LUND UNIVERSITY
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The Role of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations for OECD and non-OECD countries

Master Thesis in European and International Tax Law

15 credits

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Academic year: 2012-2013

Lund

27 May 2013

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List of Abbreviations

APA – Advance Pricing Agreement

CFA - Committee on Fiscal Affairs

CUP method – Comparable Uncontrolled Price Method

MAP – Mutual Agreement Procedure

OECD - The Organization for Economic Cooperation and Development

OECD Guidelines – OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations

TP – Transfer Pricing

1. Introduction

1.1 Background

Globalisation has resulted in an increasing number of multinational enterprises (MNEs) and intra-group transactions between different countries.

Transfer pricing, i.e. the pricing of transactions between group members, remains the most important international tax issue MNEs are facing and also presents increasingly complicated problems to tax administrations, particularly in developing countries. The OECD has made useful efforts to develop a common approach to the application of the arm's length principle, which governs the tax treatment of transfer prices. However, important differences in domestic transfer pricing rules and practices among its members and other countries remain.

Complying with different transfer pricing rules and dealing with various national tax authorities may create uncertainty and result in double taxation, penalties and a high administrative burden for MNEs. On the other hand, it is legitimate for countries to adequately levy tax on the results realised by members of MNEs in their territories.[1]

Thus, transfer pricing remains probably the most significant issue in international tax today.

The methodology is still developing and there are several unanswered practical questions. The OECD Guidelines recognise that the transfer pricing rules may be difficult to apply in many situations. They also acknowledge "transfer pricing is not an exact science, but require the exercise of judgement on the part of both the tax administration and the taxpayer."

Transfer pricing does not necessarily imply tax evasion or tax avoidance by the taxpayer. It is an economic issue that affects the sharing of tax revenues between countries. Unfortunately, the rules, as applied in most countries, deal primarily with issues of under-taxation to protect their own national tax base. Few countries give a tax refund if the profits are overstated due to cross-border pricing. Moreover, since the transactions involve the taxation in at least two countries, different tax treatments could easily result in economic double taxation.

The application of the correct price on cross border transactions requires business judgement and the use of subjective techniques often with inadequate data. The taxpayer is expected to apply his best efforts in good faith. However, he may be liable to interest and "no fault" penalties, if he gets the price wrong even when he exercises his best judgement in good faith. The tax penalties for transfer pricing violations tend to be high, and the documentary evidence and compliance requirements complex and time-

[1] Phat Tan Nguyen Transfer Pricing: The Vietnamese System in the Light of the OECD Guidelines and the Systems in certain Developed and Developing countries, Jonkoping International Business School, JIBS Dissertation Series, 2009

consuming. Moreover, tax investigations in transfer pricing cases usually take a long time and are expensive.[2]

With globalisation and the growth in electronic commerce in future, transfer pricing is expected to become an even more significant issue in international taxation. There is a need to ensure that the compliance rules are not excessive and are applied responsibly by the tax authorities in various jurisdictions. Their actions should not adversely affect international trade and business activities.[3] Moreover, the rules should ensure adequate protection to the taxpayers against potential economic double taxation through appropriate safeguards and greater co-operation among the tax authorities in various countries.[4]

1.2 Outline, Delimitation

In my Master Thesis I try to analyse the influence exerted by the OECD Transfer Pricing Guidelines. In this paper I tried to show which countries are following OECD Guidelines, where the Guidelines were an inspiration for domestic legislation, show the differences in applying the Guidelines in OECD and non-members of OECD.

First, I write about the origin and development of the OECD Guidelines at an international level, later I analyse how the arm's length principle that arose in the domestic law of some OECD member countries now constitutes an international principle followed domestically by most countries (members and non-members of the OECD) whose content has its main (legal) source in soft law materials such as the OECD Guidelines. I try to analyse the ways through which this international soft law has been transformed into domestic hard law. That process is troublesome considering the principles of tax legality and legal security.

The author tried to look at the OECD Guidelines as a source of tax law in a globalized world, and how this source is exerting an increasing influence in order to determine material issues of the tax systems.[5]

1.3 Methodology

For my research I have taken a traditional legal approach along with comparative method. I have gone through and used for my work different doctrinal articles, OECD publications as well as tax law books.

1.4 Definitions

The OECD is a unique forum where governments work together to address he economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments

[2] Rohatgi, R., Basic International Taxation, Kluwer Law International, 2002., p 428
[3] F.M. Horner, Whats New About the OECD Transfer Pricing Guidelines
[4] H. Hamaekers, The New OECD Transfer Pricing Guidelines (IBFD Asia-Pacific Tax Bulletin, Jan/Feb 1996);
[5] Jose Calderon "The OECD transfer Pricing Guidelines as a source of Tax Law: Is Globalization Reaching The Tax Law?", Intertax, 2007,Volume 35, Issue 1 p.5

and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organization provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States.

The Commission of the European Communities takes part in the work of the OECD.

OECD Publishing disseminates widely the results of the Organization's statistics gathering and research on economic, social and environmental issues, as well as the conventions, guidelines and standards agreed by its members.[6]

According to the International Tax Glossary, transfer pricing if "the area of tax law and economics that is concerned with ensuring that prices charged between associated enterprises for the transfer of goods, services and intangible property accord with the arm's length principle".[7] For purposes of business, the definition of "transfer price" is "the amount charged by one segment of an organization for a product or service that it supplies to another segment of the same organization".[8]

Arm's length principle

The international standard that OECD member countries have agreed should be used for determining transfer prices for tax purposes. It is set forth in Art.9 of the OECD Model Tax Convention as follows: where "conditions are made or imposed between the two enterprises in their commercial or financial relations which deffer 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".[9]

The arm's length principle I embodied in Art. 9 of the OECD Model and reads as follows:

Where

a) 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

[6] OECD TP Guidelines, Preface
[7] International Tax Glossary (Julie Rogers-Glaubsh ed., IBFD 2009) at 449
[8] Hamaekers, Transfer Pricing (2008), sec.2, IBFD
[9] OECD Guidelines, Glossary

b) The same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of 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.[10][11]

2. OECD Transfer Pricing Guidelines

The OECD Reports and Guidelines have set out considerations and recommendations on how to establish acceptable arm's length prices. They are intended to help tax administrations and MNEs to understand and apply regulations in practice by indicating ways to find mutually satisfactory solutions to transfer pricing cases and thus to minimize conflicts between tax administrations as well as tax administrations and MNEs and to avoid costly litigation.[12]

The role of multinational enterprises (MNEs) in world trade has increased dramatically over the last 20 years. This in part reflects the increased integration of national economies and technological progress, particularly in the area of communications. The growth of MNEs presents increasingly complex taxation issues for both tax administrations and the MNEs themselves since separate country rules for the taxation of MNEs cannot be viewed in isolation but must be addressed in a broad international context.

In the case of MNEs, the need to comply with laws and administrative requirements that may differ from country to country creates additional problems. The differing requirements may lead to a greater burden on an MNE, and result in higher costs of compliance, than for a similar enterprise operating solely within a single tax jurisdiction.

The international taxation principle that have been chosen by OECD member countries as serving the dual objectives of securing the appropriate tax base in each jurisdiction and avoiding double taxation, thereby minimising conflict between tax administrations and promoting international trade and investment. In a global economy, coordination among countries is better placed to achieve these goals than tax competition. The OECD, with its mission to contribute to the expansion of world trade on a multilateral, non-discriminatory basis and to achieve the highest sustainable economic growth in member countries, has continuously worked to build a consensus on

[10] OECD MC, Art. 9
[11] Lambert G. Ablet, "The UN Practical Manual on Transfer Pricing for Developing Countries: Should it depart from the OECD Transfer Pricing Guidelines?" [2012] International Transfer pricing Journal, p.11
[12] OECD Guidelines, para. 15

international taxation principles, thereby avoiding unilateral responses to multilateral problems.[13]

Transfer pricing issues are arising frequently between tax administrations and MNEs. OECD Transfer Pricing Guidelines are made to prevent the problems. Thus, it is important to analyse which countries follow and not follow the Guidelines, which countries which principles and legislation use to solve the problems.

These Guidelines focus on the main issues of principle that arise in the transfer pricing area. The Committee on Fiscal Affairs intends to continue its work in this area. The Committee intends to have regular reviews of the experiences of OECD member and selected non-member countries in the use of the methods used to apply the arm's length principle, with particular emphasis on difficulties encountered in the application of transactional profit methods and the ways in which these problems have been resolved between countries.[14]

The OECD Guidelines state that:

The Guidelines are intended to help tax administrations (of both OECD Member countries and non-Member countries) and MNE's by indicating ways to find mutually satisfactory solutions to transfer pricing cases, thereby minimizing conflict among tax administrations and MNEs and avoiding costly litigation. The Guidelines analyze the methods for evaluating whether the conditions of commercial and financial relations within an MNE satisfy the arm's length principle and discuss the practical application of those methods. They also include a discussion of global formulary apportionment. OECD Member countries are encouraged to follow these guidelines in evaluating for tax purposes whether their transfer pricing complies with the arm's length principle. Tax administrations are encouraged to take into account the taxpayer's commercial judgment about the application of the arm's length principle in their examination practices and to undertake their analyses of transfer pricing from that perspective.[15]

The EU Member States, as well as companies conducting business cross border within the European Union, have realized that transfer pricing adjustments are an unacceptable burden on internal-market trade. Moreover, the need to comply with different transfer pricing rules in every Member State is a considerable compliance burden for MNEs to bear.

All of this highlights the need for harmonization of transfer pricing rules.[16]

The OECD Transfer Pricing Guidelines constitute the "international standard" used by the Member States of the OECD and even for countries who are non-members of this international organization in their domestic legislations and in those double tax

[13] OECD Guidelines, preface
[14] Ibid.
[15] OECD Guidelines, ss I-14, 15 and 16
[16] Agust Karl Gudmundsson, "Lost in Transfer Pricing: The pitfalls of EU Transfer Pricing Documentation", International Transfer Pricing Journal, Jan/Feb 2009

conventions or DTCs that they conclude.[17] Some authors, such as Eden, have even held that the arm's length principle implemented through reports, recommendation and Guidelines of the OECD actually constitutes the "international transfer pricing regime",[18] which forms an integral part of the denominated "international tax regime"[19] – which is backed and monitored by a representative group of states, with its proper principles, and vertebrae from an international organization that operates as its axis (the OECD), with the aim of disturbing the taxing power among states in connection with the income flow among associate enterprises.[20]

Since their first publication, the OECD Guidelines have been improved over the years for being supplemented by several reports, including the report on intangible property (adopted by the CFA in 1997, noted by the Council in the same year and incorporated in chapters VI and VII); the report on cost contribution agreements (adopted by the CFA in 1997, noted by the Council in the same year and incorporated in chapter VIII); the report on the guidelines for monitoring procedures concerning the OECD Guidelines and the involvement of business community (adopted by the CFA in 1997, noted by the Council in the same year and incorporated in the annexes); the report on the guidelines for conducting advance pricing agreements (APAs) under a mutual agreement procedure (adopted by the CFA in 1999, noted by the Council in the same year and incorporated in the annexes); the reports on the transfer pricing aspects of business restructurings (adopted by the CFA in 2010, noted by the Council in the same year and incorporated in chapter IX).

Further improvement to the Guidelines has been provided for through the update of chapter IV on "Administration Approaches to Avoiding and Resolving Transfer Pricing Disputes" in 2009; and of the Foreword and the Preface, and of the Glossary and Annexes in 2010. In addition, further improvement was provided for in 2010 through the revision and updating of the entire set of guidelines. The OECD has committed itself to further supplement the Guidelines with additional instructions in order to address other aspects of transfer pricing.

The 2010 OECD Guidelines reaffirmed the observance of the arm's length principle and urged tax administrations not to automatically assume that associated enterprises manipulate their prices. The application of the arm's length principle is based on a comparability analysis,[21] and in the cases of an arm's length range, all the results are considered equally reliable.

Regarding the applicable transfer pricing method, the new OECD Guidelines are in favour of the selection of the "most appropriate transfer pricing method to the

[17] Janscheek and Oosterhouis, "Transfer Pricing Trends and Perceptions in Europe", International Transfer Pricing Journal, March/April 2002, p.47
[18] See Eden, "The arm's length Standard in North America", Tax Notes International 2000, vol.no. 6, p.673
[19] On the existence of an authentic "international tax system" see what was stated by Rosenbloom, "The David R. Tillinghast lecture: International tax arbitrage and the International Tax system", Tax Law Review 2000, vol. 53, p.137
[20] Eden, Taxing Multinationals: Transfer Pricing and Corporate Income taxation in North America, University of Toronto Press, Toronto, p.102
[21] OECD Guidelines, para.7

circumstances of the case", which constitutes significant progress compared to the rule on the hierarchy of methods that had been observed until then. The new OECD Guidelines specify five methods for evaluating the arm's length conditions between related-party dealings without any distinction between transactions involving tangible or intangible property, as the applicable rule is the "most appropriate method to the circumstances of the case". The proposed methods include the traditional transaction methods, namely the CUP method, the resale plus method; and the transactional profit methods, namely the transactional net margin method (TNMM) and the transactional profit split method. These methods are basically identical, in principle, to the corresponding methods described above under the US Transfer Pricing Regulations.[22]

The new OECD Guidelines provide in-depth insight into the administrative approaches to transfer pricing and documentation requirements, and encourage Member countries to enter into multilateral APAs, and, more importantly, to give special consideration to the transfer of intangibles and business restructurings. The Guidelines represent a consensus reached by the OECD Member countries on international tax principles,[23] specifically the Member countries which have largely followed the Guidelines in developing their domestic transfer pricing regulations.[24][25]

In this respect it is important to note the existence of two main routes or (legal) formulae through which the states integrate the OECD principles on transfer pricing (the OECD Guidelines) in their legal system. On the one hand, such a reception can be articulated by shaping the domestic transfer pricing provisions taking the arm's length principle – as it comes delimited in the OECD materials (OECD Transfer Pricing Guidelines and Art.9 of the OECD MC) – as a basis, model or antecedent. On the other hand, a second form of integration could come through the conclusion of tax treaties that follow what is stipulated in Art.9 of the OECD MC. There is also a third way that consists of the reception of the OECD Guidelines through the intensive use that the administrative and judicial authorities of a country make of such OECD materials (administrative and judicial creeping). It is normal that this phenomenon takes place when the OECD Guidelines have been integrated in the domestic law through the two main routes exposed above.

A good example is how certain states, like the Netherlands, have shaped the domestic provision regulating the arm's length principle practically in identical terms to those laid down in Art. 9 of the OECD MC with the aim of establishing the narrowest possible connection with the international practice represented by the OECD Transfer Pricing

[22] Lambert G. Ablet, "The UN Practical Manual on Transfer Pricing for Developing Countries: Should it depart from the OECD Transfer Pricing Guidelines?" [2012] International Transfer pricing Journal, p.9
[23] OECD Guidelines para.7
[24] UN, Working Draft on the UN Manual, chap.1, para, 3.2
[25] Lambert G. Ablet, "The UN Practical Manual on Transfer Pricing for Developing Countries: Should it depart from the OECD Transfer Pricing Guidelines?" [2012] International Transfer pricing Journal, p.8

Guidelines.[26] The Introduction of the Dutch Decree, of 30 March 2001, on the application of the arm's length principle speaks for itself:

"With regard to cross-border transactions, there is agreement amongst the OECD Member countries regarding the "arm's length principle", as is included in Art. 9 of the OECD Model Tax Convention. The OECD's Commentary on Art.9 of the OECD Model Tax Convention and the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations provide for further guidance on the arm's length principle. The policy of the Netherlands on the arm's length principle in the field of international tax law is that this principle forms an integral part of the Netherlands system of tax law as a result of its incorporation in the broad definition recorded in the Income Tax Act. In principle, this means that the OECD Guidelines apply directly to the Netherlands under Section 3.8 of the Income Tax Act. There are a number of areas in which the OECD Guidelines provide scope for individual interpretation by the member countries. In a number of other areas, practical experience has shown that that the OECD Guidelines are in need of clarification. This decree explains the Netherlands position in relation to these particular points and seeks, where possible, to remove any confusion. The OECD Guidelines have not yet fully crystallized and are regularly expanded and adjusted. If necessary, this decree will also be adjusted to take account of new developments. … "[27]

However, it is worth considering that the OECD Transfer Pricing Guidelines constitute the uniformed interpretation which is alleged upon at an international level, of the arm's length principle. Another thing is to believe that these Guidelines constitute a sort of "international regulation" that completely excludes the implementation of a national policy on transfer pricing on part of the OECD Member States. As Haigh pointed out, the OECD Transfer Pricing Guidelines are shaped in a very flexible way and leave many questions open, since a more "regulatory" description of the arm's length principle would make consensus impossible within the OECD. This way, the Guidelines are formed in a way which allows the different states to articulate a "national" or "customized" approach of certain issues of the transfer pricing policy. However, such "personalization" would have to move within the framework agreed upon at an international level by the representatives of these states before the OECD. In this sense, it is important to clarify that the peculiar configuration of the OECD Transfer Pricing Guidelines largely limits their "regulatory" use at domestic level, and at the same time allows the implementation of national fiscal policies on the matter. As indicated by Durst, the negative aspect that results from this ample and non-regulatory configuration of the OECD Transfer Pricing Guidelines lies in the fact that these Guidelines leave open ample possibilities of double taxation.[28]

A comparative analysis confirms these ideas largely, so much that the domestic transfer pricing legislation of most OECD member countries follows in a substantive

[26] De Hosson, "Codification of the Arm's Length Principle in the Netherlands Corporate Income Tax Act", Intertax 2002, p.192

[27] Decree of 30 March 2001, State Secretary for Finance

[28] Durst, "TNI Interview: Michael C. Durst", Tax Notes International, 2003, no. 10, p. 903

form what is down in the OECD Guidelines. However, the degree of alignment of such domestic law with the OECD Guidelines varies from the one country to another. Thus, countries, like the Netherlands, Austria, Spain, have tried to minimize the "deviations" that their domestic legislation articulate in respect to the OECD Guidelines. Although it does not require nor mean in any case to resign to a certain "personalization" of the (national) policy on transfer pricing (a pure and mixed alignment approach). On the other hand, states like Germany assume a consistent position with the OECD Guidelines but without giving up articulating a national policy on transfer pricing. This approach would try to limit the "implicit surrender" (yielding) of tax power that would derive from a full alignment of the domestic legislation of the national tax power). Thirdly, there are countries that have gone a step further in the "personalization" of the interpretation and application of the arm's length principle. These countries have developed a transfer pricing national policy largely aligned with the OECD Guidelines, but that provides some material deviations from these guidelines (active development of a national transfer pricing policy approach). This can be the case of the US or Australia. As is known, the US has developed as of the 1990s domestic rules that articulate an interpretation of the arm's length principle that, in certain aspects, "clashes" with the Guidelines of the OECD (for example, the so-called super royalty rule), although from 1994 onwards the greater discrepancies have been "diminished", although not eliminated. Australia, although it follows the conception of the arm's length principle resulting from the OECD Guidelines, admits some use of formulary methods. Canada and Mexico are also countries that follow the OECD interpretation of the arm's length principle, but deviate in certain (less relevant) aspects of the OECD Guidelines, for example, admitting the use of 'secret comparable' by the tax authorities.[29] Nor to say that the "deviations" that the non-member countries of the OECD articulate in respect to the OECD Transfer Pricing Guidelines are in general, greater than those we find in Member States of this international organization.[30]

2.1 Origin and legal nature of the OECD TP Guidelines

The way in which the OECD Transfer Pricing Guidelines are implemented or integrated into the legal system of the different states constitutes a question closely connected with the proper origin and development of the arm's length principle. In this sense, it must be pointed out that the arm's length principle was originally forged within the American and British legislations, passing later to the model conventions of the League of Nations and of the OECD, the moment in which this principle began to acquire an international dimension.[31]

[29] See Hamaekers, "Recent developments in legislation internationally", in Practical Experience with the OECD Transfer Pricing Guidelines, p.3

[30] Messineo, "Transfer Pricing in Latin America: new rules in Mexico and Brazil" , International Transfer Pricing Journal, p. 42

[31] Jose M. Calderon, "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?" [2007] Intertax, p.8

2.2 OECD Guidelines as a base for minimizing the tax conflicts

We can also refer to OECD Transfer Pricing Guidelines as a means of reducing the tax conflicts that arise at an EU level between the different tax conflicts that arise between different tax administrations and the taxpayers on the practical application of the different domestic and treaty rules on transfer pricing. One of the chosen routes to obtain such a reduction of the tax conflicts lies in its use by the European Forum on Transfer Pricing (EU Transfer Pricing Forum). This Forum is trying to eliminate the practical problems that arise in the EU in regards to the application of the OECD Transfer Pricing Guidelines. A common interpretation and a uniform application of the OECD Guidelines is therefore sought with the purpose of reducing the main regulatory and interpretative differences that nowadays arise at the time of actually applying the arm's length principle on cross-border transactions by the tax authorities of the different EU Member States that implement mismatched administrative approaches on different regulations of the arm's length principle. [32] In this way, the material alignment of the EU Member States domestic rules with the OECD Transfer Pricing Guidelines could also be used to conform these domestic rules to ECJ tax jurisprudence on the restrictions that are considered permissible and legitimate in relation to the effective exercise of the EU fundamental freedoms.[33]

2.3 Conflicts between the domestic legislation of a state and the OECD Transfer pricing Guidelines

Another question that is posed refers to the problem that arises when there is a conflict between the domestic legislation of a state and the OECD Transfer Pricing Guidelines within the scope of a DTC that follows Art. 9 of the OECD MC. Do the transfer pricing recommendations of the OECD Council or the proper Art.9 of the DTC exert any limiting effects on the application of the conflicting domestic transfer pricing rules?

Certainly, the answer to this question admits several answers depending on the different circumstances that appear in each case. Logically, it would be odd that conflicts of this nature should arise when the domestic provision of a state has been shaped following Art.9 of the OECD MC and the OECD Transfer Pricing Guidelines. In this kind of case, it is normal that doubts should appear about a certain aspect of the domestic provision or administrative practice and its comparability with the OECD's approach on the arm's length principle.

Jose Calderon in his article[34] states that in this and other kinds of cases it should be considered if the domestic rules establish a clear0cut conflicting deviation from that provided by the OECD Guidelines. The OECD Guidelines are not shaped with a

[32]Jose M. Calderon, "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?" [2007] Intertax, p.3

[33] Jose M. Calderon, "European Transfer Pricing Trends at the Crossroads: Caught Between Globalization, Tax Competition and EC Law" [2005] Intertax 103

[34] Jose M. Calderon, "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?" [2007] Intertax, p.17

"regulatory or normative" language, but on the contrary, they are meant to allow the application of the different domestic rules as long as the material principles embodied in the OECD Guidelines are observed. In addition, these Guidelines leave many open questions so that they can be solved in one or another by the domestic provisions of each state. In these cases, the Guidelines admit several solutions depending on the national legal principles of each country. In this sense, it could be held that only those domestic rules that establish material and conflicting deviations from the principles provided in the OECD Guidelines constitute a violation of or override the arm's length principle that generate legal problems within the framework of the DTCs that follow Art. 9 of the OECD MC.

For instance, a country not demanding specific documentation on transfer pricing in principle does not generate problems with regard to the proper application of the arm's length principle as established in the OECD Guidelines. The same would happen to any domestic legislation that establishes proportional tax penalties applicable should the taxpayer violate the transfer pricing legislation. Nevertheless, when domestic rules that articulate formulary transfer pricing methods or allow the use of "secret comparables" or provide a misaligned application of the Cost Plus method (for instance, based on fixed ratios or safe harbours) are applied within the scope of a tax treaty following Art. 9 of the OECD Model it is clear that problems between these domestic rules and the DTC could arise. In this kind of case, Art. 9 of the DTC, interpreted in line with the Commentaries and Guidelines of the OECD, could exert a certain constricting effect on the application of such domestic rules in those aspects where a material breach of the arm's length principle were observed (as shaped in the treaty and the OECD materials).

In the end, what is being contravened in these cases is the arm's length principle established in art. 9 of a DTC that allows the tax administrations of the Contracting States to carry out primary adjustments according to what is established in their domestic legislation, as long as such an adjustment does not violate the principle embodied in the referred article. The OECD Transfer Pricing Guidelines, as a separate part of the Commentaries on Art. 9 of the OECD MC, would come round as contributing to a qualified and contextual interpretation of the arm's length principle articulated in art. 9 of the applicable DTC, unless such a rule had been shaped not following or aside the OECD Model.[35]

2.4 The interrelationship between the OECD TP Guidelines and the tax treaties: from soft law to hard law

We cannot overlook the trend towards the reconfiguration or reshaping of the domestic rules on transfer pricing in order to align them with the rules and principles established in the OECD Transfer Pricing Guidelines. From a legal point of view, it can be said that such a process has been highly influenced by the conclusion of a good number of tax treaties following Art. 9 of the OECD MC. Thus, on the one hand, it is

[35] Ibid., p.18

considered that these OECD Guidelines constitute and agreed interpretation of the arm's length principle established in the referred Article to the effects of the application of the DTCs that follow the OECD MC. In addition, the arm's length principle has expanded its field of application across the legal systems of the OECD Member and non-Member States due, precisely, to its implementation through the model conventions of the League of Nations and of the OECD.[36]

The OECD Transfer Pricing Guidelines, although not legally binding, do constitute a detailed explanation of the interpretation and practical application of Art.9 of the OECD MC in which the Member States have reached consensus; it means that the domestic law and practice on transfer pricing of every member OECD state must be consistent with the interpretation that their representatives have agreed upon within the OECD Guidelines.[37]

Domestic rule implementing the arm's length principle inconsistently with the OECD Guidelines can generate a good number of tax conflicts for the affected taxpayers, which would be contrary to the principles of free flow of capital and the elimination of barriers on commerce and transnational investment. These distorting effects would be, as well, contrary to the proper original objectives of the OECD and, therefore, in some form when a country contributed actively to its generation it would be contravening the OECD Convention of 14 December 1960.

These kinds of problems were put forth specially during the first half of the 1990s when the US and some OECD member countries (Germany, Sweden and Japan, specially) came to a certain confrontation (the global tax to war) due to the unilateral approach deployed by the United States on transfer pricing. The need of a uniform and multilateral understanding on the interpretation and application of the arm's length principle was emphasized by the OECD in its report, through which this international organization on transfer pricing would provoke. OECD Transfer Pricing Guidelines represent the recovery of the OECD consensus on transfer pricing, after the problems originated by the unilateral and divergent position that derived from the American 1988 White Paper as well as the proposed regulations of transfer pricing elaborated by the Treasury Department of the US during the first half of the 1990s.[38]

2.5 Constraining effects of Transfer Pricing Guidelines

It is the view of Professor Jose Calderon, which he stated in his article[39] that one of the most material changes occurred in this field come from considering how the OECD Transfer Pricing Guidelines have extended or surpassed the value and effects that, in principle, are theirs, attending to their legal nature (they constitute a mere report of the

[36] Hamaekers, "Arm's length – How long?" an International and Comparative Taxation (Kluwer, The Hague, 2002), p.29
[37] Jose M. Calderon, "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?" [2007] Intertax, p.4
[38] Haigh, "The Perspective of Tax Administrations in the OECD", in Practical Experience with the OECD Transfer Pricing Guidelines p.13
[39] Jose M. Calderon, "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?" [2007] Intertax, p.20

OECD CFA and have been object to recommendation by the OECD Council) becoming a set of internationally agreed principles that delimit the content and criteria of application of the arm's length principle laid down in the domestic transfer pricing legislation and tax treaties of most of the OECD and some non-OECD member countries.

The OECD Transfer Pricing Guidelines have been transformed progressively throughout the last few decades; without totally losing its nature of soft law, they have evolved, to a degree, into an instrument of hard law. This dual character which the OECD Transfer Pricing Guidelines now hold has its source not in its legal nature but on the interrelation that these Guidelines have with the domestic legislation of the OECD countries and with Art. 9 of the DTCs concluded by these countries. Therefore, most of the Member States of the OECD, and also some third countries, shape their domestic transfer pricing rules taking the OECD Guidelines as their fundamental and main "legal source", which affects the legal value of the Guidelines referred to inasmuch as the tax authorities, taxpayers and even national courts have to take into account such Guidelines in order to apply the domestic transfer pricing rules. In the same line of thought, the application of the arm's length principle within the framework of a DTC that follows Art. Of the OECD MC, in principle, should be undertaken according to that established in the OECD Transfer Pricing Guidelines. All this has favoured the "legal sliding" of the OECD Transfer Pricing Guidelines into the tax systems of the states at the moment of interpreting the domestic transfer pricing rules which articulate the arm's length principle. In this sense, court decisions that invalidate transfer pricing primary adjustments because the domestic legislation was applied contrarily to that provided in the OECD Transfer pricing Guidelines are not surprising.

Thus far, the restraining effects of the domestic legislation that results from the application of art. 9 – interpreted in the light of the OECD Guidelines – in the framework of a DTC nly take place in cases where it is clear that the domestic legislation or national administrative practice contravened the material content of the arm's length principle interpreted in the light of such OECD Guidelines. Also, the OECD Transfer Pricing Guidelines can operate with a complementary functionality of a positive character when they are used as an interpretative material that guides the taxpayers and tax authorities at the time of applying the domestic transfer pricing legislation; this complementary use of the OECD Guidelines occurs frequently with regard to the application of the transfer pricing methods, inasmuch as the domestic legislation of a good number of countries does not fully regulate such matter; this circumstance favours the application of the OECD Guidelines in order to fill this (intentional) lack of regulation or "legal void".

The reasons and forces that have led to this progressive transformation of the OECD Guidelines as a soft law instrument with vocation of hard law are not only and fundamentally of a legal character. We believe that reasons and forces of an economic character have influenced this process of transformation the most. As highlighted by the OECD, a lack of uniformed understanding and of international cooperation in the application of the arm's length principle would end up generating conflicts to the states and to the enterprises whose negative consequences would be hardly foreseeable or in any case chaotic from an economic and tax point of view.[40] This same report[41] emphasizes that the correct application of the arm's length principle requires a coordinated and uniform interpretation of its according to what is established in the OECD Transfer Pricing Guidelines, in such a way that a unilateral interpretation or approach would be contrary to the objective and aim of such a principle and the DTCs following the OECD MC.[42]

As Guttentag said, serious economic problems and conflicts that would block commerce and transactional investment would derive from a configuration and application of the arm's length principle in a non-uniform or asymmetrical way by the different countries to establish internationally agreed principles on the application of the arm's length principles, and to the integration of these principles in their domestic legislations and DTCs.[43]

2.6 The current dynamism of Transfer Pricing Regulations

Regulating Transfer Pricing involves some quite unique and specific characteristics. On the one hand, it is clear that we are dealing with an assumption where various different "regulation production centres" (co-) exist. We find ourselves faced, then, with a "polycentrism of sources of law" and regulation production centres, in such a way that both international (the OECD and the UN) and supranational (EU) organizations as well as countries in their own right contribute towards creating tax regulations and principles which affect the various subjects (tax authorities, taxpayers, the courts) such regulations, the sense that they are in a permanent state of tax reform; the probable explanation for this can be found In the close connection that exists between such regulations and the reality of a situation that is continually evolving and where every day brings with it more ways of doing business and carrying our trans-national business operations and shaping business structures. Thirdly, the regulation of transfer pricing is strongly influenced by international regulations or principles, probably due to the fact that we are dealing with a subject that poses fundamentally international or multilateral questions.

In this sense, it is interesting to observe how the arm's length principle has evolved, extending beyond its originally national character to become a principle of international content and form. The arm's length principle first appeared in US and British domestic legislation in 1917-1918, but the fact is that it was not until the 1980s, that is, when it was effectively drawn up in the OECD Model (OECD MC) and in the double tax conventions (DTCs) when we began to appreciate its global emergence; such a phenomenon has been accompanied by a torrent of internal regulations and international rules and principles

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[40] The main international mechanisms which have been established to resolve these conflicts are the mutual agreement procedure established in the DTCs, as well as the procedure of "monitoring" articulated by the OECD CFA with the object to verify (and encourage) the observance of the OECD Guidelines by the member States

[41] OECD Report, OECD, Paric, 1993, p.2-3

[42] Jose M. Calderon, "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?" [2007] Intertax, p.21

[43] Guttentag, "Passing the Torch on Transfer Pricing", in Liber Amicorum Sven-Olof Lodin (Kluwer, The Hague, 2001), p.121

aimed at (re-)regulating this subject matter, first in a context where it is internationalized and later in a context of economic globalization. Such a convergence of regulations and principles deriving from heterogeneous law-production centres and which evolve at different speeds has only increased the number of doubts.[44]

Important changes aimed at adapting domestic transfer pricing regulations to the new context of economic globalization, tax competition between states in attracting business investment, and the activism of the different tax administrations in the control of transfer prices can be appreciated. As we know, states and their tax administrations currently endure important pressures of different origins, natures and scopes which have a relevant impact when the more international aspects of their legislation are being drawn up, as are, for example, a certain amount of pressure is being put on EU and OECD Member States to adapt their legislation on transfer pricing to the OECD Guidelines and ensure it complies with the requirements that derive from EU and OECD harmful tax competition projects. But at the same time, EU and OECD Member States endure the pressure applied by economic globalization on their economies; the countries whose economic and tax "climate" is less attractive or unfavourable will be at a disadvantage when domestic and foreign companies are looking to invest on their soil.

In this sense, some countries, the Netherlands for example, have tried to adapt their internal regulations on transfer pricing in a way that best suits their interests and reconciles the different demands the new international context imposes. The Dutch legislation on transfer pricing constitutes an interesting means of balancing the demands of EU and OECD harmful tax competition projects with the economic pressures economic globalization forces countries to endure.[45]

3. OECD Transfer Pricing Guidelines and OECD Member and non-member states

Recently a trend has been observed by some of the OECD Member States towards alignment of their domestic rules with the OECD Transfer Pricing Guidelines. Such a trend can be explained taking into account the important consequences deriving from such an alignment, as well as the negative effects (legal and economic) resulting from a transfer pricing approach deviating from that provided in these OECD Guidelines.[46]

The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines) are followed by many countries – even countries that are themselves not OECD members. For example, this is the case for the ANDEAN countries[47], which have all adopted transfer pricing rules (with exception of Bolivia).

[44] Jose M. Calderon, "European Transfer Pricing Trends at the Crossroads: Caught Between Globalization, Tax Competition and EC Law" [2005] Intertax 103
[45] See: De Hosson, "Codification of the arm's length principle in the Netherlands Corporate Income Tax Act"
[46] Ibid., p 103
[47] The Andean countries are Bolivia, Colombia, Ecuador and Peru, conforming to customs union called the Andean Community

Furthermore, transfer pricing legislation in Peru, Ecuador and Colombia refers, direct or indirectly, to the OECD Guidelines as a source of interpretation on the matter.[48]

A good number of Latin American countries (e.g. Chile, Argentina, Peru, Venezuela) are introducing in their norms the arm's length principle in a "consistent" way with the OECD Transfer Pricing Guidelines.[49] It is also interesting to point out how the domestic legislation of some of these non-member Latin American countries of the OECD (e.g. Colombia) remit directly to the OECD Guidelines (or to the OECD list of "tax havens") to the effects of ordering some aspects of their tax system as the own arm's length provisions. This law-making formula not only creates legal problems (conflicts with the constitutional principle of tax legality) but also political ones inasmuch as the OECD does not canalize the interests of these non-member countries.[50] In other Latin American countries like Peru, the legislation on transfer pricing should be interpreted in the light of the OECD transfer pricing Guidelines[51]; the same happens in Venezuela after reform enacted in 2001 in order to align its legislation with the OECD Transfer Pricing Guidelines.[52] The tendency to follow the principles elaborated by the OECD Committee on Fiscal Affairs is extending also to Asia where Member States (e.g. Japan) and non-members (e.g. Malaysia) of the OECD are developing their domestic rules on transfer pricing in line with the OECD Guidelines.[53]

3.1 Transfer Pricing Regulations in domestic tax law of developing countries

IBFD provides on its website, through its country surveys and country analyses, valuable information that provides general picture of what transfer pricing regulations look like in developing countries. This section is mainly based on information available on the IBFD database. The aim here is to present general overview of what transfer pricing look like on the ground.

In the vast majority of the cases, developing countries lack transfer pricing provisions in their domestic tax law.

In such cases general anti-avoidance provisions may be used by a tax administration to assess controlled transactions. In a number of general tax codes in developing countries, provisions still need the issuance of regulations in order to be operational. This is seen in, for example, Benin, Ethiopia and Zimbabwe.

Certain emerging and developing countries, however, have implemented transfer pricing regulations that are really operational for some of them. Emerging and developing countries with more or less detailed transfer pricing regulations in place include Brazil, China, Egypt, Fiji, Indonesia, Kenya, Lithuania, the Philippines, Sri Lanka, Thailand,

[48] Sophia Castro Jurado, Manuel Del Rio 2010 OECD Transfer Pricing Guidelines: Comments on the impact in Andean Countries, International Transfer Pricing Journal, May/June 2011, p 171
[49] Stack, Del Castillo and Leyva, "Transfer Pricing in the US and Latin America", Tax Management Intl Journal 2002, p 24
[50] See Jaramillo, Salinas and Castellon, "Latin American Tax Review: Colombia's Transfer Pricing Rules Strike Balance between competitiveness, Legality", Tax Notes International 2003, vol.32, no. 1, 2003, p.53
[51] Fernandex Origgi, "Peru adopts new transfer pricing rules", Tax Notes International 2004, vol.33, no. 3, p. 492
[52] Martin Jovanovich et al., "Transfer Pricing in Latin America", Tax Notes International 2004, vol.34, no.5 p. 505
[53] Kasipillai, "Malaysia releases transfer pricing Guidelines", Tax Notes International 2003, vol. 31, no.4, pp.304-305

Uruguay, Venezuela and Vietnam. Highlights of the existing transfer pricing regulations, which are mainly inspired by the OECD Guidelines, include the following:

- Mutual Agreement Procedure (MAP): The MAP is hardly existent, although Indonesia has developed a MAP program;
- APA: an APA programme is in place in handful developing countries. For example this programme is being developed in Cambodia, Colombia, Egypt, Gabon, the Philippines, Rwanda, Venezuela and Vietnam.
- Documentation issues: some developing countries that have implemented transfer pricing regulations have more or less addressed documentation issues. This includes Algeria, Egypt, and Kenya.
- Definition of related parties: the debate on the concept of "related parties" has not yet led to any common position in the realm of international tax cooperation. It is up to each individual country to decide what definition to give to the term and what would be threshold for triggering the status as such. For this reason, a variety of thresholds have been retained by the developing countries under consideration. In general, control of a party is deemed to be established when a holding in the capital of that party is greater than or equal to 50% of the amount of either the capital shares or the voting right by the other party.

In general, the methods in use in the developing countries that have implemented transfer pricing regulations are those recognized by the OECD, namely the CUP method, the resale price method, the cost-plus method, the profit split method and the TNMM. Certain legislation limits the deduction of certain charges, such as management charges and royalties.

3.1.1 Brazil

Brazil has implemented transfer pricing rules that deviate from the OECD Guidelines to a certain extent. These rules were established in Law and officially published. Since then transfer pricing rules in Brazil have evolved through amendments and normative instructions.

Brazil basically applies several transfer pricing methods that deviate from those provided for by the OECD Guidelines. The methods apply depending on the transactions involving the importation or exportation of goods. Fixed margins are adopted for export transactions, which refer to safe harbour rules. These rules are applied by Brazil regardless of the specific situation of the taxpayer or the particularities of the taxpayer's business.

Only two comparability factors are expressly authorized under Brazilian transfer pricing legislation, namely (1) specific contractual terms and (2) some differences in characteristics of similar products, services or rights.

There is no possibility to obtain advance pricing agreement.

3.1.2 Egypt

Through a circular, the Egyptian Tax Authority sets out the view of the tax administration on the application of transfer pricing rules contained in Income Tax Law and executive regulations. The Egyptian transfer pricing regulations are derived from the OECD Guidelines, which may "be consulted for more detailed discussions".[54]

Egyptian Tax Law has adopted mainly three transfer pricing methods, namely the CUP; the cost-plus method and the resale price method. The CUP method has first priority, and where the CUP method adopted by the OECD, or any other method appropriate for the taxpayer.

In Egypt, a related party is defined as any person who has a business relationship with a taxpayer where that relationship has an effect on the taxable profit.

3.1.3 India

India has issued transfer pricing regulations based on the arm's length principle. The concept of associated enterprises has been detailed in the regulations. Enterprises are deemed to be associated "where one participates directly or indirectly in the management or control or capital of the other, or where such participation in both enterprises is by a common third party." The transfer pricing methods in force are the CUP method, the cost-plus method, the resale price method; the profit split method and the TNMM. A Dispute Resolution Panel is in place.

3.1.4 Kenya

There is no reference in the Income Tax Act to the OECD Guidelines. However, it is clear that the Rules are broadly based on, but do not completely incorporate, the OECD Guidelines.[55]

The first Kenyan case to consider the application of the transfer pricing regime is the Unilever case[56]. Unilever Kenya Limited (UKL) and Unilever Uganda Limited (UGL) are subsidiaries of the conglomerate Unilever group of companies. Sometime in 1995, UGL and UKL entered into a contract under which UKL was to manufacture and supply various goods to UGL. The prices that UKL charged UGL were lower than those for identical goods that it charged Kenyan consumers and for exports to countries other than Uganda. The KRA argued that, as the two companies were related, the sale of products at a price lower than that charged to Kenyan consumers and exporters for comparable sales was a transfer price. Consequently, this arrangement resulted in less taxable profits in Kenya than would been earned if the transactions were carried out with an independent party. As a result, the KRA assessed UKL to additional tax.

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[54] Egyptian Tax Authority, "Transfer Pricing Guidelines: A Guide to the application of Art. 30 of the Income Tax Law", introductory chapter.

[55] Unilever Kenya Limited (formerly East African Industries Limited) v. The Commissioner of income Tax, Income Tax Appeal 753 of 2003, 13.p158

[56] Unilever Kenya Limited (formerly East African Industries Limited) v. The Commissioner of income Tax, Income Tax Appeal 753 of 2003, 13.

However, UKL disagreed with the KRA and filed an appeal at the Local Committee[57], which ruled against UKL. UKL appealed against the decision of the Committee on a point of law, to wit, that section 18 (3) required prices between related parties to be at arm's length, yet did not provide guidance on how to apply this in practice. UKL further contended that, in the absence of such guidelines, it could resort to international best practices, specifically the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines), for guidance on how to determine arm's length prices. Indeed, UKL had used the cost-plus method as provided in the OECD Guidelines to calculate the prices it charged UGL and, on this basis, it argued that it had complied with section 18 (3).

The High Court agreed with UKL, holding that in the absence of Kenyan guidelines to determine what constitutes an arm's length, the company was justified in resorting to the OECD Guidelines, as these are internationally accepted principles of business and thereby best evidence of international thinking of the subject.[58]Specifically, the Court stated:[59] "We live in what is now referred to as a "global village". We cannot overlook or sideline what has come out of the wisdom of taxpayers and tax collectors in other countries. And especially because of the absence of any guidelines in Kenya, we must look elsewhere. We must be prepared to innovate and to apply creative solutions based on lessons and best practices available to us. That is indeed how our law will develop and our jurisprudence will be enhanced. And that is also how we shall encourage business to thrive in our country."

The decision offers an important insight into the prominent role that the OECD Guidelines have come to occupy in transfer pricing jurisprudence. During the hearing of the Unilever case, the KRA contended that the OECD Guidelines are not part of Kenyan law, and, therefore, were not acceptable as guidelines in resolving transfer pricing issues.[60] In other words, the KRA's argument was that the OECD Guidelines are just what they purport to be – guidelines[61] – and, as they had not been incorporated into Kenyan law, lacked legal force. This argument was not accepted by the Court.

Nonetheless, the issue is very arguable and germane to tax jurisprudence in Kenya. The country is not a member of the OECD and was not involved in the drafting of the OECD Guidelines. A question must be asked as to why it was necessary for the Court to rule that Kenya would refer to the OECD Guidelines in determining what constitutes an arm's length price, despite the fact that Kenya is not a member of the OECD and was not involved in the drafting of the OECD Guidelines. It must be noted that there is an alternative view, proffered by foreign case law, that in the absence of any other guidance in determining the arm's length price, the approach of the OECD Model is a useful aid, as

[57] Local Committees serve as the first avenue for appeal against a tax assessment, but for strange reasons do not give justifications for their decisions
[58] AU: FCA SNF (Australia) Pty Ltd v. Commissioner of Taxation (2010) FCA 635, para.47, June 2011, Tax Treaty Case Law IBFD
[59] Income Tax Appeal 753 of 2003, 16
[60] Unilever Kenya Limited (formerly East African Industries Limited) v. The Commissioner of income Tax, Income Tax Appeal 753 of 2003, 13.
[61] KE: HC, 2003, SNF Australia, supra n.50, para. 58

they are the best evidence of international thinking on the topic. While resort could be had to foreign jurisprudence, ultimately it is the substance of Kenyan law that must be construed and applied. Undoubtedly, part of the reason for publishing the Rules was to address the view that the OECD Guidelines, absent incorporation, were not part of Kenyan law.

Nonetheless, the finding that section 18 (3) was ambiguous for failing to provide guidance as to how to determine arm's length was apposite. Similarly, the Court's words exhorting tax authorities to benchmark the country's tax system against international developments and practices were clearly prescient, for hardly a year later, the Minister of Finance issued and published the Rules, on the whole modelled on the OECD Guidelines.[62]

The question may be asked, therefore, as to how the Rules could deal with issues, for example, cost contribution arrangements, that are provided for in the OECD Guidelines but not in the Rules? As held in the Unilever case, it is probable that, in the nascence of Kenyan guidelines, recourse could be had to the OECD Guidelines. This issue could become clearer if the ITA were amended to require taxpayers to apply the principles in the OECD Guidelines, except where they are incompatible with express provisions of the ITA. Such a legal stipulation would create certainty and assist the KRA and taxpayers in resolving difficult matters by drawing on the experience and practice of other jurisdictions that apply the OECD Guidelines and have resolved similar disputes.[63]

4. The integration of OECD TP Guidelines in the legal system of the states

A comparative law analysis reveals how the most of the OECD Member States followed the OECD Transfer Pricing Guidelines at the time of shaping the arm's length principle in their domestic legislations.[64]

The OECD Transfer Pricing Guidelines have become the international standard or the internationally agreed principles that govern the distribution of tax power between the states on the income flow and expenses between associated enterprises.[65]

The different transfer pricing policies developed by the states exert an important influence on the system chosen for the interconnection of the domestic transfer pricing rules and the OECD Transfer Pricing Guidelines. Thus, there are important differences between the several forms of "integrating" or "incorporating" these OECD Guidelines into the legal systems of the states. In some countries like Austria and the Netherlands, the OECD Transfer Pricing Guidelines are officially published by the national tax administration. Such a fact, in principle, should not strike anyone as surprising since the

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62 Bosire Nyamori "An analysis of Kenya's Transfer Pricing Regime", International Transfer Pricing Journal, March-April 2012, p.153

63 Unilever Kenya Limited (formerly East African Industries Limited) v. The Commissioner of income Tax, Income Tax Appeal 753 of 2003, 14

64 See Pagan and Wilkie, Transfer Pricing Strategy in a Global Economy (IBFD, Amsterdam, 1993); Maistro, Transfer Pricing in the absence of comparable market prices (Kluwer, The Hague, 1995), p.57

65 Eden, Taxing Multinationals: Transfer Pricing and Corporate Income taxation in North America, University of Toronto Press, Toronto, p.34

recommendations of the OECD Council indicate the convenience that such an official publication should take place in the national language of each country. This official publication of the OECD Guidelines pursue that the Austrian tax authorities and the proper taxpayers use the OECD Guidelines as an interpretative source at the time of applying the arm's length principle established in the domestic legislation.[66] In some other countries, like the Netherlands and Switzerland[67] , the principles embodied in the OECD Guidelines reflect the national practice, and therefore it is not necessary to articulate these domestically.[68]

4.1 OECD soft law "making system"

The integration of the OECD Guidelines in the legal system of the states poses some other problems deriving from the form in which this kind of soft law has been elaborated (rule-making process) as well as from its material content. In this respect, some problems appearing from the use of this soft law because of the form in which they are made and the measures and mechanisms used for equipping them with "coercibility" or mandatory effects.[69]

In relation to the making process, it could be said that these "regulations" of soft law are elaborated without direct or indirect intervention of the competent national parliaments. On the contrary, the soft law regulations (and rule making process) are carried out by representatives of the OECD Member States (generally civil servants of the different national tax administrations) and therefor they do not possess the necessary democratic legitimacy to adopt "regulations" in a strict sense. Also, soft law is adopted through a making process that does not entail the possibilities of public discussion, official publicity and transparency with which the domestic law is made in all democratic countries (offshore phenomenon of rulemaking).[70] On the other hand, the states and other persons directly affected by these soft law rules generally have few means to participate in the making of these regulations, as they also have few mechanisms that allow them to exert a legal review on the legality of the soft law adopted or on the measures of enforcement of such soft law.

In addition, the mechanisms used to obtain the enforcement of such soft law differ from the ones used to compel the application of the domestic and international law. Whereas the enforcement of the traditional legal provisions (hard law) are assured, fundamentally, through the courts (and in certain matters through administrative action) in agreement with the rules of a "fair and due process", on the contrary, the enforcement of the soft law is obtained using different means (soft enforcement) which also entail a

[66] Mousset, Toledano, Transfer Pricing in the absence of comparable market prices, Intertax, n.55, p.379
[67] It should be noted that in Switzerland the tax authorities have published several public rulings on transfer pricing, however it is considered that in practice the OECD Guidelines prevail over these rulings (Voyame, "Switzerland" in Transfer Pricing in the absence of comparable prices, Intertax, n.55, p. 620)
[68] Maisto, Transfer Pricing in the absence of comparable market prices, Intertax, n.55, p.57
[69] Shelton, Commitment and Compliance: the role of non-binding norms in the International legal system (London, 2000)
[70] Rose and Page, Lawmaking through the Backdoor (European Policy Forum, London, 2001), p.20

different degree of coercion, they span from political and financial pressures to a warning (or threat) of the inclusion of a territory or country in a blacklist.[71]

In this respect, it has been said that those international organizations that use soft law rules end up producing what has been called a "pseudo hard law". The OECD – and in particular its Committee on Fiscal Affairs – constitutes one of the international organizations who are assuming this position in areas like the taxation of the multinationals (the OECD Transfer Pricing Guidelines), and concerning countries and territories that are not members of this Organization and therefore who generally do not participate in the making of this pseudo law.[72] The trouble in regard to this pseudo hard law does not lie only in its making process, but also in that those affected by such "pseudo law" do not have effective means to question the premises in which it is founded, nor the right of judicial legal review or international control on the legitimacy or way in which such pseudo law is made and the measures for its enforcement.[73]

Probably, these set of factors have contributed, so that backdoor rules have, on the one hand, a "closed" character when constituting an instrument through which the point of view of the members of an international organization is articulated, and, on the other hand, a prevailing administrative approach that maximizes the position of the administrations or public bodies of the Member States of the international organization.[74]

4.2 United Kingdom

In certain countries, such as the United Kingdom, the domestic provision that establishes the arm's length principle is shaped in a very undermined or liberal way but it contains an express reference to the OECD Transfer Pricing Guidelines to the effects of its practical interpretation and application. The formula used by the British lawmaker (cross-reference approach) for the integration of the OECD Guidelines into the legal system could cause some problems that go from questioning the delegation of "rule-making power" onto an international organization as the OECD to the doubtful compatibility of that formula with the principles of legal security and tax legality considering that such Guidelines are in permanent evolution (the ambulatory nature of the arm's length principle as stated in the OECD Transfer Pricing Guidelines) and are not officially published in the UK Official Gazette.[75] In fact, in some Latin American countries that used this same formula, they have declared the unconstitutionality of the domestic transfer pricing provision with the tax legality principle.[76]

The formula used in the UK for integrating the OECD Guidelines into the legal system also entails the domestic integration of the updates that are introduced in the

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[71] Ibid., p.7
[72] Ibid., p.10
[73] Zagaris 'Exchange of information policies at the millennium: balancing enforcement with due process and international human rights', Tax Management International Journal, vol.30, no.10, p.464
[74] Jose M. Calderon, "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?" [2007] Intertax 27
[75] Tiley, Revenue Law (Hart Publishing, Oxford, 2000), p.1053
[76] Jose M. Calderon, "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?" [2007] Intertax 22

OECD Transfer Pricing Guidelines from time to time. This issue poses serious problems of legality and legal scrutiny. From a legislative policy prospective, it does not seem that this UK formula would be the most advisable, in light of the problems pointed out as well as the surrender of tax power resulting from its use. Yet, the adoption of the OECD Guidelines as an interpretative source of the domestic transfer pricing provisions constitutes to be considered by some authors as one of the ways to avoid the main deviations that the arm's length principle can suffer through the asymmetrical domestic legislations of the different countries.[77]

4.3 Germany

The formula of integration adopted by some other OECD Member States such as Germany (and the Netherlands) could be considered much more "polished", at least from a strictly legal point of view, inasmuch as a formula poses problems of minor importance compared to those mentioned above.

These two countries use a system of integration of the OECD Transfer Pricing Guidelines in the legal system founded upon the use of "public administrative rulings" or "administrative acts of an interpretative nature".[78]

These legal instruments have neither the legal value of a legal provision nor normative nature in the strict sense, but they only constitute an administrative interpretation of the prevailing legislation. However, such "administrative acts or public rulings" do bind the tax administration and, in such sense, they can be invoked by the taxpayers on the basis of the principle of legitimate confidence in the public administration.

Through these "public rulings", the German and Dutch administrations make their own interpretation of the OECD Transfer Pricing Guidelines delimiting their own conception of the arm's length principle and of the methods to determine the normal market value.

This formula of integration of the OECD Guidelines is more consistent with the principles of tax legality and legal security for the following reasons.

First, national legal instruments are used to incorporate the principles embodied in these Guidelines in the domestic legal order. Secondly, the tax authorities of these countries carry out a personal interpretation of these OECD Guidelines in order to clarify obscure aspects, to delimit open questions, to make some matters flexible, or to reject some approach that these Guidelines provide (personal interpretation approach). Thirdly, we consider that the use of this formula of integration of the OECD Guidelines could serve to limit (to a certain extent) the "dynamic or ambulatory interpretation" which the OECD CFA carries out of the arm's length principle could be held that, at least, in those

[77] Ibid., p. 23
[78] See Romano, "Private rulings systems in the E.U. Member States. A comparative survey", European taxation, January, 2001, p.21

aspects in which the domestic public ruling has modulated the interpretation of the principles laid down in the OECD Guidelines would not be integrated automatically in the practice of such a state (static interpretation of the arm's length principle).[79]

4.4 The Dutch approach

The limits resulting from the use of integration of the OECD Guidelines through public rulings with regard to the domestic application of the dynamic interpretation that the OECD makes of the arm's length principle become more obvious in light of the Dutch practice. In this context, the legal codification of the arm's length principle in the Netherlands domestic legislation through a provision following Art. 9 of the OECD MC with the purpose of reinforcing its interrelationship with the OECD Transfer Pricing Guidelines has also raised certain doubts on the extent of the integration of such Guidelines in the Dutch legal system. In particular, it has been said that in some cases it is clear that the formula used by the Dutch lawmaker provides the reception or integration in the national practice of the international principles contained in the OECD Guidelines. However, there are cases where this system of integration does not work in a diaphanous way since the Dutch public ruling on transfer pricing deviates from that provided in the OECD Transfer Pricing Guidelines. This could occur, for example, in regard to the allowance of the management expenses that the subsidiaries pay to the mother companies, inasmuch as the OECD Guidelines use the denominates "benefit test" (according to which the expenses are lawful when they are assigned to the subsidiaries in a way that are "proportional" to the benefits obtained by the receiver of the service (para. 7.23 of the OECD Guidelines)), whereas the Netherlands practice accepts the lawfulness of such expenses attending to a more flexible "business purpose test".[80]

In this case, it is not clear what the intention of the Netherlands lawmaker was when it shaped the legal provision that codifies the arm's length principle in such a way that its connection with the OECD Guidelines and the international practice were reinforced.[81]

Probably, the Netherlands lawmaker formed the domestic arm's length provision materially following Art. 9 of the OECD MC with the aim to establish the narrowest possible connection between the Dutch law and practice represented by the OECD Transfer Pricing Guidelines. This position or approach seems to play in favour of a dynamic integration into the Dutch domestic law of the Transfer Pricing Guidelines updates that the OECD does from time to time, at least in all those issues where the Dutch authorities have not established an official divergent position (for instance, thorough the public on transfer pricing) in regard to that laid down in the OECD Guidelines.[82]

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[79] Jose M. Calderon, "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?" [2007] Intertax, p.23
[80] See De Hosson, "allocation of head office costs", Intertax, 1994, no. 6-7, p.248
[81] De Hosson, "Codification of the Arm's Length Principle in the Netherlands Corporate Income Tax Act", p.195
[82] Sinx and Ten Broeke, "Transfer Pricing Litigation: a Comparison", n.82, p. 34

In Switzerland similar problems have derived from the coexistence of public rulings on transfer pricing and a national practice traditionally aligned with the OECD Guidelines. Such a "duality" of sources raises doubts on the interpretative ("law") source that has to be used in practice by the taxpayers and the tax authorities, in such a way that it is considered the OECD Guidelines are those that prevail over the domestic public rulings.[83]

4.5 Concluding remarks on the systems of domestic integration of the OECD Transfer Pricing Guidelines

From a different perspective of outstanding practitioners, like Nilson[84], Stork[85], Findeis[86] and Bremer[87], have positioned themselves in favour of the direct integration of the OECD Guidelines in the domestic law system of the states. They held that the use of domestic legal mechanisms that establish a national "personalization" of the OECD Guidelines must be avoided or minimized, such it puts in danger the main practical usefulness derived from such Guidelines, that is, the uniform application of the internationally agreed principles for the application of the arm's length principle contained in such Guidelines.[88]

The same idea has been postulated by tax administrators; for instance, Haigh has held that one of the aspects that distort or minimize the usefulness of the OECD Guidelines lies in their non-binding legal value in regard to the domestic law of the Member States.[89]

In some states, like the Netherlands, re restriction of the effects of the OECD Guidelines comes from the jurisprudence of the national courts that seem to deliberately omit all reference to these Guidelines in order to preserve the principle of tax legality.

However, such a position is more formal than material, since the Dutch courts have been interpreting the arm's length principle in line with that established in the OECD Guidelines. The Swedish Supreme Court and Spanish courts have maintained a similar position, so that, although the non-binding character of the OECD Guidelines is recognised, such Guidelines are used and mentioned specifically as qualified interpretative instrument.[90]

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[83] Voyame, "Switzerland" in Transfer Pricing in the absence of comparable prices, p.620
[84] Nilson, "OECD Transfer Pricing Guidelines – Practical experience", in Practical Experience with the OECD Transfer Pricing Guidelines (IFA, Kluwer, 1999), p.9
[85] Stork, "OECD Transfer Pricing Guidelines – A business perspective", in Practical Experience with the OECD Transfer Pricing Guidelines (IFA, Kluwer, 1999), p.13-14
[86] Findeis and Bremer, "A German perspective on Transfer Pricing Documentation requirements", Tax Notes International 2002, vol.25. no.11, p.1243
[87] Ibid., p1243
[88] Nilson has proposed that the OECD supervises the alignment of the transfer pricing policies of the Member States of the OECD with the OECD Guidelines, Nilson, "OECD Transfer Pricing Guidelines – Practical experience", in Practical Experience with the OECD Transfer Pricing Guidelines (IFA, Kluwer, 1999), p.9
[89] Haigh, "The Perspective of Tax Administrations in the OECD", in Practical Experience with the OECD Transfer Pricing Guidelines p.23
[90] Edwardes-Ker, International Tax Treaties Service (In-Depth Publishing, Ireland, 1986), Art. 9, p.11

It seems, therefore, that most of the domestic law mechanisms used to integrate the OECD Transfer Pricing Guidelines in the legal system of the OECD Member States of the OECD entail important shortcomings from a legal point of view that cannot be overcame easily. Such circumstance could not reflect the approach that prevailed at the time of elaborating the OECD Guidelines. As stated by Haigh, such Guidelines have been built up by tax administrators with the main objective of solving the most urgent practical problems (e.g. elimination of the double taxation, the application of the transfer pricing methods, the issues related with the tax audits and adjustments of related transactions) that the application of the arm's length principle posed. Some other issues like those referred to the legal technique seem to have been relegated to a second plane.

However, the authorities of some states like Germany or the Netherlands have shown a greater "legal sensitivity" when facing this question and have arbitrated mechanisms, that without solving all the problems that have been considered, do minimize their intensity. From a strictly national legal perspective, perhaps the most polished or sophisticated mechanisms for regulating the arm's length principle at domestic level is the one used by the US, but this formula poses several issues from an international perspective, like the risk of misalignment of such domestic regulation on transfer pricing with the international practice represented by the OECD Guidelines. Also should be pointed out that not all the states count with the "resources" to develop a complete domestic transfer pricing regulation but only a minimal regulation on it consisting in a legal provision that establishes the arm's length principle linked with the OECD Transfer Pricing Guidelines. [91]

5. Conclusion

The new sources (mainly soft law) of the tax law in a globalized world are shaping more and more material aspects of the tax systems of the OECD and non-OECD Member States. Emerging "international tax regimes" (like the transfer pricing regime) are replacing the national regimes and policies in order to cope with the global issues posed by the new era of globalisation without a doubt is affecting the traditional tax principles and the fundamental rights of taxpayers. For instance, it could be observed that the ability to pay, the legal security, the tax legality and some other material (sometimes constitutional) principles are not governing the making process of some important aspects of the tax systems as they do in the past. Tax sovereignty has been eroded by the globalisation, and consequently the national tax principles and legal guarantees deriving from such sovereignty are being eroded too. The challenge posed by this phenomenon lies in finding a way to conciliate the globalisation, and consequently the national tax principles and legal guarantees deriving from such sovereignty are being eroded too. The challenge posed by this phenomenon lies in finding a way to conciliate the globalization need with the constitutional tax principles and rights. Transfer pricing and international

[91] Jose M. Calderon, "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?" [2007] Intertax 27

taxation in general are just the "first wave" of this phenomenon, but it would not be right to think that this globalization has no general effect on the tax systems. On the contrary, it is the author's opinion that the tax law of open economies is more and more enduring a process of internalization, inasmuch as the old or traditional frontier between the domestic and international (tax issues) is more blurred at the end of every day. That internationalization of the tax law entails a stronger external influence in the tax law making process as well as in the fundamentals of the national tax systems. It could be said that we are more and more working with new tax rules suited for these new times, but still thinking with old principles and institutions. [92]

Although the OECD Guidelines and Reports on transfer pricing are not legally binding upon the OECD member countries, the OECD Guidelines are recommended by its Council of the Ministers of Finance of its member countries and serve as internationally agreed guidelines with detailed guidance on the interpretation and application of the ALP. The OECD Guidelines may be considered a commentary on Article 9 of the OECD MTC. In practice, these reports and guidelines have had a major influence on the development of the domestic transfer pricing rules of the OECD member and other countries. In certain cases, countries simply recognize the principles and guidelines of the authorities and MNEs. The OECD Guidelines are to a certain extent different from the US transfer pricing rules, in particular with respect to the selection and application of transfer pricing methods.[93]

In my opinion, as transfer pricing is a global issue nowadays, more and more countries will follow OECD TP Guidelines and adopt their legislation consistent with the Guidelines as unilateral norms will prevent international disputes and conflicts between tax administrations and MNEs.

[92] Jose M. Calderon, "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?" [2007] Intertax, p.23

[93] Phat Tan Nguyen Transfer Pricing: The Vietnamese System in the Light of the OECD Guidelines and the Systems in certain Developed and Developing countries, Jonkoping International Business School, JIBS Dissertation Series, 2009, p 146

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The OECD Transfer Pricing Guidelines provide a framework for settling such matters by providing considerable detail as to how to apply the armâ€™s length principle. In the hypothetical French-Dutch bicycle case, the French MNE could ask the two tax authorities to try to reach agreement on what the armâ€™s length transfer price of the bicycles is and avoid double taxation.Â But abuse of transfer pricing may be a particular problem for developing countries, as companies might take advantage of it to get round exchange controls and to repatriate profits in a tax free form.Â â€¢ Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, 2001.