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OECD Transfer Pricing Guidelines in the Polish legal system. An overview of recent problems¹

**Wytyczne OECD w sprawie cen transferowych.
Przegląd najnowszych problemów**

Abstract. The authors attempt to explore the status of the OECD Transfer Pricing Guidelines in the Polish Constitutional system and its meaning in the sphere of taxation. They arrive at the conclusion that the OECD TPG's can be used in the process of interpretation of statutory provisions, but they cannot be used as the sole basis of tax authorities' decisions.

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Keywords: transfer pricing; soft-law; Constitution; interpretation.

Streszczenie. Autorzy starają się zbadać status Wytocznych OECD w sprawie cen transferowych w polskim systemie konstytucyjnym i ich znaczenie w sferze opodatkowania. Dochodzą do konkluzji, że Wytoczne OECD mogą być wykorzystywane w toku wykładni przepisów ustawowych. Nie mogą jednak stanowić samoistnej podstawy prawnej decyzji.

Słowa kluczowe: ceny transferowe; soft-law; Konstytucja; interpretacja.

1. Transfer pricing under international law

Transfer pricing stipulations in double taxation conventions (DTCs) are usually based on Article 9(1) of the OECD Model Tax Convention on Income and on Capital (OECD Model), according to which, where:

- an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or
- the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly (primary adjustment)².

This provision is aimed at eliminating economic double taxation as certain general standards of disregarding transactional conditions are developed and bilaterally recognized by state-parties to DTCs. Stipulations contained in DTCs based on Article 9 of the OECD Model do not consti-

² K. Lasiński-Sulecki, *OECD Guidelines. Between Soft-Law and Hard-Law in Transfer Pricing Matters*, "Comparative Law Review" 2014, Vol. 17, p. 64.

tute a legal basis for primary adjustments. Such a basis must stem from a domestic legal order. This reflects an old principle – currently a constitutional principle adopted by many countries, including Poland – namely, no taxation without representation (*nullum tributum sine lege*), under which only laws adopted by representative bodies such as parliaments can impose taxes³.

Numerous DTCs also contain provisions based on Article 9(2) of the OECD Model, which states that where a Contracting State includes in the profits of an enterprise of that State – and taxes accordingly – profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other (corresponding adjustment)⁴.

This provision is clearly meant to eliminate economic double taxation, as a primary adjustment in one contracting state (increasing taxable income by a decision of the tax authorities) shall result in a corresponding adjustment in the other contracting state (decreasing taxable income)⁵. The same can be said of Art. 9(1). Having said that adjustments are made on the basis of domestic provisions, it becomes clear that Art. 9(1) should be not be viewed as an anti-avoidance rule itself, but rather as a measure to align anti-avoidance provisions in different countries in order to eliminate double taxation.

It is easily noticeable that the exact transposition of Article 9 of the OECD Model into national legal orders without their further development would probably lead to problems that would eventually result in failure to

³ Ibidem, p. 64.

⁴ Ibidem, p. 64–65.

⁵ Ibidem, p. 65.

achieve the objective of DTCs based on the OECD Model, i.e. the above-mentioned elimination of economic double taxation. For instance, the concept of direct or indirect participation in management, capital or control is very broad. A person who holds 0.1% stake in a company that is a 0.1% shareholder of another company indirectly participates in capital of the latter company, though it does not really exert impact on that company. Moreover, Article 9 of the OECD Model contains the prerequisites of departing from transactional values in transactions between associated enterprises, but it does not indicate how to arrive at the proper values, i.e. such as can be reconciled with the arm's length principle. The methods of calculating prices acceptable under Article 9 of the OECD Model were only proposed in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD TPGs). The difference in length between Article 9 of the OECD Model and the OECD TPGs is particularly striking. Article 9 is less than one standard page long while the OECD TPGs are a few hundred pages long, though one must admit they do, in part, refer to articles of the OECD Model other than Article 9 (Article 25)⁶.

National transfer pricing provisions that serve as legal bases for the decisions made by tax authorities are frequently based on the OECD Model, but they are more detailed than the model and double taxation conventions based thereon. The details developed at the national level – at least in part – reflect the OECD TPGs⁷.

There are other pieces of soft-law of relevance in transfer pricing matters. The OECD's official commentary to the OECD Model should definitely be named, among others, but it should certainly be stressed that it does not focus on transfer pricing⁸.

⁶ Ibidem, p. 65–66.

⁷ Ibidem, p. 66.

⁸ Ibidem, p. 66.

2. Sources of law under the Polish Constitution

The catalogue of the sources of law from Article 87 of the Constitution of the Republic of Poland of 2 April 1997⁹ excludes the possibility of treating the OECD TPGs as a binding law in Poland. Under Art. 87(1) of the Constitution the sources of universally binding law of the Republic of Poland shall be:

- the Constitution,
- statutes,
- ratified international agreements, and
- regulations¹⁰.

Article 88(3) of the Constitution states that international agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of promulgation of other international agreements shall be specified by statute¹¹.

The OECD TPGs cannot be assigned to any of the categories of legal acts mentioned above.

Yet, the introduction of a transfer pricing regime based on the solutions developed by the OECD to the Polish legal order was connected with Poland's accession to the OECD¹². DTCs concluded by Poland are based on the OECD Model and most of them reflect Article 9(1) of this Model¹³. Nowadays, Polish provisions resemble the recommendations from the OECD TPGs to a significant extent.

⁹ Dz.U. [Polish Journal of Laws] 1997, No 78, poz. [item] 483 with subsequent amendments.

¹⁰ Translation: www.sejm.gov.pl.

¹¹ Translation: www.sejm.gov.pl.

¹² S. Sojak, *Ceny transferowe. Teoria i praktyka*, Warszawa 2001, p. 9.

¹³ Detailed review of Polish DTCs compared with the OECD Model: K. Lasiński-Sulecki, *Ceny transferowe w prawie podatkowym i celnym. Wpływ powiązania przedsiębiorstw na podstawę wymiaru podatków i ceł w prawie polskim, międzynarodowym i unijnym*, Warszawa 2014, p. 77–82.

3. References to the OECD TPGs until the end of 2018

The Minister of Finance when preparing by-laws is – in a sense – at least partly bound by the OECD TPGs. As required by Article 11(9) of the Corporate Income Tax Act of 15 February 1992¹⁴ in force until the end of 2018 the Minister of Finance shall determine, by regulation, the manner and procedure of estimating income and the manner and mode of eliminating double taxation in connection with the adjustment of profits of associated enterprises, taking into account in particular the guidelines of the OECD. The provision had its equivalent, also until the end of 2018, in Article 25(8) of the Personal Income Tax Act of 26 July 1991¹⁵. The OECD's soft-law could not thus be ignored in the process of creating executive regulations¹⁶.

4. Polish case-law on the OECD TPGs

Polish courts tend not to elaborate on the legal status of the OECD TPGs even when a complaint should prompt them to do so. The OECD TPGs are used in the following ways by Polish courts:

- to find therein the meaning of certain expressions (see the judgment of the Regional Administrative Court in Lublin of 20 September 2006, I SA/Lu 96/06),
- as an indicator of the purposes of a DTC (judgment of the Regional Administrative Court in Cracow of 3 June 2009, I SA/Kr 1374/08; the judgment of the Supreme Administrative Court in Bydgoszcz of 22 December 2006, I SA/Bd 650/06), and
- as equal to evidence measures (the judgment of the Supreme Administrative Court of 18 August 2004, FSK 359/04)¹⁷.

¹⁴ Dz.U. 2018, poz. 1036 with subsequent amendments.

¹⁵ Dz.U. 2018, poz. 1509 with subsequent amendments.

¹⁶ K. Lasiński-Sulecki, *OECD Guidelines...*, p. 73.

¹⁷ Ibidem, p. 73–74.

The last approach presented above is at least controversial. Sometimes courts simply point out that the OECD TPGs were transposed into a Polish domestic legal order (judgment of the Regional Administrative Court in Cracow of 3 June 2009, I SA/Kr 1374/08). It also happens that courts make reference to the OECD TPGs themselves without further elaborating on the topic (the judgment of the Regional Administrative Court in Wrocław of 26 July 2012, I SA/Wr 706/12)¹⁸.

An interesting judgment was issued by the Supreme Administrative Court on 20 June 2018 (II FSK 1665/16). The Court held: “Rules on transfer pricing should be used with extreme caution, given that they introduce a derogation from the principle of determining income taking into account the prices applied between contractors. For this reason, the reproduction of the meaning of legal norms contained, for example, in art. 11 of the CIT Act (in the context of the actual state of affairs) should not be limited only to grammatical interpretation without functional interpretation. The point is to take into account the essence of introducing into the tax system rules preventing erosion of the tax base through harmful (from the point of view of the state) transfer of profits between related entities (especially, but not only – operating within the international structure).

Use by the legislator in Art. 11(9) of the CIT Act of phrases “shall be determined by regulation ...” and “taking into account, in particular, the guidelines ...” indicates the imperative nature of the provision. Therefore, in the scope of determining the manner and procedure for determining revenues by means of an ordinance, the Minister of Finance should be guided by the OECD guidelines mentioned above. The court can assess whether the regulation (as a deed) meets these criteria and whether its provisions – in the context of the guidelines – are properly interpreted. In the light of the above remarks, the guidelines mentioned above will be relevant to the assessment method used by the body, and in particular the mode of its implementation.”

The Court emphasized the need to rely on the OECD TPGs, but applied them for the benefit of a taxpayer involved. One can accept such an

¹⁸ Ibidem, p. 74.

approach of the Court only because of to the fact that this Court ruled in favour of the taxpayer¹⁹. In the contrary situation (i.e. to the detriment of the taxpayer), reliance on the OECD TPGs could not be accepted. It must be remembered that under Art. 84 of the Constitution everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute. Additionally, under Art. 217 the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute²⁰.

5. Practice of applying the OECD TPGs

The release of BEPS Final Reports in 2015 at least coincided in time with a broader approach to the prerequisites of the application of transfer pricing provisions in Poland. The tax authorities seem to have been willing to achieve broader aims – typical for a general anti-avoidance rule (GAAR) – through transfer pricing provisions. The GAAR was introduced in Poland in mid-July 2016, and the tax authorities could not apply it to acts that had taken place before that date. At least a few examples of such activity of the tax authorities could be identified in late 2015 and in 2016. Tax authorities started to re-characterize and disregard transactions on the basis of TP provisions then in force²¹.

¹⁹ K. Lasiński-Sulecki, W. Morawski, *Raporty BEPS i zmiany Wytucznych OECD a obowiązki podatników w sferze cen transferowych*, „Przegląd Podatkowy” 2018, No 11, p. 24.

²⁰ K. Lasiński-Sulecki, W. Morawski, *Wytuczne OECD jako urojona podstawa prawna działań organów podatkowych w zakresie cen transferowych – uwagi w kontekście non-recognition i recharacterisation rules* [in:] J. Głuchowski (ed.), *Współczesne problemy prawa. Teoria i praktyka*, Vol. I, Warszawa 2019, p. 260.

²¹ K. Lasiński-Sulecki, *Changes in Transfer Pricing Legislation and Practice*, “International Transfer Pricing Journal” 2017, No 3.

Until the end of 2018 the arm's length principle was implemented in article 11 of the Corporate Income Tax Act. Under article 11(1) of the CIT Act, if:

- a natural person, legal person or an organizational unit having no legal personality, having its place of residence, seat or management office in Poland (a domestic subject), participates directly or indirectly in managing or controlling an enterprise located outside Poland or has shares in its capital;
- a natural or legal person, or an organizational unit having no legal personality, having its place of residence, seat or management office outside Poland (a foreign subject), participates directly or indirectly in managing or controlling a domestic subject or has shares in its capital; or
- the same natural person, legal person or an organizational unit having no legal personality, at the same time participates directly or indirectly in managing or controlling a domestic subject and a foreign subject or has shares in their capital

and if, as a result of such links, there are agreed or imposed conditions substantially different from those which would be agreed between independent subjects and, as a result thereof, such a taxpayer does not disclose any income or discloses income that is less than might have been expected if such links did not exist, the income of such taxpayer and the tax due will be assessed without taking into account the conditions resulting from such links²².

Under Article 11(2) of the CIT Act, the incomes referred to above (i.e. in paragraph 1) must be assessed on the basis of estimation, applying the comparable uncontrolled price, resale price or reasonable margin (cost-plus) method²³. If the application of these methods is impossible, the methods of transaction profit will be applied²⁴.

²² Translation: Legalis, C.H. Beck.

²³ Ibidem.

²⁴ Art. 11(3) CIT Act (translation: Legalis, C.H. Beck). Analogous provisions are included in article 25 of the Personal Income Tax Act of 26 July 1991.

The list of transfer pricing methods applicable in Poland is a closed one. The tax authorities may not reach out to apply any other method, even if it would better suit their needs²⁵. None of the methods prescribed could be used to disregard transaction or to re-characterize transaction.

Transfer pricing rules have been written anew. New rules have been in force since the beginning of 2019. This change does not affect the status of the OECD TPGs in the Polish legal system but it must be stressed that explicit legal bases for disregarding transactions and re-characterizing them were introduced.

6. Pros and cons of following the OECD TPGs

The guidelines developed by international organizations should facilitate the application of transfer pricing provisions by MNCs. Multinational groups of companies cannot obey transfer pricing rules throughout the world if these rules are not identical or at least highly similar. In any other case they always take the risk that the conditions of their cross-border transactions might be questioned in at least one jurisdiction. It would not be possible to arrange transactional conditions in such a way that tax authorities in all jurisdictions involved would be satisfied.

The MNCs would, therefore, definitely benefit in terms of limiting their exposure to tax controversies if the guidelines developed by the OECD were binding. Similarly, it is also advantageous for MNCs when such guidelines, even if they are not legally binding, are adhered to by legislators and tax authorities worldwide²⁶.

The legally binding character of transfer pricing guidelines is not overly important for tax administrations. The lack of details in DTCs' provisions on transfer pricing even allows exchequers to look for the fi-

²⁵ K. Lasiński-Sulecki, *Changes in Transfer Pricing Legislation and Practice*, "International Transfer Pricing Journal" 2017, No 3.

²⁶ A. Storck, *OECD Transfer Pricing Guidelines – A Business Perspective* [in:] *Practical Experience with the OECD Transfer Pricing Guidelines. Proceedings of a Seminar held in London in 1998 during the 52nd Congress of International Fiscal Association*, Vol. 23b, Kluwer Law International, Haga–Londyn–Boston 1999, p. 14. K. Lasiński-Sulecki, *OECD Guidelines...*, p. 76.

nancially most advantageous way of interpreting these provisions without being bound by a highly precise set of internationally adopted rules. Yet, the efficiency of tax administrations would definitely gain from such a character of transfer pricing guidelines or from their rather exact transposition in domestic legal orders (transposition word for word in their entirety is impossible as guidelines are structured and worded in a different manner from that which is usual for tax provisions). They would not be involved in as many mutual agreement procedures as they are nowadays, as discrepancies in approach between different tax jurisdictions would occur more rarely. Once tax arbitration becomes more common, tax administrations will save time that they would otherwise have had to devote to such proceedings. Thus, turning guidelines into hard-law would also be beneficial for tax administrations²⁷.

7. Final remarks

No matter how useful the global application of the OECD TPGs for MNE groups might be, one cannot ignore the constitutional standards applicable in Poland and the commonly accepted interpretative methods (that are also at least partly connected with the Constitutional standards). In Poland, a tax authority needs an explicit legal basis for every decision. It cannot apply the OECD TPGs as long as it is not clearly allowed to do so by the legal provisions in force. As a result the OECD TPGs can only be used as a supplementary tool in the process of interpretation of the legal provisions in force. Such a tool cannot, however, operate to the detriment of the taxpayer's position, as compared to the one based on statutory provisions.

²⁷ K. Lasiński-Sulecki, *OECD Guidelines...*, p. 76–77.

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