

BEFIT EESC meeting

January 2024

- Transfer Pricing rules in European legislation

- Relation with dispute resolution

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Transfer Pricing rules in European legislation

Consistency is Good

- OECD TPG are incorporated by law, by reference, or not at all.
- OECD TPG interpretations are inconsistent, i.e.:
 - Arm's Length definition
 - Arm's length range concept
 - Criteria for applying TP methods
- Issues not adequately addressed:
 - i.e. year-end adjustments



Is there an Elephant in the Room?



<https://www.constructiongenius.com/dealing-with-the-elephant-in-the-room/>

Is there an Elephant in the Room?

- 132 First, the Kingdom of the Netherlands argues that the judgment of 22 June 2006, *Belgium and Forum 187 v Commission* (C-182/03 and C-217/03, EU:C:2006:416), on which the Commission relies to identify an arm's length principle particular to EU law, is not authority for the existence of such a principle. In addition, the Commission neither stated the basis from which it had identified the existence of an arm's length principle in EU law nor explained the content of that principle. Starbucks adds that, notwithstanding the fact that observance of Article 107 TFEU effectively constitutes a limit on Member States' fiscal autonomy, the Commission exceeded the powers conferred on it by Article 107 TFEU. Starbucks criticises the Commission for having replaced, purportedly under the principle of equal treatment, Netherlands rules of tax law with a transfer pricing principle developed autonomously and, thus, for having imposed substantive rules of tax law.
- 133 Second, the Kingdom of the Netherlands argues that the Commission could not examine the APA under an arm's length principle particular to EU law, since only the legislation and national rules of the Member State concerned are relevant for the purposes of State aid control. Specifically, the Kingdom of the Netherlands contends that the existence of an advantage can be examined only by reference to the charges which are normally included in the budget of the undertaking under national law and not by reference to an arm's length principle particular to EU law. Starbucks adds, furthermore, that the Commission did not take Netherlands law into account and that its reasoning deviates from – and indeed conflicts with – Netherlands transfer pricing rules.

The Key Transfer Pricing Challenges

Separating the Trees from the Forest

- Determining the best dispute resolution avenues: domestic or international or both?
- What are the required steps after audit and primary adjustment: objection, litigation and appeal? - and (when) is there coordination with access to MAP?
- Access to alternative dispute resolution: APAs, Mediation, Arbitration?
- Time to get to dispute resolution
- Implementation of dispute resolution: unilateral, cross border, through corresponding adjustments.
- Self-help to resolve not-at-arm's-length pricing: year-end adjustments.
- Non-functioning treaty arbitration (EU Arbitration Convention and EU Arbitration Directive)

A closer look at a Tricky Issue

Back to the Future?

- Retroactive application of additional or updated OECD TPG.
 - Amazon case: Grand Duchy of Luxembourg vs. European Commission, 12 May 2021, T-816/17 and T-318/18, §§ 154-155
 - Ghent, 2016/AR/455, 8 June 2021
- Dynamic statutory interpretation vis-à-vis legal certainty.



"When faced with a tricky ethical issue, I always ask the question, 'What's in it for me?'"

Grabbing the Tiger by the Tail..



Grabbing the Tiger by the Tail

First things First

Arbitration is not working:

- Arbitration (Art 25(5) OECD MC) “only” applies when MAP (Art. 25(1) OECD MC) is not working.
- If access to arbitration is not “supported” by tax authorities, taxpayer has no realistic remedy.
- Likely consequence is that taxpayer claims a tax credit to the detriment of another government.

MAP is not working well enough:

- (Forced) settlement in lieu of MAP.
- Slow uptake/approval of MAP submission.
- No willingness to agree in MAP/cases remain open and unresolved too long or don’t get resolved at all.

Pros and Cons of the TP Directive

Points in favor and against

Pros:

- Basics of TP are addressed;
- Tricky issue of what point in the range qualifies, is dealt with;
- (More) consistent interpretation of relevant terms, possibly leading to a more objective approach to application;
- Pragmatic dispute resolution approach for corresponding adjustments;
- Compensating adjustments acknowledged and addressed;
- Access to CJEU if needed.

Cons:

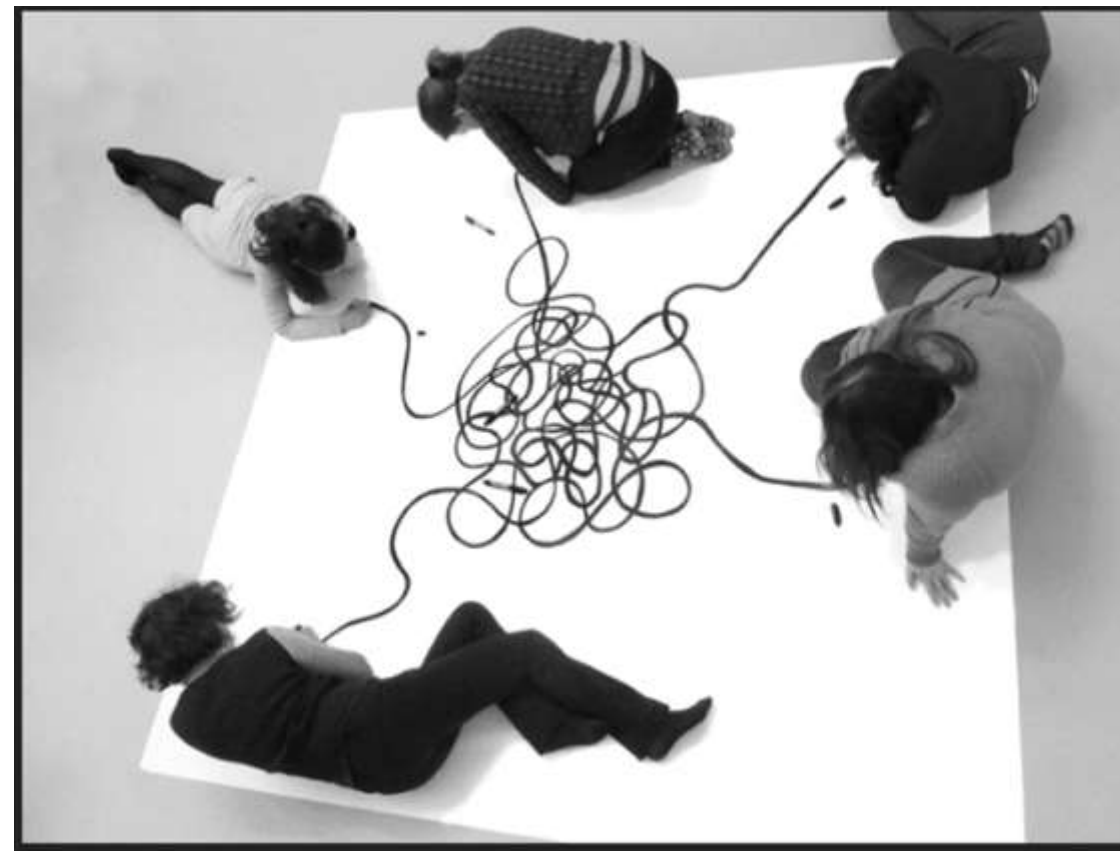
- Definition of associated enterprises deviates from common definition;
- How will application of “EU TP law” be dealt with in transactions with non-EU associated enterprises?
- Interaction between OECD TPG updates and updating the TP Directive seems unnecessarily complex
- What authority is there in MAP to resolve international-EU inconsistencies?
- While there is access to the CJEU, unclear if there is sufficient TP know-how available at that level.

Conclusion

Let's not rush to solutions

- Should we not use this opportunity to consider the status of the Multilateral Arbitration Convention that exclusively looks at transfer pricing?
- Should we not use this opportunity to improve the Arbitration Directive?
- The TP Directive could benefit from inclusion of some other aspects and nuances than what is currently listed

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<https://www.designweek.co.uk/issues/may-2014/back-to-the-drawing-room/>

THANK YOU

Please continue to reach out to us so we can (continue to) make a difference!

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