLN equivalent of 10 million euro.

Transactions other than controlled transactions are transactions with independent entities from tax havens and indirect transactions with tax havens in which the beneficial owner of the payments is a resident of the so-called tax haven. Indirect transactions with tax havens are described separately in chapter 4 of this brochure.



BENEFIT OR RISK?

No obligation to prepare benchmarking study does not mean that in the case of a tax inspection of a micro or small enterprise tax authorities cannot prepare their own transfer pricing analysis. In the last few years, transfer pricing inspections have commenced with the review of the analyses provided by taxpayers. If the analyses raise no doubts with the authorities, the inspection has no negative consequences. If there is no transfer pricing analysis available concerning a transaction made in 2021, the inspecting authority will be entitled to check the arm's length nature of the controlled transaction solely on the basis the authority's own analyses.

The question of whether the abolishment of the obligation to prepare transfer pricing analysis is good for taxpayers is disputable. The analysis as an optional Local File component should be considered above all by small enterprises with foreign capital which make cross-border transactions.

3. THE POLISH DEAL – IMPACT ON THE SCOPE OF THE LOCAL FILE FOR 2022

1

NEW EXEMPTIONS FROM THE OBLIGATION TO PREPARE THE LOCAL FILE

SAFE HARBOUR

The obligation to prepare the Local File for transactions subject to safe harbour regime has been abolished. When it comes to transactions made in 2022, taxpayers will be allowed not to prepare the Local File for the following transactions:

- transactions involving low value-added services and
- financial transactions meeting the criteria of the safe harbour exemption.

So far, taxpayers in the safe harbour regime have not been obliged to attach a transfer pricing analysis to the Local File for 2021 and the previous years.

RECHARGES

The lawmakers have revoked the obligation to prepare the Local File for recharges which only settle expenses between associated enterprises incurred for an independent enterprise, provided that additional statutory conditions are met jointly.

PERMANENT ESTABLISHMENTS IN POLAND

The documentation obligation will be abolished – subject to meeting certain conditions – for transactions made exclusively between:

- Polish permanent establishments of associated enterprises which have their residence, registered office or management in the EU or EEA;
- a foreign permanent establishment located in Poland and an associated enterprise established also in Poland.

AGREEMENTS

The documentation obligation concerning transfer pricing will also be abolished for transactions covered by:

- an advance pricing agreement (APA) – like it has been so far;
- an investment agreement;
- a tax compliance agreement.



4. INDIRECT TRANSACTIONS WITH TAX HAVENS



ENTITIES CONCERNED

Entities making transactions (both with an associated enterprise and with an independent enterprise) if the beneficial owner of the transaction-related payments has its registered office in a country applying harmful tax competition (so-called tax haven).



DOCUMENTATION THRESHOLDS

The documentation obligation arises only if the value of a uniform transaction exceeds 500 thousand zloty in a tax year. This means that to establish whether the documentation obligation applies, the values of similar (uniform) payments add up.



HOW TO GET READY

A correct determination of documentation obligations involves a major administrative burden connected with establishing the beneficial owner status and collecting statements and other information from contractors to confirm that the beneficial owner of the payments does not have its registered office in a country applying harmful tax competition.

In order to meet the due care obligation when determining the contractor's status we recommend implementing an internal procedure to facilitate the analysis and collection of the necessary source documents. It is worth following the official Explanatory notes in this regard.

Deadlines for preparation of documentation of transactions with tax havens are the same as deadlines for preparation of transfer pricing documentation. However, the process of verifying documentation obligations is complex, therefore, it should be commenced well in advance.



RULES OF PREPARING THE LOCAL FILE

Documentation of transactions with an independent enterprise does not have to include a benchmarking study. Documentation of transactions with tax havens should, however, include an additional element – an economic justification of the transactions, in particular a description of expected economic, including tax, benefits.



5. STATEMENT ON TRANSFER PRICING



ENTITIES CONCERNED

Associated enterprises obliged to prepare the Local File.



WHO FILES THE STATEMENT

The statement is to be signed by electronic means by the entity's manager in the meaning of the Accounting Act, quoting his function. If several persons meet the criteria for entity's manager or if it is impossible to indicate one, the statement should be signed by each authorised representative.

According to special regulations, during the state of epidemic emergency or the state of epidemic announced in Poland due to COVID-19, the statement may be signed by:

- 1) a natural person – if an associated enterprise is a natural person;
- 2) a person authorised by a foreign enterprise to represent it in a branch office – in the case of a foreign associated enterprise with a branch office in Poland;
- 3) a person authorised to represent the entity – in the case of other associated enterprises.

An attorney cannot sign the statement..



ELEMENTS OF THE STATEMENT

Pursuant to the Polish PIT/CIT Acts, the statement must include:

- 1) a declaration that the Local File is ready;
- 2) a statement that the prices used in transactions with associated enterprises are at arm's length.



SANCTIONS

Failure to file the statement on preparation of the Local File, late filing or providing false information is subject to fiscal crime liability.

STATEMENTS FOR 2022

The amended act abolishes the statement as a separate document and incorporates it into the TPR form.



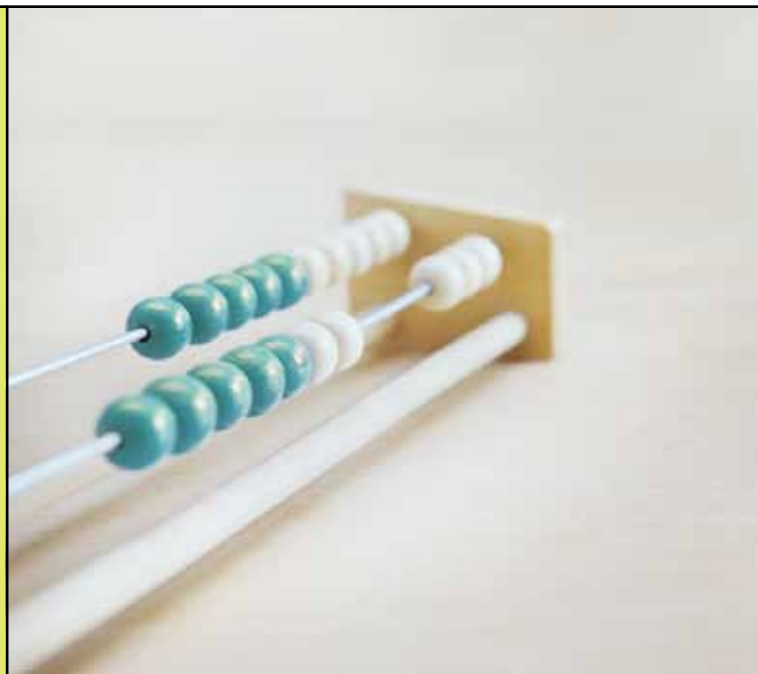
PREPARATION DEADLINE

The statement must be filed in electronic form, by the end of the ninth month of the end of the financial year.

So in the case of taxpayers whose tax year is the same as the calendar year, the deadline for filing the statement for 2021 expires on **30 September 2022**.

Pursuant to the government's amending bill, the deadlines for meeting transfer pricing obligations are to be extended:

- **until 30 September 2022** – if the deadline expires between 1 January 2022 and 30 June 2022;
- **by three months** – if the deadline expires between 1 July 2022 and 31 December 2022.



6. INFORMATION ON TRANSFER PRICING (TPR-C/TPR-P FORMS)



ENTITIES CONCERNED

TPR form should still be filed by associated enterprises:

- 1) obliged to compile Local File;
- 2) which make transactions exempt from documentation obligations under Article 11n(1) CIT Act and Article 23z(1) of the PIT Act (domestic entities which did not incur a tax loss).



HOW TO GET READY

Transfer pricing analysis (or conformity analysis) will be the key document in preparing the TPR form. Therefore, taxpayers should check whether such an analysis has been prepared or updated. Taxpayers whose results fall outside the arm's length range identified in the analysis should also consider adjusting their transfer pricing.



EXAMPLES OF INFORMATION TO BE INCLUDED IN THE TPR FORM

TPR form includes very detailed information. In order to fill out the form correctly, the taxpayer will have to, among other things, calculate the profit(loss) on the individual transactions (profitability) and compare the result with data on comparable transactions. Tax authorities will undoubtedly use that data and information to select entities for tax and combined tax/customs inspection.



SANCTIONS

Failure to file the information on transfer pricing, late filing or providing false information is punishable under Article 80e of the Polish Fiscal Crime Code.

OBLIGATIONS FOR 2022

Starting from the financial year commencing after 31 December 2021:

1. TPR form will be consolidated with the statement;
2. the deadline for submitting information on transfer pricing will be extended until the end of the eleventh month after the end of the tax year;
3. the persons authorised to sign the TPR form will change.

TPR form should be signed on behalf of the company by the company's manager (as defined in the Accounting Act). If the entity is managed by a collective body, the TPR may be signed by a designated member of that body.

The amended laws still prohibit commercial attorneys (prokurent) from signing TPR forms for 2022. They allow it, however, to be signed by the taxpayer's attorney being an attorney at law, legal or tax adviser or statutory auditor.



PREPARATION DEADLINE

The information on transfer pricing must be filed in electronic form by the end of the ninth month of the end of the financial year.

So in the case of taxpayers whose tax year is the same as the calendar year, the deadline for filing the information for 2021 expires on **30 September 2022**.

Pursuant to the government's amending bill, the deadlines for meeting transfer pricing obligations are to be extended:

- **until 30 September 2022** – if the deadline expires between 1 January 2022 and 30 June 2022;
- **by three months** – if the deadline expires between 1 July 2022 and 31 December 2022.

7. MASTER FILE



ENTITIES CONCERNED

Taxpayers making controlled transactions with associated enterprises in the meaning of the CIT Act and PIT Act must prepare the Master File required by law if the consolidated revenues of the group exceed 200 million zloty in the previous year, i.e. in 2020.



COMPONENTS OF THE MASTER FILE

The Master File should still include the following components:

- 1) a description of the group;
- 2) a description of significant intangible assets of the group;
- 3) a description of significant financial transactions made by the group;
- 4) financial and tax information of the group.

EXPECTED CHANGES – THE POLISH DEAL



SANCTIONS

Persons who fail to attach the Master File to the Local File may be punished with a fine of up to 720 day-fine units.



PREPARATION DEADLINE

The Master File must be prepared by the end of the twelfth month of the end of the financial year.

The deadline for preparation of the Master File for 2020 has been extended by 3 months. So in the case of taxpayers whose tax year is the same as the calendar year, the deadline for preparing the Master File expired on **31 March 2022**.



8. CBC-P NOTIFICATION FORM



ENTITIES CONCERNED

Like in the previous years, group members whose consolidated revenues following from the financial statements for the previous year exceed 750 million euro (3.25 billion zloty) and which, at the same time, do not file an independent CBC-R notification form must submit a CBC-P notification form.



NOTIFICATION COMPONENTS

The general information to be disclosed in the first part of the CBC-P notification form includes in particular:

- period covered by the CBC-P notification;
- details of the entity filing the CBC-P form;
- role in CBC-R reporting.

If the entity notifies that it is not a CBC-R filing entity, it must indicate whether the entity in charge of filing the CBC-R form is a Polish or foreign entity and provide its details and the country of CBC-R reporting.

Details on information to be included in the notification report are laid down in the Act on Exchange of Tax Information with Other Countries.



FILING METHOD AND FORM

The CBC-P notification form may be filed in electronic form only, using the template published by Polish tax authorities at www.podatki.gov.pl.

The CBC-P notification form can be submitted by an attorney holding a power of attorney to sign declarations/returns filed by means of electronic communication (UPL-1 form).



SANCTIONS

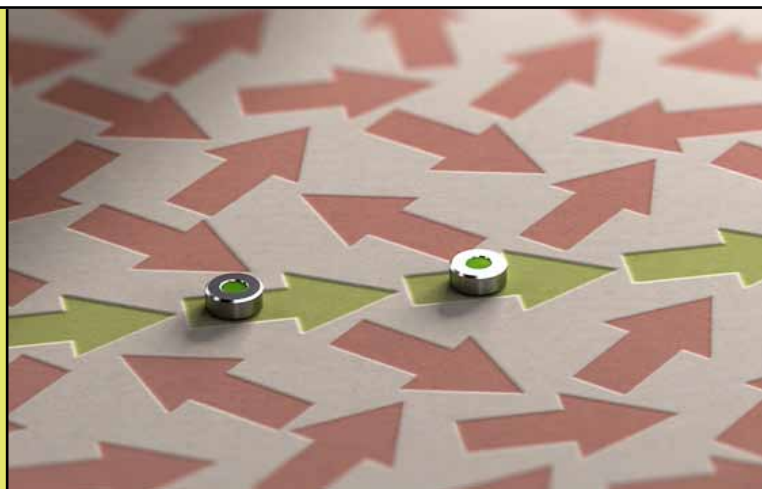
Submitting untrue information about group entities is punishable under the Polish Fiscal Crime Code.

In addition, failure to submit the notification form or submitting incomplete or untrue information is subject to a fine of up to 1 million zloty under the Act on Exchange of Tax Information with Other Countries.



PREPARATION DEADLINE

Entities obliged to submit the CBC-P form to tax authorities should do so within 3 months of the end of the group's reporting financial year.



9. CBC-R FORM



ENTITIES CONCERNED

Parent companies which have their registered office or management in Poland and which belong to a group whose consolidated revenues following from the financial statements exceeded 750 million euro (3.25 billion zloty) in the previous year must submit a CBC-R form.



INFORMATION TO BE INCLUDED IN CBC-R FORM

The CBC-R form must include:

- 1) the identification details of the group members;
- 2) information on the revenues, profit(loss) before tax, income tax paid, income tax due, share capital, undistributed profits carried forward, headcount, (non-current and current) assets other than cash and cash equivalents, the type of activity pursued by the members of the group – broken down by countries or territories;
- 3) additional information or explanations.

Details to be included in the CBC-R form are described in the Act on Exchange of Tax Information with Other Countries.



SANCTIONS

Submitting untrue information about group entities is punishable under the Polish Fiscal Crime Code.

Failure to submit the CBC-R form or submitting incomplete or untrue information is subject to a fine of up to 1 million zloty under the Act on Exchange of Tax Information with Other Countries.



PREPARATION DEADLINE

The CBC-R form must be submitted by the end of the twelfth month of the end of the financial year.



10. TRANSFER PRICING ADJUSTMENT



ENTITIES CONCERNED

Regulations on transfer pricing adjustments are applicable to taxpayers who decide to adjust transfer pricing in their dealings with associated enterprises.



HOW TO GET READY

The regulations on transfer pricing adjustments in force since 1 January 2019 specify when transfer pricing adjustments are taxable revenues or tax-deductible costs.

A transfer pricing adjustment may be recognised either as revenue or as tax-deductible cost if the taxpayer meets all of the following statutory conditions (legal status until 31 December 2021):

1. the transacting parties agree the arm's length terms and conditions already in the course of the tax year;
2. significant circumstances influencing the terms agreed in the course of the financial year change or the actual costs incurred or revenues earned underlying the transfer price are known;
3. at the time of the transfer pricing adjustment, the taxpayer holds a statement from the associated enterprise confirming that the associated enterprise has adjusted the transfer prices by the same amount as the taxpayer;
4. the other party to the adjusted transaction is established in Poland or in the country with which Poland has concluded a tax treaty and a tax information exchange agreement;
5. the adjustment is confirmed in the tax return for the year to which the adjustment refers.

For the duration of the COVID-19 pandemic the obligation to hold the statement as the condition for recognising a downward pricing adjustment has been lifted.

To meet the expectations and needs of taxpayers, the Ministry of Finance published in April 2021 the final version of explanatory notes on transfer pricing adjustments.

Following the introduction of the regulations on transfer pricing adjustments for payments already made, the recognition of transactions made with associated enterprises requires detailed analysis and review.

CHANGES UNDER THE POLISH DEAL

When it comes to transfer pricing adjustment, the Polish Deal has introduced the following changes:

- a downward transfer pricing adjustment can be made also if the taxpayer receives from an associated enterprise accounting evidence which confirms that the associated enterprise made a certain transfer pricing adjustment;
- a tax treaty is no longer mandatory, however, there must be a legal basis for exchange of tax information between countries;
- it is no longer obligatory to disclose a transfer pricing adjustment in the annual CIT return, therefore, one of the five conditions for making an effective transfer pricing adjustment has been removed.

The above rules apply to payments for the tax year commencing after 31 December 2021.



11. TRANSFER PRICING IN THE CONTEXT OF COVID-19



ENTITIES CONCERNED

The COVID-19 pandemic has had a major economic impact, which can also translate into terms and conditions of transactions made so far with associated enterprises.



HOW TO GET READY

The impact of the pandemic on transfer pricing obligations should be investigated on many levels, i.e. the taxpayer should:

1. analyse whether and how much the existing models and the group's transfer pricing policy have changed and to what extent the group entities had to respond to the pandemic;
2. properly document new transactions (restructurings, renegotiating contractual terms, transfer pricing adjustments made) and changes to the existing model of settlements between associated enterprises;
3. make sure that the settlements between associated enterprises are made at arm's length;
4. duly fulfil the documentation obligations, including prepare a complete Local File and transfer pricing analysis.

To effectively manage the transfer pricing risk, processes which take place in the company and which may result from the pandemic must be analysed in detail. The Organisation for Economic Cooperation and Development (OECD) published in December 2020 their guidance on the impact of COVID-19 on transfer pricing.

The Ministry of Finance addressed the issues related to COVID-19 by publishing in December 2021 a document entitled "Impact of COVID-19 on transfer pricing. Good practices."



12. UPDATED OECD GUIDELINES



WHAT'S NEW?

The OECD published in January 2022 a revised edition of its transfer pricing guidelines which include:

- guidance on the application of the transactional profit method;
- guidance for tax administrations on the application of the approach to hard-to-value intangibles;
- the new transfer pricing guidance on financial transactions.



WHO IS IT FOR?

Countries and tax authorities need to ensure that the taxable profits of enterprises are not artificially shifted out of their jurisdiction and that the tax base reported by enterprises in their country reflects the economic activity undertaken therein. For taxpayers, it is essential to limit the risks of economic double taxation.

The OECD Guidelines is a collection of good practices concerning the individual transfer pricing issues. Tax authorities often refer to the OECD Guidelines during inspections and Polish tax regulations, official explanatory notes of the Ministry of Finance or the recommendations of the Transfer Pricing Forum are more and more consistent with the guidelines. The guidelines provide guidance on the application of the arm's length principle, which is the international consensus on the valuation of cross-border transactions between associated enterprises.



13. CONTACT

GDANSK, WARSAW



Marcin Jeliński
Tax Adviser (Poland)
Manager
marcin.jelinski@roedl.com

GLIWICE



Marta Woźnik
Projekt leader
marta.woznik@roedl.com

WROCLAW



Dominika Tyczka-Szyda
Tax Adviser (Poland)
Associate Partner
dominika.tyczka-szyda@roedl.com



Daria Walkowiak-Dobner
Attorney at law (Poland)
Associate Partner
daria.walkowiak-dobner@roedl.com

www.roedl.pl

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Rödl & Partner

GDANSK / GDANSK
al. Grunwaldzka 472B
80-309 Gdańsk
T: +48 22 210 69 88
gdansk@roedl.com

KRAKÓW / CRACOW
ul. Mogińska 43
31-545 Kraków
T: +48 12 213 25 00
krakow@roedl.com

WARSZAWA / WARSAW
ul. Sienna 73
00-833 Warszawa
T: +48 22 696 28 00
warszawa@roedl.com

GLIWICE / GLIWICE
ul. Zygmunta Starego 26
44-100 Gliwice
T: +48 32 330 12 00
gliwice@roedl.com

POZNAŃ / POZNAN
ul. Górki 7
60-204 Poznań
T: +48 61 884 48 00
poznan@roedl.com

WROCŁAW / WROCLAW
ul. św. Mikołaja 19
50-128 Wrocław
T: +48 71 606 00 00
wroclaw@roedl.com

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