

# Transfer Pricing in 2017 — Improvement Under the Slogan of Liberalization



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## ON EXTENSION OF CONTROLLED TRANSACTIONS LIST

From now on foreign economic transactions can be recognized as controlled not only on sales, but also on the acquisition of goods and/or services carried out via a non-resident commission agent.

Economic transactions carried out with non-residents who do not pay income tax (corporate tax), including tax on income received outside country of registration of such non-residents, and who may not be tax residents of a country where they are registered as legal entities can also be recognized as controlled. The list of business legal structures of such non-residents by countries (territories) shall primarily include British LLP companies.

The current list of countries (territories) of low-tax jurisdictions and countries, with which Ukraine has not concluded any agreements including provisions on information exchange should be supplemented with a list of countries, with which such agreements were concluded, but competent authorities do not provide timely and full tax information exchange upon requests from the tax officials. While this year any country (territory) is included in the said list of the Cabinet of Ministers of Ukraine, transactions with counterparties registered in such a country (territory) shall be recognized as controlled from 1 January of the following calendar year.

## ON CONTROLLED TRANSACTIONS THAT ARE CARRIED OUT ON THE BASIS OF A FORWARD OR FUTURES CONTRACT

In case of carrying out controlled transactions under a forward or futures contract, price comparisons shall be performed on the basis of information on forward or futures prices as of the date closest to the date of the respective forward or futures contract's conclusion.

If a controlled transaction is related to export and/or import of exchange goods, carried out on the basis of forward or futures contracts, then to substantiate compliance of such transactions conditions with the "arm's length" principle, price range shall be calculated on the basis of exchange quotations of cor-

**F**rom 1 January 2017 Ukrainian tax legislation regulating transfer pricing has undergone changes, which generally can be evaluated as liberal and which were introduced in the interests of taxpayers. Here is the short list of changes.

## INCREASE OF COST CRITERION TO RECOGNIZE TRANSACTIONS AS CONTROLLED

This is definitely the most expected business standard. Preparation of reports on controlled transactions and documentations for many small businesses, whose sum of activities fell within the criterion to recognize transactions as controlled, was quite burdensome. From now on transfer pricing is a prerogative right of taxpayers with more substantial amounts of income.

The annual income criterion was increased to UAH 150 million (earlier it was UAH 50 million).

The volume of transactions with one counterparty was increased to UAH 10 million (earlier it was UAH 5 million).

Comment: yet the non-availability of controlled transactions does not mean a lack of attention on the part of controllers to a range of non-controlled transactions. Thus, for example, income tax payers with an annual income of at least UAH 20 million are obliged to increase their financial result before tax by adjusting by 30% the cost of goods, works (services) acquired from non-residents registered in countries included in the list approved by the Cabinet of Ministers of Ukraine. The increase in the taxable financial result is carried out also in case of costs accrual in the form of royalties for the benefit of non-residents. And it seems that it is possible to avoid adjustments only if a company prepares substantiation of price level under transfer pricing rules. In other words, you should either increase the tax base or substantiate level of costs in documentation.

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**O**ur philosophy on protecting a client's rights is simple – to prevent legal risks and litigation.

International Legal Center EUCON provides services representing the interests and outsourcing of non-residents and residents doing business in Ukraine and abroad.

An important feature of services provided by the firm is a comprehensive study of clients' problems, particularly the involvement of auditors, financial advisers, tax advisers, deep doctrinal research tasks. This approach enables us to provide comprehensive and intelligent solutions for our clients.

The firm operates from two offices. Yaroslav Romanchuk heads the Ukrainian office in Kyiv and Ihor Yatsenko is the head of the Polish office in Warsaw.

The team of International Legal Center EUCON advises clients on the most complicated issues of tax, transfer pricing, corporate, business restructuring, assets protection, commercialization of IP rights objects, tax planning with application of non-material assets.

The firm's clients include international and Ukrainian industry leaders that come from oil and gas, energy, agriculture and food industry, telecommunications, trade, transport, metallurgy, chemical industry, construction, hospitality, finance, etc.

The performance of the International Legal Center EUCON and its partners is highlighted by numerous recognitions and awards.

Since 2010 EUCON has been included in the list of top 50 Leading Law Firms in Ukraine according to the annual ratings conducted by the Yuridicheskaya Praktika Weekly and Kommersant-Ukraine Publishing House. EUCON is recognized as being among the leading tax law firms according to the national legal directory Ukrainian Law Firms. A Handbook for Foreign Clients, Kyiv Post, Legal Awards, international directories Legal 500 EMEA, World Tax and World Transfer Pricing, International Tax Review.

In 2015 EUCON won the Ukraine Transfer Pricing Firm of the Year award at the annual European Tax Awards 2015, International Tax Review.

The tenth anniversary awards ceremony of the best Ukrainian lawyers "Legal Awards 2016" named International Legal Center EUCON "Transfer Pricing Firm of the Year in Ukraine".

In view of the current trends in tax policies, the International Legal Center EUCON has established a separate transfer pricing practice and enlisted lawyers in addition to auditors and assessors.

International Legal Center EUCON and the International Audit Union established and operate the Transfer Pricing School attended by managers of accounting and financial divisions.

responding goods for the decade preceding the date of the respective contract's conclusion.

At the same time, such an opportunity is provided to taxpayers subject to sending notification on such contract's conclusion to the SFS of Ukraine within 10 days of its conclusion.

### ON COMPARABLE LEGAL ENTITIES AND PRICE RANGES (PROFITABILITY)

In case of non-availability or inadequacy of information on individual comparable transactions to determine profitability indices, the financial information of legal entities can be used that carry out activities comparable to a controlled transaction, provided that there is information that the mentioned entities do not carry out comparable transactions with related parties.

At the same time, the number of conditions and restrictions as to the comparable entity is set:

- It carries out comparable activities within a controlled transaction and also comparable functions related to such activities (taking into account the Classifier of economic activities and international classifications);
- There are no losses (according to accounting (financial) statements) in more than one reporting period from the periods information from which is used for comparative analysis;

– It does not own directly and/or indirectly more than 20% of corporate rights of another legal entity or does not have a member (shareholding) legal entity owning a share of direct (indirect) participation totaling more than 20%.

The right of taxpayers to calculate the profitability range on the basis of information on comparable legal entities not only for reporting period, in which a controlled transaction was carried out, but for a few preceding years, is formalized. In this case, a weighted average rate of a profitability index is calculated for each comparable company, and the procedure for such calculation must be determined by the Cabinet of Ministers of Ukraine.

### ON ADJUSTMENT OF TAX LIABILITIES UNDER CONTROLLED TRANSACTIONS

Taxpayers are allowed to carry out independent adjustment of prices in cases when controlled transactions do not conform to the "arm's length" principle, on the basis of maximum or minimum value of price ranges (profitability). At the same time, such adjustment cannot be made during verification of relevant controlled transactions.

Taxpayers received the right to carry out adjustment of their tax liabilities according to

the results of adjustment of tax liabilities by the other party of a controlled transaction, in the manner and under conditions stipulated by Ukraine's international agreements on avoidance of double taxation.

### ON DEADLINE FOR SUBMISSION OF REPORT ON CONTROLLED TRANSACTIONS

The deadline for submission of the report on controlled transactions was moved from 1 May to 1 October of the year following the reporting one. It is possible to correct errors by sending a new or specifying report to a controlling body.

Comment: unfortunately, some weak points were not avoided. Legislative bodies, when changing the date of report's submission, made no changes to related standards. A request to provide documentation on transfer pricing may be submitted after May 1 of the year following the year, in which controlled transactions were carried out. That means, prior to the deadline for submission of the report. Moreover, it is possible to make an independent adjustment of tax liabilities and to specify income tax declaration without a penalty of 3% only up to 1 May and not to 1 October, which would be logical.