Nr/No. 4/2023

KWARTALNIK PRAWA PODATKOWEGO
TAX LAW QUARTERLY

CENTRUM DOKUMENTACJI I STUDIÓW PODATKOWYCH · ŁÓDŹ ·

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Publisher:
Centre of Tax Documentation and Studies in Lodz
Lodz University Press

Initiating Editor
Sylwia Mosińska

Typesetting
AGENT PR

Cover design
Jakub Baraniak
efectoro.pl agencja komunikacji marketingowej

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ISSN 1509-877X

Printed in Poland

Published by Lodz University Press
First Edition. W.11042.23.0.C Price 54 PLN
Printing sheets 14,375

Lodz University Press
90-237 Łódź, 34A Matejki St.
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e-mail: ksiegarnia@uni.lodz.pl
tel. +48 42 635 55 77

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https://doi.org/10.18778/1509-877X.2023.04.01

Articles

Jan J.P. de Goede*

The 2017 and 2021 UN Model Tax Convention Updates and Their Impact on the Countries' Treaty Practice

Summary. This paper deals with the 2017 and 2021 UN Model updates and their possible impact on countries' tax treaty policy and practice. The Author provides an overview of the most relevant changes to the text of the UN Models 2017 and 2021, and possible interactions between the two most important new UN Model's provisions: Article 12A dealing with fees for technical services and Article 12B dealing with income from automated digital services and Pilar One and Pilar Two.

Keywords: UN Model Double Taxation Convention between Developed and Developing Countries, fees for technical services, income from automated digital services, tax treaty policy

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Received: 14.08.2023. Verified: 6.09.2023. Accepted: 1.10.2023.

1. Introduction

This article will deal with the 2017 and 2021updates of the text of the UN Model Double Taxation Convention between Developed and Developing Countries[1], and will more specifically try to say something about their possible impact on the tax treaty practice of countries. After a short overview of the most relevant changes to the text of the UN Models 2017 and 2021, I will each time provide some reflections regarding their possible impact in practice. Special attention will also be paid to the possible interaction of some of the most striking new articles introduced in the UN Models in relation to the so-called OECD/G20/Inclusive Framework Two Pillar Solution[2]. However, before doing that, I will briefly refer to previously done extensive impact research regarding the UN Model in Practice, discussing the differences between the various versions of the UN Model and of the OECD Model[3] preceding the UN Model 2017 and 2021 updates. Finally, some short conclusions and concluding remarks regarding the possible influence of the 2017 and 2021 UN Model updates on tax treaty practice will be given.

2. Differences between the UN Models and the OECD Models preceding the 2017 and 2021 updates and the impact of the specific UN Model provisions preceding the before-mentioned updates in practice

In the past, the IBFD staff carried out several large impact research projects regarding the UN Model in Practice. These research projects were focussed on the occurrence in practice in tax treaties of the distinctive provisions in the various versions of the UN Model deviating from the various versions of the OECD Model, covering all treaties and

[1] United Nations, Model Double Taxation Convention between Developed and Developing Countries (New York: UN, 2017 and 2021), hereafter referred to as "the UN Model 2017" and "the UN Model 2021", respectively.

[2] https://www.oecd.org/tax/beps/further-progress-on-two-pillar-solution-oecd-releases-consultation-document-on-the-withdrawal-of-digital-service-taxes-and-other-relevant-similar-measures-under-pillar-one-and-an-implementation-package-for-pillar-two.htm

[3] The Organisation for Economic Development and Co-operation, Model Double Tax Convention on Income and on Capital (latest version: Paris: OECD 2017), hereafter referred to as the "the OECD Model 2017".

protocols concluded in the period from 1980–2013. The latest of these studies[4], which covers the period from 1st April, 1997, to 1st January, 2013, included an analysis of the occurrence of 30 such distinctive UN Model provisions in 1811 tax treaties and amending protocols concluded in that period. The results were published in an extensive article, which also referred to the results of the previous impact research undertaken in 1997, covering the occurrence of 26 such distinctive provisions in 811 tax treaties and amending protocols concluded in the period from 1st January, 1980, to 1st April, 1997.

Reference is made to the previously mentioned research with its elaborate tables and conclusions. In the context of this article, it is interesting to note that the number of deviations between the UN and the OECD Models has remained stable at around 30 over this very long period of time from 1980–2013, during which there were various versions of the UN and OECD Models. Furthermore, also the occurrence of the distinctive UN Model provisions was surprisingly stable over these years, with some provisions generally not being included in many tax treaties, whereas others were very frequently included. The highest level of occurrence was, as to be expected found in treaties concluded between States which are both not a member of the OECD, a lower level in treaties between a State member of the OECD and a State not-member of the OECD, whereas in treaties between OECD member States there was generally a lower but rather stable percentage of inclusion of distinctive UN Model provisions, with a remarkable note that with respect to 8 such distinctive UN Model provisions the inclusion of these in tax treaties between OECD member States was about the same as in treaties between the other two categories of treaty partners as mentioned above.

In the context of the treatment of services in the OECD and UN Models, it is in view of the Articles 8(3)(b), 12A and 12B which were amended or introduced in the UN Model updates 2017 and 2021, interesting to note what the research performed in 2013 has shown with respect to the treatment of services, either on a net profits basis (like Art. 5(3)(b) UN Model) or on a gross income basis (a withholding tax in either a self-standing provision, or as included services in Art. 12 UN Model, a kind of provision which did not occur in either the OECD or UN Models).

[4] Prof. Wim Wijnen and Prof. Jan de Goede, *The UN Model in Practice 1997–2013*, IBFD, "Bulletin for International Taxation", March 2014, no. 3.

As regards Article 5(3)(b) UN Model (see the 2013 research[5]), it was respectively included in 58% of the tax treaties between two non-OECD countries, 35% in tax treaties between a non-OECD and an OECD country and even in 17% of the tax treaties between two OECD countries. Striking is also that compared with the 1997 research, the figures 2013 are about 50% higher as regards the first two mentioned categories combined (46% versus 31%) and as regards treaties between two OECD countries the provision was even included relatively much more (17% versus 2% in the 1997 research).

As regards taxation of services on a gross basis, reference is made to the the 2011 impact research[6], comprising 1586 treaties and protocols concluded in the period from 1st April, 1997, to 1st January, 2011. A provision on included services was included in respectively 5% in treaties between non-OECD countries, 5% in treaties between OECD and non-OECD countries, and 8% in treaties between OECD countries. As regards self-standing provisions, they were included in respectively in 13%, 6%, and 0% in the same three categories of countries. If added together, these percentages were 18%, 11%, and 8% of the tax treaties concluded, which seems remarkable, as no provision of that kind was at that time included in any of the Models and the research was done already many years ago.

3. The 2017 UN Model update and its possible impact

When considering the 2017 UN Model update and its possible impact, it seems useful to distinguish between the so-called BEPS-related changes to the Model and those which are not related to BEPS.

However, before discussing these changes, it can be interesting to get a very rough impression of the size of the 2017 UN Model update and also already of the subsequently discussed 2021 UN Model update, simply by looking at the following number of pages of the hardcover UN Models (including both Model texts and commentaries) 2011, 2017 and 2021, as follows:

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[5] See footnote 5, table 11 on page 142.

[6] Prof. Wim Wijnen, Prof. Jan de Goede and Andrea Alessi, *The Treatment of Services in Tax Treaties*, IBFD, "Bulletin for International Taxation", January 2012, no. 1, table 4 on page 37.

– 2011 UN Model: 483 pages;
– 2017 UN Model: 804 pages;
– 2021 UN Model: 911 pages!

3.1. BEPS-related 2017 UN Model update and its possible impact

The following UN Model provisions were added or amended in 2017 as a result of the inclusion of the BEPS related tax treaty provisions:

Title and preamble – aim to avoid tax avoidance and treaty shopping
– Art. 1 (2 and 3) – transparent entities and saving clause;
– Art. 4 (3) – dual residence of entities;
– Art. 5 (4) – exception auxiliary and preparatory activities;
– Art. 5 (4.1) – anti-fragmentation;
– Art. 5 (5) – extended dependent agent PE;
– Art. 5 (7) – limited exception for independent agent;
– Art. 5 (9) – closely related enterprise;
– Art. 10 (2) (a) – anti-dividend stripping provision;
– Art. 13 (4 and 5) – anti-dilution provisions;
– Art. 23A (1) and 23B (1) – amendment relief of double taxation methods;
– Art. 29 – entitlement to treaty benefits.

I note that almost all these BEPS-related changes in the 2017 UN Model are identical to those in the 2017 OECD Model, with the exception of Art. 29(1–7) where the UN Model follows the text of the 2016 US Limitation of Benefits (hereafter) LOB provision, whereas the 2017 OECD Model includes a framework LOB provision, which leaves more room for bilateral negotiations of the text. Furthermore, it can be noted that the BEPS-related proposed amendment of Art. 25(1) of the Models, dealing with the possibility for taxpayers to be able to file a request for MAP to the competent authorities of both Contracting States concerned, was not adopted in the UN Model.

As regards the possible impact of these BEPS-related changes on country's treaty practice, I would like to observe the following. Unfortunately, to my knowledge, there is no recent comprehensive impact research available on all the tax-treaty-related BEPS measures. Thus, I inevitably can only provide some more qualitative and personal impressions. In this context, I think one needs to make a distinction between the BEPS-related UN and OECD Model amendments which are part of the so-called Minimum Standards[7], and those which are not.

[7] https://www.oecd.org/tax/beps/beps-actions/

As more than 140 countries have joined the so-called BEPS Inclusive Framework and have thus accepted the commitment to implement the Minimum Standards, whereas more than 90 countries have signed the Convention regarding the so-called Multilateral Instrument[8], which enables the inclusion of the BEPS-related tax treaty provisions in the country's tax treaties without the bilateral renegotiation of the covered treaties, a quick and very large impact of the BEPS provisions which are Minimum Standards is to be expected and actually also occurs in practice according to the regular reports published by the OECD on the implementation of such Minimum Standards[9]. As regards the BEPS-related Model amendments not being part of the Minimum Standards, I can only point to the fact that many signatories to this previously-mentioned Convention regarding the Multilateral Instrument made reservations regarding such provisions (e.g. those regarding the anti-abuse provisions against avoidance of having a permanent establishment) and thus the uptake of those provisions in tax treaty practice will probably still be substantial, but much less than those related to these Minimum Standards. It should, however, also be observed that the fact that a country made a reservation regarding BEPS-related provisions in the before-mentioned Convention does not necessarily mean that such country is not prepared to accept such provision in a bilateral tax treaty context.

3.2. Non-BEPS-related 2017 UN Model update and its possible impact

The following UN Model provisions were added or amended in 2017, but not as part of the the BEPS project:

– Art. 3 (1)(d) – Definition international traffic;
– Art. 5 (3)(b) – Same/connected project requirement;
– Art.'s 8A, 8B – Allocation profits from international traffic;
– Art. 10 (2)(a) – Threshold participation dividends;
– Art. 12A – Fees for technical services;
– Art. 13 (3) – International traffic;
– Art. 13 (4) – Exception use in active business;
– Art. 13 (5) – Comparable interests, 365 days;

[8] https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm

[9] See, for instance: https://www.oecd.org/publications/prevention-of-tax-treaty-abuse-fifth-peer-review-report-on-treaty-shopping-9afac47c-en.htm

– Art. 15 (3) – Allocation profits international traffic;
– Art. 22 (3) – Allocation capital International traffic;
– Art. 23A (4) – Double non-taxation;
– Art. 24 (4) – Fees for technical services;
– Art. 26 (2) – Use of information for other purposes.

Unfortunately, also here there has been to date no recent comprehensive impact research available on these. Thus, I can inevitably also here only provide some more qualitative and personal impressions. The provisions relating to international traffic, to the threshold for participation dividends (Art. 10(2)(a)), to capital gains on immovable property shares or participations in other entities (Art. 13(4)), to double non-taxation (Art. 23A(4)), and to information for other purposes (Art. 26(2)) are all identical to the similar provisions in the OECD Model 2017, so in due time a large impact of these provisions on treaty practice can be expected. As these provisions are not included in a Multilateral Instrument like the one mentioned in section 3.1. above, it seems justified to expect a much slower uptake due to the need for bilateral negotiation of the relevant tax treaties than for the BEPS-related provisions which have been included in such Multilateral Instrument. For the sake of completeness, it is pointed out that a kind of UN Multilateral Instrument, called Fast Track Instrument, enabling to faster include specific UN Model provisions in existing tax treaties, is being considered to be introduced by the UN[10].

The provisions included in Art.'s 5(3)(b) and 13(5) are specific for the UN Model and such distinctive provisions were already included in previous versions of the UN Model but have now been amended to provide more taxing rights to source States and are thus, generally speaking, more attractive for developing countries, but less acceptable for the OECD countries.

Especially the newly introduced Art. 12A, allowing taxation on a gross income basis of payments of fees for technical services are arising in the source State and paid to a resident of the other State, is contentious for the OECD countries. The contentious nature is clearly expressed in the Commentaries to that provision in the UN Model. It

[10] See against the background of the Resolution of the UN General Assembly 22nd December, 2022, on a more inclusive tax co-operation, especially CRP1 on the Fast Track instrument ("UN MLI" to implement Art.'s 12A and 12B): https://www.un.org/development/desa/financing/events/26th-session-committee-experts-international-cooperation-tax-matters

thus seems justifiable to expect a substantial uptake of Article 12A in tax treaties between developing countries but to a much lesser degree in tax treaties between non-OECD and OECD countries. I do, however, also refer back to the last paragraph of section 2 above, and note that the impact research over the period 1997–2011 shows that already self-standing similar provisions such as Art. 12A were included in 13% of the tax treaties concluded between two non-OECD countries and 6% between a non-OECD and a OECD country (plus an additional 5% for each before-mentioned category of treaties for included technical services in the royalty article). So, now that the taxation at source of such fees is expressed in a standard UN Model provision, further uptake of such provision in tax treaties can perhaps be expected. OECD countries might, however, also be even more reluctant to accept such provision, as it also covers fees for digitally-provided services without any in person presence in the source State, and thus may be considered to have an overlap with the Pillar One[11] solution regarding the digitalised economy.

In this respect, it is interesting to note the alternative text for Art. 12A[12]. In that text in principle no source taxing right is granted for services provided by a non-resident in a digital form without any physical presence in the country of the recipient of the service. However, a source taxing right is provided with respect to payments for any type of services which are either performed in the source country, or even if not provided in person in the source State if the fees are paid to a closely-related enterprise or person. Thus, in the alternative text, the problem of the definition of what constitutes technical services is avoided, whereas a source taxing right is granted if digital services have been provided by a closely-related company (to avoid base erosion through the payment of such fees between closely-related companies). Under this alternative text, fees may thus be taxable on the gross amount in the source State which would not be allowed to be taxed (on a net profits basis) under the extended scope of Art. 5(3) (b) mentioned above. However, fees for digital services provided purely digitally by non-resident third parties would not be covered by such alternative Art. 12A, nor by the extended Art. 5(3)(b).

[11] See footnote 3.

[12] See Com. Art. 12A, A. General Considerations, sections 26–31, pp. 397–400.

4. The 2021 UN Model update and its possible impact

The most interesting new articles included in the text of the 2021 UN Model are in my view:

– Art. 12B: Automated Digital Services

– Art. 13(6): Capital gains on the direct transfer of certain rights granted under the law of a Contracting State for the use of resources naturally present in that State, and

– Art. 13(7): Offshore indirect transfers of shares in companies or of comparable interest in an entity, if the alienator at any time during the 365 days preceding the alienation held (in)directly at least X% of the company or entity and at any time during that period the shares or interests derived more than 50% of their value (in)directly from property taxable under the preceding provisions of Art. 13.

Besides these, the following further amendments to existing articles or new articles have been included in the 2021 UN Model:

– Art. 1 (3 and 4): resp. saving clause and placeholder collective investment vehicles)

– Art. 3 (1) (g)): definition recognised pension funds)

– Art. 4(1), Art. 29(2)(e) and (g): respectively dealing with recognised pension funds

and collective investment vehicles

– Art. 7 (note on purchase removed)

– Art.'s 10, 11 and 12 (paragraphs 2: recipient intermediary in the 3rd State)

– Art. 10(2)(a): exclusion of partnerships as parent deleted

– Art.'s 23A (2 and 4), Art 24 (4) and Art. 29(2)(B)(1): consequential to inclusion of Art. 12B.

As regards the possible impact of these provisions, I limit myself to the in my view most interesting articles mentioned above and observe again that there is no (and in fact cannot yet be due to the very recent publication of these 2021 UN Model Articles) impact research available, and thus I can only provide some more qualitative and personal impressions regarding their possible impact.

Art. 12B UN Model is very contentious and politically-sensitive for OECD countries and for other countries that are members of the Inclusive Framework which want to stick to the so-called Two Pillar approach[13], and

[13] See footnote 3.

these countries most likely do not accept it in their tax treaties, as there is a clear tension and overlap with that Two Pillar approach, and especially with Pillar One. Furthermore, this Article 12B has an even broader scope than Art. 12A as the services covered are not limited to services tailored to the specific customers and even also as payments by individuals for services for own use are covered, which is not the case with Article 12A. Thus, I do not expect an uptake of Art. 12B in tax treaties with countries part of the Inclusive Framework if in the end Pillar One (as still to be further elaborated) is accepted by them. Matters may be different if Pillar One fails to be successfully agreed upon and implemented, as Art. 12B might then perhaps be considered as a reasonable alternative.

Art. 13(6). The underlying approach in this article is already known from specific tax provisions included in tax treaties relating to capital gains made on licences granted in the context of the so-called extractive industries. However, in this newly introduced Art. 13(6), the scope of government licences is much broader and as most countries grant licences of the types covered and many times large amounts of money are involved when they are alienated, this provisions may be far less contentious for OECD countries than 12B, and, in fact, some of these OECD countries may even want to include this provision in their own tax treaty policy.

Art. 13(7). This article has been formulated in a similar way as Art. 13(4) UN Model and is probably less contentious for OECD countries than the politically very sensitive 12B, but still contentious as its scope goes far beyond the indirect sale of immovable property and of government rights granted, and thus could provide an extension of taxing rights to source States not in line with OECD country policies, whereas also a proper relief of double taxation seems not assured. Thus, for OECD countries, an uptake may perhaps only take place with respect to an amended version of Art13(7) limited to the capital gains on offshore indirect sale of the type of government licences covered under Art. 13(6) of the 2021 UN Model.

5. The relationship between Art.'s 12A and 12B, and the Two-Pillar solution

Having been asked to discuss the possible impact of the 2017 and 2021 updates of the UN Model on tax treaty practice which I have done in the previous sections, but also realising the special technical but more importantly possible political sensitivity of the relationship between the inclusion of Art.'s 12A and 12B and the digitalised economy approach as expressed in the OECD/G20/Inclusive Framework two Pillar solution, I would like to deal in a bit more detail with the relationship between the two. If Art.'s 12A and 12B would be incompatible with that two Pillar approach an uptake of these Articles in tax treaties would seem less likely in particular for countries which in the Inclusive Framework reached agreement on the two Pillar approach, at least as long as that approach is indeed going to be agreed upon and implemented.

5.1. The relationship between Art.'s 12A and 12B, and Pillar One

For an impression of the relationship between these articles and Pillar One (which briefly stated grants additional taxing rights on the so-called Amount A to market countries with respect to a part of the excess profits, determined on an amended commercial accounting profits basis, realised by the around 100 largest companies in the world), it is important to realise that the additional granting of taxing rights under Pillar One is made conditional on countries not introducing or withdrawing any type of domestic digital service taxes (hereafter DST). To get a better impression of this possible tension between Art.'s 12A and 12B, and Pillar One, it seems necessary to look at the draft Multilateral Convention on Digital Service Taxes and similar measures[14].

Article 37(1)[15] of that draft Multilateral Convention contains the obligation on Parties to the Convention to remove any measure listed in Annex A (List of Existing Measures Subject to Removal) as from the date on which the convention enters into effect with respect to that Party. However, such (draft) Annex A has to date not yet been published, so the impact on the domestic tax legislation providing the legal basis to levy tax in the source State in accordance with Art.'s 12A and 12B, cannot yet be determined on the basis of this Article 37(1).

[14] Public Consultation Document Pillar One- Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Measures, as published by the OECD on 20.12.2022.

[15] Article 37: Removal of Existing Measures.

1. A Party shall not apply any measure listed in Annex A (List of Existing Measures Subject to Removal) to any company as from the date on which this Convention enters into effect with respect to that Party.

Article 38[16] of that draft Convention, Provision Eliminating Amount A Allocations for Parties Imposing DST's and Relevant Similar Measures, contains the criteria to qualify domestic tax legislation as a DST or Similar Measure. Article 38(2) defines the term "digital services tax or relevant similar measure", whereas Article 38(3) clarifies that the term shall not

[16] Article 38 – Provision Eliminating Amount A Allocations for Parties Imposing DSTs and Relevant Similar Measures.

1. Any Party for which a digital services tax or relevant similar measure, or a measure listed in Annex A (List of Existing Measures Subject to Removal), is in force and in effect during a Period: a. shall not be allocated any profit under [the MLC provision allocating Amount A] with respect to that Period; and b. shall not impose tax with respect to that Period under any domestic law provision implementing the provisions of [the MLC provision allocating Amount A].

2. For purposes of this Article, the term "digital services tax or relevant similar measure" shall mean any tax imposed by a Party, however described, if it meets all of the following criteria and is not described in paragraph 3: a. the application of such tax, or the amount of tax imposed, is determined primarily by reference to the location of customers or users, or other similar market-based criteria; b. such tax either: i. is applicable by its terms solely to persons that: 1. are not residents of that Party ("non-residents"); or 2. are primarily owned, directly or indirectly, by non-residents of that Party ("foreign-owned businesses"); or ii. is applicable in practice exclusively or almost exclusively to non-residents or foreign-owned businesses as a result of the application of revenue thresholds, exemptions for taxpayers subject to domestic corporate income tax in that Party, or restrictions of scope that ensure that substantially all residents (other than foreign-owned businesses) supplying comparable goods or services are exempt from its application; and c. such tax is not treated as an income tax under the domestic law of the Party, or is otherwise treated by that Party as outside the scope of any agreements (other than this Convention) that are in force between that Party and one or more other jurisdictions for the avoidance of double taxation with respect to taxes on income.

3. The term "digital services tax or relevant similar measure" shall not include: a. a rule that addresses artificial structuring to avoid traditional permanent establishment or similar domestic law nexus requirements that are based on physical presence (including both direct physical presence and the physical presence and activity of an agent); b. value added taxes, goods and services taxes, sales taxes, or other similar taxes on consumption; or c. generally applicable taxes imposed with respect to transactions on a per-unit or per transaction basis rather than on an ad valorem basis.

4. A Party shall be considered to have a digital services tax or relevant similar measure in force and in effect if: a. it is determined by the Conference of the Parties to have enacted a measure described in paragraph 2; and b. the Conference of the Parties has not determined that the Party has withdrawn that measure or otherwise terminated its application with respect to all companies.

5. The definition of 'digital services tax or relevant similar measure' in paragraph 2 and any determination under paragraph 4 shall apply solely for purposes of this Convention.

include certain types of mentioned legislation (so carves out certain types of domestic tax legislation from the term).

As regards Art. 12A UN Model, I conclude when reading Art. 38(2) that the criteria listed in that provision to qualify an underlying tax as a DST or similar measure do not seem to be met and accordingly a tax levied on the gross amount of fees for technical services does not seem to be qualified as DST or similar measure. Thus, the inclusion of Art. 12A and the existence of domestic legislation enabling to exercise the taxing right granted under that article, would seemingly not negatively impact an entitlement to receive a taxing right under Pillar One. I also observe that an obligatory removal of such in practise already longstanding source taxing rights which have already been regularly included in tax treaties as mentioned in the last paragraph of section 2 above, would also seem unacceptable for developing countries which already included an Art. 12A like provision in their tax treaties and have the enabling domestic legislation in their tax law.

As regards Art. 12B UN Model, I note that underlying domestic legislations enabling to exercise the taxing right allocated under Art. 12B, are not uniform and thus one or more of the criteria to qualify domestic legislation as DST or similar measure under Art. 38(2) of the draft Convention may depending on the type of legislation be considered met. If that would be the case, an Amount A allocation would not be granted to a country having such legislation unless such legislation is withdrawn. In other words, this may cause a true obstacle for countries to agree upon and include an Article 12B in their tax treaties, assuming that Pillar One is finally agreed to and the Convention signed by a country.

In view of the importance of this determination for yes or no including Art.'s 12A and 12B UN Model, more clarity on these matters is of course desirable via either the before-mentioned Annex A or further analysis of specific domestic legislations.

Finally, although I am not aware of any official publication in this respect, in literature[17]reference is made to an ongoing discussion in the Inclusive Framework where some participating countries take the view that also taxes levied in accordance with a tax treaty on the gross amount of passive income arising in that source State, as customary already for many

[17] See, for instance, Withholding Tax Emerges as Wedge in OECD Deal, Daily Tax Report 26.08.2022, Bloomberg.

years in many tax treaties, should reduce the amount of the entitlement to an amount A. If that would be the case, that might drastically reduce the amount A allocation to in particular developing countries and thus make agreeing to Pillar One even more doubtful for these. If they would, however, accept such elaboration of Pillar One, including Articles 12A or 12B in tax treaties would probably not make much sense anymore. However, it should be observed that such reduction has not been part of the Statement on a Two-Pillar solution as agreed to and released in October 2021[18] and thus it would seem doubtful to me whether such reduction can still be included in Pillar One at this stage.

5.2. The relationship between Art.'s 12A and 12B, and Pillar Two

For an impression of the relationship between the Articles 12A and 12B, and Pillar Two (which briefly stated introduces a global minimum corporate effective income tax rate of 15% calculated on an amended commercial accounting profits tax base of jurisdictional constituent entities of a covered multinational company), it seems necessary to look at the Global Anti-Base Erosion Model Rules (Pillar Two) of 14th December, 2021[19]. The further Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two) of 1 February 2023[20] did not, in my impression, shed any further light on this relationship.

[18] https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm

[19] https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.htm

[20] https://www.oecd.org/tax/beps/agreed-administrative-guidance-for-the-pillar-two-globe-rules.pdf

In particular, relevant for the relationship between Art.'s 12A and 12B seem to be Art. 4(2)[21] and (3)[22] of the Model Rules (Pillar Two) dealing

[21] Article 4.2. Definition of Covered Taxes

4.2.1. Covered Taxes means: (a) Taxes recorded in the financial accounts of a Constituent Entity with respect to its income or profits or its share of the income or profits of a Constituent Entity in which it owns an Ownership Interest; (b) Taxes on distributed profits, deemed profit distributions, and non-business expenses imposed under an Eligible Distribution Tax System; (c) Taxes imposed in lieu of a generally applicable corporate income tax; and (d) Taxes levied by reference to retained earnings and corporate equity, including a Tax on multiple components based on income and equity.

4.2.2. Covered Taxes does not include any amount of: (a) Top-up Tax accrued by a Parent Entity under a Qualified IIR; (b) Top-up Tax accrued by a Constituent Entity under a Qualified Domestic Minimum Top-Up Tax; (c) Taxes attributable to an adjustment made by a Constituent Entity as a result of the application of a Qualified UTPR; (d) A Disqualified Refundable Imputation Tax; (e) Taxes paid by an insurance company in respect of returns to policyholders

[22] Article 4.3. Allocation of Covered Taxes from one Constituent Entity to another Constituent Entity

4.3.1. Article 4.3.2 applies to the allocation of Covered Taxes in respect of Permanent Establishments, Tax Transparent Entities and Hybrid Entities as well as the allocation of CFC taxes and taxes on distributions from one Constituent Entity to another.

4.3.2. Covered Taxes are allocated from one Constituent Entity to another Constituent Entity as follows: (a) the amount of any Covered Taxes included in the financial accounts of a Constituent Entity with respect to GloBE Income or Loss of a Permanent Establishment is allocated to the Permanent Establishment; (b) the amount of any Covered Taxes included in the financial accounts of a Tax Transparent Entity with respect to GloBE Income or Loss allocated to a Constituent Entity-owner pursuant to Article 3.5.1(b) is allocated to that Constituent Entity-owner; (c) in the case of a Constituent Entity whose Constituent Entity-owners are subject to a Controlled Foreign Company Tax Regime, the amount of any Covered Taxes included in the financial accounts of its direct or indirect Constituent Entity-owners under a Controlled Foreign Company Tax Regime on their share of the Controlled Foreign Company's income are allocated to the Constituent Entity; (d) in the case of a Constituent Entity that is a Hybrid Entity the amount of any Covered Taxes included in the financial accounts of a Constituent Entity-owner on income of the Hybrid Entity is allocated to the Hybrid Entity; and (e) the amount of any Covered Taxes accrued in the financial accounts of a Constituent Entity's direct Constituent Entity-owners on distributions from the Constituent Entity during the Fiscal Year are allocated to the distributing Constituent Entity.

4.3.3. Covered Taxes allocated to a Constituent Entity pursuant to Article 4.3.2(c) and (d) in respect of Passive Income are included in such Constituent Entity's Adjusted Covered Taxes in an amount equal to the lesser of: (a) the Covered Taxes allocated in respect of such Passive Income; or (b) the Top-up Tax Percentage for the Constituent Entity's jurisdiction, determined without regard to the Covered Taxes incurred with respect respectively with the Definition of Covered Taxes, and Allocation of Covered Taxes from one Constituent Entity to another Constituent Entity.

When reading Art. 4(2)(1) Model Rules (Pillar Two), both types of domestic taxes enabling States to exercise a taxing right granted under Art.'s 12A and 12B would seem to qualify as covered taxes on income or profits, like other withholding taxes on the gross amount of parts of the profits of a recipient company which is arising in the source State. If in case of Art. 12B(3) a taxpayer opted for taxation on a qualified net profits basis, also such taxation on deemed net income would seem to qualify as a covered tax. Moreover, the types of domestic taxes enabling to exercise the taxing right allocated to a source State under Art.'s 12A and 12B seem to me not to be excluded as covered tax under Art. 4(2)(2) Model Rules (Pillar Two). This is relevant, because if the domestic taxes enabling to exercise the taxing right allocated to a source State under Arti's 12A and 12B would not be considered taxes covered, they would not count as taxes for determining the effective tax rate (ETR) under Pillar Two and thus inclusion of Art.'s 12A and 12B in tax treaties might, depending on the circumstances, be considered less attractive.

Finally, both taxes levied under Art.'s 12A and 12B would seem to have to be allocated to the recipient Constituent Entity for the purposes of determining the latter's Effective Tax Rate (ETR), like withholding taxes on passive income, and Art. 4(3) Model Rules (Pillar Two) does not seem applicable to the taxes underlying Art.'s 12A and 12B.

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to such Passive Income by the Constituent Entity-owner, multiplied by the amount of the Constituent Entity's Passive Income includible under any Controlled Foreign Company Tax Regime or fiscal transparency rule. Any Covered Taxes of the Constituent Entity-owner incurred with respect to such Passive Income that remain after the application of this Article shall not be allocated under Article 4.3.2(c) or (d).

4.3.4. Where the GloBE Income of a Permanent Establishment is treated as GloBE Income of the Main Entity pursuant to Article 3.4.5, any Covered Taxes arising in the location of the Permanent Establishment and associated with such income are treated as Covered Taxes of the Main Entity up to an amount not exceeding such income multiplied by the highest corporate tax rate on ordinary income in the jurisdiction where the Main Entity is located.

6. Concluding remarks regarding the impact of the 2017 and 2021 UN Model updates on tax treaty practice

The 2017 and 2021 updates of the UN Model have been large and also introduced some new provisions substantially increasing source country taxing rights. As far as I am aware no comprehensive research has yet been done regarding their impact on tax treaty practise and as it generally takes quite some time before new or amended provisions in the UN and OECD Models are effectively included in tax treaties, it is perhaps also still too early for such comprehensive impact research to be undertaken. Thus, I inevitably had to resort to a more qualitative and personal assessment of the possible impact of these updates on treaty practise.

In section 2 of this article, I dealt with the comprehensive impact research done with respect to distinct UN Model provisions predating the 2017 and 2021 updates, as this may give a feeling about the acceptability of some approaches and thus can be indirectly of interest when trying to assess the possible impact of some of the distinct provisions of the 2017 and 2021 UN Model updates.

Subsequently, I dealt in **section 3** with the possible impact of the 2017 UN Model, making a distinction between the BEPS-related and the non-BEPS-related changes to the text of the UN Model. Almost all BEPS-related amendments (dealt with in section 3.1.) are identical in both the UN and OECD Models, thus substantially increasing the chance of these having an uptake in tax treaty practise.

However, within this category of BEPS-related changes a further distinction should in my view be made between provisions which constitute so-called BEPS Minimum Standards the inclusion of which is peer reviewed. Reporting of OECD on the implementation of the tax treaty related Minimum Standards shows that their uptake is impressive. The uptake of the other BEPS-related amendments will be smaller and slower.

In all BEPS-related tax treaty provisions the Convention implementing the so-called Multilateral Instrument is very helpful in realising a relatively fast uptake, but especially as regards the amendments which are not Minimum Standards a lot of reservations have been made, thus not leading to a very large and fast uptake of these in actual tax treaty practise. It should, however, not be forgotten that countries making such reservation may still be willing to include such provisions in the context of bilateral tax treaty negotiations, which will, however, only show over the longer period time, which it takes to bilaterally renegotiate tax treaties.

The possible impact of the non-BEPS-related amendments, is dealt with in section 3.2. As a number of these amendments have been included also in the OECD Model, their uptake may be expected to be substantial in the longer run.

However, in the 2017 UN Model update, also some very distinct provisions have been amended or newly introduced (especially Art.'s 5(3)(b), 12A), which will substantially strengthen source taxing rights if included in tax treaties. Thus, it may be expected that OECD countries will generally be reluctant or even not willing to accept such provisions (or against a high price to be paid for these with respect to other treaty provisions).

In particular, Art. 12A is contentious as can also be clearly seen from the commentaries to that provision in the UN Model 2017. Yet, it is pointed out that a more longstanding, albeit relatively limited, tax treaty practice of including a source taxing right with respect to fees for technical services already existed. Now that such provision in the form of Art. 12A is included in the UN Model, more countries may try to get it included in their tax treaties and an uptake, especially in tax treaties between developing countries, can be expected. OECD countries may, however, be even be more reluctant to accept Art. 12A than they were in the past in view of the overlap with the digitalised economy for which they feel the solution should be found in the Two Pillar solution. It is interesting to note that in the Commentaries to Art. 12A an alternative text is mentioned which would substantially strengthen source taxing rights with respect to any type of services provided by a resident of a contracting State in the other contracting State either in person or digitally if in the latter case the recipient of the service is closely related to the provider of such digital services.

In **section 4**, the amendments included in the 2021 UN Model are discussed and an attempt is made to assess the possible impact of these very recently introduced distinct UN Model provisions on tax treaty practise. Most attention has been devoted to the in the 2021 Model update newly introduced Art.'s 12B, 13(6) and 13(7).

Of these, Art. 12B seems most contentious, both from a technical and a political perspective, to OECD countries and other countries that joined the Inclusive Framework as this Article is perceived to be in conflict with the approach agreed to in the Two Pillar solution and especially with Pillar One. Thus, as long as Pillar One is still to be finalised and agreed to, not much uptake on Art. 12B may in my view be expected, especially not in tax treaties between developing and OECD / Inclusive Framework countries. This may, however, substantially change if Pillar One would not be finalised successfully, or the Multilateral Convention dealing with Pillar One would not be signed by many countries.

I do, however, expect a much better uptake of Art. 13(6), as being able to tax capital gains on the alienation of government licences (a policy aim recognised and realised in specific tax treaty provisions already for a long time in the extractive industries by developed and increasingly also by developing countries) can be substantial and seemingly increasingly important due to many other valuable licenses being granted by States.

Art. 13(7) may also enjoy a gradual uptake especially in treaties between developing countries but its scope may perhaps be considered too wide for OECD countries which generally accepted such source taxing rights for offshore indirect transfers only for immovable property (see Art. 13(4) of the OECD and UN Models) and thus may perhaps want to limit its scope to the licenses referred to in Art. 13(6).

In **section 5**, I have dealt with the compatibility of Art.'s 12A and 12B with Pillar One and Pillar Two, which assessment is of course based on the (draft) rules currently known regarding these Pillars. I looked at that as such compatibility may of course have an impact on the possible uptake of these provisions in tax treaty practise.

It seems to me that the domestic taxes enabling the exercise of the taxing rights expressed in Art. 12A are compatible with Pillar One, whereas depending on the various domestic legislations incompatibility of taxes aimed to exercise the taxing rights allocated by Art. 12B is more likely and thus a further obstacle to including Art. 12B in tax treaties. The latter also depends on the successful conclusion of Pillar One and its uptake in practise.

Finally, I have also dealt with the question whether the taxes underlying Art.'s 12A and 12B would be covered taxes under Pillar Two and have the impression they would be and that this aspect should thus not create an obstacle to including these in tax treaties from the perspective of Pillar Two.

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Aktualizacje Konwencji Modelowej ONZ w sprawie unikania podwójnego opodatkowania między państwami rozwiniętymi a rozwijającymi się i ich wpływ na praktykę traktatową państw

Streszczenie. Autor przedstawia przegląd najważniejszych zmian w tekście Konwencji Modelowej ONZ w spawie unikania podwójnego opodatkowania między państwami rozwiniętymi a rozwijającymi się dokonanych w latach 2017 i 2021 oraz możliwe interakcje pomiędzy dwoma nowymi najważniejszymi postanowieniami Konwencji Modelowej ONZ: art. 12A dotyczącym opłat za usługi techniczne oraz art. 12B dotyczącym dochodów z zautomatyzowanych usług cyfrowych oraz Filaru Pierwszego i Filaru Drugiego.

Słowa kluczowe: Konwencja Modelowa ONZ w spawie unikania podwójnego opodatkowania między państwami rozwiniętymi a rozwijającymi się, opłaty za usługi techniczne, dochody z automatyzowanych usług cyfrowych, polityka dotycząca umów podatkowych

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https://doi.org/10.18778/1509-877X.2023.04.02

Articles

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The Brazil-Poland Double Tax Convention in the Context of the Countries' Contemporary Tax Treaty Policy and Practice

Summary. This paper deals with the Brazil-Poland double tax convention for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance, signed on 20th September, 2022, in the context of contemporary Brazil's and Poland's tax treaty policy and practice. The Author analyses its main features in comparison to Brazil's and Poland's positions to the MLI and changes introduced to the OECD and UN Models in 2017. Tax treaty provisions relevant to both countries' tax treaty policies and practices are also examined. The study concentrates around the research question whether the BR-PL DTC fits into the countries' contemporary tax treaty policy and practice or whether it is a unique bilateral tax treaty with specific features creating a *sui generis* pattern for tax treaties: for Brazil – with other OECD Member States and for Poland – with other South American states.

Keywords: Brazil, Poland, bilateral comprehensive tax treaty, Multilateral Convention (the MLI), OECD Model, UN Model, tax treaty policy and practice

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Received: 15.08.2023. Verified: 26.08.2023. Accepted: 23.10.2023.

1. Introduction

On 20th September, 2022, Brazil and Poland signed the double tax convention for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance (hereafter: BR-PL DTC)[1]. The BR-PL DTC is the first comprehensive tax treaty ever concluded between Brazil and Poland. At the same time, it is one of the latest bilateral tax treaties in Poland's tax treaty practice finally filling the gap in its tax treaty network with the BRICS countries[2]. The BR-PL DTC has been already ratified by Poland on 12th April, 2023, and still waits for the approval by the Brazilian National Congress[3].

The BR-PL DTC is not Covered Tax Agreement (hereafter: the CTA) within the meaning of Art. 2 (1)(a) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereafter: the MLI)[4]. Contrary to Poland, Brazil did not sign the MLI and does not intend to do so in the foreseeable future. Brazil decided to renegotiate/conclude each of its bilateral tax treaties with its treaty partners on an individual basis. This approach is driven by the fact

[1] The English text of the BR-PL DTC https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 7.08.2023).

[2] Z. Kukulski, *Praktyka traktatowa państw BRICS a bilateralne umowy podatkowe z Polską,* "Kwartalnik Prawa Podatkowego" 2015, no. 3, p. 9 et seq.

[3] The Act of 9th March, 2023, on the ratification of the Agreement between the Republic of Poland and the Federative Republic of Brazil for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance, and the Protocol to this Agreement, signed in New York on 20th September, 2022 (*Ustawa z dnia 9 marca 2023 r. o ratyfikacji Umowy między Rzecząpospolitą Polską a Federacyjną Republiką Brazylii w sprawie eliminowania podwójnego opodatkowania w zakresie podatków od dochodu oraz zapobiegania uchylaniu się i unikaniu opodatkowania oraz Protokołu do tej Umowy, podpisanych w Nowym Jorku dnia 20 września 2022 r.*), Journal of Law (Dziennik Ustaw) 2023, item 704) See also: https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-pl_01_eng_2022_tt__td1.html (access: 8.08.2023). See: https://concordia.itamaraty.gov.br/detalhamento-acordo/12613?TituloAcordo=Polonia&tipoPesquisa=1&TipoAcordo=BL,TL,ML (access: 8.08.2023).

[4] Multilateral Convention Implementing Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, done at Paris on 24th November, 2016 (*Konwencja Wielostronna implementująca środki traktatowego prawa podatkowego mające na celu zapobieżenie erozji podstawy opodatkowania i przenoszeniu zysków sporzadzona w Paryżu dnia 24 listopada 20216 r.*), Journal of Laws (*Dziennk Ustaw*) 2018, item 1369. See also: https://read.oecd-ilibrary.org/taxation/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties-action-15-2015-final-report_9789264241688-en#page1 (access: 8.08.2023).

that Brazil's tax treaty network is – compared to Poland's – not extensive[5]. It does not mean that the MLI has no impact at all on Brazil's tax treaty policy. Similarities and differences between Brazil's and Poland's approaches to the MLI's anti-BEPS provisions will be further discussed in Sec. 3 of this paper.

Brazil's DTCs with Argentina and the UK, and Poland's DTCs with Georgia and the Netherlands illustrate both countries' contemporary tax treaty policy and practice. They were selected for this research study for the following reasons: 1) neither of them is CTA within the meaning of Art. 2 (1)(a) of the MLI and, therefore, solutions adopted therein result from bilateral negotiations; 2) they reflect Brazil's and Poland's tax treaty policies with the OECD MS (the UK in the case of Brazil and the Netherlands in the case of Poland), as well as with non-OECD MS (Argentina in the case of Brazil and Georgia in the case of Poland); and, finally, 3) they were amended and/or concluded in the post-BEPS era.

The aim of this paper is to analyse the provisions of the BR-PL DTC in the context of countries' different approaches to the MLI. The impact of 2017 updates of the OECD Model Convention on Income and Capital (hereafter: the OECD Model)[6] and the UN Model Double Taxation Convention between Developed and Developing Countries (hereafter: the UN Model)[7] on the BR-PL DTC is also discussed. All these changes raise the question whether the BR-PL DTC fits to Brazil's and Poland's tax treaty network in the post-BEPS era or if it is a unique bilateral tax treaty, therefore crating a *sui generis* pattern: for Brazil – with other OECD Member States (hereafter OECD MS), and for Poland – with non-OECD Member States (hereafter: non-OECD MS), especially with other South American states[8]. Moreover, the paper examines

[5] J.F. Bianco, *Principal Purpose Test in Brazilian Tax Treaties,* https://www.ibdt.org.br/RDTIA/n-7-2020/principal-purpose-test-in-brazilian-tax-treaties/ (access: 8.08.2023), pp. 249–250.

[6] *OECD Model Tax Convention on Income and on Capital. Condensed version – 2017 and Key Features of Member Countries 2018*, A. Cracea (ed.), IBFD Publications, Amsterdam 2018, p. 11; See also: https://www.oecd.org/tax/treaties/oecd-approves-2017-update-model-tax-convention.htm (access: 8.08.2023).

[7] *United Nations Model Double Taxation Convention Between Developed and Developing Countries 2017 Update*, Department of Economic and Social Affairs, New York 2017, pp. XIII–XIV, https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf (access: 8.08.2023).

[8] A. Trindade Marinho, *Transformation of Tax System in Brazil – 25 years of experience and future challenges,* [in:] *Transformation of Tax Systems in the CEE and BRICS Countries*

non-OECD and non-UN Models-based provisions present in the BR-PL DTC relevant to both states' tax policies and practices.

Therefore, the anti-BEPS measures in the BR-PL DTC will be discussed following the structure of the 2017 versions of the OECD and the UN Models. The same pattern is used in the analysis of non-anti-BEPS provisions contained in both Models.

2. The Current status of Brazil's and Poland's tax treaty policy and practice

Brazil's tax treaty network has been recently growing impressively. Up to now, Brazil has been party to 37 comprehensive bilateral tax treaties already in force. Brazil's tax treaty list includes DTCs with European, Asian, and South and North American states[9]. Africa, except for the DTC with Republic of South Africa, is underrepresented in Brazil's tax treaty network. Several of the above-mentioned tax treaties – e.g. DTCs with Chile, China (People's Rep. of China), India, Singapore, and Sweden – have been changed via amending protocols not in force yet[10]. Moreover, Brazil signed between 2020 and 2022 several more comprehensive bilateral tax treaties with the new tax treaty partners such as: Columbia, Norway, Paraguay, the United Kingdom, and Poland[11]. None of these new DTCs have been approved by the Brazilian National Congress. Besides that, the two more DTCs with Lithuania and Malaysia are now under negotiations. Brazil is also a party to several bilateral tax information exchange agreements (hereafter: TIEAs)[12].

– 25 years of experience and future challenges, W. Nykiel, Z. Kukulski (eds.), Fundacja CDSP, Łódź 2018, pp. 337–339; Z. Kukulski, *Konwencja Modelowa OECD i Konwencja Modelowa ONZ w polskiej praktyce traktatowej*, Warszawa 2015, p. 18.

9 List of Brazil's comprehensive bilateral tax treaties in force includes DTCs with: Argentina, Austria, Belgium, Canada, Chile, China (People's Rep. of China), the Czech Rep., Denmark, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Korea (Rep.), Luxembourg, Mexico, the Netherlands, Norway, Peru, Philippines, Portugal, Russia, Singapore, Slovakia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Türkiye, Ukraine, the UAE, Uruguay, and Venezuela – is available at: https://research.ibfd.org/#/doc?url=/collections/ita/html/ita_br_s_007.html%23ita_br_s_7.4.1.3 (access: 8.08.2023).

10 https://research.ibfd.org/#/doc?url=/collections/ita/html/ita_br_s_007.html%23ita_br_s_7.4.1.3 (access: 8.08.2023).

11 Ibidem.

12 Ibidem.

Brazil is not the OECD Member State. However, on 25th January, 2022, the OECD Council decided to open accession discussions with Brazil. As a result, the Roadmap for the OECD Accession Process of Brazil was adopted on 10th June, 2022[13]. Hopefully it will also translate into an increase in the importance of the OECD Model in the Brazilian treaty policy, which until now has been mainly based on the UN Model[14]. Even now, the growing impact of the OECD Model as updated in 2017 is clearly visible in all of the recently signed/amended tax treaties with the OECD Member States, including the BR-PL DTC[15]. One of the prominent exceptions still following the UN Model as updated in 2017 is, *inter alia*, a separate provision dealing with the elimination of the double taxation of fees for technical services (hereafter: FTS), which will be further discussed in Sec. 4 of this paper.

Poland joined the OECD in 1996 and the European Union in 2004. Undoubtedly, these two events shaped Poland's tax treaty policy and practice after the collapse of communism in Central and Eastern Europe, and still have a great impact on it[16]. Today, Poland is a party to 90 comprehensive bilateral tax treaties[17]. Besides that, several other types of bilateral tax treaties are also present in the Polish tax treaty network, i.e. treaties for the elimination of selected types of income of individuals, treaties for the elimination of double taxation of enterprises exploring ships and aircrafts in international traffic, treaties for the elimination of double taxation with respect to inheritance taxes, and, finally, TIEAs[18]. However,

13 https://www.oecd.org/latin-america/Roadmap-OECD-Accession-Process-brazil-EN.pdf (access: 8.08.2022).

14 Z. Kukulski, *Praktyka traktatowa*…, pp. 13–15.

15 R. Tomaleza, *Brazil's absence from the Multilateral BEPS Convention and the new amending protocol signed between Brazil and Argentina,* http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 8.08.2023).

16 A. Nowak-Piechota, A. Barwaniec, *Transformation of Tax System in Poland – 25 years of experience and future challenges*, [in:] *Transformation of Tax Systems in the CEE and BRICS Countries – 25 years of experience and future challenges,* W. Nykiel, Z. Kukulski (eds.), Fundacja CDSP, Łódź 2018, pp. 209 et seq.

17 For the list of Poland's tax treaty network see: https://www.podatki.gov.pl/podatkowa-wspolpraca-miedzynarodowa/wykaz-umow-o-unikaniu-podwojnego-opodatkowania/ (access: 9.08.2023).

18 Z. Kukulski, *Rozdział V Polskie umowy podatkowe*, [in:] *Konwencja modelowa OECD i konwencja modelowa ONZ w polskiej praktyce traktatowej*, Warszawa 2015, https://sip.lex.pl/#/monograph/369332190/285378?pit=2023-08-11&keyword=Kukulski%20&tocHit=1&cm=SREST (access: 14.08.2023).

their role is limited in comparison to the importance of comprehensive DTCs for Poland's modern economy. Moreover, the signing and relatively rapid ratification of the MLI marks yet another milestone for the Polish contemporary tax treaty policy and practice. This topic will be further discussed in Sec. 3 of this paper.

Poland's comprehensive bilateral tax treaty network covers all Europe, except for the Europe's microstates such as Andorra, Lichtenstein, Monaco, and San Marino, and almost all Asia, except for the following states: Afghanistan, Bahrain, Bhutan, Brunei, Cambodia, East Timor, Iraq, Laos, the Maldives, Myanmar, Nepal, North Korea, Oman, Turkmenistan, and Yemen. In North America, the list of comprehensive bilateral tax treaties includes DTCs with Canada, Mexico, and the USA (the "old" DTC of 1974 still being in force). Moreover, Poland concluded DTCs with Australia and New Zealand.

Africa and South America are underrepresented in the Polish tax treaty network. In Africa, Poland is party to several DTCs with Algeria, Egypt, Ethiopia, Morocco, Niger, South Africa, Tunisia, Zambia, and Zimbabwe. On the other hand, in South America, Poland concluded DTCs only with Brazil, Chile, and Uruguay.

Only few comprehensive bilateral tax treaties that Poland is party to are not in force. This includes DTCs with Algeria, Nigeria, the USA (the new DTC of 2013 not being effective yet), Uruguay, and Zambia.

Generally, in its tax policy and practice, Poland follows the OECD Model. However, there are some provisions present in Polish tax treaties – with both OECD and non-OECD Member States – clearly based on the UN Model's recommendations, e.g. source-state taxation of royalties, provisions extending the P.E. concept on supervisory activity over a building site, the furnishing of services provision, shorter than 12-month threshold for a building site to constitute the P.E, independent professional services provision (183-day threshold), exclusive or rarely shared source-state taxation of pensions paid from public social security schemes, source-state taxation of other income, and, recently, also a separate FTS provision[19]. In these areas, the Polish tax treaty practice seems to be similar to that of Brazil's.

[19] Z. Kukulski, *Rozdział VII Wpływ Konwencji Modelowej ONZ na polską praktykę traktatową*, [in:] *Konwencja modelowa OECD i konwencja modelowa ONZ w polskiej praktyce traktatowej*, Warszawa 2015, https://sip.lex.pl/#/monograph/369332190/42?pit=2023-08-11&keyword=Kukulski%20&tocHit=1&cm=SRES (access: 14.08.2023).

3. Brazil's and Poland's approaches to the MLI anti-BEPS measures

As already mentioned, Brazil's absence at the signing ceremony of the MLI that took place on 7th June, 2017, in Paris, was above all justified by the complexity of the MLI[20]. Instead, Brazil decided to amend and update its DTCs through bilateral negotiations. Therefore, many of the MLI anti-BEPS measures were introduced to the recently amended or newly concluded DTCs. The DTC with Argentina changed via the amending protocol signed in 2017, as well as the new 2022 DTC with the UK, representing both OECD and non-OECD Member States, which illustrates Brazil's general approach to the tax-treaty-related anti-BEPS measures regulated in the MLI[21].

The following of the MLI anti-BEPS measures constituting both minimum standards and non-minimum standards of the MLI were incorporated into the above-mentioned tax treaties: 1) transparent entities provision (Art. 3 MLI), 2) dual resident entities provision (Art. 4 MLI), 3) rule adopting the credit method for the elimination of double taxation (Art. 5 MLI – Option C), 4) the preamble to the DTC (Art. 6 MLI), 5) PPT-Rule combined with an ownership clause worded negatively, along with a type of activity clause inspired by the Limitation of Benefits Clause (hereafter: LoB Clause) and an anti-abuse rule for permanent establishments situated in third jurisdictions (Art. 7 MLI and Art. 10 MLI), 6) dividend transfer transaction provision (Art. 8 MLI), 7) a rule against artificial avoidance of the P.E. status through *commissionaire* arrangements and similar strategies (Art. 12 MLI), 8) a rule against the artificial avoidance of the P.E. status through the specific activity exemptions (Art. 13 MLI), and, finally, 9) the definition of a person closely related to an enterprise

20 R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 9.08.2023).

21 F. Colucci, *Brazil's Responses to BEPS – Implementation Through the Double Taxation Agreement with Argentina*, https://www.machadomeyer.com.br/en/recent-publications/publications/tax/brazil-s-responses-to-beps-implementation-through-the-double-taxation-agreement-with-argentina (access: 9.08.2023). See also: https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_ar-br_02_eng_1980_tt__ad1.html (access: 9.08.2023) and https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-uk_02_eng_2022_tt__td1.html (access: 9.08.2023).

(Art. 15 MLI)[22]. Regarding the mutual agreement procedure (hereafter: MAP), Brazil's post-MLI DTCs usually replace the old provision in order to follow the wording of Art. 16 MLI aimed at the improvement of dispute resolutions[23].

In recently amended or newly-concluded DTCs, Brazil did not decide to include the immovable property clause (Art. 9 MLI) and anti-splitting up contracts provision (Art. 14 MLI). Brazil also maintained its current tax treaty practice against corresponding transfer pricing adjustment (Art. 17 MLI). However, in general, Brazil will provide access to MAP in transfer-pricing cases in the absence of such treaty provision in its DTCs[24]. Moreover, Brazil did also not include mandatory binding arbitration provisions (Arts. 18–26 MLI) into its contemporary tax treaties.

Poland is one of the signatories of the MLI. The country ratified the MLI on 8th November, 2016, as the fourth tax jurisdiction in the world just after Austria, the Isle of Man, and Jersey, and deposited the instrument of ratification to the OECD on 23rd January, 2018[25]. Poland listed 78 out of its 89 DTCs as CTAs[26]. Only a few DTCs that Poland is party to – namely non-ratified comprehensive DTCs with Algeria, Nigeria, Uruguay, and Zambia – were not listed by Poland as CTAs. Poland did not notify as CTAs also non-comprehensive DTCs with Guernsey, the Isle of Man, and Jersey. Moreover, DTCs in force with Germany, Georgia[27], and Montenegro were,

[22] R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 9.08.2023). See also: F. Colucci, *Brazil's Responses…*, https://www.machadomeyer.com.br/en/recent-publications/publications/tax/brazil-s-responses-to-beps-implementation-through-the-double-taxation-agreement-with-argentina (access: 9.08.2023).

[23] R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 9.08.2023).

[24] R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 9.08.2023).

[25] OECD, *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (access: 10.08.2023).

[26] Republic of Poland: Status of List of Reservations and Notifications upon Deposit of the Instrument of Ratification, https://www.oecd.org/tax/treaties/beps-mli-position-poland-instrument-deposit.pdf (access: 10.08.2023).

[27] The new DTC of between Georgia and Poland implementing the MLI's selected ant-BEPS measures has been already ratified and will be in force since 1st January, 2024.

according to Poland's position, also not listed as CTAs. Poland wishes to modify those DTCs through bilateral negotiations[28]. Therefore, the 1999 DTC between Poland and Georgia was replaced by the new tax treaty concluded in 2021. Besides that, the 2002 DTC between the Netherlands and Poland has also recently been bilaterally changed via the amending protocol singed in 2020, because this tax treaty was notified only by Poland and not by the Netherlands as CTA[29].

Poland assumed a wide implementation of the MLI[30]. The following MLI's anti-BEPS measures were adopted by Poland with no reservations: 1) transparent entities provision (Art. 3 MLI), 2) dual resident entities provision (Art. 4 MLI), 3) a rule adopting the credit method for the elimination of double taxation (Art. 5 MLI – Option C)[31], 4) the preamble to the DTC (Art. 6 MLI), 5) PPT-Rule as an *interim* measure (Art. 7 MLI – Option 1), 6) dividend transfer transaction provision (Art. 8 MLI),

See: Z. Kukulski, *Nowa bilateralna umowa podatkowa Polski z Gruzją w świetle stanowiska Polski i Gruzji wobec Konwencji Wielostronnej oraz aktualizacji Konwencji Modelowej OECD i Konwencji Modelowej ONZ z 2017 r.*, "Kwartalnik Prawa Podatkowego" 2021, no. 4, pp. 37 et seq.

[28] Justification to the Act ratifying the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, done at in Paris on 24th November, 2016, the Sejm paper no. 1776, Warsaw, 18th July, 2017 (*Uzasadnienie do projektu ustawy ratyfikującej Konwencję wielostronną implementującą środki prawa traktatowego mające na celu zapobieganie erozji podstawy opodatkowania i przenoszenia zysku, sporządzonej w Paryżu 24 listopada 2016 r., druk sejmowy nr 1776, Warszawa, 18 lipca 2017 r.*), pp. 45–47, 56–57, https://orka.sejm.gov.pl/Druki8ka.nsf/0/39B2431FBC225D03C12581670038E84D/%24File/1776.pdf (access: 10.08.2021).

[29] The amending protocol signed on 29th October, 2020, to the 2002 DTC the Netherlands and Poland entered into force on 1st January, 2023. See: Z. Kukulski, *Protokół zmieniający bilateralną umowę podatkową Polski z Holandią w świetle stanowiska Polski do Konwencji Wielostronnej (MLI) oraz aktualizacji Konwencji Modelowej OECD w sprawie podatku od dochodu i majątku z 2017 r.*, "Kwartalnik Prawa Podatkowego" 2020, no. 1, pp. 55 et seq.

[30] A. Franczak, *Multilateral Convention (MLI) – The Evolution or Revolution?*, "Studia Iuridica Lublinensia" 2018, vol. 27, no. 2, pp. 9 et seq., https://doi.org/10.17951/sil.2018.27.2.9. See also: M. Raińczuk, M. Leconte, *Konwencja Wielostronna – wpływ na umowy o unikaniu podwójnego opodatkowania zawarte przez Polskę*, "Przegląd Podatkowy" 2018, no. 1, pp. 20–21.

[31] M. Jamroży, *Metody unikania podwójnego opodatkowania w świetle wielostronnej konwencji implementującej środki traktatowego prawa podatkowego*, "Studia Prawno-Ekonomiczne" 2018, vol. 107, pp. 11–32; H. Litwińczuk, *Międzynarodowe prawo podatkowe,* Wolters Kluwer, Warszawa 2020, p. 379.

7) immovable property clause (Art. 9 MLI), and, finally, 8) corresponding transfer pricing adjustment (Art. 17 MLI)[32]. The question whether and to which extent the CTAs will be modified through the MLI depends on the position of Poland's tax treaty partner[33].

Regarding the mechanisms improving dispute resolutions (Art. 16 MLI), Poland reserved the right not to apply Art. 16(1)(1) of the MLI, arguing that the country is currently not able to meet the minimum standard in this area[34]. Ultimately, Poland intends to introduce into its DTCs a system of bilateral notifications or another system of consultations with tax treaty partner's competent authorities aimed at improving the effectiveness of the MAP. Regarding other provisions of Art. 16 of the MLI, Poland did not raise any objections and adopted the regulations indicated therein.

On the other hand, Poland opted out only few provisions of the MLI, namely the anti-abuse clause for P.Es. located in third jurisdictions (Art. 10 MLI), rules against artificial avoidance of the P.E. status (Arts. 12–15), and arbitration provisions (Arts. 18–26 MLI). It means that in all these areas, despite the position of Poland's tax treaty partner, the CTAs will not be modified via the MLI.

In summary, when putting side by side Brazilian and Polish approaches to the MLI anti-BEPS measures, many common areas can be identified, e.g. measures against treaty abuse (Art. 6 and Art. 7 MLI) and majority of other anti-BEPS provisions not constituting the MLI minimum standards. Of course, there are also several important points where the positions of the two countries differ, e.g. immovable property clause (Art. 9 MLI), rules against artificial avoidance of the P.E. status (Arts. 12–15 MLI) as well as the corresponding transfer pricing adjustment (Art. 17 MLI). It raises the

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[32] Government Declaration of 6th June, 2018, on the binding force of the Multilateral Convention implementing tax treaty measures aimed at preventing base erosion and profit shifting, done at Paris on 24th November, 2016, Journal of Laws (*Dziennik Ustaw*) 2018, item 1370. (*Oświadczenie rządowe z dnia 6 czerwca 2018 r. w sprawie mocy obowiązującej Konwencji wielostronnej implementującej środki traktatowego prawa podatkowego mające na celu zapobieganie erozji podstawy opodatkowania i przenoszeniu zysku, sporządzonej w Paryżu dnia 24 listopada 2016 r., Dz.U. z 2018 r., poz. 1370*).

[33] It is worth mentioning that Polish Ministry of Finance publishes explanations regarding the impact of the MLI on a given DTC (the so-called synthetic text) as it enters into force. Synthetic texts of the DTCs modified by the MLI – both in Polish and in English are available at: https://www.podatki.gov.pl/podatkowa-wspolpraca-miedzynarodowa/wykaz-umow-o-unikaniu-podwojnego-opodatkowania/ (access: 10.08.2023).

[34] Z. Kukulski, *Protokół…*, p. 59.

question whether – and, if so, to what extent – the BR-PL DTC is consistent with Brazil's and Poland's approaches to the MLI anti-BEPS measures, and if there are any other factors influencing solutions adopted in this tax treaty.

4. The impact of the MLI anti-BEPS measures and the latest OECD and UN Models updates in this area on the BR-PL DTC

The BR-PL DTC follows the structure of the 2017 OECD Model with some exceptions in favour of the 2017 UN Model. The impact of the latest update of the UN Model in 2021 is meaningless[35]. Moreover, the treaty contains also specific non-OECD and non-UN Models-based provisions frequently present in the Brazilian and the Polish tax treaties.

The title of the BR-PL DTC corresponds with the 2017 OECD and the UN Models updates introducing the objective of preventing tax avoidance simultaneously alongside the elimination of doble taxation and prevention against tax evasion as a goal of tax treaty. Also, the preamble to the BR-PL DTC expressing both states' intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax avoidance and tax evasion follows the 2017 OECD and the UN Models, and, therefore, is fully compliant with Art. 6(1) of the MLI (*Purpose of the Covered Tax Agreement*)[36]. The preamble also asserts, as provided in Art. 6(3) of the MLI, that Brazil and Poland desire to further develop their economic relationship and to enhance their cooperation in tax matters. Similar solution is adopted in recently amended and/or concluded by Brazil DTCs with Argentina and the UK, as well in Poland's DTCs with the Netherlands and Georgia.

The BR-PL DTC contains a provision dealing with fiscal transparent entities based on Art. 3(1) of the MLI. Similar solution was also adopted in updated versions of Art. 1(2) of the OECD and the UN Models in 2017[37].

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[35] *United Nations…*, pp. XII–XVI, https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model_2021.pdf (access: 10.08.2023).

[36] Z. Kukulski, *Art. 6 Konwencji Wielostronnej jako dyrektywa wykładni umów o unikaniu podwójnego opodatkowania*, [in:] *Prawo podatkowe w systemie prawa. Międzygałęziowe związki norm i instytucji prawnych*, A. Kaźmierczyk, A. Franczak (eds.), Warszawa 2019, p. 510 et seq.

[37] See: H. Litwińczuk, *Rozdział 5 Charakterystyka treści poszczególnych artykułów Modelu Konwencji OECD*, [in:] *Międzynarodowe prawo podatkowe*, Warszawa 2020, https://sip.lex.pl/#/monograph/369464442/31?keyword=litwińczuk&tocHit=1&cm=STOP (access: 11.08.2023).

Also, savings clause confirming the general rule of international tax law according to which the DTC should not affect the right of contracting states to tax their own residents, except where intended, and listing the provisions of the DTC to which this rule is not applicable – is also present in the BR-PL DTC[38]. Such rules were also adopted in currently amended and/or concluded DTCs by both states, except for Brazil's DTC with Argentina[39] and for Poland's DTC with Georgia[40]. In addition the *tie-breaker rules* in the BR-PL DTC, especially the treaty's dual resident entities provision, are structured on the 2017 OECD and the UN Models, and, therefore, are in line with Art. 4(1) of the MLI[41]. In the analysed group of DTCs, only the treaty between Brazil and Argentina predates the 2017 updates of the OECD and the UN Models, providing the place of effective management as the only decisive criterion solving the cases of dual residence for persons other than individuals[42].

The concept of P.E. in the BR-PL DTC adopts all anti-BEPS measures against artificial avoidance of the P.E. status recommended by Arts. 12–15 of the MLI as well as by Art. 5 of the 2017 OECD and UN Models. These include: 1) a rule against artificial avoidance of the P.E. status through *commissionaire* arrangements and similar strategies[43], 2) the rule against the artificial avoidance of the P.E. status though the specific activity exemptions[44],

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[38] See: Art. 1(3) of the BR-PL DTC available at: https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 11.08.2023).

[39] R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (dostęp: 11.08.2023).

[40] See: Art. 1 of the BR-AR DTC, available at: https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Personal-Scope_ARTICLE-I (access: 11.08.2023), and Art. 1 of the GE-PL DTC available at: https://www.podatki.gov.pl/media/7167/gruzja-tekst-en-2021.pdf (dostęp: 11.08.2023).

[41] See: Art. 4(3) of the BR-PL DTC available at: https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 11.08.2023).

[42] See: Art. 4(3) of the BR-AR DTC, available at: https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Resident_ARTICLE-IV (access: 11.08.2023).

[43] See: Art 5(7) of the BR-PL DTC, https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Resident_ARTICLE-IV (access: 11.08.2023).

[44] See: Art. 5(5) of the BR-PL DTC, https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Resident_ARTICLE-IV (access: 11.08.2023). https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/

3) the splitting-up of contracts provision[45], and 4) the concept of person closely related to an enterprise[46]. Moreover, the BR-PL DTC contains the anti-fragmentation rule recommended by Art. 5(4.1.) of the OECD and the UN Models following the OECD/G20 Final Report on Action 7 of the BEPS (*Preventing the Artificial Avoidance of Permanent Establishment Status*)[47], The purpose of this provision is to prevent an enterprise from fragmenting its activities – either within the enterprise or between closely related enterprises – to qualify for the specific activity exemptions in Art. 5(4) of the OECD and the UN Models.

Such a wide absorption of all anti-BEPS measures with respect to the artificial avoidance of the P.E. is present only in the DTC between the Netherlands and Poland[48]. None of such measures is included in the DTC between Poland and Georgia[49]. In the case of Brazil, only some of them were adopted in DTCs with Argentina and the UK, e.g. the concept of a person closely related to an enterprise, a rule against the artificial avoidance of the P.E. status through the specific activity exemption[50], and the anti-fragmentation

Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Resident_ARTICLE-IV (access: 11.08.2023).

[45] See: Art. 5(4) of the BR-PL DTC, https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Resident_ARTICLE-IV (access: 11.08.2023).

[46] See: Art. 5(11) of the BR-PL DTC, https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Resident_ARTICLE-IV (access: 11.08.2023).

[47] *OECD/G20 Base Erosion and Profit Shifting Project: Preventing the Artificial Avoidance of the Permanent Establishment Status. Action 7 – 2015 Final Report*, pp. 39 et seq., https://www.oecd-ilibrary.org/docserver/9789264241220-en.pdf?expires=1691758966&id=id&accname=guest&checksum=DD1F02F7E9EA60784EB131A740357EB8 (access: 11.08.2023).

[48] See: Art. 5 of the Protocol between the Republic of Poland and the Kingdom of the Netherlands amending the Convention between the Republic of Poland and the Kingdom of the Netherlands for the elimination of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed at Warsaw on 13th February, 2002, and the Protocol, signed at Warsaw on 13th February, 2002, https://www.podatki.gov.pl/media/6445/protokół-teskt-angielski.pdf (access: 11.08.2023).

[49] Art. 5 of the GE-PL DTC, https://www.podatki.gov.pl/media/7167/gruzja-tekst-en-2021.pdf (access: 11.08.2023).

[50] See: Art. 5 of the BR-AR DTC only, https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Permanent-Establishment_ARTICLE-V (access: 11.08.2023).

rule recommended by Art. 5(4.1.) of the OECD and the UN Models, as well as the concept of a person closely related to a company[51].

One of Poland's tax treaty policy goals is the implementation of corresponding transfer pricing adjustment provision to its all-modern tax treaties. No surprise then that such a rule based on Art. 9(2) of the OECD and the UN Models, and, therefore, on Art. 17 of the MLI is also present in Poland's DTCs with the Netherlands and Georgia. Brazil, however, stands in a position against Art. 9(2) of the OECD and the UN Models. Brazil's DTC with Argentina confirms this policy and practice, while DTCs with the UK and Poland contradict it.

However, the corresponding transfer pricing adjustment provision is directly part of the text of Art. 9 of the Brazil's DTC with the UK only. In the case of Poland, such a rule is missed. The provision being equivalent of Art. 9(2) of the OECD and the UN Models is to be found in the final protocol to the BR-PL DTC. According to it, Poland reserves the right to provide corresponding transfer pricing adjustment, while Brazil gives Poland the most favoured nation treatment (hereafter: MFN). Thus, if after the signing of the DTC, any convention or agreement concluded by Brazil with a third State includes provisions which have an equal result to correspondent transfer pricing adjustment, Brazil shall also apply such provisions to BR-PL DTC as soon as such provisions take effect between Brazil and that third State. Moreover, Brazil shall inform Poland of any such provisions which would take effect between Brazil and a third State.

Furthermore, the final protocol contains yet another provision, clearly inspired by Art. 9(3) of the UN Model. It gives Poland right not to provide the corresponding transfer pricing adjustment where judicial, administrative, or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under Article 9, one of the enterprises concerned is liable to penalty with respect to fraud, gross negligence, or wilful default. Similar solutions are exceptional in the Polish tax treaty practice[52]. In the case of Brazil, provision excluding

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[51] See: Art. 5 of the BR-UK DTC, https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-uk_02_eng_2022_tt__td1.html (access: 11.08.2023).

[52] Z. Kukulski, *Eliminacja podwójnego opodatkowania w sensie prawnym i ekonomicznym dochodów z działalności gospodarczej na gruncie Konwencji Modelowej ONZ – odstępstwa od Konwencji Modelowej OECD*, [in:] *Konwencja modelowa OECD i konwencja modelowa ONZ w polskiej praktyce traktatowej*, Warszawa 2015, https://sip.lex.pl/#/monograph/369332190/27?pit=2023-08-11&keyword=Kukulski%20&tocHit=1&cm=SREST (access: 14.08.2023).

the application of correspondent transfer pricing adjustment in the case of fraudulent or negligent conduct is included in the DTC with the UK[53].

The BR-PL DTC also introduces a minimum shareholding threshold of 365 days for the application of the reduced WHT rate provided in Art. 10(2)(a) (*Dividends*) in order to avoid dividend stripping tax avoidance schemes[54]. Similar restriction is present in all tax treaties discussed in this paper, except for Poland's DTC with Georgia[55].

Contrary to Brazil's contemporary tax treaty policy and practice, the BR-PL DTC includes the post-BEPS wording of the immovable property clause. Thus, gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, as well as certificates or participating units of an investment fund, may be taxed in the company's *situs* state if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50% of their value directly or indirectly from immovable property situated in that state. Such clause compatible with Art. 9 of the MLI and the modern version of Art. 13(4) in both Model Conventions is also provided in Poland's DTC with the Netherlands and is missing in the DTC with Georgia.

In their post-BEPS tax treaties, both countries try to replace previously used exemption as a method for the elimination of double taxation. Thus, the BR-PL DTC also adopts the ordinary tax credit method instead of the exemption. That is yet another significant change in comparison to Brazil's and Poland's pre-BEPS tax treaty policy and practice.

The MAP provision in BR-DTC is designed to fit Brazil's and Poland's positions towards the improvement of dispute resolution as discussed in Sec. 3 of this paper[56]. Moreover, Brazil and Poland did not include in their tax treaty the mandatory binding arbitration provided in Arts. 18–26 of the

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[53] See: Art. 9(4) of the BR-UK DTC., https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-uk_02_eng_2022_tt__td1.html%23tt_br-uk_02_eng_2022_tt__td1_a9 (access: 12.08.2023).

[54] See: Art. 10 of the BR-PL DTC, (access: 11.08.2023); See also: R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 11.09.2023).

[55] See: Art. 10 of GE-PL DTC, https://www.podatki.gov.pl/media/7167/gruzja-tekst-en-2021.pdf (access: 11.08.2023).

[56] See: Art. 26 of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 12.08.2023).

MLI. Similar approach is present in all DTCs currently amended and/or concluded both by Brazil and Poland.

Regarding Art. 7 of the MLI, Poland opted for PPT-Rule. The PPT-Rule is also introduced in Poland's DTCs with the Netherlands and with Georgia, even though both treaties are not CTAs. In BR-PL DTC, however, Brazil's approach towards the prevention of treaty abuse was adopted[57]. Thus, the PPT-Rule provided in the BR-PL DTC[58] is combined with some provisions inspired by the LoB clause, similar to those discussed in Sec. 3 of this paper[59]. Moreover, the BR-PL DTC contains also a specific anti-abuse provision aimed at limiting tax treaty benefits if the Brazilian or Polish legislation contains provisions, or introduces such provisions after the signing of the DTC, whereby offshore income derived by a resident company form: 1) shipping; 2) banking, financing, insurance investment or similar activities; or 3) operating as a holding company, co-ordination centre or similar entity providing administrative services or other support to a group of companies which carry on business primarily in third states is not taxed in that state or is taxed at a rate of tax which is lower than 75% of the rate of tax which is applied to income from similar onshore activities[60]. Brazil's DTCs with Argentina and the UK also contain a similar rule.

5. Non-anti-BEPS provisions in the BR-PL DTC

The BR-PL contains non-anti-BEPS provisions based on 2017 updates of the OECD and the UN Models. It also includes some solutions reflecting specific tax treaty policy and practice of both states. This approach is typical of all tax treaties amended and/or concluded by Brazil and Poland in the post-BEPS era.

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57 See: Art. 28 of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 12.08.2023).

58 See: Art. 28(6) of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 12.08.2023).

59 See: Art. 28(2) and (3) of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 12.08.2023). See also: J.F. Bianco, *Principal Purpose Test in Brazilian Tax Treaties*, https://www.ibdt.org.br/RDTIA/n-7-2020/principal-purpose-test-in-brazilian-tax-treaties/ (access: 12.08.2022).

60 See: Art. 28(1) of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 12.08.2023).

The OECD and the UN Models share many similarities. The number of differences between them was a bit mellowed due to the 2017 updates. Despite that, the UN Model still contains many inbred provisions supporting fiscal interests of emerging economies such as Brazil[61]. Some of them are also attractive for the OECD MS, including for Poland.

The BR-PL DTCs follows the 2017 OECD and UN Models in relation to their recommendations dealing with: taxes covered, general definitions, tie-breaker rules for individuals, the concept of actual P.E.[62], a positive list of places constituting a P.E., the agency of P.E., and the status of a subsidiary as a P.E. The same applies to some rules allocating taxing rights in cases of income from immovable property, international shipping and air transport, dividends, interests, capital gains, employment income, directors' fees, entertainers and sportspersons, government service, students, and other income. Also, non-discrimination clauses, the exchange of information provisions, as well as members of diplomatic missions and consular posts provision are in line with the OECD and the UN Models.

Less significant deviations from both Models can be identified in some of the above-mentioned provisions. However, if so, they do not change Brazil's and Poland's approach towards the 2017 updates of the OECD and the UN Models, e.g. different from the OECD's WHT rates for dividends and interest. Moreover, the BR-PL DTC does not contain distributive rule dealing with the elimination of the double taxation of capital (Art. 22 of the OECD/UN Models), because taxes on capital are not covered by this treaty. Also, the assistance in collection of taxes provision (Art. 28 of the OECD/UN Model) is omitted.

The UN Model deviates from the OECD as of the concept of P.E. Provision of Art. 5(3)(a) of the first mentioned Model, provide 6-month (or 183-day instead) threshold after which a building site, a construction, assembly, or installation project is to constitute the P.E. This typical UN Model recommendation is present in tax treaties between Brazil and both Argentina and the UK, while the BR-PL DTC follows the OECD Model threshold of 12 months. The exact same solution is adopted in the tax treaty between Poland and the Netherlands, but not in the DTCs with Georgia, where the threshold is 9 months.

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[61] Ibidem, pp.

[62] H. Litwińczuk, *Rozdział 9 ZAKŁAD*, [in:] *Międzynarodowe prawo podatkowe*, Warszawa 2020, https://sip.lex.pl/#/monograph/369464442/93?keyword=litwińczuk&tocHit=1&cm=STOP (access: 12.08.2023).

The shorter threshold for a building site etc. to constitute a P.E. is not the only difference between the UN and the OECD Models. Also, the supervisory activities in connection therewith lead to the existence of a P.E. in the *situs* state. This typical UN Model provision is not included into the BR-PL DTC, and neither in Poland's DTC with the Netherlands nor Georgia. It is present in Brazil's DTCs with Argentina and the UK instead. Moreover, contrary to Brazil's DTC with the UK, Poland's DTCs with the Netherlands and Georgia do not include one more typical UN Model provision dealing with the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose – the so-called services P.E.[63] According to Art. 5(3)(b) of the UN Model, such services lead to the existence of a P.E., but only if activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned.

The concept of P.E. in the BR-PL DTC also contains yet another typical UN Model provision dealing with insurance agents (Art. 5(6) of the UN Model). Insurance companies are deemed to have a P.E. in other contracting state if they collect premiums or insure risks in that territory through a person who is not an agent of an independent status[64]. A similar rule is present in Brazil's tax treaties with Argentina[65] and the UK[66], but not in Poland's DTCs with the Netherlands and Georgia.

Regarding business income, the BR-PL DTC follows the pre-2010 version of the OECD Model[67]. It means that rules dealing with profits

[63] W. Wijen, J. de Goede, A. Alessi, *The Treatment of Services in Tax Treaties*, "Bulletin for International Taxation" 2012, no. 1, pp. 29–30.

[64] Z. Kukulski, *Koncepcja zakładu oraz definicja należności licencyjnych na gruncie Konwencji Modelowej ONZ*, [in:] *Konwencja modelowa OECD i konwencja modelowa ONZ w polskiej praktyce traktatowej*, Warszawa 2015, https://sip.lex.pl/#/monograph/369332190/26?pit=2023-08-11&keyword=Kukulski%20&tocHit=1&cm=SREST (access: 14.08.2023).

[65] See: Art. 5(6) of the BR-AR DTC, https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Permanent-Establishment_ARTICLE-V (access: 11.08.2023).

[66] Art. 5(6) of the BR-UK DTC, https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-uk_02_eng_2022_tt__td1.html (access: 11.08.2023).

[67] H. Litwińczuk, *Model Konwencji OECD z 2010 r. i wersje późniejsze*, [in:] *Międzynarodowe prawo podatkowe*, Warszawa 2020, https://sip.lex.pl/#/monograph/369464442/111?keyword=litwińczuk&tocHit=1&cm=STOP (access: 12.08.2023).

attribution to the P.E. are not based on the *Authorised OECD Approach* (hereafter: AOA) and are thus in line with the 2017 UN Model[68]. Poland's DTC with the Netherlands and Poland is the only example among the examined tax treaties containing the AOA. Moreover, none of them contains the *limited force of attraction* provision as recommended in Art. 7(1)(b) and (c) of the UN Model.

The majority of modern tax treaties that Poland is party to, except for the DTC with the Netherlands, treat income form independent professional services (former Art. 14 deleted from the OECD Model in 2000) as part of business income. Separate provision dealing with this type of income is not only still present in the UN Model but also has wider scope in comparison to its OECD equivalent. According to Art. 14(2) of the UN Model, the source-state taxation is reserved also when a person providing independent professional services in the other contracting state, regardless of having a fixed base there, is present in that state for a period or periods amounting to or exceeding in the aggregate 183 days in any 12-month period commencing or ending in the fiscal year concerned. If the 183-day threshold of presence is fulfilled, the source state is entitled to tax only income as is derived from a person's activity performed in that state. The same provision is present in Art. 15 of the BR-PL DTC, but also in its tax treaty with Argentina and the UK, and, therefore, seems to be one of the features of modern Brazilian tax treaty practice. Contemporary Polish tax treaty practice in this area is different, e.g. the 1999 DTC between Poland and Georgia provided, contrary to the tax treaty now in force, a separate provision dealing with income from independent professional services.

Brazil and Poland follow the UN Model with respect to the elimination of the double taxation of royalties in their tax treaty policy and practice. The UN Model attributes taxing rights over royalties to both contracting states. The source state, however, is obliged to limit the WHT imposed therein. The UN Model does not contain recommendations for the level of maximum WHT rate applicable in the source state. Thus, the WHT rate is determined by contracting states during the DTC's negotiations. The BR-PL DTC, as well as the other DTCs currently amended and/or concluded by Brazil and Poland, replicates this pattern[69]. The majority of tax treaties concluded by Brazil and Poland, including Brazil's DTCs with Argentina and the UK as

[68] Ibidem.

[69] See: Art. 12(1) and (2) of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 13.08.2023).

well as Poland's DTCs with the Netherlands and Georgia, provide single reduced WHT rate for royalties. In the BR-PL DTCs, however, there are two WHT rates: 15% applicable to royalties arising from the use or the right to use trademarks, and 10% applicable to the royalties in all other cases.

Another common similarity between Brazil's and Poland's tax treaty policy and practice lies in the scope of definition of royalties which is based on Art. 12(3) of the UN Model. In the UN Model, the term "royalties" also means payments of any kind receiver as a consideration for the use of, or the right to use, cinematograph films and recordings for television or radio broadcasting, and for the use of, or the right to use, any industrial, commercial (the so-called leasing) equipment[70]. A similar approach is adopted in the BR-PL DTs as well as in Brazil's DTC with the UK and Poland's DTCs with the Netherlands and Georgia.

In 2017, a new provision for FTS was introduced to the UN Model in Art. 12A[71]. The lack of a separate rule dealing with the elimination of the double taxation of such fees – especially the lack of a precise definition of this term allowing distinguishing FTS from fees for "ordinary services" – generated inconsistent tax treaty policy and practice in DTCs concluded by Poland. In the majority of Poland's tax treaties FTS of an auxiliary, complementary or instrumental nature to a know-how or technology transfer agreements are treated as royalty payments, while fees from "ordinary services" – as business income[72]. Therefore, a separate FTS provision is quite rare in Poland's tax treaty practice[73]. Brazil tends to go

[70] *United Nations Model…*, p. 14, https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf (access: 13.08.2023).

[71] J. Martin, *UN releases updated model tax treaty adding new technical services fees article*, https://mnetax.com/un-releases-updated-model-tax-treaty-adding-new-technical-service-fees-article-27765 (access: 13.08.2023). A. Báez Moreno, *The Taxation of Technical Services under the United Nations Model Double Taxation Convention: A Rushed – Yet Appropriate – Proposal for (Developing) Countries?,* "World Tax Journal" 2015, vol. 7, no. 3, pp. 267–328, https://edisciplinas.usp.br/pluginfile.php/5503651/mod_resource/content/0/Andres%20Baez%20-%20wtj_2015_03_int_2.pdf (access: 13.08.2023).

[72] W. Wijnen, J. de Goede, A. Alessi, *The Treatment…*, pp. 32–34. See also: R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 13.08.2023); Z. Kukulski, *Eliminacja podwójnego opodatkowania opłat za usługi techniczne w świetle art. 12A Konwencji Modelowej ONZ – rozwiązanie problemu czy źródło nowych sporów interpretacyjnych?* "Przegląd Prawa Publicznego" 2022, no. 4, pp. 84–87.

[73] Z. Kukulski, *Eliminacja podwójnego…*, p. 87.

in the opposite direction[74]. Thus, an express definition for FTS along with a distributive rule for such fees is often present in the Brazilian tax treaty practice, including Brazil's DTCs with Argentina, the UK, and Poland. Pursuant to it, FTS are considered as payments in consideration for any service of a managerial, technical, or consultancy nature, unless the payment is made to an employee of the person making it, or for teaching in an educational institution as well as for teaching by an educational institution, and, finally, by an individual for licenses for their personal use[75]. This approach follows the 2017 UN Model definition of FTS[76].

In Brazil's DTC with Argentina, however, a more inclusive concept of technical services and technical assistance was adopted that can change the current case-law favouring the position of the Brazilian tax administration[77]. Thus, the FTS provision under this treaty applies to fees from services that depend on specialized technical knowledge or that involve administrative assistance or consultancy services, carried out by independent professionals or under an employment relationship, or even as a result of automated structures with clear technological content. It also covers fees from permanent advice rendered by the assignor of a secret process or formula to the assignee by means of technicians, designs, studies, instructions, or other similar services which enable the effective use of the assigned process or formula. The solution adopted in Brazil's DTC with Argentina solves many qualification conflicts that may arise when

[74] R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 13.08.2023).

[75] See: Art. 13(3) of the BR-UK DTC, https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-uk_02_eng_2022_tt__td1.html%23tt_br-uk_02_eng_2022_tt__td1_a13 (access: 13.08.2023), Art. 13(3) of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 13.08.2023).

[76] See: Sec. 5 of the final protocol to the BR-PL DTC, according to which treaty FTS provisions also apply to payments of any kind received as consideration for the rendering of technical assistance, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 13.08.2023).

[77] See: Art. 12 of the BR-AR DTC, https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_ar-br_02_eng_1980_tt__ad1.html%23tt_ar-br_02_eng_1980_tt__ad1_a9 (access: 13.08.2023). R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 13.08.2023).

interpreting the narrow concept of FTS recommended by the UN Model[78]. If a similar approach were adopted in Poland's tax treaty practice, it might also help to clarify certain doubts raised in the Polish judicature[79].

Likewise, the UN Model, the BR-PL DTC, pensions, and other similar remuneration in consideration of past employment and annuities arising in a Contracting State may be taxed in the residence state of their beneficiary[80]. Moreover, the exclusive right to tax pensions and other similar payments in attributed to the source state thereof only if they are made under a public scheme which is part of the social security system of that state or its political subdivision or a local authority. A similar approach is used in Poland's DTC with the Netherlands. It was also present in the 1999 DTC with Georgia, replaced by the new treaty signed in 2021, which fully follows the OECD pattern granting the exclusive right to tax pensions to the recipient's residence state. Brazil's treaty policy and practice is similarly inconsistent in this area. For example, the DTC with the UK follows the OECD Model, while the DTC with Argentina goes even further than the UN Model and attributes the exclusive right to tax pensions and annuities regardless of the fact whether they are made under a public scheme which is part of the social security system or not. Moreover, Brazil's DTC with Argentina provides definitions for pensions and annuities and similar income, while in Poland's DTC with the Netherlands, only the definition for annuities can be found. A similar solution is rather rare in both countries' tax treaty practice.

Finally, the BR-DTC follows the UN Model regarding the taxation of other income. Pursuant to Art. 23(3) of that treaty, which is an equivalent of Art. 21(3) of the UN Model, items of income, wherever arising, not dealt with in the foregoing articles of that treaty may also be taxed in the source state. No such rule is present in Poland's DTCs with the Netherlands and Georgia. A unique solution is adopted in Brazil's DTC with Argentina. Art. 22 of that treaty simply states that other income shall be taxable only

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[78] A. Báez Moreno, *Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services,* "World Tax Journal" 2021, no. 11, pp. 531 et seq.

[79] E.g., (PL) Judgment of the Supreme Administrative Court of 8th July, 2016, II FSK 885/15, LEX 2118181.

[80] See: Art. 19 of the BR-PL DTC, https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_ar-br_02_eng_1980_tt__ad1.html%23tt_ar-br_02_eng_1980_tt__ad1_a9 (access: 13.08.2023).

in the source state[81]. On the other hand, Brazil's DTC with the UK contains identical provision to the BR-PL DTC. Moreover, it includes a special non-BEPS-based anti-profit shifting clause. Identical clauses are typically parts of treaty provisions dealing with interests (as recommended in Art. 11(6) of the OECD and UN Models), royalties (as recommended in Art. 12(6) of the OECD and UN Models), and FTS 9 (as recommended in Art. 12A(7) of the UN Model), but not with other income.

6. Provisions reflecting country-specific tax treaty policies and practices in the BR-PL DTC

The BR-PL DTC contains several provisions specific for Brazilian and Polish tax treaty policy and practice. These include interest source-state exemption clause, separate distributive rule for teachers and researchers, and the MFN clauses.

The interest source-state exemption clause is a typical non-OECD and non-UN Models-based provision present in all tax treaties Brazil and Poland are parties to, analyzed in this research study. Such clauses provide exemption from WHT in the source state for interest arising there and derived and beneficiary owned by the Government of the other Contracting State, a political subdivision thereof or any agency (including the Central Bank or a financial institution) wholly owned by that Government or a political subdivision thereof[82]. In some tax treaties, e.g. in the DTC between Poland and the Netherlands, the list of exempt state owned or controlled beneficiaries is longer. It includes, *inter alia*, interest paid on a loan of whatever kind granted, insured or guaranteed by an institution for purposes of promoting export, interest paid in connection with the sale on credit of any industrial, commercial, or scientific equipment, or from a loan of whatever kind granted by a bank, or in respect of a bond, debenture and other similar obligation of the government of a contracting state, or of a political subdivision, or a local authority thereof, and, finally, interest paid to a recognized pension fund of a contracting state which is generally exempt from taxation thereof.

[81] See: Art. 22 of the BR-AR DTC, http://www.planalto.gov.br/CCIVil_03/Atos/decretos/1982/D87976.html (access: 13.08.2023).

[82] Commentary on Article 11, [in:] *United Nations…*, p. 334 et seq., https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf (access: 13.08.2023).

Brazil DTCs with Argentina and the UK, and Poland's DTC with the Netherlands contain a separate distributive rule for teachers and researchers. Similar provision is present in the BR-PL DTC[83]. The analysis of the Polish contemporary tax treaty policy and practice leads to the conclusion that such a rule is rather disappearing in Poland's tax treaties, e.g. the DTC with Georgia, while it seems to be a constant feature of Brazil's approach towards it.

Lastly, even though Brazil and Poland are not closely related economies, the BR-PL DTC includes the MFN clause in the final protocol. The MFN clause in BR-PL DTC crates an automatic entitlement to better terms, providing that if after the date of signing the DTC, Brazil enters into a tax treaty with any OECD MS, excluding any state in Latin America (e.g. Chile) pursuant to which the applicable WHT rates on interest and royalties are lower (including any exemption) than the ones provided in the BR-PL DTC, then WHT rates applicable to such interest and royalties will be replaced by the rate of 10%, from the time on which such lower rates (or exemptions) enter into force and for as long as such rates are applicable. Similar MFN clauses with wider scope covering also WHT rates on dividends and FTS are included in Brazil's DTCs with Argentina and the UK. Thus, the presence of such clauses seems to be a feature of the Brazilian contemporary tax treaty policy and practice.

7. Conclusions

The BR-PL DTC follows both countries' approach to the post-BEPS international tax treaty regime. The impact of the MLI anti-BEPS measures on it is clearly visible. The treaty provisions also incorporate changes in the OECD and the UN Models. Moreover, it also reflects countries' specific tax treaty policies and practices.

From Brazil's perspective, the BR-PL DTC is in line with its recently amended and concluded DTCs with both OECD and non-OECD MS. The treaty also follows Brazil's approach to the MLI's anti-BEPS measures.

Also from Poland's perspective, the treaty with Brazil fits in Poland's contemporary tax treaty policy and practice, which is now heavily dependent on Poland's tax treaty partners' positions to the MLI. It results

[83] See: Art. 21 of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 14.08.2023).

in a range of differences in implementation of the MLI anti-BEPS measures regardless of whether a given DTC is a CTA or not. Poland's DTCs with the Netherlands and Georgia are the examples illustrating these issues. Comparing the Dutch approach to the MLI[84], Georgia's position to it is restrictive[85]. Except for minimum standards of the MLI, Georgia opted-out all other anti-BEPS measures. Not surprisingly, this affects the solutions adopted in Poland's DTC with that state. The same applies to the DTC with the Netherlands.

Brazil is not only the largest country in South America. The country is also one of the world's emerging economies aspiring to membership in the OECD. Brazil is also a member state of BRICS[86] and the South American trade bloc established by the Treaty of Asunción in 1991 as well as the Protocol of Ouro Preto in 1994, the so-called MERCOSUL[87]. Thus, its tax treaty policy and practice is undoubtedly observed and followed by other South American states. Having a DTC, such a BR-PL DTC, reflecting countries' position to the treaty related anti-BEPS measures and balancing the taxing rights between the residence and source state, might be a pattern for Poland during the negotiations of DTCs with other South American countries, as well for Brazil in relation to other OECD and EU Member States.

The BR-PL DTC is an important tool that might, according to its preamble, not only further develop the economic relationship and enhance their bilateral cooperation in tax matters between these two in the future. Having in mind that Brazil's Southern Federal States, especially Paraná, are inhabited by a large percentage of population with Polish

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[84] The Netherlands (submitted by the Kingdom of the Netherlands in respect of the Netherlands) – Status of List of Reservations and Notifications upon Deposit of the Instrument of Acceptance, deposited on 29th March, 2019, https://www.oecd.org/tax/treaties/beps-mli-position-netherlands-instrument-deposit.pdf (access: 14.08.2023).

[85] Reservations and notifications under the Multilateral Convention to Implement Tax Treaty Related Measures io Prevent Base Erosion and Profit Shifting – Georgia, deposited on 29th March, 2019, https://www.oecd.org/tax/treaties/beps-mli-position-georgia-instrument-deposit.pdf (access: 14.08.2023).

[86] See: http://infobrics.org (access: 14.08.2023).

[87] The full member states of the MERCOSUL include Argentina, Brazil, Paraguay, and Uruguay. Venezuela is a full MS but has been suspended since 1st December, 2016. Moreover, Bolivia, Chile, Colombia, Ecuador, Guyana, Peru and Suriname have the status of associates. See: https://www.mercosur.int/quienes-somos/paises-del-mercosur/ (access: 14.08.2023).

roots, it might also create new or strengthen the existing interpersonal ties between residents of both Contracting States, leading to economic growth as well as cultural, scientific, and social exchange.

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Umowa o unikaniu podwójnego opodatkowania Brazylii z Polską w świetle ich aktualnej polityki i praktyki traktatowej

Streszczenie. Artykuł dotyczy umowy o unikaniu podwójnego opodatkowania w zakresie podatków od dochodu oraz zapobiegania uchylaniu się od opodatkowania i unikania opodatkowania między Brazylią i Polską, podpisanej 20 września 2022 r. w kontekście współczesnej polityki i praktyki umów podatkowych Brazylii i Polski. Autor analizuje jej główne cechy w porównaniu ze stanowiskiem Brazylii i Polski wobec Konwencji Wielostronnej implementującej środki prawa traktatowego mające na celu zapobieganie erozji podstawy opodatkowania i przenoszenia zysku oraz zmian wprowadzonych do Konwencji Modelowej OECD i Konwencji Modelowej ONZ w 2017 r., a także inne regulacje w niej zawarte, które mają istotne znaczenie w polityce i praktyce traktatowej obu państw. Badania koncentrują się wokół tezy, czy i w jakim stopniu umowa Brazylii z Polską stanowi przykład unikalnej bilateralnej umowy podatkowej o specyficznych cechach, czy też może stanowić swoisty wzorzec dla bilateralnych umów podatkowych: Brazylii – z innymi państwami członkowskimi OECD oraz Polski – z innymi państwami Ameryki Południowej.

Słowa kluczowe: Brazylia, Polska, bilateralna umowa podatkowa, Konwencja Wielostronna (MLI), Konwencja Modelowa OECD, Konwencja Modelowa ONZ, polityka traktatowa, praktyka traktatowa

COPE Member since 2022 JM17111

https://doi.org/10.18778/1509-877X.2023.04.03

Articles

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An Analysis of the Principal Purpose Test Rule and the General Anti-Abuse Rules Contained in the Brazil-Poland Double Taxation Convention Signed in September 2022

Summary. The paper deals with the analysis of the legal aspects of the principal purpose test rule (PPT-Rule) and the general anti-abuse rules contained in the Brazil-Poland Double Tax Convention concluded on 20th September, 2022, in the light of Brazil's international tax treaty policy and practice. The Authors discuss issues related to the interaction between the PPT-Rule and other treaty specific anti-tax avoidance provisions as well as the objective and subjective elements of the PPT-Rule itself and the possible consequences of its application, especially challenges related to the legal certainty principle.

Keywords: Brazil, Poland, double tax convention, anti-abuse rules, principle purpose test rule (PPT-Rule)

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Received: 31.07.2023. Verified: 26.08.2023. Accepted: 23.10.2023.

1. Introduction

After the OECD had released various reports regarding the analysis and the measures to be taken in order to address the phenomenon of the Base Erosion and Profit Shifting (BEPS), many countries signed the G-20/OECD BEPS Plan Action 15 "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting". This multilateral convention implements, among other things, some measures proposed by the G-20/OECD BEPS Plan Action 6[1]. This Action 6 determined, as a minimum standard to address treaty abuse, the following measures:

1) Initially, changes to the title and preamble of double taxation conventions, in order to introduce a clear statement that the parties to the convention intend to avoid creating opportunities for non--taxation or reduced taxation through tax evasion or avoidance, in particular treaty shopping arrangements;
2) Additionally, either the inclusion of the Principal Purpose Test (PPT) rule or a Limitation of Benefit (LOB) clause supplemented by a mechanism that deals with conduit financing arrangements.

Poland is one of the signatory countries to the Multilateral Convention and has agreed to incorporate the PPT rule in their tax treaties. Even though Brazil has not signed the BEPS multilateral agreement as Poland did, it has been adopting in its bilateral treaty negotiations the *minimum standards* set out in the G-20/OECD BEPS Project.

Accordingly, the double taxation convention signed in September 2022 by Poland and Brazil (not yet in force) contains the PPT rule in article 28 (6). The rule follows the OECD Model Convention (2017 Version), stating that[2]

> notwithstanding the other provisions of this Agreement, a benefit under this Convention shall not be granted in respect of an item of income[3] if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that

[1] OECD. *OECD/G20 Base Erosion and Profit Shifting Project*, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*, OECD Publishing, Paris 2015.

[2] Republic of Brazil & Republic of Poland, *Agreement Between the Federative Republic of Brazil and the Republic of Poland for the Elimination of Double Taxation in Respect to Taxes on Income and the Prevention of Tax Abuse*, New York, 2022, https://concordia.itamaraty.gov.br/detalhamento-acordo/12613?tipoPesquisa=2&TipoAcordo=BL&IdEnvolvido=246

[3] The OECD Model also suggests that the PPT's wording includes items of "capital" (additionally to income), but that has not been included in Brazil and Poland's signed treaty.

> benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Agreement.

In its first part, this paper will indicate some controversial issues regarding the PPT rule, considering the Commentaries to the OECD Model Convention of 2017 (OECD Model)[4].

Afterwards, the paper will comment on the anti-abusive rules and the PPT rule contained in the Convention signed by Brazil and Poland (not yet in force) in the light of the Brazilian international tax policy.

The paper takes into account previous studies carried out by its Authors regarding the PPT rule and Brazilian international fiscal policy[5].

2. The PPT rule

The PPT rule is a General Anti-Avoidance Rule (GAAR) introduced in the OECD Model Tax Convention in 2017. According to the OECD Commentaries to the 2017 Model Tax Convention (art. 29, para. 169), this rule was based on a "guiding principle" that had been suggested by the OECD's Commentaries since 2003[6].

The PPT rule was introduced in addition to many Specific Anti-Avoidance Rules (SAARs) that have been proposed by the OECD over the years, such as the LOB clause (which seeks to ensure that there is a sufficient link between the entity claiming treaty benefits and the resident State)[7],

[4] OECD. *Model Taxation Convention on Income and on Capital, Condensed Version 2017*, OECD Publishing, Paris 2017.

[5] See M.A.P. Furman, *Abuso de Tratados Internacionais e a Regra do Principal Purpose Test*, Arraes, Belo Horizonte 2022 and M.S. de Godoi, S.B.M. Cirilo, *A exigência de um padrão mínimo de combate ao abuso dos Tratados tributários (Ação 6 do Projeto BEPS) e a política fiscal internacional brasileira*, "Revista de Direito Internacional Econômico Tributário" 2020, vol. 15, pp. 1–43.

[6] See OECD Commentaries on art. 1, para. 61 (OECD. *Model Taxation Convention on Income and on Capital, Condensed Version 2017*, OECD Publishing, Paris 2017). It is worth pointing out some differences between the PPT rule and the guiding principle, such as: (i) the subjective element and the tax benefit being one of and not the principal purpose of the transaction; (ii) the burden of proof and (iii) the reasonableness test.

[7] Since 1992, the OECD has suggested that this rule integrates anti-abuse clauses that had been suggested over the years, such as: look through approach clause, exclusion approach clause, subject to tax approach, beneficial owner, channel approach, and *bona fide* clauses (safeguards).

holding periods provisions introduced within articles that regard dividends and capital gains (Articles 10 and 13 of the OECD Model Convention) and rules that deal with permanent establishments (PEs).

The PPT rule is, accordingly to the G-20/OECD BEPS Plan Action 6, necessary to address forms of abuse that cannot be properly prevented by the existing SAARs, since SAARs are objective and specific provisions, and, therefore, can reach only certain types of transactions (it is impossible to foresee and prevent all abusive forms of tax planning). The PPT rule, on the other hand, can evaluate and prevent abuse in a general approach, and be applied with a case-to-case analysis[8].

2.1. PPT rule's interaction with SAARs

The PPT rule initiates with the expression "notwithstanding the other provisions of this Agreement (…)", indicating its connection with other rules contained in the tax treaty.

The OECD Commentaries on Art. 29, para 171 and 172, states that this rule supplements other anti-abuse provisions, such as the LOB clause, hence the later rule focuses only on the relationship between the taxpayer and the State of residency but does not guarantee that the treaty was not improperly used.

A practical example of the supplementary nature of the PPT rule is given in para. 173 of the OECD Commentaries. In sum, a public-traded entity can be held as qualified person (resident) if their shares are regularly traded, and it is managed and controlled in the resident State. If, for example, a bank is a public company and attends to those requirements, the bank's ownership could pass the LOB clause. However, the bank could try to attract benefits such as lower source taxation, re-passing the funds to third parties, therefore performing a conduit financing arrangement. Thus, the operation can be structured to improperly gain benefits from lower source taxation in spite of the resident being a qualified person.

Considering this, the PPT is compatible with other SAARs, since each rule addresses a different aspect of the operation – if a person passes the LOB test or another SAARs, it does not necessarily mean that the transaction overall done by this person will pass the PPT rule[9].

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[8] See OECD. *OECD/G20 Base Erosion and Profit Shifting Project, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*, OECD Publishing, Paris 2015, p. 23 (section A–19).

[9] In this sense: A. Pegoraro, *A Cláusula de Principal Propósito (PPT) nos acordos para evitar a dupla tributação da renda*, IBDT, Kindle Edition, São Paulo 2021, position 107;

2.2. The subjective element and reasonableness test

Perhaps the most debated and problematic issue regarding the PPT is the "subjective" test, since the rule states that the benefits can be denied if it is "reasonable to conclude, considering all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction". This is the main element that, as will be shown, is criticised by scholars who understand that the rule is too vague and uncertain.

Regarding the reasonableness test ("reasonable to conclude"), the OECD Commentaries on art. 29, para. 178, states that it is important to make a case-by-case objective analysis of all the facts involved in the transaction. Also, it establishes that it is not necessary to prove the intentions of the persons concerned by the operation, but it must be reasonable to conclude that the transaction aimed, as one of its principal purposes, to obtain benefits, in order to check if the arrangement "can only be reasonably explained" by a tax benefit[10].

Furthermore, para. 179 of the Commentaries indicates that a person cannot avoid the PPT rule simply by asserting that the arrangement was not undertaken to obtain benefits, and that all evidence should be weighed to verify if the reasonableness test is met. Para. 181 of the Commentaries

D.J. Duff, *Tax Treaty Abuse and The Principal Purpose Test – Part 2*, "Canadian Tax Journal" 2018, vol. 66, no. 4, pp. 961–963; I. Zahra, *The Principal Purpose Test: A Critical Analysis of Its Substantive and Procedural Aspects – Part 1*, "Bulletin for International Taxation" 2019a, vol. 73, no. 11, Online Journals, p. 620; L. De Broe, J. Luts, *BEPS Action 6: Tax treaty abuse*, "Intertax" 2015, vol. 43, no. 2, p. 133; L.E. Schoueri, C.G. Moreira, *Abuso dos Acordos de Bitributação e Teste do Objetivo Principal: Repensando o Teste do Objetivo Principal à Luz da Segurança Jurídica*, [in:] C.C.A. de Azevedo, O.G. da Gama Vital de, M.A.F. Macedo (eds.), *Direitos Fundamentais e Estado Fiscal: estudos em homenagem ao professor Ricardo Lobo Torres*, JusPodivm, Salvador 2019, p. 783; R.J. Danon, *Treaty Abuse in the Post-BEPS World: Analysis of the policy shift and impact of the principal purpose test for MNE Groups*, "Bulletin for International Taxation" 2018, vol. 72, no. 1, p. 35; and V. Chand, *The interaction of the Principal Purpose Test (and the Guiding Principle) with Treaty and Domestic Anti-avoidance rules*, "Intertax" 2018a, vol. 46, no. 2, pp. 116–118. Andrés Báez Moreno (A.B. Moreno, *GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test. What Have We Gained from BEPS Action 6*? "Intertax" 2017, vol. 45, pp. 440–441) disagrees that an operation could be held as abusive if one of its aspects passes a LOB test and understands that applying the PPT rule in this case would be against the rule's objective element. For this author, the PPT could only be applied for rule shopping operations since treaty shopping is to be addressed by LOB rules (residency tests).

[10] See OECD Model Tax Convention 2017, p. 592.

explains that, when an arrangement is "linked to a core commercial activity, and its form has not been driven by considerations of obtaining a benefit, it is unlikely that its principal purpose will be considered to be to obtain that benefit".

Para. 174 of the Commentaries indicates that the PPT intends to ensure that tax treaties apply "in accordance with the purpose for which they were entered into, i.e. to provide benefits in respect of bona fide exchanges of goods and services, and movements of capital and persons as opposed to arrangements whose principal objective is to secure a more favourable tax treatment".

Considering this scenario, it can be concluded that the "subjective" element is not indeed so subjective, since the PPT does not intend to pursue the subjective and personal intentions of the taxpayer, but it seeks, in an objective way, to evaluate if the operation is genuine or if it was structured artificially (the lack of business purposes)[11].

However, the fact that the PPT refers to "one of" the principal purposes and not the principal purpose may be problematic, although the OECD Commentaries and examples of the application of the PPT clearly indicate that having taxpayer a tax benefit as one of the principal purposes of the arrangement is not enough to apply the PPT and deny the treaty application.

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[11] In this sense: A.B. Moreno, *op. cit*., p. 435; A. Pegoraro, *op. cit*., p. 136; B. Kuzniacki, *The Principal Purpose Test (PPT) in BEPS Action 6 and the MLI: Exploring Challenges Arising from Its Legal Implementation and Practical Application*, "World Tax Journal" May 2018, p. 261; C.P. Taboada, *OECD Base Erosion and Profit Shifting Action 6: The General Anti-Abuse Rule*, "Bulletin for International Taxation" 2015, vol. 69, no. 10, p. 605; C. Elliffe, *The Meaning of the Principal Purpose Test: One Ring to Bind Them All*? "World Tax Journal" 2019, vol. 11, p. 13; I. Zahra, *The Principal Purpose Test: A Critical Analysis of Its Substantive and Procedural Aspects – Part 1*, "Bulletin for International Taxation" 2019a, vol. 73, no. 11, Online Journals, p. 614; M.L. Gomes, *The principal purpose test in the Multilateral Instrument*, Lumen Juris, Rio de Janeiro 2021, p. 98. Differently, D. Weber, *The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Case Law*. "Erasmus Law Review" 2017, no. 1, Online Journal, p. 49 agrees that the test is objectified but understands that the taxpayer intentions will be considered. In another sense, L. De Broe, J. Luts, *op. cit*., p. 132 and M. Lang, *BEPS Action 6: Introducting na Antiabuse Rule in Tax Treaties*, "Tax Notes International" 2014, vol. 74, no. 7, p. 658 criticize the evaluation of the taxpayer's intentions.

2.3. The objective element

If the subjective element is satisfied, the PPT can still be ruled out if it is "established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention".

Further criticism relates to the burden of proof imposed by the PPT rule, and a question can be raised as to if only the taxpayer must fulfil the objective element or if the tax authorities must also prove that granting the benefit would not be in accordance with the tax convention in order to apply the PPT rule.

In this sense, some authors criticise the PPT rule's burden of proof, since they understand that tax authorities must only show that it would be *reasonable* to conclude that obtaining the benefit is one of the principal purposes (subjective element); meanwhile, the taxpayer would have to *establish* that obtaining such benefit does not confront the double taxation convention[12].

Considering the OECD's Commentaries and examples of the PPT rule, it can be concluded that both elements must be satisfied by tax authorities, and the wording of the PPT rule could be improved by expressly stating that tax authorities must also establish that granting the benefit is not in accordance with the Convention's relevant provisions.

Furthermore, it is not clear what the relevant provisions of the Convention are. In some examples, the OECD Commentaries refer to the treaty as a whole, while in others – to specific articles (such as the dividend rule). Considering Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), a convention must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", and, therefore, it could be understood that the convention must be evaluated as a whole (as well as its protocols) in order to apply the PPT.

2.4. The PPT rule's consequences

The application of the PPT rule, according to the OECD Commentaries on Art. 29, para. 183, could be subjected to some kind of approval process within the administration.

12 See L. De Broe, J. Luts, *op. cit.*, p. 132; M.L. Gomes, *op. cit.*, p. 139; M. Lang, *op. cit.*, p. 660; R.J. Danon, *op. cit.*, p. 18; S. van Weeghel, *A Deconstruction of the Principal Purposes Test*, "World Tax Journal" 2019, vol. 11, no. 1, p. 14; and V. Chand, *op. cit.*, p. 21.

Para. 184 of the Commentaries suggests the introduction of a saving/discretionary relief clause in order to allow tax authorities to grant the benefit pursued or another tax benefit if such authority concludes that the benefits would be granted despite of the arrangement that triggered the PPT rule. It is suggested by para. 185 of the Commentaries that the competent authority of the source State consults the resident State before rejecting the benefits that were claimed.

A question may arise as to whether alternative benefits can be granted even if this clause is not introduced in a tax treaty, and if authorities can reclassify the operation in order to grant alternative benefits. The answer is positive: a GAAR requires the reclassification of the operation, and this reclassification could also happen considering domestic provisions[13]. The PPT rule aims to disregard abusive/non-substantial or genuine transactions, so tax authorities can grant benefits that would already be granted if the arrangement was not structured in an abusive manner.

2.5. The PPT rule's compatibility with the legal certainty principle

Concerns have been raised as to whether the PPT rule complies with general tax principles usually adopted by national Constitutions and EU Law, such as the legal certainty principle. Mostly, the subjective element and the burden of proof of the PPT are held as incompatible aspects of the rule, since the opinion of various authors is that the PPT gives discretionary power to tax authorities, without a clear scope of application[14].

However, the fact is, as with any other GAAR, that the PPT rule will naturally have a certain degree of uncertainty since it aims to achieve forms of tax planning that cannot always be foreseen and must be defined in a case-by-case scenario[15]. The OECD Commentaries demonstrate a clear effort to show that the rule aims to apply only to artificial, non-genuine or operations that lack of business purposes that were structured in order to obtain tax benefits that would not be granted otherwise. If the PPT is incorporated to the convention and applied in accordance to

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[13] See A. Pegoraro, *op. cit.*, p. 172; M.L. Gomes, *op. cit.*, p. 149; I. Zahra, *The Principal Purpose Test: A Critical Analysis of Its Substantive and Procedural Aspects – Part 2*, "Bulletin for International Taxation" 2019b, vol. 73, no. 11, Online Journals, p. 689; V. Chand, *op. cit.*, p. 40; D.J. Duff, *op. cit.*, p. 970.

[14] In this sense, see A.B. Moreno, *op. cit.*, p. 445; L. De Broe, J. Luts, *op. cit.*, p. 146; M. Lang, *op. cit.*, p. 663, and R.J. Danon, *op. cit.*, p. 26.

[15] Similarly, see C.P. Taboada, *op. cit.*, p. 608 and D. Weber, *op. cit.*, p. 56.

the OECD's Commentaries and guidelines, the rule could not be held as too vague or subjective, and thus it does comply with principles such as the legal certainty.

3. The Brazil-Poland double taxation convention (signed in September 2022, not yet in force) and its anti-abuse rules in the light of the Brazilian international tax policy

In September 2022, Brazil and Poland concluded negotiations and signed a double taxation convention, which is not yet in force.

As commented in the introduction, Poland has signed the MLI and has agreed to adopt the PPT rule in its treaties. Brazil has also been including anti-abuse rules suggested by the BEPS Plan Action 6 in its other recent negotiated treaties, even though it has not signed the MLI and it is not a member of the OECD.

3.1. Title and preamble

The title of the Brazil-Poland Convention states that the treaty aims to eliminate double taxation of income to prevent tax evasion "and avoidance". This reference in the title of the treaty to the prevention not only of tax evasion but also of tax avoidance is a novelty in Brazilian treaties – a novelty that appears in the treaties with Switzerland, the United Arab Emirates, and Singapore (signed in 2018 and already in force), but does not appear in the treaties signed prior to the BEPS Project. In the case of the treaty with India, for example, signed in 1988 and revised in 2013, the title mentions the prevention of tax evasion, but not tax avoidance.

In the preamble to the Brazil-Poland Convention, as well as in the preamble to the treaties Brazil signed in 2018 with Singapore, the United Arab Emirates, and Switzerland, it is stated that the objective of the agreement is to eliminate double taxation in relation to taxes on income, "without creating opportunities for non- taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States)". In effect, the text of the OECD Model Convention was used literally in the Brazil-Poland Convention. In treaties signed by Brazil from the 1990s onwards, the preamble only refers to the prevention of tax evasion. In the case of the oldest treaties signed by Brazil, from the 1970s and 1980s, no mention is even made of the prevention of tax evasion, the parties' objective being only to avoid double taxation, as stated in the Brazil-Luxembourg treaty, signed in 1978.

3.2. Article 1

In Article 1 of the Brazil-Poland Convention, which deals with the subjective scope of the treaty, there is a provision that seeks to avoid an inappropriate use of the treaty through an entity residing in one of the two countries, but which is transparent for tax purposes and whose income is not taxed by the country of residence. This norm, which can be considered a kind of anti-abuse rule, is also included in the 2018 agreements Brazil signed with Switzerland, the United Arab Emirates, and Singapore, but it is not included in the treaties signed before 2018 by Brazil, as is the case with the convention signed with India in 1988 and with Israel in 2002.

3.3. Article 5

In Article 5 of the Convention, which deals with permanent establishments, there is an anti-abuse rule intended to complement the rule that "a building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months". According to this anti-abuse rule (Article 5.4 of the Convention),

> For the sole purpose of determining whether the twelve-month period referred to in paragraph 3 has been exceeded,
>
> a) where and enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site or construction or installation project and these activities are carried on during periods of time that do not last more than twelve months, and
>
> b) connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the firs-mentioned enterprise, these different periods of time shall be added to the period of time during which the first mentioned enterprise has carried on activities at that building site or construction or installation project.

It is worth noticing that the period of 12 months contained in the rule of the convention with Poland is not common in Brazilian treaties, which generally adopt, regarding this rule, the period of 6 months.

This anti-abuse rule contained in Art. 5.4 of the Convention with Poland is mentioned/suggested in the Official Commentaries to the OECD Model (item 52 of the comments to Art. 5), but it is not found in the other treaties signed by Brazil.

3.4. The PPT Rule – Art. 28

The OECD Model Convention updated in 2017 brings in Art. 28 a series of options for general rules to avoid abuse or inappropriate use of the treaty, and the G-20/OECD BEPS Project considers a minimum standard (Action 6) to provide in bilateral treaties for some form of a combination of these anti-abuse rules, such as the LOB clause (in its complete or simplified versions) and the so-called PPT rule.

In the case of the Brazil-Poland Convention, the rules on "entitlement to benefits" are in Article 28. In this article, there is the following combination of anti-abuse norms.

In Article 28 paragraph 1, a specific anti-abuse rule is defined, aimed at situations in which one of the contracting States already foresees, at the time of signature of the agreement, or foresee in the future, privileged tax regimes for offshore income derived by a resident company from activities such as shipping, banking, insurance, operation as holding company or co-ordination centre to a group of companies which carry on business primarily in the third States. In such cases, the other Contracting State will not be obliged to guarantee the application of the benefits of the Convention on the income derived from these offshore activities or on the dividends paid from such income.

In Article 28 paragraph 2, a typical simplified Limitation on Benefits rule is used to avoid treaty shopping through a relatively simple test regarding the possible control of a company by non-resident entities. According to this rule,

> Notwithstanding the provisions of paragraph 1, a company that is a resident of a Contracting State and derives income from sources within the other Contracting State shall not entitled in that other Contracting State to the benefits of this Agreement if, at that time or on at least half of the days of a twelve-month period that includes that time, persons who are not residents of the first-mentioned State or that are not entitled to benefits of this Agreement own, directly or indirectly, at least 50 per cent of the shares of the company. However, the preceding sentence shall not apply if that company has its principal class of shares regularly traded on one or more recognised stock exchanges, or carries on in the Contracting State of which it

> is a resident a substantive business activity other than the mere holding of securities or any other assets, or the mere performance of auxiliary, preparatory or any other similar activities in respect of other related entities.

In Article 28 paragraph 3, a specific anti-abuse rule is used to deal with situations where an enterprise of a Contracting State derives income from the other Contracting State, but the first Contracting State assigns that income to a permanent establishment of the enterprise situated in a third State, being such income exempt from taxation in the first State. In this situation, if taxation in the third State is less than 75% of the taxation that would be imposed by the first State if the permanent establishment were located there, then the provisions of the treaty will not apply to said income, remaining taxable in accordance with the provisions of the legislation of the other Contracting State.

For all three anti-abuse rules put in Article 28 paragraphs 1 to 3, the Convention provides for a saving clause in Article 28 paragraph 4. The competent authority of the Contracting State in which benefits were to be denied according to paragraphs 1–3 can grant the benefits "taking into account the object and the purpose" of the Convention, but only if "such resident demonstrates to the satisfaction of such competent authorities that neither its establishment, acquisition or maintenance, nor the conduct of its operation, had as one of its principal purposes the obtaining of benefits under this Agreement".

It is worth noticing that, in the case of the Brazil-Switzerland convention, there is no such saving clause rule contained in Article 28 paragraph 4 of the treaty with Poland. The three anti-abuse rules mentioned above are contained in the agreement with Switzerland, but not the saving clause.

Complementing these three aforementioned anti-abuse norms, the Brazil-Poland Convention adopts, in the last paragraph of its Article 28, a PPT rule in the exact terms suggested in the 2017 OECD Model Convention (as occurred in the 2018 Brazilian treaties with Switzerland, the United Arab Emirates, and Singapore):

> Art. 28, paragraph 6. Notwithstanding the other provisions of this Agreement, a benefit under this Agreement shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Agreement.

Finally, the Protocol of the Brazil-Poland Convention establishes in its item 10 that "the provisions of the Agreement shall not prevent a Contracting State from applying its domestic legislation aimed at countering tax evasion and avoidance, whether or not described as such, including provisions of its law regarding 'thin capitalisation' or to avoid the deferral of payment of the income tax such as the "controlled foreign corporations/CFCs" legislation".

It is worth noticing that in Brazil, federal tax authorities do not use a typical GAAR to disregard transactions that are held as abusive, as those operations are currently questioned by the application of a broad concept of sham. Also, the Brazilian Constitutional Court has not yet properly analysed the limits, nature, and powers of a typical GAAR[16].

4. Final remarks

In order to come into force, the Convention signed by Brazil and Poland in September 2022 must pass the legislative power scrutiny. In the case of Brazil, this legislative power scrutiny has not been started yet (July 2023).

Brazil and Poland decided to use in the Convention signed in September 2022 the entire arsenal of anti-abuse rules provided for in the 2017 OECD Model Convention, perfectly complying with the minimum standard of the Action 6 of the BEPS Project, which demonstrates that Brazil, even though it has not signed the BEPS multilateral agreement as Poland did in 2018, has been adopting in its bilateral treaty negotiations the *minimum standards* set out in the BEPS Project Reports in 2015.

With some minor differences, the Brazil-Poland Convention (not yet in force), regarding anti-abuse rules, follows the same pattern that one can see on Brazilian conventions signed with Switzerland, Singapore, and the United Arab Emirates in 2018, which are in force since 1st January, 2022. This pattern can also be seen in the Protocol that Brazil signed with Argentina in 2017 (already in force) and with Sweden in 2019 (not yet in force) as well as on the DTCs that Brazil signed with Uruguay in 2019 (not in force) and with UK and Norway in 2022 (not yet in force).

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16 As regards Brazilian Supreme Court case law, see M.S. de Godoi, *Exercício de Compreensão Crítica do Acórdão do Supremo Tribunal Federal na Ação Direta de Inconstitucionalidade n. 2.446 (2022) e de suas Consequências Práticas sobre o Planejamento Tributário no Direito Brasileiro*, "Direito Tributário Atual" 2022, vol. 52, pp. 465–485.

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Analiza klauzuli testu celu podstawowego i klauzul ogólnych zawartych w umowie o unikaniu podwójnego opodatkowania między Brazylią i Polską podpisanej we wrześniu 2022 r.

Streszczenie. Artykuły dotyczy analizy normatywnych aspektów klauzuli testu celu podstawowego (PPT-Rule) oraz klauzul ogólnych zapobiegających nadużyciom traktatu zawartych w brazylijsko-polskiej bilateralnej umowie o unikaniu podwójnego opodatkowania zawartej 20 września 2022 r. w świetle brazylijskiej polityki i praktyki bilateralnych umów podatkowych. Autorzy omawiają zagadnienia związane z interakcją klauzuli celu testu podstawowego (PPT-Rule) z innymi traktatowymi klauzulami szczególnymi zapobiegającymi traktatowymi przeciwdziałającymi unikaniu opodatkowania, a także obiektywne i subiektywne elementy samej klauzuli testu celu podstawowego (PPT-Rule) oraz możliwe konsekwencje jej stosowania, w szczególności wyzwania związane z wymogami prawnymi zasada pewności.

Słowa kluczowe: Brazylia, Polska, umowa o unikaniu podwójnego opodatkowania, klauzule przeciwdziałające nadużyciom traktatu, klauzula testu celu podstawowego (PPT-Rule)

COPE Member since 2022 JM17111

https://doi.org/10.18778/1509-877X.2023.04.04

Articles

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Exit Taxation and the DTT Between Poland and Brazil

Summary. The article addresses the issue of double taxation elimination in cases involving the application of an exit tax under the DTT between Poland and Brazil, which was signed in 2022. The author explains the key characteristics of the Polish exit tax and then elaborates on an appropriate allocation rule in the context of exit taxation. The article also discusses Article 24 of the Polish-Brazil DTT, which deals with double taxation. Finally, the author presents the specific solutions adopted in other countries' double taxation treaties to eliminate double taxation in cases where an exit tax is imposed.

Keywords: exit tax, double taxation, emigration

1. Introduction

On 20th September, 2022, Poland and Brazil concluded the Agreement for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance (hereinafter referred to as

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Received: 8.09.2023. Verified: 21.09.2023. Accepted: 22.09.2023.

“the Poland-Brazil DTT”). For the last decade in Poland, many provisions introducing tax institutions previously unfamiliar with Polish law have been implemented, especially in income taxation. As an example, in 2019, exit tax regulations entered into force. Since the Poland-Brazil DTT is one of the first treaties concluded after 2019, it is crucial to consider whether an issue of double taxation elimination after the imposition of exit tax was considered when establishing the wording of the analysed treaty. It must be pointed out that this problem concerns, in practice, taxpayers emigrating from Poland, as Brazil does not impose an exit tax.

2. Polish exit tax – key features

Capital and people mobility as well as the freedom of establishment encourage many taxpayers to change their residence or transfer their business assets abroad. This phenomenon impacts national budgets – some countries may lose their tax revenues. In addition, legislators face the dilemma of protecting tax claims against tax avoidance[1]. States can prevent this problem or ignore it. One of the methods of combating the effects of taxpayers’ emigration on the tax level is introducing a particular type of regulation, namely an exit tax. This tax is charged to taxpayers primarily when they leave the country of residence (i.e. in cases of emigration). It can be imposed on both natural and legal persons. In this case, the fiction is assumed that a taxpayer alienates their assets and is therefore obliged to pay tax on capital gains[2].

Exit tax in Poland was introduced in 2019, in connection with the implementation of the Council Directive of 12th July, 2016, laying down rules against tax avoidance practices that directly affect the functioning of the internal market[3]. Generally, as stated under Art. 1 of the ATA Directive, this act applies only to taxpayers subject to corporate tax. However, along

[1] L. de Broe, *Hard times for emigration taxes in the EC*, [in:] H.P.A.M. Arendonk, F.A. van Engelen, S.J.J.M. Jansen (eds.), *A tax globalist: the search for the borders of international taxation: essays in honour of Maarten J. Ellis*, Amsterdam 2005, p. 211; M. Nestmann, *op. cit.*, p. 551

[2] A. Nowak-Piechota, *Podatek od wyjścia – analiza i ocena regulacji*, “Przegląd Podatkowy” 2019, no. 1, p. 34.

[3] (EU) 2016/1164, Official Journal EU L 193 of 19.07.2016, pp. 1–14, hereinafter referred to as “ATA Directive”.

with the exit tax introduction to the Act on Corporate Income Tax[4], the Polish legislator decided to establish similar provisions for natural persons[5].

Taxpayers are subject to exit tax upon emigration or a transfer of certain assets abroad if Poland loses its right to tax capital gains on the alienation of their property and the transferred asset remains the ownership of the same taxpayer[6]. This tax is imposed on unrealised capital gains which are built-in business assets. Exceptionally, in the case of natural persons, private property [Pol. *majątek osobisty*], defined under the PIT Act, may be subject to exit tax (e.g. shares or interests in a partnership), provided that a person has been a Polish tax resident for a total of at least five years in ten years preceding the date of emigration[7].

According to the Polish provisions, income is computed as a market value for the transferred assets at the time of exit, less their tax value at the time of departure[8]. This regulation ensures that the exit state (here – Poland) is entitled to tax the economic value of a capital gain created in its territory, although the gain was not realised before the transfer or emigration. In this case, an arm's length principle is applied when tax base is being established. The CIT and PIT exit tax rate equals, in principle, 19%[9].

As a rule, taxpayers are obliged to pay the amount of exit tax assessed immediately. Exceptionally, the tax payment may be deferred by paying it in instalments over a maximum of five years (sometimes with interest and a guarantee). It concerns only transfers of assets or a change of residence within the European Union (and the EEA)[10].

[4] Act of 15th February, 1992, on Corporate Income Tax (*Ustawa o podatku dochodowym od osób prawnych)*, Journal of Laws PL 2022, heading 2587, amended, hereinafter referred to as: "the CIT Act".

[5] Act of 23rd October, 2018, amending the Personal Income Tax Act, the Corporate Income Tax Act, the Tax Ordinance Act and certain other acts (Journal of Laws PL, heading 2193, amended).

[6] Art. 24f(2) of the CIT Act and Art. 30da(2) of Act of 26th July, 1991, on Personal Income Tax (*Ustawa o podatku dochodowym od osób fizycznych*), Journal of Laws PL 2022, heading 2647, amended, hereinafter referred to as: "the PIT Act".

[7] Art. 30da(3) of the PIT Act.

[8] Art. 24f(5) of the CIT Act and Art. 30da(7) of the PIT Act.

[9] Art. 24f(1) of the CIT Act and Art. 30da(1)(1) of the PIT Act.

[10] Art. 24i of the CIT Act and Art. 30de of the PIT Act.

3. Exit tax and allocation of taxing rights

Establishing an appropriate allocation rule under a particular double tax treaty for cases involving an exit tax is critical. From the perspective of both the emigration and the immigration state, two circumstances may give rise to a double taxation (or double non-taxation). The first country taxes an exit of unrealised gains, while the other taxes an actual sale and taxation of capital gains. In practice, the countries – parties to a particular treaty – may apply different provisions of that treaty that allocate taxing rights.

A distributive rule based on Art. 13 of the OECD Model Tax Convention on Income and on Capital (hereinafter referred to as: "the OECD Model")[11] or the UN Model Double Taxation Convention between Developed and Developing Countries (hereinafter referred to as: "the UN Model")[12] concerning capital gains is applied most in this case[13]. However, it must be noted that under this provision, the term "alienation" is used in all its paragraphs, whereas an exit tax is levied on deemed alienation of assets. The Convention does not define the term "alienation". Thus, according to Art. 3(2) of the OECD Model, corresponding to Art. 3(2) of the UN Model, any term not defined in the Convention should have the meaning it has under the domestic law of the state applying a particular treaty. As a result, if the domestic tax law considers a deemed alienation as an alienation, Art. 13 of a treaty should be considered when an exit tax is imposed. Additionally, according to the OECD and the UN Commentary on Art. 13, the same rules should apply to capital appreciation of assets as in the case of the alienation of such assets[14].

[11] OECD (2017), *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing, https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm

[12] UN (2021), *Model Double Taxation Convention between Developed and Developing Countries 2021*, United Nations, https://financing.desa.un.org/document/un-model-double-taxation-convention-between-developed-and-developing-countries-2021

[13] V. Chand, *Exit Charges for Migrating Individuals and Companies: Comparative and Tax Treaty Analysis*, "Bulletin for International Taxation" 2013, no. 4/5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250769 (access: 31.07.2023).

[14] Para. 9, first sentence: *Commentary on Article 13, Commentaries on the Article of the Model Tax Convention on Income and on Capital* and *Commentaries on the Articles of the United Nations Model Double Taxation Convention Between Developed and Developing Countries.*

Under the Poland-Brazil DTT, a distributive rule concerning capital gains is governed by Art. 14 of this treaty:

ARTICLE 14
Capital Gains

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

3. Gains that an enterprise of a Contracting State that operates ships or aircraft in international traffic derives from the alienation of such ships or aircraft, or of movable property pertaining to the operation of such ships or aircraft, shall be taxable only in that State.

4. Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, as well as certificates or participating units of an investment fund, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in paragraph 2 of Article 6, situated in that other State.

5. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4 that arise in the other Contracting State may be taxed in that other State.

Considering the wording of Art. 14, it seems that Para. 5 may be a base to allocate taxing rights between the countries when exit tax is imposed (apart from the transfer of assets subject to an immovable property clause regulated under Art. 14(4) of the Poland-Brazil DTT). This approach may be confirmed in the Manual for the Negotiation of Bilateral Tax Treaties 2019 (hereinafter referred to as: "the Manual")[15]. Paragraph 470 of the Manual concerning Art. 14(6) of the UN Model, which corresponds to Art. 14(5) of the Poland-Brazil DTT, states that some countries may use this provision to confirm their right to impose an exit tax provided under the domestic law on capital gains accrued

[15] https://www.un.org/esa/ffd/publications/manual-bilateral-tax-treaties-update-2019.html

before a change of residence. The Manual refers to the Commentary of the UN Model and Art. 1(3) of the UN Model Convention, according to which exit taxes are generally accepted in a tax treaty practice. However, a fundamental condition is that the tax liability in this case must arise before a transfer of residence. Additionally, this liability may not extend to income accruing after the change of residence.

As mentioned above, the analysed provision may be applied when the Polish exit tax is imposed on an emigrating taxpayer. Polish regulations in this regard meet the requirements stated in the Manual and the Commentary of the UN Model. According to Polish PIT and CIT provisions, the tax liability arises on the day preceding the day of the cessation of residence (or transfer of some assets abroad)[16]. Thus, a Polish taxpayer who emigrates to Brazil may seek the allocation of taxing rights based on Art. 14(5) of the Poland-Brazil DTT. It must be noted that, traditionally, Art. 13(5) of the OECD Model Convention (or Art. 13(8) of the UN Model), being an origin under both the OECD Model and UN Model to Art. 14(5) of the Poland-Brazil DTT, is governed by a residuary clause.

However, the Poland-Brazil DTT applied an alternative to the traditional wording of Art. 13(5) of the OECD Model Convention (or Art. 13(8) of the UN Model). According to Art. 14(5) of this treaty, either or both states may tax gains from the alienation of the property not mentioned in Art. 14 para. 1–4. Thus, the state of residence will eliminate double taxation under Art. 24 of the Poland-Brazil DTT.

It may seem that the implementation of an alternative distribution of taxing rights of a 'sweep-up' rule under Art. 14(5) of the Poland-Brazil Treaty may be preferable in the context of exit taxation. Additionally, it is the first Polish double tax treaty that modifies the traditional wording of the provision mentioned above based on the OECD or the UN Model. One may even conclude that this article was adopted in its current form to help emigrating taxpayers avoid double taxation resulting from the exit tax.

At first sight, the analysed construction of Art. 14(5) of the Polish-Brazil DTT allows for solving the double taxation problem under the treaty provisions. On the contrary, under the traditional wording of that provision, taxation rights are allocated exclusively to a residence state, which means that an emigrating taxpayer cannot apply the double taxation elimination method provided under the treaty.

[16] Art. 30da(6) and (7) of the PIT Act and Art. 24f(5) and (6) of the CIT Act.

For this reason, it is worth examining the possibility of applying Art. 24 of the Poland-Brazil DTT to the issues involving exit taxation.

4. The elimination of double taxation

Art. 24 governs the elimination of double taxation under the Poland-Brazil DTT.

ARTICLE 24
The elimination of Double Taxation

1. In Poland, double taxation shall be avoided as follows:
Where a resident of Poland derives income which may be taxed in Brazil in accordance with the provisions of this Agreement (except to the extent that these provisions allow taxation by Brazil solely because the income is also income derived by a resident of Brazil), Poland shall allow as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in Brazil. Such deduction shall not, however, exceed that part of the income tax, as computed before the deduction is given, which is attributable to the income which may be taxed in Brazil.
2. In Brazil, double taxation shall be avoided as follows:
Where a resident of Brazil derives income which, in accordance with the provisions of this Agreement, may be taxed in Poland, Brazil shall allow, subject to the provisions of its law regarding the elimination of double taxation (which shall not affect the general principle hereof), as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in Poland. Such deduction shall not, however, exceed that part of the income tax, as computed before the deduction is given, which is attributable to the income which may be taxed in Poland.
3. Where in accordance with any provision of the Agreement income derived by a resident of a Contracting State is exempt from tax in that State, such State may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income.

Firstly, it must be remembered that an article of a treaty eliminating double taxation, based on the OECD Model or the UN Model (basically Art. 23A or Art. 23B), generally deals with double taxation caused by a conflict between residence rule in one country and source rule in another. Additionally, it may solve a concurrent conflict of residency rules that should be solved, in the first place, under Art. 4 of a relevant treaty[17].

However, an imposition of exit taxes causes a *sui generis* non-concurrent conflict of residency rules. It stems from the fact that the tax liability under exit taxation arises when a taxpayer is a resident of an

[17] The OECD Commentary on Art. 23A and 23B, para. 4.

emigration country. In contrast, double taxation occurs when capital gains are realised in the new residence state. As Art. 24 of the analysed treaty does not address this type of conflict, it cannot be applied when an exit tax is imposed.

It can be argued that it is better to convert the unlimited tax liability that comes with an exit tax into a limited tax liability, as suggested by the OECD and UN Commentary on employment stock options. However, it is important to note that the provisions regarding employment income (Article 15 of the OECD and UN Model) and capital gains (Article 13 of the OECD and the UN Model) have different scopes. The first provision allocates taxing rights based on where the employment is exercised. This type of rule is not present in Art. 13 of the OECD and the UN Model, which means that this provision does not provide that the distribution of rights is dependable on the place of a taxpayer's residence when the gain occurred[18].

Even though the proposed approach regarding the transformation of the tax liability may not be accepted, it does not provide an answer to a fundamental question: How should the source of capital gains be determined in this scenerio? This issue is mentioned in the Manual. According to Para. 469 of this document, counties that adopt the alternative version of Art. 13(5) or (6) of a treaty should clarify during negotiations how the source of capital gain is to be determined. Otherwise, the emigrating taxpayer may face obstacles in receiving double tax relief in their country of residence.

An analysis of the Polish-Brazil DTT and official online documents, including the justification to draft legislation on ratification of the Poland-Brazil DTT[19], indicates that this issue has not been addressed. Consequently, according to the Commentary on Art. 13 of the UN Model, Brazil's and Poland's domestic laws will determine the gain's source. However, as stated before, tax liabilities in emigration and immigration countries do not arise

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[18] V. Chand, *Exit Charges…*

[19] Draft Act of 26th January, 2023, on Ratification of the Agreement for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance, signed in New York on 20th September, 2022 (*Projekt ustawy o ratyfikacji Umowy między Rzecząpospolitą Polską a Federacyjną Republiką Brazylii w sprawie eliminowania podwójnego opodatkowania w zakresie podatków od dochodu oraz zapobiegania uchylaniu się i unikaniu opodatkowania oraz Protokołu do tej Umowy, podpisanych w Nowym Jorku dnia 20 września 2022 r.*), no. 2987.

concurrently. Thus, both Poland and Brazil may determine the source of the gain in a different way. This situation, again, may lead to double taxation.

It must be underlined that some countries with exit tax regimes implemented special modifications of Art. 13 in their tax treaties. These treaties grant an emigration state the right to levy an exit tax. In some treaties, there are directly adopted methods of eliminating double taxation for emigrating taxpayers. Most important is that these treaties stipulate that an emigration country may tax capital appreciation of shares and other interests for the residency period of a taxpayer in that country. Then, directly under the provision concerning capital gains taxation (mainly Art. 13), bilateral methods, eliminating double taxation, are implemented, i.e. exemption, step-up, or tax credit methods[20].

Such a solution has been adopted in German tax treaty practice. As an example, Art. 13(6) of the German-Netherlands Income Tax Treaty that stipulates an exemption method, may be presented:

> 6. Where an individual was a resident of a Contracting State and has become a resident of the other Contracting State, the provisions of paragraph 5 shall not prevent the first-mentioned State from taxing under its domestic law the capital appreciation of shares, profit sharing certificates, call options and usufruct on shares and profit sharing certificates in and debt-claims on a company for the period of residency of that individual in the first-mentioned State. In such a case, the appreciation of capital taxed in the first-mentioned State shall not be included in the tax base when determining the subsequent appreciation of capital by the other State[21].

On the other hand, the German-France Tax Treaty under Art. 7(6) regarding exit taxation contains a step-up clause:

> 6. Where an individual has been a resident of a Contracting State for a period of five years or more and has become a resident of the other Contracting State, paragraph 5 shall not prevent the first-mentioned State from taxing under its domestic laws any capital appreciation accrued, during the period of residence of that person in that State, in respect of shares in a company which is a resident of that State. If the first-mentioned Contracting State taxes an individual in respect of such capital appreciation, the other Contracting State shall, if it taxes the capital gains arising from a later alienation of the shares in accordance with paragraph 5, in determining the amount of the capital gains, use as the acquisition costs the value of the shares at

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[20] A. Nowak-Piechota, *Podatek od wyjścia*, Łódź 2018, p. 180.

[21] Convention of 12th April, 2012, between the Federal Republic of Germany and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, unofficial translation, IBFD Tax Research Platform (access: 30.07.2023).

> the time of transfer of residence. If the sale price is less than the value of the shares at the time of transfer of residence, the sale price shall be taken into account in determining the capital gain by the first-mentioned State[22].

The analysis of these exemplary provisions shows that implemented solutions primarily make it possible to determine a gain source. Accordingly, an unrealised gain arises in an emigration country and includes any capital appreciation during a taxpayer's residence period. In practice, such a solution is helpful in indicating the income that arises in the emigration country and, consequently, properly allocating the taxing rights.

5. Concluding remarks

As stated in the Introduction, the Poland-Brazil DTT is one of the first treaties signed after the exit tax introduction in Poland. The Polish party had a chance to negotiate the treaty provisions allocating taxing rights due to the exit tax imposition on emigrating taxpayers.

This article's findings indicate that the implementation of the alternative version of Art. 13(5) based on the OECD Model (corresponding to Art. 13(8) of the UN Model) under the Poland-Brazil Treaty does not solve the problem of double taxation for cases involving exit taxation. However, it creates an opportunity to apply one of the double taxation elimination methods. Art. 24 of the analysed treaty does not resolve the non-concurrent residence-residence conflict. Consequently, a taxpayer emigrating from Poland may resolve double taxation issues only under mutual agreement, according to Art. 26 of the Poland-Brazil DTT.

In conclusion, in the author's opinion, Poland should have reconsidered a tax treaty policy to protect its emigrating taxpayers after introducing the exit tax[23]. Negotiating the treaty with Brazil was an excellent opportunity to achieve this objective, e.g. by inserting the step-up clause into an additional paragraph of Art. 14, following the tax treaty practice of the other countries. Unfortunately, this chance was wasted.

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[22] Convention of 21st July, 1959, between the Federal Republic of Germany and the French Republic for the avoidance of double taxation and the establishment of rules for reciprocal administrative and legal assistance with respect to taxes on income and on capital, business tax and land tax, unofficial translation, IBFD Tax Research Platform (access: 30.07.2023).

[23] A. Nowak-Piechota, *Podatek…*, pp. 185 et seq.

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Podatek od wyjścia a polsko-brazylijska umowa o unikaniu podwójnego opodatkowania

Streszczenie. Artykuł porusza problematykę eliminacji podwójnego opodatkowania w sprawach związanych ze stosowaniem podatku od wyjścia (*exit tax*) w ramach polsko-brazylijskiej umowy o unikaniu podwójnego opodatkowania podpisanej w 2022 r. Autorka przedstawia kluczowe cechy polskiego podatku od wyjścia, a następnie zastanawia się, jakie przepisy analizowanej umowy mogą mieć zastosowanie w przypadku obciążenia podatnika podatkiem od wyjścia. W artykule omówiono również art. 24 ww. umowy. Końcowo Autorka zaprezentowała specyficzne rozwiązania przyjęte w umowach o unikaniu podwójnego opodatkowania innych państw, pozwalające na eliminację podwójnego opodatkowania w razie nałożenia podatku od wyjścia.

Słowa kluczowe: podatek od wyjścia, podwójne opodatkowanie, emigracja

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https://doi.org/10.18778/1509-877X.2023.04.05

Articles

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The Remuneration of Teachers and Researchers under Art. 21 of the Brazil-Poland Double Taxation Convention of 2022 in the Light of the Polish Treaty Practice

Summary. The aim of this paper is to analyze an exemption addressed to visiting teachers and researchers included in Art. 21 of the Agreement between the Republic of Poland and the Federative Republic of Brazil for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance signed in New York on 20 September 2022. The Brazil-Poland provision is compared with its equivalents included in agreements concluded by Poland with other countries. Clauses limiting or extending the application of the exemption, present or missing in Art. 21 of the Brazil-Poland DTC, are discussed. The said provision is also assessed against content and/or quality criteria that such a special provision should fulfill.

Keywords: teachers, researchers, double taxation, double non-taxation, exemption, tax treaty, double taxation convention, Poland, Brazil

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Received: 12.08.2023. Verified: 6.09.2023. Accepted: 1.10.2023.

1. Introductory remarks

Cross-border mobility of teachers and researchers (hereinafter also referred to as "academics") has become an essential element of academic development. Temporary teaching and/or research stays abroad are beneficial not only to academics themselves, but also to both home and host countries, and to humanity in general. By facilitating an international exchange of ideas, such mobility contributes to the advancement and dissemination of human knowledge and to the growth of understanding between nations and cultures. What begins as a personal development experience of a visiting teacher/researcher, very often becomes a foundation of an enhanced, long-term cooperation between home and host institutions, including joint research projects. It is thus crucial to remove bureaucratic and financial barriers to such mobility, including tax barriers.

Double taxation of income of a visiting academic is not the only thing that could pose a significant barrier. Given the temporary nature of the visit, also the mere necessity to become familiar with and fulfil tax obligations in the host country could hinder mobility. Tax formalities, uncertainties, and risks (real or just subjectively perceived) have the potential to distract the academic from his/her core activities (teaching and/or research) or even to discourage him/her from the mobility itself. To remove such potential barriers to mobility, the host country may unilaterally opt to introduce into its national legislation a tax exemption for the income of an academic derived from teaching and/or research in its territory during a temporary stay. Alternatively, both countries, the host and the home one, may agree to enrich their bilateral international agreement on the elimination of double taxation of income, with a provision explicitly addressed to visiting academics and providing them with a limited exemption in the host country. To truly facilitate or at least not to hinder mobility, such an exemption, included either in domestic legislation or in a treaty, must be drafted with the utmost care so that it does not become a source of uncertainty/risk itself, hence an additional barrier. If needed, official (advance) guidance on the exemption should be provided to the academics and host institutions by the tax administration. The host institutions' legal or tax departments should also be ready to assist.

The aim of this paper is to analyze the exemption addressed to visiting teachers and researchers included in Art. 21 of the Agreement between the Republic of Poland and the Federative Republic of Brazil for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance signed in New York on 20th September, 2022 (hereinafter: "the Brazil-Poland DTC")[1]. The Brazil-Poland provision is compared with its equivalents included in agreements concluded by Poland with other countries[2]. Clauses limiting or extending the application of the exemption, present or missing in Art. 21 of the Brazil-Poland DTC, are discussed. The said provision is also assessed against contents and/or quality criteria that such a special provision should fulfil.

2. The *Teachers and Researchers* article in the OECD and the UN Models, and commentaries thereon

The OECD[3] and the UN[4] Model Conventions on the elimination of double taxation of income and capital, which are commonly used as blueprints during negotiations of bilateral conventions to be concluded between countries, do not include a separate *Teachers and Researchers* provision. As discussed below, the official commentaries to these models

[1] Available in English at https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 4.08.2023). See also the Act of 9th March, 2023, on the ratification of the Agreement between the Republic of Poland and the Federative Republic of Brazil for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance, and the Protocol to this Agreement, signed in New York on 20th September, 2022 (*Ustawa z dnia 9 marca 2023 r. o ratyfikacji Umowy między Rzecząpospolitą Polską a Federacyjną Republiką Brazylii w sprawie eliminowania podwójnego opodatkowania w zakresie podatków od dochodu oraz zapobiegania uchylaniu się i unikaniu opodatkowania oraz Protokołu do tej Umowy, podpisanych w Nowym Jorku dnia 20 września 2022 r.*), Official Gazette (Dziennik Ustaw) 2023, item 704. To date, the Brazil-Poland DTC has only been ratified by Poland. For the purposes of this paper, the English version of the said treaty is analysed.

[2] All agreements on the elimination of double taxation of income concluded by Poland are available at: https://www.podatki.gov.pl/podatkowa-wspolpraca-miedzynarodowa/wykaz-umow-o-unikaniu-podwojnego-opodatkowania/ (access: 4.08.2023). For the purposes of this paper, the English version is analyzed, if available, otherwise – the Polish one. In individual cases, the English version is compared with the Polish one.

[3] See OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing, Paris 2017 (hereinafter: "OECD Model 2017").

[4] See UN, *Model Double Taxation Convention between Developed and Developing Countries 2017 Update*, United Nations, New York 2017 (hereinafter: "UN Model 2017"), as well as the most recent UN, *Model Double Taxation Convention between Developed and Developing Countries 2021 Update*, United Nations, New York 2021 (hereinafter: "UN Model 2021").

acknowledge that many treaties contain such special provisions, the aim of which is to facilitate cultural relations or the exchange of knowledge by exempting income in the host state. It is further explained in the commentaries that the absence of a specific provision in the models should not prevent contracting states from including such a provision in a treaty if they deem it appropriate ("desirable"). However, no exact wording is suggested in the commentaries. As a result, the wording adopted by contracting states worldwide is very diverse. Moreover, specific provisions are either included in a separate *Teachers* (and *Researchers*) article or added to the article generally devoted to students[5].

During the drafting of the OECD and the UN Models and commentaries thereon, initiatives to add an article devoted to teachers occurred, but after thorough consideration, they resulted only in clarifying additions to the commentaries[6].

The commentary on Art. 15 of the OECD Model 2017 concerning *Income from Employment* (para. 11) only remarks that no special provision has been made in the Model regarding the remuneration of visiting professors, although many treaties contain such rules, with the main purpose of facilitating cultural relations by introducing a limited tax exemption. It is further explained that the absence of specific rules in the Model should not be interpreted as an obstacle to the inclusion of such rules in double taxation conventions. Interestingly, among positions on Art. 20 of the OECD Model 2017 concerning *Students* and its commentary,

[5] Commenting on Art. 20 of the OECD Model 2017 dedicated to *Students*, H. Litwińczuk remarks that in their bilateral treaties contracting states may extend the scope of this article to address the specific situation of teachers and researchers (H. Litwińczuk, *Artykuł 20. Studenci (Students)*, [in:] H. Litwińczuk, *Międzynarodowe prawo podatkowe*, Wolters Kluwer, Warszawa 2020, Lex/el). M. Herm notes that many countries include a provision dealing with teaching and research staff in the same article as students (M. Herm, *Student Article in Model Conventions and in Tax Treaties*, "Intertax" 2004, no. 2, p. 69). X. Zhu argues that the *Teachers and Researchers* article evolved from the *Students* article (X. Zhu, *The "Teachers and Researchers" Article in Tax Treaties*, "Asia-Pacific Tax Bulletin" 2019, no. 2, IBFD Tax Research Platform/el). Both articles, instead of distributing taxing powers between the source and the residence state, provide an exemption in the host state (H. Zhu, *The "Teachers and Researchers"* …).

[6] For a brief discussion of the historic context and arguments voiced in favor and against, see P.N. Csoklich, O.Ch. Günther, *Visiting Academics in Double Tax Treaties*, "Intertax" 2011, no. 11, p. 587; Commentary on Art. 20 UN Model 2017, paras. 10–12; Commentary on Art. 20 UN Model 2021, paras. 11–13.

Brazil, similarly to several other countries, explicitly reserved "the right to add an article which addresses the situation of teachers, professors and researchers, subject to various conditions and to make a corresponding modification to para. 1 of Article 15". Poland did not express its position on the issue.

The UN Model 2017 commentary (also 2021) deals more extensively with the specific situation of teachers and researchers. The commentary on Art. 15 concerning *Income from Dependent Personal Services* remarks that Art. 15, as well as Arts. 14 (*Independent personal services*), 19 (*Government service*), and 23 (*Methods for elimination of double taxation*) are generally adequate to prevent double taxation of visiting teachers, but "some countries may wish to include a visiting teachers article in their treaties"[7]. More detailed coverage is provided in paras. 10 to 12 of the 2017 commentary on Article 20 concerning *Students* (similarly to paras. 11 to 13 of the 2021 commentary). It is explained that under the UN Model 2017 (also 2021) "visiting teachers are subject to Art. 14, if the services are performed in an independent capacity, Art. 15, if the services are dependent, or Art. 19, if the remuneration is paid by a contracting state"[8], but Arts. 14 and 15 normally do not exempt a visiting teacher's income from taxation at source, because, generally, they allow source taxation if the individual providing independent or dependent services is present in the host country for more than 183 days, and many teaching assignments last longer[9]. It follows that many treaties include "an additional article or paragraph dealing specifically with teachers and, sometimes, researchers, typically exempting them from taxation in the host country if their stay does not exceed a prescribed length". It is also noted that a tax exemption included in domestic legislation is an alternative preferred "by many". The diversity of national approaches is then indicated

[7] See Commentary on Art. 15 UN Model 2017, para. 3; Commentary on Art. 15 UN Model 2021, para. 7.

[8] For a detailed discussion on the problems of qualification of income of visiting teachers and researchers under Art. 7, Art. 15 or Art. 19 of the OECD Model, see P.N. Csoklich, O.Ch. Günther, *Visiting …*, pp. 579–587.

[9] A "temporary" teaching and/or research visit in the host country is often long enough for the academic to become a tax resident under the domestic legislation of the host country. Depending on individual circumstances, the academic will keep or lose his/her resident status in the home country. Hence, dual residence is possible, which may be solved on the basis of tie-breaker rules, as included in Art. 4(2) of the OECD Model 2017 and the UN Model 2017 (2021).

as an impediment to the inclusion of a specific provision in the UN Model. However, the problem is not neglected. On the contrary, para. 12 of the commentary on Art. 20 (*Students*) of the UN Model 2017 (likewise para. 13 of the 2021 commentary) provides valuable guidance for contracting states wishing to include in their treaty a special provision relating to visiting teachers. Firstly, double non-taxation of teachers is "not desirable". Secondly, the benefit (i.e. the exemption in the host country) should be limited to visits of a set maximum duration. Normally, the limit should be set at two years. An extension of the time limit should be possible in individual cases by a mutual agreement between competent authorities of the contracting states. Above all, the consequences of visits exceeding the time limit should be determined: whether income is "taxable as of the beginning of the visit or merely from the date beyond the expiration of the time limit". Thirdly, it should be decided "whether the benefits should be limited to teaching services performed at certain institutions «recognized» by the Contracting States in which the services are performed". Fourthly, in the case of researchers, it should be stated whether the benefit (exemption) is only applicable to "remuneration for research performed in the public (vs. private) interest". Finally, it should be determined "whether an individual may be entitled to the benefits of the article more than once." Article 21 of the Brazil-Poland DTC on *Teachers and Researchers* is tested against these requirements in the subsequent parts of this paper.

3. The *Teachers and Researchers* article in the Polish tax treaty practice

The *Teachers and Researchers* article is a very characteristic element of the Polish treaty practice, included in double taxation conventions (comprehensive and selective) with 66 out of 91 (73%) countries[10]. Usually, a separate article is included, while only several DTCs include a joint article with paragraphs dedicated to *Teachers* (and *Researchers*) and *Students* (Croatia,

[10] Interestingly, in a few cases, the *Teachers and Researchers* provision is included in the "old", yet still applicable DTC, and not included in the new, not yet applicable DTC (Georgia 1999 vs. 2021, Malaysia 1977 vs. 2013, the USA 1974 vs. 2003). The "old", still applicable DTCs are analyzed in this paper. Additionally, several signed DTCs that never entered into force due to the lack of bilateral ratification are taken into account (Algeria, Nigeria, Uruguay, and Zambia). Currently, the status of the Brazil-Poland DTC is similar, as it has not been ratified by Brazil yet.

France, Indonesia, Iran, Kazakhstan, Kyrgyzstan, Russia, Spain). Both teaching and research are covered, even if the title of the provision refers to "teachers" and/or "professors", omitting "researchers" (Australia, Bangladesh, Belgium, Croatia, Estonia, Hungary, Iran, Ireland, Japan, Macedonia, Malaysia 1997 (still applicable), Malta, Montenegro, the Netherlands, Pakistan, Serbia, South Korea, Spain, Uruguay, the USA 1974 (still applicable)).

The lack of a model provision may be one of the reasons for the very diverse wording of the *Teachers and Researchers* provision included in Polish treaties. The most common, but not overly prevailing wording thereof includes two paragraphs and reads as follows:

> Article … Professors /Teachers and Researchers. 1) An individual who visits a Contracting State for the purpose of teaching or carrying out research at an university, college or other recognized educational institution in that Contracting State, and who is or was immediately before that visit a resident of the other Contracting State, shall be exempted from taxation by the first mentioned Contracting State on any remuneration for such teaching or research for a period not exceeding two years. 2) The provisions of paragraph 1 of this Article shall not apply to income from research if such research is undertaken not in the public interest but primarily for the private benefit of a specific person or persons.

These conclusions generally correspond with the findings included in the most extensive analysis of the Polish treaty practice published by Z. Kukulski[11], in which not the exact typical wording is provided, but a set of conditions and consequences which may be used to build the hypothesis and disposition of the article.

According to Z. Kukulski, the three most common divergences from the above include: 1) the lack of limitation of the exemption only to research carried in the public interest and not primarily for the private benefit (Algeria, Austria, Bangladesh, China, Germany, Kuwait, Malaysia 1997, Morocco, Mongolia, Pakistan, Saudi Arabia, Slovenia, South Korea, Vietnam, the United Arab Emirates); 2) the limitation of the exemption only to income arising from sources outside the host country (Algeria, Indonesia, Iran, Kyrgyzstan, Macedonia, Montenegro, Morocco, Serbia, Zambia, Zimbabwe); 3) the modification (shortening, extension or omission[12]) of the

[11] See Z. Kukulski, *Inne postanowienia szczególne w polskiej praktyce traktatowej*, [in:] Z. Kukulski, *Konwencja modelowa OECD i konwencja modelowa ONZ w polskiej praktyce traktatowej*, Wolters Kluwer, Warszawa 2015, Lex/el.

[12] Interestingly, the English version of the DTC with Zambia does not contain any time limit, while the Polish version refers to a stay not exceeding two years. The DTC with Uruguay does not contain any time limitation.

time limit (China (five years), Egypt (one year), Kuwait (five years), Qatar (three years), Russia (three years), United Arab Emirates (three years), Uruguay (none))[13].

Several other recurring differences may also be listed.

Most treaties provide that the income is exempted for a period not exceeding a certain threshold. Thereby, the temporal limitation is an element of the disposition of the norm. However, in many treaties, a stay not exceeding a certain time limit is a condition for the application of the exemption, thus being an element of the hypothesis of the norm[14] (Algeria, Australia, Bangladesh, Belgium, Croatia, Georgia 1999 (still applicable); Indonesia, Iran, Italy, Japan, Kazakhstan, Lebanon, Luxembourg, Macedonia, Malaysia 1977 (still applicable), Malta, Morocco, the Netherlands, South Korea, Pakistan, Portugal, Qatar, Spain, Ukraine, Zimbabwe). The consequences of exceeding the threshold differ substantially. In the first case, income becomes taxable only from the date beyond the expiration of the time limit (i.e. non-retrospective taxation), while in the latter case, a longer stay makes the income taxable as of the very beginning of the visit (i.e. retrospective taxation). Some treaties (Hungary, Ireland, South Africa, the United Arab Emirates) refer to the time limit twice, providing that the stay should not exceed X years and that the exemption is applicable for a period not exceeding X years. Regardless which of the above versions is adopted, often an addition is made concerning the calculation of the time limit – from the date of "*first* visit [or less frequently – arrival] for that purpose" (Albania, Austria, Bulgaria, Cyprus, Egypt, Estonia, Germany, Greece, Hungary, Ireland, Israel, Kazakhstan, Latvia, Lithuania, Mexico, Montenegro, the Netherlands, Nigeria, Philippines, Romania, Russia, Serbia, Slovakia, Slovenia, Ukraine, the United Kingdom), "*first* arrival" (China, Kuwait, Lebanon, Mongolia, Vietnam), or merely "arrival" (Ethiopia, India, Sri Lanka, Thailand, the USA 1974).

Some treaties include the requirement of teaching and/or research being the "sole" purpose of the visit (Algeria, Armenia, Austria, Bangladesh, Georgia 1999, Indonesia, Ireland, Qatar, South Korea, Lebanon, Malaysia 1977, Morocco, Thailand, the United Kingdom, the United Arab Emirates) or – the "primary" purpose (China, Iran, Kyrgyzstan, Kuwait, Macedonia, Mongolia,

[13] Z. Kukulski, *Inne*…

[14] On the distinction between the time limit being an element of the legal requirements for the application of the exemption and an element of the legal consequences, see also P.N. Csoklich, O.Ch. Günther, *Visiting*…, pp. 593–594.

the USA 1974, Vietnam). Several treaties provide that the visit or the teaching and/or research should take place "at the invitation" of the host institution or (rarely) the host state (Armenia, Bangladesh, Indonesia, Lebanon, Malaysia 1977, South Korea, Qatar, Thailand, the United Arab Emirates, the USA 1974), or, additionally, under an official programme of cultural exchange (Indonesia, Qatar). As regards the host institutions, several treaties go beyond the standard list (including universities, colleges, or other recognized educational institutions) by adding schools (Australia, Bangladesh, China, Croatia, India, Indonesia, Italy, Japan, Kuwait, Lebanon, Malaysia 1977, Malta, Mongolia, Montenegro, Qatar, Serbia, Slovenia, South Korea, Spain, Thailand, the United Arab Emirates, the United Kingdom, Vietnam), and just two (Indonesia, Qatar) – by adding museums, and one (Indonesia) – by adding other cultural institutions. On the contrary, few treaties seem to limit the coverage to institutions of "higher education" (Greece, Ireland, Pakistan, Uruguay). Some treaties include "other educational (or research) institutions" without requiring them to be "recognized" or "accredited" (Italy, Kazakhstan, Malta, the Netherlands, Pakistan, Portugal, Russia, Spain, Ukraine, the United Arab Emirates, Zimbabwe). Few treaties do not indicate types of covered host institutions at all (France, Iran, Kyrgyzstan, Macedonia, Zambia). Few treaties do not expressly reserve that only remuneration for teaching or research is exempted, referring to "remuneration of teachers and researchers" (Belgium, Croatia[15], Georgia 1999, Kyrgyzstan, Luxembourg) or "remuneration received for his [teacher's or researcher's] activities" (France).

While under most treaties being a resident of the other contracting state "immediately before" visiting the host state is sufficient for the exemption to be applicable, the wording of some treaties is more restrictive, requiring the academic to "be" a resident of the other contracting state, i.e. to keep his/her resident status in the home country for the duration of the temporary teaching/research visit (Australia, Belgium, Croatia, France, Kyrgyzstan, Luxembourg, Malta, the Netherlands, Russia, the USA, Zambia, Zimbabwe). The adverb "immediately" is missing in few treaties (Bangladesh, Saudi Arabia). Two treaties (Iran, Macedonia) refer to being a national of the other contracting state and one (Pakistan) to being "from one of the contracting states".

[15] The English version of the DTC with Croatia does not include such a restriction, while it is present in the Polish version.

Moreover, variations of the subject to tax clause may be found in several Polish treaties, whereby the exemption in the host country is conditional upon the taxation of the income in the other country (Austria, Australia, Germany, Malta, Malaysia 1977; the United Kingdom, the United Arab Emirates). On the contrary, under the DTC with Portugal, double non-taxation seems to be the intended result, as the exemption in the host country applies "provided that the income is not taxed in the other State". Strangely, the English version of the DTC with Pakistan expressly states that the income "should not be taxed in either of the contracting states" (which clearly leads to double non-taxation), while the Polish version provides that the income is not to be taxed in the host country.

As has been shown, the wording of the *Teachers and Researchers* article in DTCs concluded by Poland is diverse, although it is possible to identify the most common clauses as well as the ones being less common or very rare.

4. The *Teachers and Researchers* article in the Brazil-Poland 2022 DTC

Article 21 of the Brazil-Poland 2022 DTC, entitled *Teachers and Researchers*, includes one paragraph and provides that:

> An individual who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who, at the invitation of the Government of the first-mentioned State or of a university, college, school or museum in that first-mentioned State, or under an official programme of cultural exchange, is present in that State for a period not exceeding two consecutive years solely for the purpose of teaching, giving lectures or carrying out research at such institutions shall be exempt from tax in that State on the remuneration for such activity, provided that such remuneration arises from sources outside that State.

The wording included in the Brazil-Poland 2022 DTC is rather distinctive, with only one other treaty concluded by Poland bearing close resemblance, namely the DTC with Indonesia of 1992, which addresses the situation of teachers and researchers in the first paragraph of its Article 21[16]. Despite minor differences in expressing the conditions and consequences of application, the normative content of both provisions is almost the same. However, the adjective "consecutive", referring to the two years of stay, is

[16] Art. 21 para. 2 of the DTC with Indonesia concerns students, apprentices, and business trainees.

not included in the treaty with Indonesia, while "other cultural institutions" are added to the list of institutions at which teaching or research may be done. Similarities in wording may also be identified in the DTC with Qatar of 2008, though there are more differences in normative content: the period of stay is set at three years, the adjective "consecutive" is not included, "other similar educational, scientific or research institutions" are added, and the condition of research in public interest is present.

When comparing Art. 21 of the Brazil-Poland DTC with the most common wording included in Polish treaties, the requirement of "remuneration arising from sources outside that State" seems to be the most distinctive and simultaneously the most limiting element of the Brazilian-Polish provision. The visit should take place at the invitation of the government or a listed institution of the host state, or under an official programme of cultural exchange, and yet the remuneration should be of foreign origin. It is a possible, but not that common situation, with financing provided by the home country or institution, a third country or its institution, an international organization or even a multinational enterprise. A similar clause referring to "sources outside the host state" is included in the *Students* article and explained in para. 4 of the Commentary to Art. 20 of the OECD Model which may be helpful in interpreting the *Teachers and Researchers* provision[17]. Thus, "sources outside the host state" are payments which are not made by or on behalf of a resident of the host state, or which are not borne by a permanent establishment which a person has in the host state.

The requirement of foreign-origin sources may in some cases be helpful in preventing double non-taxation[18], which may occur if both the host country (due to the exemption) and the home – or better – departure country (due to the academic's loss of resident status) do not have the competence to tax the income of the visiting academic. On the one hand, it is sensible to address the exemption also to academics who were residents of the country of departure "immediately before visiting the host state". By including such a clause, it is acknowledged that, depending

[17] P.N. Csoklich, O.Ch. Günther, *Visiting*…, p. 596.

[18] It may also be connected with the fact that a foreign payer is not entitled to the deduction of the remuneration paid to the academic from his/her taxable income. However, there is a discussion if it is justifiable that an academic is taxed or exempted depending on where the funds originate from. See P.N. Csoklich, O.Ch. Günther, *Visiting*…, p. 595, 599.

on individual circumstances, a temporary visit may lead to the loss of tax resident status in the home country. Under the domestic legislation of the host state, the academic may often become its resident, e.g. after meeting the 183 days criteria. However, such an "immediately before" clause may result in double non-taxation, if the host country applies the exemption, while the country of departure is no longer entitled to tax the income of its former resident. Then, the country of financing (often coinciding with the country of departure – the former country of residence) may be entitled to tax under its domestic legislation, e.g. on the basis of source principle, but not necessarily. Nonetheless, double non-taxation may be better prevented by including a subject to tax clause present in several other treaties and missing from the DTC with Brazil[19]. Such a clause would definitely better fulfil the UN Commentary guidance that "double exemption of teachers is not desirable".

The inclusion of the word "immediately", as in the Brazil-Poland DTC, may be helpful in the proper addressing of the exemption so that the benefit is not provided to an academic who in the past used to be a resident of the other state and before coming to the host state became a resident of a third country and during his/her temporary visit to the host state became its resident. Such a person is generally entitled to treaty benefits and the restriction "immediately" is needed to exclude him/her from the scope of the *Teachers and Researchers* exemption. The basic condition for the application of the treaty and entitlement to the exemption as one of the treaty benefits, as set in Art. 1(1), is that the person is a resident of one or both of the contracting states, hence newly acquired residence of the host state seems sufficient to benefit from the exemption. Then, the "immediately before" clause becomes crucial.

The "sole purpose" clause, present in the Brazilian-Polish provision, may be seriously limiting. For example, it may prevent a medical researcher and practicing physician who is invited to the host country to carry out research at an university under full-time employment from undertaking a part-time medical practice at a local hospital, which could be of a great benefit to the patients and medical staff of the host state. Given the present wording, such a researcher-practitioner is not entitled to the exemption

[19] Alternatively, the requirement that the academic remains a resident in his/her home country during the whole duration of his/her temporary stay may be introduced to avoid the risk of double non-taxation. However, such an approach seriously limits the applicability of the exemption.

at all. A better solution would be to exempt solely his/her income from research[20] and to tax under general rules the income from medical practice. On the other hand, the "primary purpose" clause, which could be a part of this alternative, is more prone to interpretative doubts and diverging application, as compared with the "sole purpose" criterion.

At the same time, there is no requirement in Art. 21 of the Brazil-Poland DTC that research is undertaken "in the public interest and not primarily for the private benefit of a specific person or persons". Teaching and research as part of the basic mission of universities, colleges, schools, and museums generally serves the public interest. However, if teaching or research is a part of a business-like activity of the educational/research institution (e.g. a course, a training, or a laboratory analysis offered similarly to commercial entities), private interests/benefits may be at stake. Under the Brazil-Poland DTC, such a distinction, often difficult to make, is irrelevant, as the exemption may be equally applied to commercial teaching and research. This omission (or policy decision) is to some extent mitigated by the above-mentioned requirement of an invitation, combined with an exhaustive list of eligible host institutions which tend to focus on their "basic mission", with commercial operations (usually) being only an addition. However, it is easy to imagine an academic invited by a university to carry out research as part of a new medicine development programme in cooperation with a foreign, multinational pharmaceutical company, with remuneration of the academic funded by the company. If the patent rights to the newly developed drug are solely or primarily awarded to the company, the research is "for the private benefit of a specific person or persons". On the contrary, research results openly published in scientific journals – even with financing by such a company – point to "public benefit". Both cases are covered by the Brazilian-Polish exemption.

A peculiarity of the Brazil-Poland DTC is that host institutions are listed exhaustively, without reference to other "recognized" educational and or/research institutions. This seems to fulfil the UN Model commentary recommendation that a decision is needed as to "whether the benefits should be limited to teaching services performed at certain institutions «recognized» by the Contracting States in which the services are performed". There is no requirement for the institutions to be "recognized"

[20] Art. 21 of the Brazil-Poland DTC already provides that only remuneration from teaching and research is exempted.

or "accredited", but the exhaustive list only includes universities, colleges, schools, or museums which (typically) are certified by the authorities when established and supervised when operating.

Regarding the "invitation" requirement, it is crucial that the academic comes to the host state after receiving an invitation, and on the basis of this invitation at the indicated institution carries out exactly the type of activities that are included in the said invitation[21]. If the academic first arrives to the host state and only afterwards gets a teaching or research job at a proper institution, the exemption will not apply.

As with all treaties containing a *Teachers and Researchers* provision, it is open to interpretation who should be considered a teacher or a researcher. National approaches may vary, especially regarding practitioners and M.A. or Ph.D. students, thus people with limited or none teaching and/or research experience. If the treaty does not provide a hint, the (legal) definitions of the host country should prevail. The wording of the Brazil-Poland DTC refers to "an individual who is present in that [the host] state … solely for the purpose of teaching, giving lectures or carrying out research". Thus, the activity undertaken by the invited person during the stay seems to matter more than his/her formal qualifications or prior engagement in teaching and/or research in the home country. In contrast, some other Polish treaties, when shaping the personal scope of the exemption, refer not to the activity, but to a person who is a teacher, a professor, or a researcher, which could point to having such status even before the mobility.

Article 21 of the Brazil-Poland treaty does not provide that only a presence of two years "from the date of first visit for the purpose of teaching or research" is covered, which can be an argument in favor of the possibility of reusing the exemption in the case of a new visit (with a new limit of two years). Instead, the unique phrase "[being] present for a period not exceeding two consecutive years" is used. The combination of these may lead to interpretative doubts, with a slight preference towards the recurring entitlement to the exemption. The requirement of clarity on this issue, put by the UN commentary, seems not to be fully met. The exemption should only be granted again after an academic left the host country in due time, actually returning to his/her home country for a reasonable period, without

[21] It has been suggested in international literature that an academic who got employed after responding to an advertisement posted by an eligible institution meets the "invitation" requirement (T.H. Teck, *The "Teachers and Researchers" Article in Singapore's Tax Treaties*, "Bulletin for International Taxation" 2006, no. 3, p. 120).

immediate intention of visiting the host country again for the purpose of teaching and/or research. In other words, there must be a reasonable break between the visits[22] and the visits should be genuinely separate[23], preferably the new one not yet planned when leaving the host state.

Last but not least, as required by the UN Model commentary, the consequences of exceeding the time limit are stated in the Brazil-Poland DTC. However, it is done indirectly, i.e. by referring to the period of presence for the purpose of teaching and/or research[24] (resulting in retrospectivity) and not to the period of application of the exemption (not resulting in retrospectivity), which may be unclear for a person without a background in international tax law. Contrary to the UN guidance, there is no option for individual extensions upon agreement of the competent authorities of contracting states. Meanwhile, an experiment, especially in the field of bioscience, may need to be continued beyond the time limit, with no intention of misusing the exemption[25]. Thus, academics, especially researchers, may be discouraged from accepting the invitation to visit the host state because of the possibility of retrospective taxation if the actual period of stay exceeds "two consecutive years".

5. Concluding remarks

The wording of the *Teachers and Researchers* article in the Brazil-Poland DTC is very different from the one most commonly present in Polish treaties. It is difficult to clearly assess whether the Brazilian-Polish provision is more restrictive than its equivalents. On the one

[22] Leaving the host state for a (relatively) short period, while maintaining housing arrangements there, suggests continuity of stay (T.H. Teck, *The "Teachers and Researchers"…*, p. 122).

[23] A different source of financing or a different host institution may also be arguments in favor of considering two stays separate (P.N. Csoklich, O.Ch. Günther, *Visiting…*, p. 595), provided the visits are separated by a reasonable period of absence.

[24] Visits for other purposes (e.g. touristic, medical, family) should not be included in the calculation. On this issue see P.N. Csoklich, O.Ch. Günther, *Visiting…*, pp. 592–593.

[25] As has been rightly pointed out in the literature, if states intend to attract visiting academics, they should refrain from retrospective taxation, especially if the prolongation of stay beyond the limit is caused by the need to complete a research project, which is in the interest of the host institution. In addition short extensions for reasons of illness, injury and the like should not lead to the denial of the exemption. See P.N. Csoklich, O.Ch. Günther, *Visiting…*, pp. 593–594.

hand, it includes clauses seriously limiting the scope of its applicability (e.g. “sources outside the host state”, “sole purpose”, “invitation”), while on the other hand, important safeguarding clauses, present in many treaties, are missing (e.g. “public benefit”, “subject to tax”). The inclusion of academics who were residents of the country of departure “immediately before” the visit is definitely sensible, but may result in double non-taxation. The possibility of retrospective taxation may pose a serious problem, especially for researchers. Interpretative doubts may also be a risk factor. However, the inclusion of the said provision in the Brazil-Poland DTC mitigates problems with the qualification of academics’ income as derived from independent personal services, employment, or government services. Certainly, the analyzed provision has the potential of facilitating academic exchange. It will be interesting to analyze emerging practice and verify how the Brazilian and the Polish tax authorities and courts approach the identified issues.

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Wynagrodzenie nauczycieli i pracowników naukowych w artykule 21 polsko-brazylijskiej umowy o unikaniu podwójnego opodatkowania z 2022 r. w świetle polskiej praktyki traktatowej

Streszczenie. Celem artykułu jest analiza zwolnienia skierowanego do wizytujących nauczycieli i pracowników naukowych przewidzianego w art. 21 umowy między Rzecząpospolitą Polską a Federacyjną Republiką Brazylii w sprawie eliminowania podwójnego opodatkowania w zakresie podatków od dochodu oraz zapobiegania uchylaniu się i unikaniu opodatkowania podpisanej w Nowym Jorku dnia 20 września 2022 r. Postanowienie polsko-brazylijskiej umowy zostało porównane z jego odpowiednikami w umowach zawartych przez Polskę z innymi państwami. Przeanalizowano klauzule ograniczające lub rozszerzające stosowanie zwolnienia, obecne lub brakujące w art. 21 umowy polsko-brazylijskiej. Przepis oceniono również w świetle kryteriów pożądanej zawartości i/lub jakościowych, jakie taki przepis szczególny powinien spełniać.

Słowa kluczowe: nauczyciele, pracownicy naukowi, podwójne opodatkowanie, podwójne nieopodatkowanie, zwolnienie, traktat podatkowy, umowa o unikaniu podwójnego opodatkowania, Polska, Brazylia

https://doi.org/10.18778/1509-877X.2023.04.06

Articles

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A Discussion on the International Tax Issues Arising in Chinese Enterprises' Investments to Brazil

Summary. Brazil is a member state of the Golden BRICS and the biggest economy in South America. China is also a member state of the Golden BRICS and the second biggest economy in the world. To enhance mutual economic cooperation in trading and investment is in line with the interests of both countries. Against this background, this paper discusses a few tax issues arising in the cases concerning Chinese enterprises' investments in Brazil from the perspective of double tax treaty and the protocol signed in 2022. Due to the differences in double tax treaties and domestic tax systems, for Chinese investors, to invest in the European Union Member States such as Poland and to invest in Brazil will translate into different tax issues. The differences in tax issues would lead to different tax plans. Most of the tax practitioners in China could not speak Portuguese. This is a realistic obstacle preventing Chinese tax experts or Chinese enterprises from managing the tax risks arising in the Brazilian market. Macau as an area once having so close link with Portugal and nowadays still having some residents able to speak Portugal hopefully might build up a bridge between China and Brazil, if Macau has a plan to sign a double tax treaty with Brazil that is attractive to Chinese enterprises, and also if it has a competitive domestic tax regime.

Keywords: Brazil, China, double tax treaty, holding structure, capital gains, tax credit, treaty benefit

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Received: 21.08.2023. Verified: 26.08.2023. Accepted: 23.10.2023.

1. Introduction

1.1. A brief introduction to the economic cooperation between China and Brazil

Brazil is a member state of the Golden BRICS and the largest economy in South America. It is a big market with a population of more than 200 million. Brazil has abundant mineral resources and agricultural resources. In recent years, China has imported significant soybeans and iron ore from Brazil. Chinese enterprises have comparative advantages in the construction of infrastructure and mineral resources exploitation, green energy, and construction machinery manufacturing. Some famous Chinese enterprises have made direct investments in Brazil, e.g. the BYD Brazil Solar Panel Factory and the Pure Electric Bus Chassis Factory were simultaneously completed and put into operation in April 2017[1]; the China State Grid established a branch in Brazil[2]. The Guangxi Liugong Machinery Co., Ltd. (hereafter abbreviated as "the Liugong parent company") established a subsidiary in Brazil in 2009[3] and in 2015 it opened a new factory located in the modern equipment manufacturing industry cluster in Moggiguasu, Sao Paulo, Brazil. The Liugong factory area is about 15,000 square meters (3,600 square meters), and it is a comprehensive factory integrating manufacturing, accessories, and customer training[4].

1.2. Literature review

In the long run, Chinese tax experts did not pay enough attention to the double tax treaty practice or tax system in Brazil. The publication of academic papers on Brazilian taxation in Chinese journals is very rare. Xue Wei (2021) analyzed the tax risks of the BRICS countries from the

[1] "中国投资助推巴西经济长远发展", 人民日报, 2017年8月14日, 网址, http://news.gxnews.com.cn/staticpages/20170814/newgx59915e9c-16436979-.1.shtml (access: 8.12.2023).

[2] "中国投资助推巴西经济长远发展", 人民日报, 2017年8月14日, 网址, http://news.gxnews.com.cn/staticpages/20170814/newgx59915e9c-16436979-.1.shtml (access: 8.12.2023).

[3] 柳工2009年年报 (Annual Report of Liugong, 2009).

[4] 杜鹏卿. "柳工巴西新工厂建成开业 成为柳工第三个海外工厂", 2015年4月14日的广西新闻网, http://www.gxnews.com.cn/staticpages/20150414/newgx552c9719-12588637.shtml (access: 8.12.2023

perspective of tax treaties and tax business environment, and came to the following conclusions: "firstly, there are significant differences in the overall business environment of BRICS countries. In recent years, both China and India have continuously and significantly improved their respective business environments, Russia and South Africa have the most favorable tax and business environments, unfortunately Brazil has the worst business environment. In terms of tax compliance costs, Indian taxpayers have to made tax payments the most frequently, and Brazilian taxpayers have to spend the most time on doing tax compliance. In terms of the expenditure on taxes and levies, Brazil is the highest and South Africa is the lowest. Secondly, there are differences in the time threshold of constituting a permanent establishment and differences in the withholding tax rates for passive income (including dividend, interest and royalties income) either, and there are differences in the negotiation procedures due to the BRICS countries have different domestic laws."[5] The research team of the Xiamen Local Taxation Bureau (2017) conducted a comparative study on overseas tax credit systems in the BRICS countries from several aspects, namely the object of credit, the limit of credit, and the treatment of overseas losses, to evaluate the operational effectiveness of overseas tax credit systems in BRICS countries. Under the premise of respecting the differences in the tax systems of the BRICS countries, the research team of the Xiamen Local Taxation Bureau (2017) suggested that the construction of China's overseas tax credit system should be strengthened and international tax cooperation among the BRICS countries should be optimized[6].

The above tax literature has not offered concrete tax guidance for China enterprises that intend to make direct investments in Brazil. As a potential investor to the Brazilian market, a typical Chinese investor would like to know: (1) whether an intermediary holding structure is appropriate in the investment to Brazil; (2) whether there is any tax-efficient channel to pay passive income from a Brazilian subsidiary to the Chinese parent company; (3) how to avoid double taxation for the profits sourced from Brazil; and (4) how to exit from the Brazilian market in the end in a tax-efficient manner. This paper will try to analyze the above questions on

[5] 薛伟. 金砖国家的税收风险分析— —基于税收协定和税收营商环境, 《财会月刊》, 2021年第19期, 第154–160.

[6] 厦门市地方税务局课题组. 金砖国家境外税收抵免制度比较研究, 《福建论坛人文社会科学版》, 2018 年第 5 期, 第26–35页.

the foundation of performing case studies on the Chinese enterprises' investments in Brazil. This paper will also discuss some provisions relevant to Chinese enterprises' investments to Brazil contained in the latest China-Brazil double tax treaty and the protocol signed in 2022.

2. A discussion on international tax issues arising in Chinese enterprises' investments to Brazil

For a China parent company, in its preliminary phase of doing business in Brazil, it is necessary to consider the forms of doing business. For instance, the Chinese company named as "the Chery Automobile Co., Ltd." experienced four phases. In the first phase, it carried out cooperation with Brazilian automobile sales agents under general agency model. In the second phase, it established self-operated 4S automobile stores in Brazil, phasing out the former general agency model. In the third phase, it set up a self-operated manufacturing base in Brazil and registered as a wholly-China-capital subsidiary based in Brazil. In the fourth phase, it converted its wholly-China-capital subsidiary into a joint venture with 50% shares held by a Brazilian automobile group and 50% held by China shareholder.

In the following parts, some special tax issues arising in different investment stages or cases for Brazil subsidiaries will be discussed. These investment stages include but are not limited to the selection of a holding structure in the beginning, the exit from the Brazilian market in the end, the overseas tax credit during the operation period, and the repatriation of passive income from Brazil to China in case the Brazilian subsidiary makes profits or is able to bear interest or royalties.

2.1. The holding structure

In section 2.1., the cases of making investment to Brazil by two China manufacturing enterprises – the Liugong group and the Chery Automobile Co. Ltd. – will be studied so that light can be shed on Chinese enterprises when they consider how to plan their holding structure compatible with the Brazilian domestic tax regimes and the double tax treaty signed with China. For the Liugong group case, see the details in 2.1.1; for the Chery Automobile Co. Ltd case, refer to the details in 2.1.2.

2.1.1. The holding structure of the Liugong Brazilian subsidiary

As mentioned above, the full name of the Liugong parent company is "Guangxi Liugong Machinery Co., Ltd.". It is a listed company with its shares traded in the Shenzhen Stock Exchange (stock number: 000528). Its headquarters are registered and located in the Liuzhou City, Guangxi Zhuang Autonomous Region. It started international business in the 1990s. The company has established four manufacturing bases in India, Poland, Brazil, and Indonesia, as well as four overseas research and development institutions in India, Poland, the United States, and the United Kingdom. It also has multiple marketing companies with complete machine, service, accessories, and training capabilities, and provides sales and service support to overseas customers through more than 2,700 outlets of more than 300 distributors. Liugong's overseas business covers most countries and regions along the "the Belt and Road".

Liugong held the 24th meeting of the 5th Board of Directors on 6th November, 2008, and the meeting resolved to establish a wholly-owned subsidiary, Liugong Machinery Latin America Co., Ltd., with its registered office in Sao Paulo, Brazil, and a registered capital of 2 million USD. The company obtained the approval certificate of the Ministry of Commerce of the People's Republic of China [2009] – Shanghe Overseas Investment Certificate No. 000490 – on 17th March, 2009, and received the registration certificate on 16th October, 2009. The Business scope of the Liugong Machinery Latin America Co., Ltd. is "research and development, manufacturing, distribution, leasing, service, and training of construction machinery products and spare parts". The Liugong Machinery Latin America Co., Ltd. has been included in the consolidated financial statements of the company since the date of its establishment. In 2010, the incorporation capital of the Liugong Machinery Latin America Co., Ltd. was increased to 3 million USD, with 99% of its shares still directly held by the Liugong parent company and 1% shares indirectly held by its group associated company or person (note: the annual report of 2010 did not offer any information on the minority shareholder).

On 25th April, 2011, the Liugong parent company held the 10th meeting of the 6th Board of Directors. In the meeting, a resolution (LGGDZ (2011) No. 8–5) was passed to establish a sales company in Mexico – "Liugong Mexico Co., Ltd.", which was in 99% owned by Liugong (Latin America) Co., Ltd., and in 1% owned by Mr. Dai Wuping, Senior Regional Manager of Latin America Company. As a subsidiary, Liugong (Latin America) Co., Ltd. was included in the consolidation scope of Liugong parent company.

The holding structure in year 2011 is set out as below:

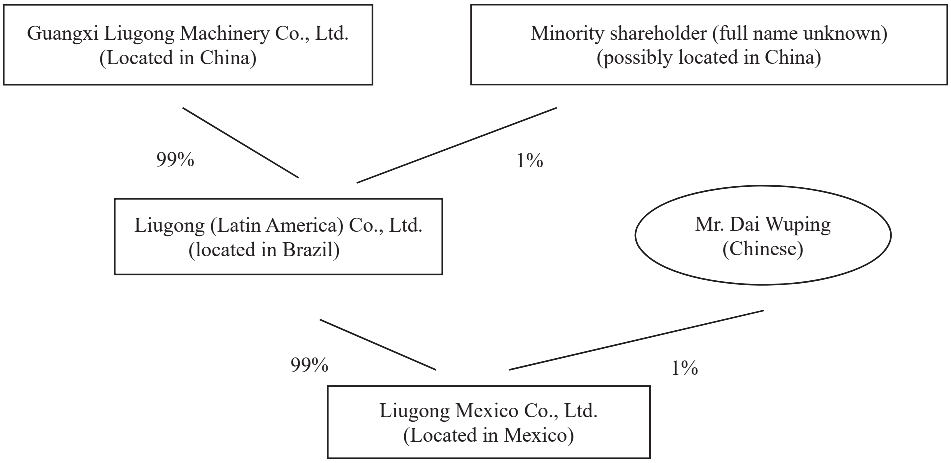

Chart 1. The holding structure of the Brazilian subsidiary

From the above chart of the holding structure, it is obvious that the Liugong parent company did not use any intermediary holding company as the first step of making direct investment in Brazil. This holding structure for the Brazilian subsidiary is very different to the holding structure for the Polish subsidiary, where the investment path for the Liugong group's Polish subsidiary is "China parent company – the Hong Kong intermediary company – the Netherlands holding company – the Poland subsidiary".

Why did the holding structure for the Brazilian subsidiary not use any intermediary holding company? As a routine, Chinese investors, especially state-owned enterprises, usually use Hong Kong's company as an intermediary holding company when they start their international business. Hong Kong is an ideal jurisdiction, since it adopts only source jurisdiction, does not exercise residence jurisdiction, its profits tax rate is only 16.5%, and it also offers preferential withholding tax treatments for the payment of passive income to a non-resident beneficiary party.

There is no tax treaty concluded between Brazil and Hong Kong. Since China concluded a double tax treaty with Brazil in 1991, this might be the reason that the Liugong parent company chose to make a direct holding to the Brazilian subsidiary without using any intermediary holding company. According to the "Dividend Exemption System" stipulated by the Brazilian domestic tax system, Brazil did not charge withholding tax on the payment of dividend to non-resident shareholders[7]. This might be the major reason to explain why the Liugong parent company chose to make direct investment in Brazil without using any intermediary holding company.

2.1.2. The holding structure of the Chery Brazilian subsidiary

Similarly, another Chinese automobile enterprise also adopted a direct holding structure to making an investment in Brazil. The full name of this Chinese automobile company is "the Chery Automobile Co., Ltd". It established its Brazilian subsidiary in 2010 with a registration capital of 0.4 billion USD. The Chery Brazilian subsidiary was incorporated in Sao Paulo, Brazil, in 2010. With regard to its business scope, it is "engaged in the import of complete vehicles, auto parts and related products and services, local procurement and construction of parts, manufacturing and sales of complete vehicles and parts, etc". The holding structure of the Chery Brazilian subsidiary is as follows: the Chery Automobile Co., Ltd. holds 50.07% of the shares; the Chery (Shanghai) Investment Co., Ltd. holds 34.19% of the shares; the Wuhu Purui Automobile Investment Co., Ltd. holds 34.19% of the shares[8]. In a word, the above three China shareholders hold all the shares of the Chery Brazilian subsidiary. No overseas intermediary company is used in the investment from China to Brazil.

According to the "Dividend Exemption System" stipulated by the Brazilian domestic tax system, Brazil did not charge withholding tax on the payment of dividend to non-resident shareholders[9]. This might be the major reason why China shareholders chose to make a direct investment to Brazil without using any intermediary holding company.

3. A discussion on the tax risks arising in China investment's exit from Brazil

Unfortunately, the Chery Brazilian subsidiary suffered continuous losses and its three shareholders finally made a difficult decision, i.e. to sell 50% of the shares in the Chery Brazilian subsidiary to the biggest

[7] 国家税务总局国际税务司国别（地区）投资税收指南课题组. 中国居民赴巴西投资税收指南, 2022年8月31日, 第18页.

[8] 记者高飞昌. 奇瑞突然抛售巴西分公司50%股权, 剥离不良资产还是另有玄机？经济观察报, 2017年10月12日, https://www.sohu.com/a/197736107_629444, (access: 12.04.2023).

[9] 国家税务总局国际税务司国别（地区）投资税收指南课题组. 中国居民赴巴西投资税收指南, 2022年8月31日, 第18页.

Brazilian automobile manufacturing and sales company, namely the "CAOA Group". After this share transfer deal was complete, the Brazilian domestic automobile manufacturing and sales company, the CAOA Group, became a new shareholder of the Chery Brazilian subsidiary, holding 50% of its shares. This Chery Brazilian subsidiary became the first joint venture between China and Brazil.

No details were disclosed on the possible capital gains tax exposures for the above Chery Brazilian subsidiary. In this case, the sellers of the shares include three China shareholders, while the buyer is a Brazilian domestic group. Article 13 (Capital gains) of the double tax treaty effective in 2017 (note: the double tax treaty signed in 1991 between China and Brazil) did not clarify whether the seller's residence country or the buyer's residence country should have the exclusive taxing right on the possible capital gains sourced from the transfer of company shares. The transfer of Brazilian subsidiary's shares should not be categorized as the alienation of immovable property (see Article 13.1), or gains from the alienation of movable property forming part of the business property of a permanent establishment (see Article 13.2), or gains from the alienation of ships or aircraft (see Article 13.3). The tax outcome of share transfer should be based on Article 13.4, "gains from the alienation of any property other than that referred to in paragraphs 1, 2, and 3, may be taxed in both Contracting State". China charges capital gains to its residents according to the Chinese corporate income tax law. If Brazil also charges capital gains to the M&A target (note: the target company is based in Brazil, whose shares are sold by its former Chinese shareholders) located in Brazilian jurisdiction, there will be double taxation on the capital gains tax. In the above case of the Chery Brazilian subsidiary, since the Brazilian subsidiary made continuous losses for several years, there might be capital losses rather than capital gains. The tax saving might be one of the reasons the Chinese shareholders decided to sell 50% shares to a Brazilian automobile group. Similarly, the financial situations of other Chinese automobile brands that have made direct investments in Brazil by either establishing sales companies or manufacturing bases are not optimistic either. Poor profitability in the Brazilian market might to some extent eliminate the possible capital gains from double taxation in the future, even though no Chinese brands expect to make losses in any jurisdictions.

China and Brazil signed a protocol on 23rd May, 2022. Unfortunately, the protocol to amend the old version of double tax treaty (signed in 1991) does not provide any solution to the possible double taxation caused by capital gains issue arising in the transfer of subsidiary's shares when the subsidiary is located in the other contracting state.

3.1. The tax credit issue

China's standard corporate income tax rate is 25%. High tech companies recognized by Chinese governments or enterprises located in the west of China and fulfilling designated conditions enjoy 15% corporate income tax rate. The Liugong parent company enjoys 15% corporate income tax rate, since it is located in the west of China and meets other designated conditions.

However, Brazil levies a very high corporate income tax rate. In Brazil, the fundamental corporate income tax rate (abbreviated as "IRPJ" in Brazilian) is 15%. For the enterprise's annual profits exceeding the Brazilian Real 240,000, a surcharge of 10% should be imposed on the exceeding part of profits; and the CSLL rate is 9%[10], where the tax base is the accounting profits after making adjustments based on tax law. Roughly speaking, the approximate nominal tax rate of the Brazilian federal corporate income tax for a big size and profitable enterprise is 34% (note: 34% = 15% + 10% + 9%). The Brazilian rough tax rate of 34% is much higher than China's standard corporate income tax rate 25% and even much higher than China's preferential corporate income tax rate of 15%. According to Article 23.1(1) and 23.1(2) of the Brazilian double tax treaty signed with China, China adopts the direct tax credit method and the indirect tax credit method to eliminate double taxation for profits sourced from Brazil. However, there is no way to eliminate the over-paid tax burden (the Brazilian tax burden exceeding the tax payable under the Chinese domestic corporate income tax law) indirectly borne by Chinese parent companies. This is an important issue that should draw the attention of the Brazilian tax authority. In order to eliminate the non-creditable profit tax burden arising in Brazil, Chinese enterprises have a motivation to control the annual profits of their Brazilian subsidiaries carefully within the threshold of no more than the Brazilian Real 240,000 in order to eliminate the non-creditable tax burden when the dividend is repatriated back to the Chinese parent company, since

[10] According to the protocol signed on 23rd May, 2022, the Brazilian federal tax covered by the double tax treaty with China includes *Contribuição Social sobre o Lucro Líquido* (abbreviated as "CSLL").

the Chinese corporate income tax rate is much lower than the Brazilian federal corporate income tax rate (IRPJ + IRPJ surcharge + CSLL). The big difference in corporate income tax rates is an important issue that might prevent Chinese enterprises from shifting profitable assets or functions or high risks to the Brazilian market in order to maintain a thin profit in Brazil. Under the arm's length rule, limited assets, functions, and risks are commensurate with limited profits. The Chinese parent company and the Brazilian subsidiaries should carefully manage their supply chain and align their assets, functions, and risks in a reasonable way in order to justify the possible thin profits earned in Brazilian market. Obviously, it is a rational choice made by Chinese enterprises and also a choice driven by the Brazilian government's high tax rate system, because no Chinese enterprises expect to make this choice if they have any other options.

3.2. The bottom line for withholding tax rate on passive income

Interestingly, Article 16.2(b) of the protocol signed on 23rd May, 2022, stipulates: "If, after the 23rd day of May 2022, Brazil agrees, in an Agreement or Protocol with any other State to rates that are lower (including any exemption) than the ones provided in Article 10, 11, and 12, then such rates shall, for the purposes of this Agreement, automatically be applied under the same terms, from the time and for as long as such rates are applicable in that other Agreement. However, in the case of dividends, such rate shall in no case be lower than 5 percent, and in the case of interest and royalties, such rates shall in no case be lower than 10 percent".

The paragraph in the above Article 16.2(b) of the protocol is very similar to "the most-favoured-nation rate of duty" that is usually adopted in custom duty field, but under the double tax treaty context, it could be viewed as the most-favored-nation rate of withholding tax. This is a very good practice for Chinese investors, since after this paragraph comes into force, Chinese parent companies could enjoy preferential withholding tax rate if such a preferential withholding tax rate exists in other tax treaties signed by Brazil with other non-Chinese tax jurisdictions. Chinese investors do not need to make great efforts to do treaty shopping or do tax planning merely for the purposes of paying passive income from Brazil to China. This paragraph in the above Article 16.2(b) of the protocol also set a bottom line for the withholding tax rates – for dividend rates it cannot be lower than 5% and for interest rate, and royalty rate cannot be lower than 10%.

3.3. The lack of interest-sharing mechanism in the field of the exchange of information

Article 13.4 stipulates:

> If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitation of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

This section is of practical significance under the "Belt and Road Initiative". The Chinese government cannot directly appoint its tax officials to overseas enterprises located in other countries for doing tax inspection as what it does in the PRC jurisdiction. After Chinese enterprises go abroad for investment – although the Chinese government has strengthened its document requirements for Chinese domestic parent companies to submit overseas investment information – it does not mean that Chinese domestic parent companies will provide complete and truthful information required by the tax bureau. Therefore, the central tax administration of the PRC has motivation to strengthen the exchange of tax information with countries along the "Belt and Road". Due to the insufficient tax collection and management capabilities of the countries other than China along the "Belt and Road", the Chinese government has already funded many training courses for tax officials from these countries. However, this does not mean that these countries along the "Belt and Road" have a strong motivation to collect and share tax information of Chinese enterprises, which are incorporated or based in investment destination countries, with China's central tax authority or provincial tax authorities. The reason behind these countries' lack of motivation is easy to explain, since the tax information might be more inclined to benefit the Chinese government unilaterally, unless the Chinese enterprise also avoids or even evades taxes in these host countries along the "Belt and Road", thus giving an excuse for these host countries to charge more tax revenues. Moreover, in order to attract Chinese investments, these host countries have already granted Chinese enterprises some corporate income tax, value-added tax, and import tariff preferences specifically designed to attract international investment inflow. In other words, these host countries do not have the willingness to be very strict to Chinese enterprises in tax administration and tax collection matters, and they naturally do not feel the need to collect tax information more than their own needs. Perhaps these host countries have made some efforts to collect tax information and share tax information with China; however, if the tax information only benefits China unilaterally in the long run, and if, on the other hand, these countries cannot obtain sufficient compensation for their costs incurred in collecting the tax information unilaterally needed by China, sooner or later, it might turn out that the collection and sharing of such tax information only remains on paper and cannot be sustainable.

In the China-Brazil economic cooperation, due to China's significantly stronger economic strength than Brazil, China is more often a capital exporter, unilaterally exporting capital to Brazil. As a capital importing country, Brazil might have motivation to protect Chinese enterprises that have already been established in Brazil. This is a justification for the Brazilian tax authorities to be unwilling to respond to China's request for tax information sharing, because even if Brazil provides tax information, it will only facilitate the Chinese government to conduct tax inspections, charge under-paid taxes, and impose late payment surcharges or even fines on its Brazilian subsidiary's ultimate parent company in China. This will undoubtedly weaken the Chinese parent companies' ability to reinvest in Brazilian subsidiaries in the future, but the taxes, late payment surcharges, and fines collected by the Chinese government will not be shared with the Brazilian government. Therefore, in the absence of a tax-benefit-sharing mechanism between capital exporting countries and capital importing countries, capital exporting countries may not necessarily be able to obtain the benefits of obtaining assistance offered by capital importing countries in collecting and sharing tax information. This might be a common challenge faced by all capital exporting countries. What the Chinese government can do is to add a tax interests sharing paragraph to the tax treaty protocol between China and Brazil to address the imbalance of enjoying tax interests in bilateral tax information sharing in order to realize the sustainable sharing of tax information with the Brazilian government in the future. This tax information may be more inclined to benefit the Chinese government unilaterally. Of course, now this is just a literal clause, and Chinese tax government still needs to wait and see whether the Brazilian government will do its utmost to implement it as the Chinese government wishes. In fact, even if the Brazilian government does not make every effort to enforce the clause and instead uses its discretion to enforce it, it may be difficult for the Chinese government to raise objections to this, as whether to make every effort or not depends on the current resources and willingness of the executing party.

In summary, the proposal of this clause is aimed at overcoming the "self interest" nature of both contracting parties' habitual shortness and protection of their own tax base. However, even if the clause overcomes the limitations of the "self interest" of both contracting parties at the time of contracting, this does not mean that the clause can effectively overcome the limitations of "self interest" of both contracting parties during its implementation stage. Regardless of its realistic implementation outcome, the proposal of this provision is indeed a constructive response to the tax information sharing provisions of previous tax treaties and the current situation of tax information sharing.

3.4. The paragraph aimed to curb tax treaty abuse

Article 14 of the protocol set out very lengthy and detailed conditions for obtaining the qualification of enjoying treaty benefits. Obviously, both China and Brazil have both interests in curbing tax treaty abuse. Brazil has a tradition of set out a white list and a black list for anti-avoidance purposes. Article 14 of the protocol might serve the purpose of discouraging investors to structure faked transactions or shell companies merely for tax saving purposes.

4. Concluding remarks

Due to the differences in double tax treaties and domestic tax systems, for Chinese investors, to invest in the European Union Member States such as Poland and to invest in Brazil translate into different tax issues. The differences in tax issues would lead to different tax plans adopted by Chinese investors.

Being aware of the tax directives applicable in the European Union or the domestic tax laws in each Member State is easier for Chinese investors, since English is a commonly used language in Europe. However, in Brazil, the official language is not English, but Portuguese. Nowadays, in China, it is very difficult to find any tax expert who is familiar with taxation and also speaks Portuguese, since only few Chinese universities specialized in teaching foreign languages teach Portuguese. Most of tax practitioners in China could not speak Portuguese. This is a realistic obstacle preventing Chinese tax experts or Chinese enterprises from managing the tax risks arising in the Brazilian market. One Deputy to the National People's Congress of China, who is a Macau resident, suggested that Macau – as an area once having so close link with Portugal and nowadays still having some residents able to speak Portugal – should build up a bridge between China and Brazil, and make efforts to deepen the economic cooperation between these two.

Chinese enterprises prefer to choose Hong Kong as an ideal location to set up an intermediary holding company and then make an investment through the Hong Kong intermediary company to the European Union Member States or to other Asian Pacific countries. Unfortunately, Brazil has not signed any double tax treaty with Hong Kong. However, it is also a pity that Brazil did not sign any double tax treaty with Macau either. Due to Macau's historical link with Portugal and due to Portugal's historical link with Brazil, if Brazil signs a favorable tax treaty with Macau, Macau might have a chance to be viewed as an attractive tax jurisdiction by Chinese enterprises for establishing an intermediary holding company before Chinese enterprises make investments in Brazil.

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Dyskusja nt. problemów międzynarodowych aspektów podatkowych związanych z inwestycjami chińskich przedsiębiorstw w Brazylii

Streszczenie. Brazylia jest członkiem „Złotego" BRICS i największą gospodarką Ameryki Południowej. Chiny są także państwem członkowskim „Złotego: BRICS i drugą co do wielkości gospodarką na świecie. Wzmocnienie wzajemnej współpracy gospodarczej w zakresie handlu i inwestycji jest zgodne z interesami obu krajów. Na tym tle w artykule omówiono kilka zagadnień podatkowych pojawiających się w sprawach dotyczących inwestycji przedsiębiorstw chińskich w Brazylii, z perspektywy umowy o unikaniu podwójnego opodatkowania oraz protokołu podpisanego w 2022 r. Ze względu na różnice w umowach o unikaniu podwójnego opodatkowania oraz krajowych systemach podatkowych, dla inwestorów z Chin inwestowanie w państwach członkowskich Unii Europejskiej, takich jak Polska, oraz inwestowanie w Brazylii będzie wiązało się z różnymi kwestiami podatkowymi. Różnice w kwestiach podatkowych prowadziłyby do różnych planów podatkowych. Większość doradców podatkowych w Chinach nie mówiła po portugalsku. Jest to realna przeszkoda uniemożliwiająca chińskim ekspertom podatkowym lub chińskim przedsiębiorstwom zarządzanie ryzykiem podatkowym powstającym na rynku brazylijskim. Makau, jako obszar niegdyś tak blisko powiązany z Portugalią, a obecnie niektórzy mieszkańcy nadal mówią po portugalsku, miejmy nadzieję, że może zbudować pomost między Chinami a Brazylią, jeśli Makau będzie miało plan podpisania atrakcyjnej dla Chin umowy o unikaniu podwójnego opodatkowania z Brazylią przedsiębiorstwa, a także posiada konkurencyjny krajowy system podatkowy.

Słowa kluczowe: Brazylia, Chiny, bilateralna umowa podatkowa, struktura holdingowa, zyski kapitałowe, kredyt podatkowy, korzyści traktatowe

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JM17111

https://doi.org/10.18778/1509-877X.2023.04.07

Articles

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The Constitutionalisation of the Tax Sovereignty of European Autonomous Territories

Summary. This article presents the results of a comparative legal research concerning tax sovereignty granted to 13 European autonomous territories by constitutional law. Research material includes the constitutions of the main states and legal acts constituting the autonomous territories as well as selected scientific publications in the field of tax sovereignty and territorial autonomy. The most important research findings are as follows: tax sovereignty has been constitutionalised for the vast majority of European autonomous territories (11 out of 13); tax sovereignty has been regulated in only 2 constitutions (but in relation to 7 autonomous territories); the scope of granted tax sovereignty differs between the autonomous territories (some norms indicate the structural elements of the tax, while others define tax sovereignty in very general terms); the provisions granting tax sovereignty are protected against amendment, but, in principle, the approval of the central state is required;

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Received: 8.08.2023. Verified: 11.09.2023. Accepted: 1.10.2023.

Madeira and the Azores are, in the opinion of the authors, characterised by the highest level of constitutionalisation in terms of tax sovereignty.

Keywords: autonomous territory, tax sovereignty, territorial autonomy, taxes, constitution

1. Introduction

Nowadays, as a result of the progressing economic crisis, the concept of "tax sovereignty" is gaining importance. Literature indicates two ways of understanding the term "tax sovereignty", i.e. either in an external or in an internal way[1]. External tax sovereignty is often analysed in the context of a state's independence in the face of external pressures from other states or international organisations that want to influence its tax policy[2]. On the other hand, tax sovereignty understood internally is the state's right to tax individuals in accordance with the applicable tax law in its territory[3].

Tax sovereignty in the internal sense is undoubtedly related to constitution – the highest ranking act in the hierarchy of internal law. Introducing a public financial standard to the constitution serves to ensure fiscal stability. Constitutions are directly applicable, characterised by a qualified amendment process, and resistant to momentary impulses, which makes the constitutional norms of financial governance less vulnerable to current political needs[4].

Tax sovereignty in the internal aspect does not necessarily apply to the state itself. As a result of the constitutional process of financial public decentralisation, a state shares its power with its internal entities (usually local government units)[5]. This leads to the following problem:

[1] See more in V. Raritska, *Tax Sovereignty as a Fundamental Characteristic of Tax Law System*, [in:] M. Radvan (ed.), *System of Financial Law. System of Tax Law. Conference Proceedings*, https://is.muni.cz/repo/1353424/system-of-tax-law.pdf#page=346, Brno 2015, p. 344.

[2] Y. Brauner, An Essay on *BEPS, Sovereignty, and Taxation*, [in:] S.A. Rocha, A. Christians (eds.), *Tax Sovereignty in the BEPS Era*, Kluwer International 2017; A. Christians, *Sovereignty, Taxation and Social Contract*, "Minnesota Journal of International Law", 2008, vol. 18 cited for T. Dagan, *Klaus Vogel Lecture 2021: Unbundled Tax Sovereignty – Refining the Challenges*, "Bulletin For International Taxation" 2022, July, https://www.ibfd.org/sites/default/files/2022-09/ifa-free-bit-article.pdf, p. 318.

[3] See more T. Dagan, *Klaus Vogel…*, p. 318 and others.

[4] Ł. Kielin, *Constitutionalisation of Fiscal Rules in Times of Financial Crises: A Cure or a Trap?*, "Financial Law Review" 2021, no. 22(2), p. 96.

[5] See more about the decentralisation process in M. Bogucka-Felczak, *Konstytucyjne determinany funkcjonowania mechanizmów korekcyjno-wyrównawczych w systemie dochodów jednostek samorządu terytorialnego*, Warszawa 2017, pp. 40–51.

what if an autonomous territory or territories, which have been granted a constitutional special legal and political status, function alongside local government units within the state?

The extensive literature on the tax sovereignty of the state or the tax power of local government units, as well as on autonomous territories, generally overlooks the tax sovereignty of autonomous territories. The existing publications discussing autonomous territories in a monographic manner, including from the comparative perspective[6], analyse issues of tax sovereignty in the background.

For example, M. Suksi in his monograph comparing territorial autonomies devoted a few pages to the issues of taxation, focusing mostly on issues of the division of competences, participation through elections and referendums, the executive power of territorial autonomy, and international relations[7]. Moreover, T. Benedikter, when comparing the 10[8] (20[9]), analysed in the first place issues such as the division of powers, history, elections, etc.[10]

This article is intended to fill this gap.

2. Research methodology

The subject of the research is the tax sovereignty of European autonomous territories according to constitutional legal acts.

According to E. Tegler, tax sovereignty can be considered in two aspects: territorial and material. The first one means that it is implemented

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[6] See, for example, A. Przyborowska-Klimczak, *The Role of Parliamentary Bodies of Autonomous Territories in European States*, "Studia Iuridica Lublinensia" 2022, Issue 5, https://journals.umcs.pl/sil/article/view/14659/pdf; P. Łaski, *Autonomous Territory In the Light of International Law*, "Teka Komisji Prawniczej PAN Oddział w Lublinie" 2022, XV, no. 1, https://ojs.academicon.pl/tkppan/article/view/4462

[7] M. Suksi, *Sub-State Governance through Territorial Autonomy. A Comparative Study in Constitutional Law of Powers, Procedures and Institutions*, Berlin 2011, pp. 166–170.

[8] T. Benedikter, *Territorial autonomy as a means of minority protection and conflict solution in the European experience – An overview and schematic comparison*, http://www.gfbv.it/3dossier/eu-min/autonomy.html (access: 20.07.2023).

[9] T. Benedikter, *The World's Modern Autonomy Systems. Concepts and Experiences of Regional Territorial Autonomy*, Bolzen 2009.

[10] Similar thematic proportions were used in the following studies: Y. Ghai, S. Woodman, *Practising Self-Government: A Comparative Study of Autonomous Regions*, Cambridge University Press 2013.

within a specific territory and it is not allowed to extend beyond the territorial scope of the operation of a given public-legal entity. The second aspect consists of the right to introduce taxes, the right to collect benefits from taxes, and the right to administer them[11]. In the material aspect, the right to introduce taxes can be legally defined as the scope of powers to make decisions on tax matters. These decisions may concern the construction of the individual components of a tax (such as the subject of taxation, tax base, rates, reliefs and exemptions, payment dates and methods). The tax authority may be concerned with shaping the content of the tax liability, i.e. issuing individual decisions regarding annulment, deferral, spreading into instalments, tax collection and execution[12].

For the purposes of the study, it was assumed that tax sovereignty understood solely as the right to introduce new taxes (including structural elements) will be subjected to the analysis.

There are two main definitions of territorial autonomy. The first one combines the concept of territorial autonomy with a separate type of statehood. Territorial autonomy is a type of exercise of public authority in a decentralised state. This leads to the creation of a regional or autonomous state, which is an "intermediate" state between a unitary state and a federal state[13]. The second definition (the one adopted in this article) combines the lexical approach to autonomy (self-determination, independence) with geographical location and separateness[14]. An autonomous territory in this second group of definitions is a territorial

[11] E. Tegler, *Władztwo podatkowe gminy*, [in:] W. Miemiec, B. Cybulski (eds.), *Samorządowy poradnik budżetowy na 1997 rok*, Warszawa 1997, pp. 375–376 cited for J. Glumińska-Pawlic, *Konstytucyjne gwarancje władztwa podatkowego jednostek samorządu terytorialnego. Teoria i praktyka*, [in:] R.P. Krawczyk, A. Borowicz (eds.), *Aktualne problemy samorządu terytorialnego po 25 latach jego istnienia*, Łódź 2016, https://doi.org/10.18778/8088-114-3.03, p. 30. See also D. Godula, *Problematyka władztwa podatkowego gminy*, [in:] W. Miemiec (ed.), *Finanse samorządowe po 25 latach samorządności. Diagnoza i perspektywy*, Warszawa 2015, p. 412; W. Miemiec, *Prawne gwarancje samodzielności finansowej gminy w zakresie dochodów publicznoprawnych*, Wrocław 2005, p. 104.

[12] E. Kornberger-Sokołowska, M. Bitner, *Prawo finansów samorządowych*, Warszawa 2018, p. 35

[13] J. Iwanek, *Pojęcie autonomii terytorialnej we współczesnej europejskiej przestrzeni demokratycznej*, [in:] M. Domagała, J. Iwanek (eds.), *Autonomia terytorialna w perspektywie europejskiej.* Tom I, *Teoria – Historia*, Toruń 2014, p. 20

[14] M. Bogucka-Felczak, P. Kowalski, *Financial Sovereignty of Autonomous Territories in 20th Century Central and Eastern Europe*, "Historia Constitucional" 2022, Issue 23, p. 301.

entity within a sovereign state that has been granted asymmetric powers (compared to other units within the state, such as local government units)[15].

Autonomous territories were selected for the study according to the following criteria. First, only those located geographically within mainland Europe were selected. All overseas territories (e.g. the French Antilles, the Netherlands Antilles) or territories located geographically outside the European continent (e.g. Greenland) were rejected. Due to disputes over the eastern border between Europe and Asia, the Nenets Autonomous District was excluded from the research.

Secondly, only autonomous territories of those countries where there is a continental law system – rather than a common law system (Northern Ireland, Wales) or a mixed system using common law (Scotland) – were selected. Common law systems are not open to comparison with continental system countries, and the vast majority of European countries are characterised by the latter system.

Thirdly, the authors wanted to study only those autonomous territories that are directly or indirectly constitutionalised[16]. Terms such as "autonomy" and "autonomous territory" have been inserted into all European constitutions. The research tool used for this was the https://www.constituteproject.org database[17].

The application of these criteria led to the selection of the following list of autonomous territories[18]: the Autonomy of the Åland Islands (Finland), the Autonomous territorial-unit of Gagauzia (Moldova), the Azores and Madeira Autonomous Regions (Portugal), the Autonomous Province of Vojvodina (Serbia), the Autonomous Republic of Crimea

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15 Definition based on A. Ichijo, *What are Territorial Autonomies and Why the Handbook?*, [in:] B.C.H. Fong, A. Ichijo (eds.), *The Routledge Handbook of Comparative Territorial Autonomies*, Routlege New York 2022.

16 The lack of constitutionalisation of Svalbard in the Constitution of Norway was the reason for excluding this island from the study.

17 See more in Z. Elkins, T. Ginsburg, J. Melton, *Constitute: The World's Constitutions to Read, Search, and Compare,* https://www.constituteproject.org/content/about (access: 21.07.2023).

18 Kosovo and Metohija (further Kosovo) were not included in the study due to their international status. The authors refer to the official position of Poland on this subject. Kosovo's independence as a state (the Republic of Kosovo) was recognized by Poland on February 26, 2008, similarly to most European Union countries (M. Ickiewicz-Sawicka, *Pogranicze Serbsko-Albańskie – konflikt o Kosowo*, [in:] J. Regina-Zacharski, R. Łoś (eds.), *Sąsiedztwo i pogranicze – między konfliktem a współpracą*, tom 2, Łódź 2013, p. 95).

(Ukraine)[19], Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige/ Sudtirol (further: Trentino-Alto Adige), and Valle d'Aosta/Vallee d'Aoste (further: Valle d'Aosta) (Italy). The list was supplemented with other European autonomous territories meeting the previous criteria: Mount Athos (Greece), which is referred to as territory with ancient privileged status[20], and Faeroe Islands (Dennmark), which are only mentioned in the Constitution of Denmark in a few paragraphs next to Greenland.

The above led to the collection of research material in the form of 8 constitutions and 14 legal acts constituting the autonomous territories[21].

3. Comparative legal research

3.1. The Åland Islands

The Finnish Constitution[22] contains scant regulation regarding the autonomy of the Åland Islands. The main legal act only contains norms referring to the Act on the Autonomy of the Åland Islands[23] (in legislative matters – Section 75 of the Finnish Constitution, in local government matters – section 120 of the Finnish Constitution). An interesting regulation in the field of financial public matters is Section

[19] The Autonomous Republic of Crimea was included in the research despite the fact that it is, *de facto*, under the control of the Russian Federation. The Republic of Poland officially (https://www.gov.pl/web/diplomacy/mfa-statement-on-the-sixth-anniversary-of-russias-annexation-of-crimea, access: 20.07.2023) condemns the violation of Ukraine's integrity and sovereignty, as does the United Nations General Assembly in Resolution adopted on 27 March 2014, 68/262 entitled Territorial integrity of Ukraine (https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/455/17/PDF/N1345517.pdf?OpenElement, access: 20.07.2023).

[20] Article 105(1) of The Constitution of Greece As revised by the parliamentary resolution of May 27th 2008 of the VIIIth Revisionary Parliament, https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf (access: 7.06.2023).

[21] In addition, the Autonomous Communities of Spain, despite the extensive autonomy of individual communities, could not be classified as autonomous territories due to the unitary nature of Spain as a country.

[22] The Constitution of Finland 11th June, 1999 (731/1999, amendments up to 817/2018 included), https://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf (access: 13.06.2023).

[23] Act on the Autonomy of Åland (16th August, 1991/1144), https://peacemaker.un.org/sites/peacemaker.un.org/files/FI%20SE_930101_Act%20on%20the%20Autonomy%20of%20Aland.pdf (access: 13.06.2023).

58 of the Finnish Constitution, which lists matters in which the President of Finland makes decisions without a draft submitted in advance by the Government. One of them is the matters referred to in the Act on the Autonomy of the Åland Islands, other than those relating to the finances of the Åland Islands.

Although Section 121(3) of the Constitution stipulates that municipalities have the right to levy a municipal tax, this does not apply to the Åland Islands, as they have their own self-government in accordance with section 120.

The Act on the Autonomy of the Åland Islands clearly indicates the tax sovereignty granted to the Åland Islands. First of all, Section 27(36) indicates that the State shall have legislative power in matters relating to taxes and dues, with the exceptions provided for in section 18, subparagraph 5. Section 18(5) indicates that the Island shall have legislative powers with respect to the the additional tax on income for Åland and the provisional extra income tax, as well as the trade and amusement taxes, the bases of the dues levied for Åland and the municipal tax. Section 27(36) in conjunction with section 18(5) as the basis for tax sovereignty for amendments require concerted action by both the state and the autonomous authorities.

According to Section 69, the Åland Autonomy Act can only be amended, repealed or made exceptions by coherent decisions of the Parliament of Finland and the Parliament of Åland. In the Parliament of Finland, decisions are taken in the manner provided for amending and repealing of the Constitution, and in the Parliament of Åland, by a majority of at least two-thirds of the votes cast.

3.2. The Mount Athos

The Constitution of Greece contains an entire article relating to the autonomy of Mount Athos (Aghion Oros). Article 105 is placed in section VI entitled “Administration”. Article 105 contains legal norms determining the sovereignty of this area, the role of the Ecumenical Patriarchate, the division of the area into twelve Holy Monasteries, and the role of the governor. Art. 105 of the Constitution also contains a reference to the separate legal act, which is to regulate customs and tax privileges.

The Constitutional Charter of the Holy Mountain of Athos of 1924[24] does not contain provisions directly granting Mount Athos tax sovereignty. Instead, it provides numerous tax privileges. In one of the initial articles of this act, Art. 12, it is explicitly stated that Mount Athos enjoys, according to the ancient established customs, special privileges and tax immunities that are clearly set out in the present Constitutional Charter.

The above was mainly introduced via Legislative Decree of the 10th September, 1926, on the Ratification of the Constitutional Charter of Mount Athos[25].

Article 2 of the Decree and Article 167 of the CCMA contain the following subject-object and subject exemptions in the tax structure: produce from Athos is exempted from any tax on land income and other direct income; transfer and income from any property located on Mount Athos are exempt from taxation (this applies to manual workers – monks, but not to merchants who are practicing their trade on Mount Athos); monks living on Mount Athos are exempt from consumption taxes on products produced and consumed locally, with the exception of taxes on tobacco, powder, and other explosive substances and monopoly goods; all contracts governing the transfer of rights to real estate on Mount Athos and drawn up by the competent monastic authorities or Hiera Koinotis are exempt from a stamp tax; fishing on Mount Athos for consumption by the monks is not subject to taxation.

3.3. The Azores and Madeira

The Portuguese Constitution[26] regulates the autonomy of the archipelagos of the Azores and Madeira in several places. According to Article 5(1) and 6(2), the Azores and Madeira are components of Portuguese territory while also constituting separate autonomous regions, with their own political and administrative statutes and authorities. Other provisions of the constitution concern, *inter alia*, the administrative division of the autonomy (Article 236(2)); the competence of the Court

[24] Further: CCMA, https://www.mountathos.org/en-us/Athonite-Meadow/Historical-and-Legal-Documents/Mount-Athos-Institutional-Chart.aspx (access: 22.06.2023).

[25] Further: Decree, https://www.mountathos.org/en-us/Athonite-Meadow/Historical-and-Legal-Documents/Mount-Athos-Institutional-Chart.aspx (access: 22.06.2023).

[26] Constitution of the Portuguese Republic Seventh Revision, 2005, https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf (access: 22.06.2023).

of Auditors over the archipelagos (Article 214(1)(4)); the substantive limits of amendments to the Constitution (Article 288 (o)). In addition, the entire Title VII "Autonomous Region" contains legal norms on, among other things, the political and administrative system (Art. 225); statutes and electoral laws (Art. 226); powers of the autonomous regions (Art. 227); legislative autonomy (Art. 228); cooperation between bodies that exercise sovereign power and regional bodies (Art. 229).

The Portuguese Constitution explicitly provides for the financial governance of the autonomous regions, although it does not specify what these powers include, referring to the statutes of the archipelagos. According to Art. 227(1)(i) of the Constitution, the autonomous regions shall be territorial bodies corporate and shall possess the following powers, which shall be defined in their statutes: to exercise their own power to tax as laid down by law as well as to adapt the national fiscal system to the specificities of the region under the terms of framework laws passed by the Assembly.

The tax sovereignty is regulated in the Political and Administrative Statute of the Autonomous Region of Madeira[27] and in the Political and Administrative Statute of the Autonomous Region of the Azores[28].

First of all, Art. 107(1, 2) the Statute of Madeira provides in principle that the Autonomous Region of Madeira exercises its own fiscal powers in accordance with the provisions of this Statute and the law. The region also has the power to adapt the national tax system to regional specificities in accordance with the law. A similar regulation is provided for in Art. 20(1, 2) of the Political and Administrative Statute of the Autonomous Region of the Azores.

Art. 135(1) of the Statute of Madeira divides these "tax powers", *inter alia*, into regulatory, administrative, and legislative powers. On the other hand, Art. 50(1) of the Statute of the Azores divides these powers into "taxation powers" and "adaptation powers".

In the case of the Autonomy of Madeira, legislative and regulatory competences comprise the following powers: the power to create and regulate taxes, in force only in the Region, defining the respective incidence, rate, tax benefits, and guarantees for taxpayers under the conditions set out in this law; the power to adapt national taxes to regional specificities, in

[27] https://www.cne.pt/sites/default/files/dl/legis_eparam_2012.pdf (access: 22.06.2023).

[28] https://www.alra.pt/documentos/estatuto_pt.pdf (access: 22.06.2023).

terms of incidence, rate, tax benefits, and taxpayer guarantees, within the limits set by law and under the terms of the following articles (Art. 135(2) of the Statute of Madeira).

Subsequent articles grant the regions the power to create and regulate contributions for improvement in force in the Region, to tax increases in the value of real estate resulting from works and regional public investments, and to create and regulate other special contributions tending to offset the higher regional expenses resulting from private activities that are exhausting or aggressive to public goods or the regional environment; to define measures, namely of a fiscal nature, to compensate for decreases in the value of real estate resulting from administrative decisions or regional public investments (Art. 136(1, 2)); the authority to levy surcharges on taxes in force in the Region, under the terms of the applicable tax legislation (Art. 137); tax regulatory powers relating to matters subject to regional legislative powers (Art. 139); in case of the adaptation of the national system to the regional specificity, the legislative body may, under the terms of the law, reduce the national rates of income tax, value added tax to the limit of 30% (Art. 138(2)) or set different limits for the rates of municipal contributions for real estate (Art. 138(4)).

Similar regulations are provided for in the Statute of the Azores. The Region has the power to: create and regulate taxes, defining their respective incidence, rate, liquidation, collection, tax benefits and guarantees of tax payers, in the terms of the Finance Law of the Autonomous Regions, including the power to create and regulate contributions on improvements to charge added value on real estate deriving from renovation and regional public investment and to create and regulate other special contributions tending to compensate greater regional expenditure deriving from private activities, that may erode or jeopardise public assets or the regional environment; adapt national taxes to the specific characteristics of the Region, in matters of tax incidence, rates, tax benefits and guarantees for taxpayers, in the terms of the Finance Law of the Autonomous Regions; levy surplus charges upon the collection of taxes implemented in the Autonomous Region of the Azores; reduce, in the terms of the Finance Law of the Autonomous Regions, the rates of national income and value added taxes, and of special consumer taxes, in accordance with current legislation; determine the application, in the Autonomous Region of the Azores, of reduced rates of the Tax on the Income of Collective Persons defined in national legislation (Art. 50(2) of the Statute of the Azores).

Article 227(1) (i) of the Constitution of Portugal as the basis for tax sovereignty for amendment require the launch of the procedure for amending the Constitution, which is characterised by: a need for 5 years to pass since the date of publication of the last law amending the ordinary Constitution (Art. 284(1)); an amendment to the Constitution requires a resolution by a majority of two-thirds of the total number of deputies, and in the case of an extraordinary amendment – four-fifths of the total number of deputies (Art. 286(1) in connection with Art. 284(2)); acts amending the constitution must respect the substantive limits of the amendment, which include, among others, political-administrative autonomy of Madeira and the Azores.

In turn, the amendment of the statutes of both archipelagos takes place at the initiative of the Assembly, which is approved by the Assembly of the Portuguese Republic (Article 137 of the Statute of the Azores and Article 148 paragraph 1 and paragraph 4 of the Statute of Madeira).

3.4. The Gagauzia

The Constitution of Moldova[29] provides for Gagauzia as an autonomous territory in two articles. According to Article 110(1), the autonomous territorial unit of Gagauzia is one of the territories into which Moldova is divided, right next to villages, towns, and districts. Article 111, on the other hand, is entirely devoted to the autonomous territory. It contains several references to Gagauz legislation on: rights and freedoms (Section 2); authorities (Section 3); budget (Section 5); control of compliance with Moldovan legislation in Gagauzia (Section 6).

According to Art. 12(2) point d, of the Law of the Republic of Moldova – On the special legal status of Gagauzia (Gagauz Yeri)[30], and according to Art. 51(2) point d. of the Code of Gagauzia (Gagauz Yeri)[31], the powers of the People's Assembly of Gagauzia include passing laws on local taxes.

[29] Constitution of the Republic of Moldova Adopted on 27th July, 1994, with Amendments through 2016 https://www.constcourt.md/public/files/file/Actele%20Curtii/acte_en/MDA_Constitution_EN.pdf (access: 7.07.2023).

[30] Further: The law on the special legal status, December 23rd, 1994, No. 344-XIII, as amended, https://halktoplushu.md/archives/8 (access: 7.07.2023).

[31] Further: The Legal Code, No. 28-XXX/I, 5.06.1998, as amended https://halktoplushu.md/archives/103 (access: 7.07.2023).

Art. 12(2) point d, the of the law on the special legal status as a basis for tax sovereignty for amendment requires three-fifths of elected deputies of the Parliament of the Republic of Moldova (Art. 27(2) of the law on special legal status). Surprisingly, Art. 51(2) point d. of the Legal Code as another basis for tax sovereignty for amendment requires the adoption of a law by the People's Assembly of Gaugazia by referendum or on its own initiative. The law is adopted by a majority of two-thirds of elected deputies (Art. 93(1,2) of the Legal Code).

3.5. The Vojvodina

The Constitution of Serbia[32] regulates the issues of autonomy of Vojvodina in many places, but two types of provisions can be identified, i.e. those where Vojvodina is mentioned by name and those that use the term "autonomous provinces". According to Art. 182(2), the Republic of Serbia consists of the autonomous province of Vojvodina and the autonomous province of Kosovo and Metohija. Apart from Art. 184(2) and 185(2) of the Constitution (issues of budgetary autonomy and the Statute), the Constitution no longer uses the term "Vojvodina". There are many articles in the Constitution of Serbia where the legislator indicates the status of the autonomous province, its rights and obligations. There are no provisions for tax sovereignty among them.

The Statute of the Autonomous Province of Vojvodina[33] also does not provide for a legal norm establishing the tax sovereignty of this territory. Moreover, these issues are not mentioned in Art. 31 of the Statute, which lists the competences of the legislative body of the autonomy – the Assembly of the Autonomous Province of Vojvodina.

3.6. The Faroe Islands

The Danish Constitution[34] only regulates the issues of autonomy of the Faroes in a few places. The constitution does not devote a separate article to them, but indicates their rights in several places (e.g. regarding

[32] Constitution of the Republic of Serbia with amendments of 2006, http://www.parlament.gov.rs/upload/documents/Constitution_%20of_Serbia_pdf.pdf (access: 7.07.2023).

[33] "Official Gazette of AP Vojvodina", number 20/2014, https://www.skupstinavojvodine.gov.rs/Strana.aspx?s=statut&j=EN (access: 7.07.2023).

[34] The Constitutional Act of Denmark of 5th June, 1953, https://www.thedanishparliament.dk/-/media/sites/ft/pdf/publikationer/engelske-publikationer-pdf/the_constitutional_act_of_denmark_2018_uk_web.ashx (access: 7.07.2023).

representation in the Folketing – Art. 28, 32(5); principles of conducting referenda – Art. 42 par. 8).

The Home Rule Act of the Faroe Islands[35] clarifies the status of the Faroe Islands not as an "autonomy" but as a "self-governing community within the Danish Kingdom" (Section 1). According to this legal act, the Faroe Islands take over certain affairs and fields of affairs from the State. The Faroese Home Government can decide that all or some of these of affairs and fields of affairs shall be transferred at once to the Home Government, with the consequence that the expenses involved are born by the same. With the same consequence the Home Government can decide at a later state that affairs and fields of affairs in the list which are not transferred at once, shall be transferred to the Home Government. In similar manner, it is the duty of the Home Government to take over affairs and fields of affairs enumerated in the list when the state authorities wish it to do so (Section 2). What is more, the Home Government in case of affairs and fields of affairs has the legislative and administrative authority (Section 4).

Some of these "Special Faroese Affairs" include: municipal affairs including: local government administration, supervision and taxation (List A, point 2), and direct and indirect taxes, including: stamp duties, totalised duties, duties on special Faroese lottery. Handling charges such as legal fees and land registration fees shall accrue to the authority which defrays the cost of the institution concerned (List A, point 6).

The Home Act Rule does not contain provisions for amending this act. It should be noted that the Home Rule Act was passed by the Danish Parliament with the approval of this act by the Faroese Parliament.

3.7. Crimea

The Constitution of Ukraine[36] regulates the autonomy of Crimea in a number of places. According to Article 133(1), the system of administrative and territorial structure of Ukraine is composed of the Autonomous Republic of Crimea, *oblasts*, districts, cities, city districts,

[35] No. 137 of 23rd March, 1948, https://english.stm.dk/media/10516/fo-hjemmestyrelov-uk.pdf (access: 7.07.2023).

[36] Constitution of Ukraine Adpoted at the Fifth Session of the Verkhovna Rada of Ukraine on 28th June, 1996 Amended by the Laws of Ukraine, http://biblioteka.sejm.gov.pl/wp-content/uploads/2017/06/Ukraina_ang_010117.pdf (access: 20.07.2023).

settlements, and villages. Other provisions of the constitution concern, *inter alia*, Crimea as an integral part of Ukraine (Article 134); stressing that Crimea has its own Constitution adopted by the Verkhovna Rada of Autonomy and approved by the Verkhovna Rada of Ukraine by at least half of its constitutional composition (Article 135(1)); the prohibition of non-conformity of normative acts of the autonomy with the Constitution of Ukraine and laws of Ukraine (Article 135(2)); the identification of the authorities of Crimea (Articles 136, 139); the competences of the Autonomy (Articles 137 and 138).

It should be emphasised that pursuant to Art. 138 sec. 1 point 4 of the Constitution of Ukraine, it is the responsibility of Crimea to develop, adopt, and implement the budget of the Autonomy in accordance with the tax and budget policy of Ukraine. In turn, Art. 138 sec. 2 of the Constitution provides that the laws of Ukraine may add other powers to the Autonomy.

The Constitution of the Autonomous Republic of Crimea[37] defines Crimea's tax sovereignty in several places. The most important of them is Art. 18 sec. 1 point 14 of this act, according to which, the powers of the Autonomy shall include: fixing, under Ukrainian legislation, revenues forming the budget of the Autonomous Republic of Crimea; securing the implementation of the same; conducting experiments in taxation sphere; fixing local taxes and fees; as well as patenting specific activities and, in general, exercise of such other powers in budget and taxation sphere, as provided for by Ukrainian laws.

Moreover, Art. 26 sec. 2 point 8 is a clarification of the previous article, as it states that it is within the power of the Verkhovna Rada of the Autonomous Republic of Crimea to fix taxes and tax benefits under Ukrainian laws.

The above-mentioned articles providing for the tax sovereignty of Crimea may be amended by a decision of the Verkhovna Rada of the Autonomous Republic of Crimea adopted by the majority of votes of the total membership. However, changes must be approved by the Verkhovna Rada of Ukraine (Article 27(1) in connection with Article 48(3) of the Crimea Constitution).

[37] Adopted at the second session of the Supreme Rada of Autonomous Republic of Crimea on 21st October, 1998, As amended by the Law of Ukraine, https://web.archive.org/web/20140312144006/http://www.rada.crimea.ua/en/bases-of-activity/konstituciya-ARK (access: 20.07.2023).

3.8. Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige, and Valle d'Aosta

According to Art. 114(1) of the Constitution of Italy[38], the Italian Republic is composed of municipalities, provinces, metropolitan cities, regions, and the state. There are 20 regions, 5 of which have "special forms and conditions of autonomy" (Art. 116(1) in conjunction with Art. 131 of the Constitution). These regions are: Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige, and Valle d'Aosta. In addition, the Trentino-Alto Adige region is divided into the autonomous provinces of Trento and Bolzano. The Constitution of Italy does not specify the forms and conditions of these regions, but refers to the special statutes adopted by constitutional law.

It needs to be emphasised that the Constitution of Italy directly grants tax powers to all local government units. According to Art. 119(2), municipalities, provinces, metropolitan cities, and regions shall have independent financial resources. They set and levy taxes and collect revenues of their own in compliance with the Constitution and according to the principles of coordination of State finances and the tax system. They share in the tax revenues related to their respective territories The above means that all five regions also have tax sovereignty, so an analysis of the norms of individual constitutional acts will be used to compare the legal regulation of this sovereignty.

According to the Article 5 of the Statute of Friuli-Venezia Giulia[39], while observing the general limits indicated in Article 4 and in harmony with the fundamental principles established by State laws in individual matters, the Region has legislative power to establish regional taxes, as provided for in Article 51.

Pursuant to this article, the revenues of Friuli-Venezia Giulia also consist of the income from its assets or from its own taxes which it has the right to establish under regional law, in harmony with the tax system of the State and the Municipalities, including in the form of metropolitan cities (Article 51(1)). What is more, the revenue relating to own taxes and

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[38] The Constitution of the Italian Republic, 27th December, 1947, https://www.quirinale.it/allegati_statici/costituzione/costituzione_inglese.pdf (access: 8.07.2023).

[39] Statute Special of Autonomous region Friuli Julian Venice constitutional law – 31st January, 1963, no. 1 and later changes and additions, Coordinated text January 2022, https://www.consiglio.regione.fvg.it/cms/export/sites/consiglio/istituzione/allegati/Allegati_istituzione_statuto/Statuto-aggiornato-gennaio-2022.pdf (access: 8.07.2023).

co-participations and surcharges on state taxes that the laws of the State attribute to the local authorities is due to Friuli-Venezia Giulia with reference to the local authorities of its territory, without prejudice to financial neutrality for the State budget (Art. 51(2)). In addition, the Region is entitled to certain modifications of the structural elements of local and state tax obligations. In compliance with the European Union's rules on state aid, the Region may: with reference to the state taxes for which the State foresees the possibility, modify the rates, reducing them beyond the currently established limits and increasing them, within the maximum level of taxation established by state legislation; provide for exemptions from payment; introduce tax credits and deductions from the tax base; in the matters within its competence, institute new local taxes, regulating, also in derogation from state law, among other things, the methods of collection; regulate local municipal taxes of real estate nature established by state law, also notwithstanding the same law, defining the methods of collection and allowing local authorities to modify the rates and to introduce exemptions, deductions (Art. 51(4) a-b-bis). According to Art. 51(6), if the law of the State establishes a tax due to the provinces, this tax and the powers recognised to the provinces in relation to it are attributed to the Region.

The other Regions, on the other hand, do not mention tax matters within the competence of the legislature (Article 3 and following of the Special Statute of Sardinia[40]; Article 14 and following of the Special Statute of Sicily[41]; Article 4 and following of the Special Statute of Trentino Alto-Adige[42]; Article 2 and following of the Special Statute of the Valle d'Aosta[43]).

40 Special statute for Sardinia Constitutional Law 26th February, 1948, no. 3, Current coordinated text, updated as at 30th December, 2013, https://www.regione.sardegna.it/documenti/1_5_20150114110812.pdf (access: 8.07.2023).

41 Special Statute of Sicilian Region, constitutional law 7th February, 2013, no. 2, published in the GU of the Republic no. 41 of 18th February, 2013, https://www.ars.sicilia.it/sites/default/files/downloads/2019-06/Statuto2019.pdf (access: 8.07.2023).

42 The Special Statute for Treninto Alto-Adige, 1st January, 2015, https://www.consiglio.provincia.tn.it/news/web-radio/archivio/Mp3/statuto%20speciale%20annotato.pdf (access: 8.07.2023).

43 Special Statute of Valle d'Aosta Constitutional Law 26th February, 1948, no. 4, https://www.regione.vda.it/Autonomia_istituzioni/lostatuto_i.aspx (access: 8.07.2023). The exception is Art. 3(f), according to which the Region has the power to issue legislative norms for the integration and implementation of the laws of the Republic, within the limits indicated in the previous article, to adapt them to regional conditions, in the following matters: regional and municipal finances.

Despite this, the aforementioned statutes specify the scale of the granted authority. Extensive legal regulation is provided in the Special Statute for Trentino-Alto Adige which grants tax sovereignty to both the entire region and the two autonomous provinces – Trento and Bolzano. The region and the provinces have the power to establish their own taxes with laws in harmony with the principles of the State tax system, on matters of their respective competence (Article 73(1)). However, only provinces can establish taxes and levies on tourism (Article 72); in relation to the state taxes for which the State provides for the possibility, can in any case modify the rates and provide for exemptions, deductions as long as they are within the limits of the higher rates defined by the state legislation (Article 73(1a)). Additionally, the provinces have legislative competence in matters of local finance. In matters of competence, the provinces may institute new local taxes. The provincial law regulates the aforementioned taxes and local municipal real estate taxes established by state law, also in derogation from the same law, defining the methods of collection and may allow local authorities to modify the rates and to introduce exemptions, deductions. The distribution of revenue and the surtaxes on state taxes that the laws of the State attribute to the local authorities are due, with regard to the local authorities of the respective territory, to the provinces. Where the state law regulates the establishment of additional taxation however named by the local authorities, the related purposes are provided by the provinces by identifying criteria, methods, and limits of the application of this discipline in the respective territory (Article 80(1–3)).

Pursuant to Art. 10[6] of the Sardinian Statute, the Region, in order to promote the economic development of the island and in compliance with the Community legislation, with respect to the state taxes for which the State provides for the possibility, may, without prejudice to the coverage of the standard requirement for the financing of the essential levels benefits concerning civil and social rights referred to in Article 117(2) (m) of the Constitution: a) provide for tax breaks, exemptions, tax deductions, deductions from the taxable base and to grant, with charges borne by the regional budget, contributions to be used in compensation in accordance with state legislation; b) change the rates upwards within the taxable values established by state law or downward to zero.

According to Article 12(2) of the Special Statute of Valle d'Aosta, the Region can institute its own taxes and surcharges in compliance with the principles of the current tax law.

Additionally, Article 36(1, 2) of the Statute of Sicily indicates that the Region approves certain taxes to meet financial needs and production taxes are reserved to the State.

Article 119(2) of the Italian Constitution as the basis for tax sovereignty to amend, requires the launch of the procedure for amending the Constitution, which is characterised by: the adoption of the amendment by both chambers of the parliament in two consecutive debates, with an interval of no less than three months, by an absolute majority of members of each chamber in the second ballot (art. 138(1)); Laws may be submitted to a referendum if, within three months of their promulgation, one-fifth of the members of one of the chambers or five hundred thousand voters or five regional councils request so (art. 138(2)); no referendum is held if the law was passed in the second ballot by a majority of two-thirds of its members (art. 138(3)).

The aforementioned constitutional procedure is applied to all statutes of Italian autonomous territories with the following changes, among others: the initiative for amendments can also be exercised by the Regional Council, government or parliamentary initiatives to amend this Statute are communicated by the Government of the Republic to the Regional Council, which shall express its opinion within two months, approved modifications are not subject to a national referendum (Art. 63(1–4) of the Friuli-Venezia Giulia Statute; Art. 54(1–4) of the Sardinian Statute; Art. 41ter(1–4) of the Statute of Sicily; Art. 103(1–4) of the Statute of Trentino Alto-Adige; Art. 50(1–4) of the Special Statute of the Valle d'Aosta).

However, Art. 51 of the Friuli-Venezia Giulia Statute, Art. 10[6] of the Sardinian Statute, Art. 72, 73, 80 of the Statute of Trentino Alto-Adige, may be modified with state laws, at the request of the Government and of the Region. Additionally, in case of Friuli-Venezia Giulia, Sardinia, state law has to be consulted with the Region (Art. 63(5) of the Friuli-Venezia Giulia Statute; Art. 54(5) of the Sardinian Statute; Art. 104(1) of the Statute of Trentino Alto-Adige).

What is more, according to Art. 50(5) of the Statute of Valle d'Aosta, the modification of Art. 12(2) of the Statute will be established by state law as the "financial regulation of the Region" (in agreement with the Regional Council).

4. Final remarks

The conducted analysis does not exhaust all issues related to the constitutionalisation of the tax authority of European autonomous territories. The authors have narrowed the subject of the research to the most important constitutional legal acts and to the autonomous territories located in continental Europe. Moreover, the research results were obtained using linguistic and systemic interpretation solely on the basis of the collected research material. Expanding the research material in the future, e.g. by other types of legislation, case law, and by including other territories for comparison purposes, may provide different conclusions in the future[44].

Nevertheless, according to the authors, the comparative study provided many valuable quantitative and qualitative findings. Out of 13 autonomous territories included in the study, it was found that not all systemic legal acts contain a norm granting tax sovereignty. In the case of Vojvodina and Mount Athos, neither the Constitutions of Serbia and Greece nor the acts establishing the autonomy contain legal norms of this type. Art. 2 of the Decree and Art. 167 of the CCMA provide only objective and subjective tax exemptions. However, the remaining 11 autonomous territories have appropriate legal regulations in their constitutional legislation.

The tax sovereignty of not all remaining autonomies is written into the main state constitutions. The Portuguese Constitution (Art. 227(1) (i)) and the Constitution of Italy (Art. 119(2)) contain relevant standards in their content (which is more or less similar). Both articles confer the right to impose taxes (although only the Portuguese constitution uses the term "sovereignty"), provided that it is in accordance with national legislation. Only the Constitution of Portugal in Art. 227(1) grants the right to adjust (adapt) the national tax system to the specificities of the autonomous regions.

The above means that only the tax powers of Madeira, the Azores, Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige, and Valle d'Aosta have been introduced into the Constitution of the main state. Unlike the other autonomous territories (Åland Islands, Faroe Islands, Crimea and Gagauzia).

[44] In particular, it seems advisable to examine the relationship between the tax sovereignty of autonomous territories in the process of applying tax law and the degree of the constitutionalisation of the tax sovereignty granted to them.

The tax authority of all 11 autonomies has been incorporated into their statutes. The difference between individual legal norms granting tax sovereignty lies in the scale of its granting.

The most laconic and thus explicitly not limited to a selected structural element of the tax or type of tax are the regulations of the statutes of Gagauzia, Crimea, and Valle d'Aosta (although the regulations of the two latter autonomies contain a reference to the internal tax law). The statutes of some Italian and both Portuguese autonomies provide for detailed fiscal powers with regard to the indicated structural elements of regional taxes and, in addition to the above powers, the authorities of the autonomies may modify certain structural elements in the field of central taxes (Friuli-Venezia Giulia, Trentino-Alto Adige, Madeira and the Azores). The exception in this regard is the Sardinian statute, which only provides for adaptive powers with regard to structural elements in the field of state taxation. In turn, the statutes of the Åland Islands and the Faroe Islands grant tax sovereignty in the field of selected types of taxes. Finally, reference should be made to the statute of Sicily, which provides for the right of the region to approve certain taxes and reserves the tax sovereignty in relation to production tax to the state.

There is no doubt that the provisions conferring tax sovereignty in the constitutions of Italy and Portugal are protected against their derogation by the binding special procedure for amending the constitution. It is difficult to say which of the legal acts is more protected. The Portuguese Constitution provides for a more difficult majority when amending the ordinary constitution (2/3 of all deputies, while in the Italian Constitution it is an absolute majority). However, Portugal has a unicameral parliament, while Italy has a bicameral one. Nevertheless, from the point of view of autonomy, it is very important that the laws amending the Portuguese Constitution respect the substantive limits of the amendment, which include the political and administrative autonomy of Madeira and the Azores.

On the other hand, the protection of legal norms of tax sovereignty in the statutes of autonomies is more or less similar. As a rule, and without going into the details described above, it is up to the autonomy authorities to initiate the change procedure, but in virtually every case the central state authority must approve the change. The exception is the Faroe Islands, where the statutory provisions do not contain a procedure for amending this legal act.

It should be also emphasised that in the case of Gagauzia, the method of amendment varies depending on the type of legal act. The act on the special status of Gagauzia requires a decision of the main state's legislative body to be amended. In turn, the Legal Code of Gagauzia requires the legislative body of the autonomous territory to amend a law or a referendum.

Taking everything into consideration, in the opinion of the authors, it is the Portuguese autonomous territories that are characterised by the highest level of constitutionalisation in terms of tax sovereignty. The norms providing for this authority are found both in the Constitution and in the statutes of both territories. The Constitution of Portugal, apart from the explicitly granted tax authority, grants the right to adjust (adapt) the national tax system to the specificity of autonomous regions. These powers are confirmed and detailed in the statutes of Madeira and the Azores. The Portuguese constitution is very strongly protected against changing the norms in the field of tax powers (one of the material boundaries of change is precisely territorial autonomy).

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Konstytucjonalizacja władztwa podatkowego europejskich terytoriów autonomicznych

Streszczenie. Artykuł przedstawia wyniki badań komparatystyki prawniczej dotyczącej władztwa podatkowego przyznanego 13 europejskim terytoriom autonomicznym przez prawo konstytucyjne. Materiał badawczy obejmuje: konstytucje państw głównych oraz akty prawne konstytuujące terytoria autonomiczne, a także wybrane publikacje naukowe z zakresu władztwa podatkowego oraz autonomii terytorialnej. Do najważniejszych wyników badań należą m.in.: władztwo podatkowe zostało skonstytucjonalizowane w większości przypadków europejskich terytoriów autonomicznych (11 z 13); władztwo podatkowe zostało uregulowane tylko w 2 konstytucjach (ale w odniesieniu do 7 terytoriów autonomicznych); zakres przyznanego władztwa podatkowego jest zróżnicowany (niektóre normy wymieniają elementy konstrukcyjne podatku, inne określają władztwo podatkowe w sposób bardzo ogólny); przepisy przyznające władztwo podatkowe są chronione przed ich zmianą, ale co do zasady wymagana jest zgoda państwa centralnego; Madera i Azory, zdaniem autorów, charakteryzują się najwyższym stopniem konstytucjonalizacji w zakresie władztwa podatkowego.

Słowa kluczowe: terytorium autonomiczne, władztwo podatkowe, autonomia terytorialna, podatki, konstytucja.

COPE
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JM17111

https://doi.org/10.18778/1509-877X.2023.04.08

Articles

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Polish Concession Fee on Offshore Wind Farms: A Quasi-Tax Hidden in the Energy Law

Summary. The production of electricity using offshore wind farms is at a preparatory stage in Poland. However, it has the opportunity to become the most dynamically-developing segment of the power industry, especially considering ambitious targets for reducing CO_2 emissions. The development of the renewable energy sector in Poland has major real estate tax context when one takes into account that RET paid for the infrastructure projects constitutes an important source of tax revenue for the local communities. The taxation of wind farms is a well-recognised issue, but jurisprudence developed in this area cannot help in solving the problem of the taxation of the offshore wind farms. A legal loophole in the Polish RET provisions made it impossible to tax the offshore constructions. In order to capture the tax from offshore wind farms, the Polish legislator introduced a special concession fee, whose amount is approx. equal to the hypothetical RET to be paid from the wind farm if it was located onshore. The purpose of the article is to present the doubts regarding the offshore concession fee from the perspective of Polish constitutional standards as well as the Polish tax system consistency.

Keywords: offshore, real estate tax, wind farms, property taxation, concession fee, energy transformation

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Received: 16.08.2023. Verified: 15.09.2023. Accepted: 29.09.2023.

1. Introduction

Poland still depends on coal as its primary energy source. However, due to ambitious targets for reducing CO_2 emissions[1], Poland must move away from coal-fired power generation. Wind energy has good prospects in Poland (due to favourable natural conditions)[2], which is reflected by the increasing levels of investment in this sector by the largest Polish and global energy companies. Given the risks of conflicts with local communities in cases of onshore investments, the construction of offshore wind farms would appear to be an ideal solution. During the transition from 2020 to 2021, Poland witnessed significant changes in legal regulations, which were designed to create a favourable environment for investments in offshore wind farms. One aspect of these changes was a new quasi-tax covering offshore wind farms. Usually, low-emission energy development is associated with tax preferences for investors. However, in the case presented here, low-carbon energy could be perceived as a potential source of government revenue. The production of electricity using offshore wind farms is at a preparatory stage in Poland. However, it has the opportunity to become the most dynamically-developing segment of the power industry, which is not surprising given the context of the European market[3].

2. Polish property tax – what is it all about?

In the Polish tax system, taxation of property has been entrusted mainly to the property tax [Pol. *podatek od nieruchomości*] regulated in the Act of 12th January, 1991, on Local Taxes and Fees[4]. Land, buildings, and structures

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1 D. Hasterok, R. Castro, M. Landrat, K. Piko, M. Doepfert, H. Morais, *Polish Energy Transition 2040: Energy Mix Optimization Using Grey Wolf Optimizer*, "Energies" 2021, no. 14(501), https://doi.org/10.3390/en14020501

2 G. Wiśniewski, K. Michałowska-Knap, S. Koć, *Energetyka wiatrowa – stan aktualny i perspektywy rozwoju w Polsce* [*Wind energy – current status and development prospects in Poland*], Warszawa, 2012, https://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/senat/zespoly/energia/raport.pdf

3 See also J. Similä, N. Soininen, E. Paukku, *Towards sustainable blue energy production: an analysis of legal transformative and adaptive capacity*, "Journal of Energy & Natural Resources Law", vol. 40, no. 1, pp. 61–81, https://www.tandfonline.com/doi/full/10.1080/02646811.2021.1875687?src (access: 20.08.2023).

4 Journal of Laws 2023, item 70 as amended, hereinafter cited as: "Local Taxes and Fees Act".

are subject to this[5] tax, which is primarily paid by their owners (and their holders in selected cases)[6]. For land and buildings, property tax is levied on their surface area[7], whereas it is levied on their value for structures. Generally, the initial value is adopted for tax depreciation purposes, which is not reduced by depreciation write-offs[8]. If depreciation allowances are not made on structures, the taxable amount is their market value on the date when the tax obligation arises[9]. Hence, the taxable amount is the historical value of the structure in both cases, which is not reduced annually due to progressive wear and tear. This means that in a situation where there is no significant inflation, the decrease in the real value of the taxable item (resulting from wear and tear and technological development) is not accompanied by a commensurate decrease in the tax burden. The provisions of the Act on Local Taxes and Fees define the maximum rates of property tax on land, buildings (specific rates per unit area), and structures. However, individual municipalities may set tax rates at a level lower than the maximum rates. It is worth noting that while many municipalities decide to introduce rates lower than the maximum rates allowed by the Act for land and buildings (especially when not used for a business activity), the rule for structures is to set the rate at the maximum level permitted by the Act (i.e. 2% per year on the value).

The legal definitions of buildings and structures (subject to property tax) are contained in the provisions of the Act on Local Taxes and Fees. However, this includes a reference to the notion of a construction object regulated in the provisions of the Act of 7th July, 1994, Construction Law[10]. Thus, a building is understood to be a construction object within the meaning of the Construction Law which is permanently connected with the ground, separated from the space by means of building partitions, and has foundations and a roof. A structure, in turn, is a construction object within the meaning of the provisions of the Construction Law which is not

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[5] Art. 2(1) of the Local Taxes and Fees Act.

[6] Art. 3 of the Local Taxes and Fees Act.

[7] Art. 4(1)(1) and (2) of the Local Taxes and Fees Act.

[8] Art. 4(3) of the Local Taxes and Fees Act.

[9] Art. 4(5) of the Local Taxes and Fees Act.

[10] Journal of Laws of 2023, item 682 as amended, hereinafter cited as the "Construction Law". The terms: "*obiekt budowlany*" (English: "construction object"), "*budowla*" (English: "structure"), "*budynek*" (English: "building") used in the Construction Law and tax regulation do not correspond to their colloquial meanings in Polish.

a building or a small architectural object, as well as a construction device, within the meaning of the Construction Law, connected to a construction object. This ensures the possibility of using the construction object in accordance with its intended purpose. A perusal of the relevant provisions of the Construction Law leads to the conclusion that taxable structures are understood to include, *inter alia*, line structures (e.g. power lines), foundations, construction parts of machines, and technical equipment. It should be noted that the distinction between buildings and structures is the source of many disputes in practice.

3. Energy (renewable) – an important source of tax revenue

Due to the described regulations (particularly those that define the subject and the tax base of constructions), the property tax in Poland constitutes a significant business cost for entrepreneurs operating in manufacturing sectors (including the energy sector). Accordingly, in order to conduct their business activities, they use assets of significant value that qualify as structures. This tax generates an annual cost of 2% of their initial value, which often does not correspond to the market value of the facilities. Further, the property tax generates costs for the taxpayer, regardless of whether the business activity is profitable. In practice, companies operating in the conventional energy field (such as power plants, combined heat and power plants, owners of transmission infrastructure, and coal mines) are among the largest property tax payers in Poland. However, due to the dynamic development of the renewable energy sector, entrepreneurs operating in this industry have also become significant property taxpayers. In their case, the distribution of tax revenue is decentralised. Low-carbon energy installations are usually located in low-urbanised municipalities (often rural) with low levels of industrial development. Therefore, the tax paid on them constitutes a significant source of budget revenue in these municipalities. The fiscal aspect has been the background to numerous disputes between taxpayers and tax authorities in recent years concerning the taxation of wind farms, which were the first large-scale renewable energy sources in Poland. These disputes have also been the source of significant (and sometimes surprising) legislative changes, resulting in either decreases or increases in the tax due on wind farms.

As indicated previously, according to the definition included in the Act on Local Taxes and Fees (interpreted with the Construction Law), a structure is understood to be many things, including foundations, building parts of machines, and technical equipment. Based on this definition, wind farm owners argued that only the foundations and the tower (and, possibly, the power line connected to the farm) should be subject to property tax, while any electricity generating equipment mounted on them (such as the rotor and nacelle) is not considered a structure. Many tax authorities did not accept this approach, claiming that all elements of a wind farm (both construction and technical) constitute a taxable structure, creating the so-called technical-utility whole. However, because the value of technical facilities on a wind farm is several times higher than the value of its construction parts, the adoption of this tax approach would result in a multiplication of the property tax paid by their owners. As a general rule, Polish administrative courts supported the position of taxpayers in their judgments[11]. However, to exclude discussions in this respect, the legislator decided to introduce an appropriate amendment to the provisions. On 26th September, 2005, "wind power plants" were explicitly added to the definition of a structure in the Construction Law as examples of technical devices, where only their construction parts constituted a structure.

This *status quo* was violated when the Polish Parliament enacted the Act of 20th May, 2016, on investments in wind power plants[12]. As of 1st January, 2017, this Act introduced changes that resulted in multiple increases in property tax on wind farms. In particular, a definition of the structure of a wind power plant was introduced, which included both construction parts and technical elements. Despite serious doubts about the introduced regulations, the Supreme Administrative Court confirmed the interpretation of the regulations. Accordingly, as of 1st January, 2017, the whole wind farm (not only the building parts) is subject to taxation, which equates to a tax increase of several hundred percent[13]. Ultimately, the arguments presented by the renewable energy industry were either economic or constitutional. The former is related to tax increases, rendering the profitability of investments in wind farms

[11] Judgments of the Supreme Administrative Court of: 7th October, 2009, II FSK 635/08; 30 July 2009, II FSK 202/08; 16th December, 2009, II FSK 1184/08; 5th January, 2010, II FSK 1101/08.

[12] Journal of Laws 2021, item 724. Despite its name, this Act was referred to as the "Anti-Windfarm Act", when, in fact, it prevented new wind farms from being built on land.

[13] Judgment of the Supreme Administrative Court of 22nd October, 2018, II FSK 2983/17.

questionable. The constitutional argument focused on treating the technical equipment of wind farms as taxable constructions, placing their owners in a much worse position than owners of other types of renewable energy sources and representatives of conventional energy. The strength of these arguments convinced the legislator to change the provisions. Therefore, as of 1st January, 2018, the original *status quo* was restored, meaning that only the construction parts of wind farms were subject to property tax[14]. However, these disputes only concerned onshore wind farms, as offshore facilities did not exist at that time in Poland.

4. Offshore wind farms – the taxation of structures on "no man's land"

The possibility of taxing offshore wind farms located outside territorial waters[15] in the exclusive economic zone does not raise major legal questions. This is a result of the possibility of taxation being rather weakly related to the territory of the state. After all, there are no major doubts that the income of a resident of a given state may be taxed by that state, even if it is earned in the territory of another state. Looking at the problem from the perspective of the principles of the taxation of foreign income in different countries, it would probably be possible to tax wind farms located outside the exclusive economic zone when the entities that own them are residents of the taxing state. Moreover, it would not even need to pertain to the owners of the wind farms, as the tax law is not "attached" to the right of ownership. It would be sufficient that a resident of the state derives income from the wind farm for the state of residence to be entitled to taxing the income from these offshore wind farms; hence, the farms themselves would be subjected to wealth tax[16]. Although "the taxation of all residents" wealth

[14] This amendment was introduced by the Act of 7th June, 2018, amending the Act on Renewable Energy Sources and certain other acts (Journal of Laws of 2018, item 1276), with retroactive effect from 1st January, 2018, which in turn was challenged (acting on the complaint of municipalities) by the Constitutional Court in its judgment of 22nd July, 2020 (K 4/19).

[15] In Poland, the erection and use of offshore wind farms in internal waters and the territorial sea is explicitly forbidden, which results from the Art. 23 par. 1a of the Act on maritime areas of the Republic of Poland and maritime administration of 21st March, 1991 (Journal of Laws of 2023, item 960), further quoted as the "Act on maritime areas".

[16] O. Lynne, A. Miller, E. Mulligan, *Principles of international Taxation*, Bloomsbury Professional, 2017, p. 22.

is a rare solution (regardless of where it is located), this is treated as natural in tax law literature.

Sometimes, references are made in the literature to the 1982 UN Convention on the Law of the Sea[17] as the basis for taxing offshore wind farms by that state in whose exclusive economic zone they are located[18]. However, it is doubtful that Article 56 of the Convention covers taxing a property. In accordance with the following provision:

1. In the exclusive economic zone, the coastal State has:
   (a) sovereign rights for the purpose of exploring, and exploiting, conserving, and managing the natural resources, whether living or non-living of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds;
   (b) jurisdiction, as provided for in the relevant provisions of this Convention with regard to:
      (i) the establishment and use of artificial islands, installations, and structures;
      (ii) marine scientific research;
      (iii) the protection and preservation of the marine environment;
   (c) other rights and duties provided for in this Convention.

Thus, this regulation only concerns the construction of wind power plants in the exclusive economic zone, and it does not have a taxation aspect. The right to taxation is not limited territorially, meaning that it does not consist, *inter alia*, in physical activity within the zone to which the above-mentioned provision refers. It is not necessary to resolve this issue in the context of the Polish tax law.

5. The dispute over the taxation of offshore wind farms – a Polish discussion about nothing

The taxation of offshore wind farms has been discussed in the doctrine of the Polish tax law for many years, even before the first real investments in the field appeared[19]. Further, being both the tax authorities and the

[17] https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

[18] S. Schultes-Schnitzlein, M. Dettmeier, *The Taxation of German Offshore Wind Farms*, "International Tax Review" 2012, no. 23(4), p. 72.

[19] B. Pahl, *Morskie farmy wiatrowe zlokalizowane w wyłącznej strefie ekonomicznej a podatek od nieruchomości* [*Offshore wind farms located in the exclusive economic zone and property tax*], "Finanse Komunalne" 2013, no. 3, pp. 40–44.

beneficiaries of this property tax, municipalities were very interested in the taxation potential of offshore wind farms. Moreover, especially in this area of investment, the construction part constitutes the tax base of the wind farm structure (which is undoubtedly subject to property tax) and so the tax could reach a very high value due to significant costs related to the foundation of offshore wind farms. The problem here was that the specificity of the local tax regulation meant that offshore wind farms were *de facto* outside the scope of the property tax, even though they are formally classified as structures (which should be subject to property tax).

According to Article 2(1) of the Act on Maritime Areas, the maritime areas of the Republic of Poland are as follows: 1) internal sea waters, 2) the territorial sea, 3) the contiguous zone, and 4) the exclusive economic zone. Further, the territory of Poland comprises internal sea waters and the territorial sea[20]. *A contrario*, therefore, the exclusive economic zone (in which offshore wind farms are located) is not the territory of Poland. Rather, it comprises artificial islands, structures, and equipment, which is utilised, *inter alia*, for the use of wind for energy purposes, which are subject to Polish law[21]. Accordingly, since structures erected in the exclusive economic zone are subject to the Polish law, they should be considered as a potential subject of property tax. Moreover, offshore wind farms include structures that meet the criteria for a taxable building. However, the problem here is uncertainty over what tax rate should be applied.

The reason for this problem is that property tax is considered a local tax and the law only provides for maximum tax rates. Further, the rates applicable in a given municipality are set by the municipality itself by way of a resolution of the municipal council[22]. A resolution of the municipal council as an act of local law is a source of universally-binding law only within the territory of a given municipality[23]. Accordingly, the rates resulting from the Act cannot be applied here, as this regulation is addressed to municipalities and only constitutes a limitation of their freedom in shaping tax burdens.

It should be noted that the regulations in force would make it possible to determine the competent tax authority in the matter of taxation with property tax on objects of taxation located in the Polish exclusive economic

[20] Art. 2(2) Maritime Areas Act.
[21] Art. 22(2) Maritime Areas Act.
[22] Art. 5(1) of the Local Taxes and Fees Act.
[23] Art. 87(2) of the Polish Constitution.

zone. As a rule, the tax authority competent to rule on property tax is the mayor of the municipality [Pol. *gmina*] in which the subject of taxation is located[24]. There is no municipal body competent for the exclusive economic zone, as it does not constitute a territory of Poland, meaning that it does not fall within the territory of any municipality. Moreover, according to the relevant executive regulations to the Polish Tax Ordinance[25], if it is not possible to determine the local competence according to the provisions of the tax law, the competent tax authority in the matter of local taxes is the president of the Capital City of Warsaw[26]. However, the determination of the competent tax authority would not make it possible to levy the tax when the tax rate is still missing. Officially, Polish courts adhere strictly to the principle that all structural elements of a tax must follow from the law adopted by the Parliament. In cases where a legal loophole is exposed in the act, the courts are inclined to state that it is not possible to levy tax, even if there is no doubt that the given factual situation is subject to taxation. In the case law of the Supreme Administrative Court, the concept of "incompleteness of the legal norm" appears in this case, rendering it impossible to levy the tax[27]. From the perspective of constitutional standards, such a jurisprudential concept should definitely be assessed positively. Conversely, from the perspective of the fiscal interests of the state and municipalities, this assessment may be different. This is accompanied by a certain concern about preserving the principles of fairness in that certain types of activity remain outside the scope of the rather cumbersome property tax.

6. How can offshore construction tax be captured?

There is no doubt that the existence of a legal loophole related to the taxation of offshore wind farms was not an optimal situation. For many years, this was a problem with no negative consequences for either public finances or for respecting the principle of the equality of entrepreneurs in the absence of offshore wind farms in the Polish exclusive economic zone.

[24] Art. 1c, Article 6(7) and (9) of the Local Taxes and Fees Act.

[25] Tax Ordinance Act of 29th August, 1997, Journal of Laws of 2020, item 1325, as amended.

[26] § 10 of the Regulation of the Minister of Finance of 22nd August, 2005, on the jurisdiction of tax authorities (Journal of Laws 2019, item 2371).

[27] Judgement of the Supreme Administrative Court of 17th November, 2014, II FPS 4/14.

However, concrete investment plans announced by energy corporations in 2019 motivated the Polish legislator to address this problem. Indeed, investments in offshore wind farms located in the Polish exclusive economic zone have attracted strong interest from the largest Polish and global energy companies. For example, joint projects have been initiated by Polenergia (Poland) and Equinor (Norway), *Polska Grupa Energetyczna* (Poland) and Orsred (Denmark), as well as Orlen (Poland) and Northland Power (Canada).

In addition, individual projects have been implemented by Germany's RWE and France's EDPR and Engie[28]. The Polish authorities are planning to hold four more auctions for new offshore projects in 2025, 2027, 2029, and 2031[29].

The starting point for the work on amending the regulations was the conviction that offshore wind farms should not escape property taxation. First, this resulted in inequality in relation to onshore wind farms (as well as other onshore energy sources), where property tax is a significant cost of economic activity[30]. Second, it deprived the budget of important tax revenues. Accordingly, the only way forward was to find a way of taxing offshore wind farms.

One method for solving this problem could be the introduction of appropriate amendments to the provisions of the Act on Local Taxes and Fees or the Tax Ordinance, which would define the competence of the municipal council in cases where local competence cannot be established according to the general rules. Similar to the case where determining the competence of the tax authority in the absence of local competence resulted in the president of the Capital City of Warsaw being assigned, the council of Warsaw could be deemed the council of the municipality competent to adopt tax rates for objects of taxation located in the exclusive economic zone. However, such a solution could raise doubts from the perspective of compliance with the Constitution. In Poland, a resolution of the municipal

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[28] https://www.ure.gov.pl/pl/urzad/informacje-ogolne/aktualnosci/9595,Offshore-Prezes-Urzedu-Regulacji-Energetyki-rozpatrzyl-ostatni-wniosek-w-ramach-.html.

[29] https://www.rechargenews.com/wind/local-players-sweep-the-board-in-polands-latest-offshore-wind-round/2-1-1461658

[30] *Uzasadnienie do projektu ustawy o promowaniu wytwarzania energii elektrycznej w morskich farmach wiatrowych z 23 grudnia 2019 r.* [*Explanatory Memorandum to the Draft Law on Promoting Electricity Generation in Offshore Wind Farms, 23rd December, 2019*], https://legislacja.gov.pl/projekt/12329105/katalog/12656009#12656009 (access: 15.04.2021).

council is an act of local law. However, in line with Art. 87(2) of the Polish Constitution, acts of local law constitute a source of law exclusively within the area in which the given municipal council operates. Accordingly, the Polish exclusive economic zone (which is not considered a territory of Poland) is not an area in which the council of the Capital City of Warsaw (or any other municipal council) operates. In addition, a tax authority other than the tax authority of the municipality of Warsaw would operate on the basis of such an act of local law. Thus, one municipality would decide on the revenue levels of other municipalities.

Another possible solution could be the introduction of a provision specifying the tax rate applicable to structures located in the Polish exclusive economic zone (i.e. without the necessity of referring to the resolution of the municipal council) directly into the Act on Local Taxes and Charges. In such a case, the tax would (as an exception) be calculated based on the statutory rate. However, the authority competent to collect the tax would be the mayor of the Capital City of Warsaw, who would generate income on this account. This solution could raise doubts from the perspective of systemic compatibility. This is because property tax is a local tax; hence, the competence to establish its amount resides with local self-government units, which follows directly from the Constitution[31]. Admittedly, the Constitution stipulates that they only have this power "to the extent specified in the Act". However, thus far, the legislator has always given local governments this power with respect to taxes they collect themselves. Moreover, the question becomes whether it would be fair for Warsaw (which is not even located by the sea) to receive tax revenue from offshore wind farms. Another option would be to accept the legal fiction that the exclusive economic zone is the area of coastal municipalities. However, even if these legal doubts were disregarded, such a solution would always engender practical problems related to tax assessment.

Finally, the third method of taxing offshore wind farms could be to introduce a completely new tax (not a local tax); this would not require the adoption of rates set by the municipality council. The advantage of this solution would be not interfering with the existing tax regulations while achieving the desired fiscal effect. This is precisely the solution that was originally adopted in the draft law on the promotion of electricity

[31] Article 168 of the Polish Constitution: Local self-government units shall have the right to determine the amount of local taxes and charges to the extent determined by law.

generation in offshore wind farms of 23rd December, 2019[32], whose author was the Minister of State Assets and not the Minister of Finance (which is interesting in itself). The aim of this project was the introduction of a "tax on offshore wind farms", the subject of which would be the conduct of economic activity in the field of electricity generation in an offshore wind farm. The resulting tax base would emanate from the concession of the installed electrical capacity of the offshore wind farm, while the tax rate was to be set as a lump sum of 23,000 PLN per 1 MW. The tax was to constitute state budget revenue, and the competent tax authorities were to be the tax administration authorities considered competent according to the place of residence of the taxpayer (not the place of location of the offshore wind farm).

A number of comments were made pertaining to the draft during the public consultation[33]. The most frequent of these concerned the mechanism for the annual adjustment of the flat tax amount contained in the provisions. The objectors pointed out that provisions on property tax do not provide for the valorisation of the tax rate on structures[34]. In general, the tax base is the initial value of a structure for tax depreciation purposes and remains unchanged. However, according to the intention of the authors of the legislation, the amount of tax on offshore wind farms should correspond to the amount of property tax paid on land-based power plants. Hence, the introduction of the valorisation mechanism was indeed illogical. Another issue revealed when the draft was analysed was entrusting the competence to issue a *de facto* decision determining the amount of the tax base to a non-tax authority (the President of the Energy Regulatory Office issuing an energy production concession). This could not be challenged by a taxpayer before the competent tax authority (who is bound by the content of the concession)[35]. While the project to introduce a new tax did not appear to materialise, this happened under a different name.

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32 https://legislacja.gov.pl/docs//2/12329105/12656009/12656010/dokument434588.pdf (access: 12.04.2021).

33 https://legislacja.gov.pl/projekt/12329105/katalog/12656009#12656009 (access: 15.04.2021).

34 The maximum rate provided for by the Local Taxes and Fees Act is 2% of the tax base.

35 M. Ruta, *Podatek od morskich farm wiatrowych – proponowany model opodatkowania inwestycji offshore* [*Tax on Offshore Wind Farms: A Proposed Model for Taxing Offshore Investments*], "Przegląd Podatkowy", 2020, no. 6, p. 58.

7. Instead of a tax – a concession fee

Many of the previous remarks were considered in the governmental draft of the Act on the Promotion of Electricity Generation in Offshore Wind Farms, which was finally submitted to the Parliament and adopted as the Act of 17th December, 2020, on the promotion of electricity generation in offshore wind farms[36]. The new concession fee is regulated by the provisions of the Energy Law Act of 10th April, 1997[37], modified by the previously mentioned act. It is worth emphasising that this fee took over the majority of assumptions which had been developed at an earlier legislative stage for the offshore wind farm tax.

With regard to the concession fee on an offshore wind farm, it is the performance of economic activity in the field of electricity generation in an offshore wind farm, as referred to in the Offshore Wind Farms Act (which contains a definition of an offshore wind farm[38]). The concession fee itself, which is related to energy production, is not a novelty under the Polish law. An entrepreneur wishing to engage in the activity of generating electricity pays such a concession fee, which is a product of the revenue of the energy company[39]. This is obtained from the sale of goods or services within the scope of its activity covered by the concession, achieved in the year in which the obligation to pay the fee arose, and with an appropriate coefficient as defined in the regulations issued pursuant to Article 34(6) of the Energy Law (hereinafter: concession fee on energy generation). The Ordinance of the Council of Ministers of 12th October, 2021, on the concession fee is currently in force[40], according to which the coefficient is 0.0005 (for electricity generation). Therefore, the concession fee is essentially a type of revenue tax with a rate of 0.05% of revenue.

An energy enterprise performing economic activity by producing electric energy in an offshore wind farm pays a concession fee comprising two parts, namely the sum of the previously mentioned concession fee on energy generation and an amount constituting a specific "supplement".

[36] Journal of Laws 2023, item 1385 hereinafter cited as: "the Offshore Wind Farms Act".

[37] Art. 34 of the Act of 10th April, 1997, Energy Law, Journal of Laws of 2022, item 1385, hereinafter cited as "Energy Law".

[38] Art. 3(3) of the Offshore Wind Farms Act.

[39] These provisions apply to both entrepreneurs who wish to generate electricity and, *inter alia*, the transmitters.

[40] Journal of Laws 2021, item 1938.

Herein, this supplement is referred to as the concession fee for an offshore wind farm. It is calculated as a product of the installed electric capacity of the offshore wind farm expressed in megawatts (MW), resulting from the licence for the production of electric energy in this offshore wind farm, and an appropriate coefficient (expressed in PLN) specified in the provisions issued pursuant to Art. 34(6) of the Energy law[41]. The law stipulates that this coefficient cannot be greater than 23,000 PLN[42].

Of course, the question arises as to why this coefficient was set at the maximum level of 23,000 PLN. The explanation can be found in the justification of the draft act on offshore wind farms prepared by the Council of Ministers[43].

The amount of the coefficient in question is estimated at 23,000 PLN/MW, taking into account the balancing of the fiscal burden of offshore and onshore wind technologies, as the difference between:

(a) the average level of property tax for onshore wind farms, amounting to 36,000 PLN/MW per year, less,
(b) the average fee for the issuance of permits erecting and exploiting artificial islands, installations, and equipment in Polish maritime areas for offshore wind farms under the Act on maritime areas of the Republic of Poland and maritime administration, calculated per one year of operation of the project, amounting to 5,000 PLN/MW/year[44], and
c) the average property tax resulting from the application of 2% property tax to the assessed value of the onshore part of the offshore wind farm infrastructure, amounting to 8,000 PLN/MW/year.

According to the Ordinance of the Council of Ministers (2021, cited above) the coefficient is precisely 23,000 PLN. However, it should be noted that from 2021 onwards, due to inflation, it is no longer in line with the concept resulting from the justification of the law which introduced the fee.

Pursuant to Article 34(7) of the Energy Law, an energy enterprise producing electricity in a renewable energy source installation (where

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41 Art. 34(2)(2a) of the Energy Law.

42 Art. 34(2a) of the Energy Law. 23,000 PLN is equivalent to 5,152 EUR according to the exchange rate of 20th August, 2023.

43 https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=0282D90367CB9DADC12586370030F731

44 Further to concession fee for the occupation of maritime areas; such a term is not used in the Maritime Areas Act, where a simpler term is used, namely “concession fee”.

the total capacity of the renewable energy source installation does not exceed 5 MW) is exempted from paying a concession fee with regard to the production of energy in that installation.

8. Licence fee for the occupation of maritime areas

The previously described concession fee related to the construction and operation of wind farms is linked to the fee for the permit for occupying the exclusive economic zone for the erection and use of artificial islands, structures, and equipment (as referred to in the Maritime Areas Act). The introduction of these fees is not directly related to the current activity of the legislator concerning the intensification of works on the construction of offshore wind farms, as they have been in force since 2004. However, their regulation has evolved.

In principle, the concession fee for the permit to work within the maritime area is only 1,500 PLN. If the issued permit concerns the occupation of the exclusive economic zone for the erection and use of artificial islands, constructions, and devices, the entity which granted the permit pays an additional fee amounting to 1% of the value of the planned undertaking. This fee is referred to as the concession fee for the occupation of the exclusive economic zone[45]. The value of the planned project is calculated for the purpose of the additional fee, taking into account the market prices for equipment and services necessary for the complete execution of the project (as of the date of submitting the application for the permit)[46]. Moreover, the additional fee is paid gradually:

1) 10% of the full amount of the fee within 90 days of the date on which the permit decision becomes binding;
2) 30% of the full amount within 30 days from that date,
3) 30% of the full amount within 30 days of the day on which the use of artificial islands, structures, and equipment commenced;
4) 30% of the full amount after 3 years from the date of the payment referred to in Point 3.

Therefore, it is not strictly a permit fee, since it will not always have to be paid (e.g. in the event of abandonment), even if a permit is granted.

[45] Art. 27b(1) of the Law on Maritime Areas.

[46] Art. 27b(1d) of the Law on Maritime Areas.

9. Concession fee or tax – between words and reality?

The construction of the concession fees clearly indicates that the legislator treats them as a substitute for the property tax which would be due from the wind farm if the exclusive economic zone was treated as a typical part of the Polish territory (hypothetically). This would constitute a rational and just solution, and would mean that the tax burden on various facilities would be similar in terms of legal construction. Further, there could be no allegations that some form of electricity generation was discriminated against in terms of taxation, which is an important issue.

Different legal situations of entrepreneurs in analogous situations may sometimes be treated as state aid[47]. Of course, it is doubtful that even in the situation of a complete lack of the taxation of offshore wind power plants such an exemption could be considered state aid. However, the very risk of such a view appearing must be a concern for investors. It should be noted here that the UE's Member States can also pursue their tax policy using the stimulative function of the tax. From this perspective, taxing renewable energy more favourably than carbon-intensive energy would be acceptable in principle from the perspective of the state aid rules.

Even if one relied on domestic law, it could be questioned whether the non-taxation of offshore wind farms violated the constitutional principle of equality[48]. However, enforcing respect for the equality of taxation would be difficult while there is a statutory requirement to impose taxes in Poland[49]. Accordingly, it would be impossible to extend the taxation of onshore wind farms to offshore wind farms. Theoretically, it would only be possible to recognise that the levying of tax on onshore wind farms violates the constitutional principle of equality. However, it is difficult to be decisive when formulating a view that the principle of equality has been breached, since the condition for the establishment of a breach of this principle is the recognition that there are no significant differences between onshore and offshore wind farms.

A tax imposed in this way would not be an end to constitutional problems. This is because the concession fee for an offshore wind farm is not a classic fee (within the meaning of the Polish law); it is a tax. In Poland, public fees have a pecuniary character and are paid for some kind

47 Arts. 107–109 of the Treaty on the Functioning of the European Union.

48 Art. 32 of the Polish Constitution.

49 Art. 217 of the Polish Constitution.

of mutual benefit of the state or local government administration; hence, they are equivalent[50]. Neither the concession fee for offshore wind farms nor the concession fee for the occupation of maritime areas (which have been in existence since 2004) has any features of equivalence. Admittedly, owing to the payment of these fees, the entrepreneur may legally carry out investments in Polish maritime areas. However, the amount of the fee refers to the value of these investments and not to the value of the mutual benefit of the public administration body.

Doubts are raised by a statement included in the same justification of the draft of the Offshore Wind Farms, which reads as follows: "The fee is an equivalent benefit, and in this context, it should be noted that the amount of the additional fee within the concession fee for the producers from offshore wind farms is adequate and takes into account the costs incurred by numerous bodies performing tasks related to the development of offshore wind farms in Poland"[51].

Thus, the authors of the draft refer to a hypothetical value of the property tax when determining the amount of the fee for offshore wind farms (as indicated previously). However, in further lines of text they declare that the value of the concession fee corresponds to the costs of public administration. This inconsistency of the authors of the regulations (the discrepancy between the actual content and the declared purpose) provokes the thesis of concealing taxes under the name of "fees" for political reasons[52].

The Polish legislator is not the only body to avoid using the term tax (probably for political reasons), because introducing new taxes is certainly not an action met with a positive reception in society. As a result, it is commonly indicated in the literature that there are such burdens that are formally referred to as fees, which are actually taxes[53].

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[50] See, for example, A. Gomułowicz [in:] A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe* [*Taxes and Tax Law*], Warsaw 2008, p. 137, which is a view repeated in virtually every other textbook on tax law.

[51] https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=0282D90367CB9DADC12586370030F731

[52] https://www.money.pl/gospodarka/podatki-w-polsce-balcerowicz-kolejne-daniny-ukrywa-sie-pod-haslem-oplat-6613743569664129v.html

[53] See, for example, D. Antonów, *Pojęcie opłaty w polskim języku prawnym* [The C*oncept of Fee in the Polish Legal Language*], [in:] W. Miemiec (ed.), *Księga jubileuszowa ku czci profesor Krystyny Sawickiej, Gromadzenie i wydatkowanie środków publicznych. Zagadnienia finansowoprawne*, Wrocław 2017, pp. 487–496.

The question arises whether such "legislative camouflage" has any legal significance. It would appear that there is even a risk of declaring the legal regulation of concession fees unconstitutional. The Polish Constitution sets very strict requirements for tax regulation. According to Article 217 of the Constitution: "The imposition of taxes, other public tributes, the determination of subjects, objects of taxation and tax rates, as well as the principles of granting reliefs and remissions and categories of subjects exempt from taxes shall be made by means of a law". It follows that in the case of taxes, it is stated explicitly that tax rates must be provided for in the law, while there is no such requirement for fees. Meanwhile, the rate of the concession fee for offshore wind farms will result from a regulation of the Council of Ministers, not from an act adopted by the Parliament. Further, the Energy Law only includes the maximum rate of the coefficient used to calculate the concession fee, which is probably a violation of the Polish Constitution.

This situation would look slightly different if the local character of this tax (called the concession fee) was maintained. In relation to local taxes and fees, Article 168 of the Constitution of the Republic of Poland would be applicable, according to which "Local government units have the right to establish the amount of local taxes and fees within the scope specified in the act". In practice, the Polish Parliament determines only the maximum rates of local taxes and fees (by the act of the Parliament), and specific rates applicable in a given commune are adopted by the commune council. Thus, if the concession fee was of a local character and was collected by the relevant municipality, the council of this municipality could adopt the rates of this fee, provided it did not exceed the maximum rate set by law. However, the Constitution does not give such freedom to government bodies.

10. Conclusion

The introduction of taxation for offshore wind farms will obviously constitute a certain obstacle for investors, similar to any other form of taxation. However, it should be taken into account that the introduction of taxation for offshore wind farms (in the form of the so-called concession fee) has resulted in a comprehensive regulation of the conditions for conducting such investments. To some extent, this balances the financial effects of the introduced fee.

A reasonable assumption was made that all electricity-generation technologies should be treated analogously, and shaping the concession fee to the amount corresponding to the load of an onshore wind farm would be considered a fair solution. The key point is that the concession fee is linked to the amount of property tax paid on an onshore wind farm with similar energy productivity rather than being dependent on the value of the offshore wind farm structure. Typically, building costs for such a farm will be higher than for an onshore farm. If offshore wind farms in Poland were also taxed in relation to their construction costs, then production of the same amount of energy on sea and land would be taxed higher for the offshore wind farms.

The fee under scrutiny is not called a tax (probably for political reasons), even though it is, in fact, a tax. However, the presented regulation should be assessed in a much harsher light from the perspective of the Polish constitutional standards. By assuming that it does not introduce a tax, the legislator did not care about the principles resulting from the Constitution of the Republic of Poland concerning the principles of levying taxes. Meanwhile, from the perspective of the Polish Constitution, it is the features that matter, not the burden. This elicits a moderate risk of recognising the regulation as violating the Polish Constitution, with the possible declaration of unconstitutionality having negative consequences for investors.

The introduced fee constitutes income for the central budget, not for local governments as the property tax (which the fee was supposed to substitute). Thus, while the introduction of the fee is an economically-neutral solution from the perspective of entities investing in offshore wind farms (having been set at an amount corresponding to the property tax paid on onshore farms), Polish municipalities are the losers in discussions on taxing offshore wind farms. Although giving all the revenue from the tax on such farms to Warsaw (or even the coastal municipalities) could be considered unjustified, the introduction of a mechanism distributing the revenue from a fee equivalent to a property tax among all the municipalities in Poland could be considered a possible solution.

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Polska opłata koncesyjna od morskich farm wiatrowych – quasi-podatek ukryty w Prawie energetycznym

Streszczenie. Produkcja energii elektrycznej z wykorzystaniem morskich farm wiatrowych znajduje się w Polsce na etapie przygotowawczym. Ma jednak szansę stać się najdynamiczniej rozwijającym się segmentem energetyki, mając na uwadze ambitne cele w zakresie redukcji emisji CO_2. Rozwój sektora energii odnawialnej w Polsce ma istotny kontekst podatkowy w zakresie podatku od nieruchomości, mając na uwadze, że podatek od projektów infrastrukturalnych stanowi ważne źródło dochodów podatkowych dla gmin. Opodatkowanie farm wiatrowych jest zagadnieniem dobrze rozpoznanym, jednakże orzecznictwo wypracowane w tym obszarze nie może pomóc w rozwiązaniu problemu opodatkowania morskich farm wiatrowych. Luka prawna w polskich przepisach regulujących podatek od nieruchomości uniemożliwiła opodatkowanie inwestycji *offshore*. W celu objęcia morskich farm wiatrowych *quasi*-podatkiem polski ustawodawca wprowadził specjalną opłatę koncesyjną, której wysokość jest zbliżona do hipotetycznego podatku od nieruchomości jaki byłby należny od farmy wiatrowej, jeżeli byłaby ona zlokalizowana na lądzie. Celem artykułu jest przedstawienie wątpliwości dotyczących opłaty koncesyjnej od morskich elektrowni wiatrowych z punktu widzenia polskich standardów konstytucyjnych oraz spójności polskiego systemu podatkowego.

Słowa kluczowe: morskie farmy wiatrowe, podatek od nieruchomości, elektrownie wiatrowe, podatki majątkowe, opłata koncesyjna, transformacja energetyczna

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https://doi.org/10.18778/1509-877X.2023.04.09

Articles

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Reporting Tax Schemes Violates Legal Professional Privilege

Summary. In this article, the author discusses the judgment of the CJEU in the case C-694/20 Orde van Vlaamse Balies and Others, which extends the protection of professional secrecy for lawyers. In the context of combating aggressive tax planning, the CJEU ruled that requiring licensed lawyers to inform other intermediaries involved in a tax scheme is unnecessary and violates the right to respectful communication with the client. The CJEU's view that legal professional privilege takes precedence over tax objectives and obligations is the main novelty of the judgment under review. Individuals who consult a lawyer, as well as a tax advisor, have a reasonable expectation that their communications will remain private and confidential. Therefore, except in exceptional circumstances, they have a legitimate expectation that their lawyer will not, without their consent, disclose to anyone the fact that they are the subject of his or her advice. Following the judgment, the European Commission will legislate to amend the DAC6 Directive so that it meets the requirements of EU primary law as identified by the Court.

The judgment is also important because it recognises that legal professional privilege is not limited to advice given in the context of litigation, which has been a restrictive view in antitrust cases.

In Orde van Vlaamse Balies and Others, in which the Court held that the duty to inform other intermediaries imposed by Article 8ab(5) DAC 6 interfered with the right to respect for communications between lawyers and their clients guaranteed by Article 7 of the Charter of Fundamental Rights, the Court gave primacy to primary law (the Charter of Fundamental Rights) over secondary law (DAC 6). In this context, a new jurisprudential trend can be observed in which a substantive review of the Tax Directive was carried out on the basis of the Charter of Fundamental

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Received: 5.09.2023. Verified: 21.09.2023. Accepted: 22.09.2023.

Rights. In general, the CJEU has been reluctant to get involved in substantively reviewing EU secondary legislation. More recently, however, the CJEU seems to be carefully analysing provisions of EU directives that are not in line with fundamental rights.

Keywords: legal professional privilege, tax schemes, MDR, Charter of Fundamental Rights, right to privacy

1. The obligation to report tax schemes – legal framework

The obligation to report a possible potentially aggressive tax planning arrangement (hereinafter also referred to as a tax scheme) to the competent authorities was introduced in the European Union by Council Directive (EU) 2018/822 of 25th May, 2018 (OJ 2018 L 139, p. 1) (hereinafter DAC 6), which amended Council Directive 2011/16/EU of 15th February, 2011, on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), establishing a system of cooperation between the national tax authorities of the Member States and the principles and procedures applicable to the exchange of information for tax purposes.

The information obligations imposed by this Directive are primarily aimed at combating potentially aggressive tax planning arrangements which may lead to tax avoidance and tax evasion. By virtue of Article 1(2) of DAC 6, Article 8ab, entitled "*Scope and conditions of the mandatory automatic exchange of information on notifiable cross-border arrangements*", was added to Directive 2011/16, among other things. According to its wording, each Member State was required to take the necessary measures to impose an obligation on intermediaries to provide the competent authorities with information on notifiable cross-border arrangements that is known to them or is in their possession or under their control. An "intermediary" within the meaning of the Directive is a person who prepares, markets, organises, or arranges for the implementation of a notifiable cross-border arrangement or manages the implementation of such an arrangement. The term also includes a person who, having regard for the relevant facts and circumstances and on the basis of the information available and the relevant expertise and knowledge required to provide such services, is aware or can reasonably be expected to be aware that he/she has undertaken to provide, directly or through others, assistance, support or advice in relation to the preparation, marketing, organisation, making available for implementation, or overseeing the implementation of a notifiable cross-border arrangement. Each person must be able to demonstrate that they did not know, or could not reasonably be expected to know, that they were involved in a reportable cross-border arrangement. For this purpose, that person may rely on all relevant facts and circumstances, available information and his/her relevant expertise and orientation. The above intermediaries, whether directly or through others, are also required to provide information within 30 days of the day following the provision of assistance, support, or advice.

In parallel, Article 8ab(5) of DAC 6 allows the intermediary to exclude themself from the obligation to provide information on the tax regime. According to the text, any Member State may take the appropriate measures to allow an intermediary to be exempted from the obligation to provide information concerning cross-border agreements subject to notification if such information is in breach of the obligation of confidentiality under the national law of that Member State. In such cases, each Member State shall take the necessary measures to oblige intermediaries to inform without delay any other intermediary or, where there is no such intermediary, the taxpayer concerned of their obligation to report under its paragraph 6 of the DAC 6. Only in so far as intermediaries act within the limits of the relevant national provisions governing their profession may they be exempted from the obligation laid down in the first subparagraph of Article 8ab DAC 6. Each Member State should also take the necessary measures to provide that, where there is no intermediary or where an intermediary notifies the relevant taxable person or another intermediary that the exemption provided for in paragraph 5 applies, the obligation to provide information on the notifiable cross-border arrangement shall lie with that other notified intermediary or, in the absence of such an intermediary, with the relevant taxable person.

The purpose of DAC 6 is to ensure that Member States' tax authorities have complete and relevant information on potentially aggressive tax planning arrangements, so that they can act more quickly to combat harmful tax practices and to eliminate loopholes, either through legislation or through appropriate risk assessments and tax audits. However, this ambition of the directive is striking the self-regulation and independence that are the cornerstones of the secrecy of the legal profession, which serves the rule of law by enabling lawyers to provide completely independent legal advice.

The reporting obligation under the DAC 6 applies to all entities that are habitually involved in the design, marketing, organisation, or supervision of the implementation of a reportable cross-border transaction or series of transactions, as well as to entities that provide assistance or advice in this respect. This means that the obligation also extends to entities providing legal assistance, including members of the professions bound by legal professional privilege such as solicitors, barristers, or tax advisers. It is precisely because of the national rules in force in the Member States on professional secrecy that a Member State may exempt intermediaries from this obligation. However, DAC 6 considers that the provision of information to the tax authority on a cross-border tax arrangement is crucial to the Directive's objective of combating tax avoidance and, therefore, *inter alia*, it is necessary in such circumstances to shift the reporting obligation to the taxpayer using the arrangement or to another intermediary who is also involved in the design and implementation of the arrangement. In such circumstances, the taxpayers acting as intermediaries are required to promptly inform any other intermediary or the relevant taxpayer of their obligation to report to the competent tax authorities.

Member States were required to adopt and publish the laws, regulations, and administrative provisions necessary to implement DAC 6 by 31st December, 2019, at the latest and to apply them from 1st July, 2020. They have not been implemented in any of the other EU Member States, nor have they been implemented in Poland, before 2019. The Polish legislator transposed DAC 6 into national law by the Act of 23rd October, 2018, amending the Personal Income Tax Act, the Corporate Income Tax Act, the Tax Ordinance Act, and certain other acts[1] as of 1st January, 2019, by adding the provisions of Chapter 11a to the Tax Ordinance Act[2]. These provisions provide for the obligation to offer information on the tax scheme to the tax authorities. This obligation applies to both cross-border and domestic tax schemes, whereas DAC 6 imposes such an obligation only on cross-border schemes. This is not the only deviation from DAC 6 that has been introduced by the Polish legislator at the implementation level.

DAC 6 refers to two groups of operators: an intermediary and a beneficiary, whereas Polish provisions introduce the notion of a promoter, an intermediary, and a beneficiary. An intermediary under DAC 6 is any person that designs, markets, organises, but also makes available for implementation or manages the implementation of a reportable cross-border arrangement. Under Article 86a § 1 point 8 of the Tax Ordinance Act, a promoter means any person, in particular a tax adviser, advocate,

[1] Journal of Laws of 2018, item 2193; hereinafter: the amending act.

[2] Act of 29th August, 1997, Tax Ordinance, Journal of Laws of 2022, item 2651, as amended.

legal counsellor, an employee of a bank or other financial institution who advises clients, also in the case where such subject does not have its place of residence, seat or management office on the territory of the country, that develops, offers, makes available, or implements an arrangement or manages the implementation of an arrangement. An intermediary (a supporter) means, in turn, any person, in particular an expert auditor, a notary, a person providing services of keeping the account books, an accountant or a finance director, a bank or other financial institution, including their employee, which or who, while exercising the diligence generally required from the performed acts, having regard for the professional nature of activity, the area of specialisation, and the object of performed acts, undertook to grant, directly or via other persons, assistance, support or advice as regards developing, entering into circulation, organising, making available for implementation or supervising the implementation of an arrangement. Pursuant to Article 86b § 4 of the Tax Ordinance Act, if a legal advisor (in particular, a tax advisor, advocate or legal counsel) who is a promoter (or intermediary) and who has not been released from this obligation by the beneficiary, provides information on a tax scheme that is not a standardised tax scheme in breach of the obligation to maintain legally protected professional secrecy, he/she is obliged to inform the beneficiary in writing without delay and within the time limit of the obligation to submit the tax scheme to the Head of the National Fiscal Administration and to provide the beneficiary with the data referred to in Article 86f § 1 concerning the tax scheme. Furthermore, § 5 of the same article stipulates that in such a case, if more than one entity is obliged to communicate the information on the tax scheme, the entity referred to in this provision shall, at the same time as it informs the beneficiary, inform in writing the other entities known to it which are obliged to communicate the information on the tax scheme, that it will not communicate the information on the tax scheme to the Head of the National Fiscal Administration. Within 30 days of informing the beneficiary or other entities of the obligation to provide information on the tax scheme, the promoter shall also inform the Head of the National Fiscal Administration of the date on which the tax scheme was made available to the beneficiary or other entities of the obligation to provide information on the tax scheme, indicating the date on which the tax scheme was made available or the activity related to the implementation of the tax scheme was carried out, and the number of entities that they have informed of the obligation to provide information. The provision of

Article 86b § 7 of the Tax Ordinance Act specifies the cases in which the provision of information does not constitute a breach of the obligation to maintain professional secrecy protected by law. Among the cases covered by this exclusion, this provision indicates the transmission of information to the Head of the National Fiscal Administration when the beneficiary or other entities have been informed of the need to provide information on the tax scheme to tax authorities.

2. Doubts about the compatibility of the tax reporting provisions with the EU law

Member States have proceeded with the implementation of DAC 6 in the emotive context. In most countries, doubts have been raised if DAC 6 is compliant with EU law, as far as the obligation to provide information to legal aid practitioners is concerned.

Doubts of this kind have also been raised with regard to the provisions implementing DAC 6 in Belgium. The Directive 2011/16/EU of 15th February, 2011, was transposed in Belgium by the Decree of 21st June, 2013, on administrative cooperation in the field of taxation. This Decree was amended by the Decree of 26th June, 2020, on the mandatory automatic exchange of information in the field of taxation for reportable cross-border arrangements, which transposed the DAC 6 into the national system. Subsection 2 of Section 2 of Chapter 2 of the Decree of 21st June, 2013, introduced the mandatory provision of information on notifiable cross-border arrangements by intermediaries or relevant taxpayers. In turn, Article 11/6 of the same Decree established the relationship between the reporting obligation and the professional secrecy that certain intermediaries were obliged to maintain. It transposed Article 8ab(5) and (6) of Directive 2011/16. Like the aforementioned provisions of the Tax Ordinance Act, Article 11(6) of the Decree of 21st June, 2013, provides in paragraph 1 that an intermediary subject to professional secrecy is obliged:

1) to inform another intermediary or intermediaries, in writing and in a reasonable manner, that he/she or they cannot comply with the obligation to notify, with the result that the obligation to notify is automatically imposed on the other intermediary or intermediaries;
2) in the absence of another intermediary, to inform the competent taxpayer or taxpayers concerned in writing and in a reasonable manner of their obligation to report.

Where an intermediary has informed the taxpayer or another intermediary of the application of the exemption provided for in Article 11(6) of the Decree, the obligation to provide information on the notifiable cross-border arrangement falls on the other intermediary who has been informed or, in the absence of another intermediary, on the taxpayer. The Decree transposing the Directive into Belgian law thus provided that an intermediary involved in a cross-border tax planning arrangement bound by professional secrecy must inform the other intermediaries that he/she cannot make such a declaration himself.

Two associations of legal professionals brought an action before the Belgian Constitutional Court, claiming, *inter alia*, that the mere fact of informing other intermediaries of the transfer was a breach of professional secrecy. By letters dated 31st August, 2020, and 1st October, 2020, two Belgian lawyers also brought actions before the Constitutional Court for the suspension of the application of the Decree of 26th June, 2020, and for its annulment in whole or in part, challenging in particular the obligation for a lawyer acting as an intermediary, when bound by professional secrecy, to inform the other intermediaries concerned in writing and with reasons that he/she cannot comply with his/her obligation to notify the tax scheme. The Belgian Constitutional Court stayed the proceedings and asked the European Court of Justice (ECJ) whether Article 1(2) of DAC 6 infringes the right to a fair trial guaranteed by Article 47 of the Charter and the right to respect for private life guaranteed by Article 7 of the Charter in so far as it introduces the new provision 8ab(5) into Directive 2011/16, which provides that where a Member State adopts the necessary measures to allow intermediaries to dispense with the obligation to provide information on notifiable cross-border arrangements for reasons of professional secrecy, that Member State must oblige intermediaries to inform any other intermediary or, failing that, the relevant taxable person, without delay, of their obligation to provide information. This obligation has the effect of obliging the intermediary lawyer to disclose to other intermediaries, who are not his/her clients, information that he/she has obtained in the course of his/her professional activity.

The information that intermediary lawyers are required to provide to the competent authority in relation to their clients is protected by professional secrecy if it relates to activities connected with the provision of legal advice or legal representation.

The Constitutional Court of Belgium has held that the mere fact of using the services of a lawyer is also covered by professional secrecy. Information protected by professional secrecy *vis-à-vis* public authorities is also protected *vis-à-vis* other parties, such as other intermediaries. Moreover, the Court considered that the obligation to provide information is not necessary to ensure that cross-border arrangements are notified where the client, whether or not he/she is assisted by a lawyer, can himself/herself inform the other intermediaries and ask them to comply with their obligation to notify the competent tax authorities. The national court pointed out that the information which lawyers are required to communicate to the competent authority concerning their clients is protected by professional secrecy in so far as it relates to activities falling within the scope of their specific tasks of defending or representing clients in legal proceedings and providing legal advice. The court notes that the mere fact of the use of a lawyer's services is covered by professional secrecy, *a fortiori* the identity of the lawyer's client. Information which is protected by professional secrecy with regard to public authorities is also protected with regard to other parties, such as other intermediaries.

On 5th April, 2022, Advocate General Rantos recommended the ECJ to consider the requirement for intermediaries claiming legal professional privilege under the DAC 6 to inform other intermediaries (or the relevant taxpayer) of their reporting obligation "does not violate their rights under the EU Charter of Fundamental Rights, as long as the name of the intermediary claiming the privilege is not disclosed to the tax authorities"[3].

Similar request for a preliminary ruling was lodged on 28th June, 2021, by the French *Conseil d'État* (France) in the case C-398/*21 Conseil national des barreaux, Conférence des bâtonniers, Ordre des avocats du barreau de Paris v Premier ministre, Ministre de l'Economie, des Finances et de la Relance*[4]. The *Conseil d'État* has doubts whether Article 8ab(5) of DAC 6 infringes the right to a fair hearing guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union and Article 6

[3] Opinion of Advocate General Rantos delivered on 5th April, 2022, case C-694/20, *Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v Vlaamse Regering*, ECLI:EU:C:2022:259.

[4] Request for a preliminary ruling from the Conseil d'État (France) lodged on 28th June, 2021 – Conseil national des barreaux, Conférence des bâtonniers, Ordre des avocats du barreau de Paris v Premier ministre, Ministre de l'Economie, des Finances et de la Relance, Case C-398/21.

of the European Convention for the Protection of Human Rights and Fundamental Freedoms in that it does not exclude, in principle, lawyers participating in judicial proceedings from the scope of intermediaries who must supply the tax authorities with the information necessary for reporting a cross-border tax arrangement or who must notify another intermediary of that obligation. In the opinion of *Conseil d'État*, Article 8ab(5) of DAC 6 infringes also the rights in respect of correspondence and private life guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in that it does not exclude, in principle, lawyers assessing their client's legal situation from the scope of intermediaries who must supply the tax authorities with the information necessary for reporting a cross-border tax arrangement or who must notify another intermediary of that obligation.

Additionally, *Cour Constitutionnelle* in Belgium lodged on 29th September, 2022, further questions to CJEU on DAC 6[5]. The *Cour Constitutionnelle* in Belgium questions whether DAC 6 infringes Article 6(3) of the Treaty of the European Union and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union and, more specifically, the principles of equality and non-discrimination as guaranteed by those provisions, in that the directive does not limit the reporting obligation in respect of cross-border arrangements to corporation tax, but makes it applicable to all taxes falling within the scope of directive 2011/16/EU. The court asks also whether DAC 6 violates the principle of legality in criminal matters as guaranteed by Article 49(1) of the Charter of Fundamental Rights of the European Union and by Article 7(1) of the European Convention on Human Rights, the general principle of legal certainty and the right to respect for private life as guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union and by Article 8 of the European Convention on Human Rights, in that the concepts used in the directive are not sufficiently clear and precise. A similar objection is raised against the DAC 6 use of the 30-day period during which the intermediary or relevant taxpayer must fulfil its reporting obligation in respect of a cross-border arrangement as it the court's view it is not fixed in a sufficiently clear and precise manner.

[5] Request for a preliminary ruling from the Cour constitutionnelle (Belgium) lodged on 29th September, 2022, in the case C-623/22 *Belgian Association of Tax Lawyers and Others v Premier ministre/ Eerste Minister*.

The Court also upholds the plea of incompatibility of the new Article 8ab(5) of DAC 6 with the right to respect for private life as guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union and by Article 8 of the European Convention on Human Rights, as it requires the intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer, of their reporting obligations, in so far as the effect of that obligation is to oblige an intermediary bound by legal professional privilege subject to criminal sanctions under the national law of that Member State to share with another intermediary, not being his/her client, information which he/she obtains in the course of the essential activities of his/her profession. It also alleges that DAC 6 infringes the right to respect for private life in that the reporting obligation in respect of cross-border arrangements interferes with the right to respect for the private life of intermediaries and relevant taxpayers which is not reasonably justified or proportionate in the light of the objectives pursued and which is not relevant to the objective of ensuring the proper functioning of the internal market.

3. Judgments of the ECJ of 8th December, 2022 (C-694/20), and of 7th March, 2023 (C-398/21)

On 8th December, 2022, the ECJ delivered its judgment in case C-694/20 concerning the compatibility with EU law of the obligation for intermediaries who benefit from the professional secrecy exemption from providing information on cross-border arrangements of potentially aggressive tax planning to inform another intermediary of the obligation to provide such information[6].

The Court held that Article 8ab(5) of Directive 2011/16/EU, as amended by DAC 6, is invalid in the light of Article 7 of the Charter of Fundamental Rights of the European Union in so far as its application by the Member States has the effect of imposing on a lawyer acting as an intermediary within the meaning of Art. 3(21) of that directive, where they are exempted from the obligation to notify cross-border agreements by reason of the professional secrecy which he/she is bound to observe, an obligation to inform without delay any other intermediary who is

[6] Judgment of the ECJ of 8th December, 2022, *Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v Vlaamse Regering,* C-694/20, EU:C:2022:963.

not his/her client of his/her obligation to notify under Article 8ab(6) of that Directive. The Court found that the mere obligation to inform a person who is not a client of such an obligation to provide information impermissibly interferes with the right to respect for legal professional privilege, as guaranteed by Article 7 of the EU Charter of Fundamental Rights, by again giving priority to fundamental rights over considerations of general interest. The judgment applies to all legal aid providers subject to legal professional privilege and upholds the fundamental principles of the protection of the right to legal aid. The Court ruled that the obligation to notify was invalid in the light of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, in particular the right to respect for communications between a lawyer and his client (Article 7).

In its judgment, the Court first recalled Article 7 of the Charter of Fundamental Rights of the EU, which protects the confidentiality of all correspondence between individuals and natural persons. Article 7 of the Charter recognises that everyone has the right to respect for their private and family life, their home, and their communications. These provisions correspond to Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), while Article 47, which guarantees the right to an effective remedy and to a fair trial, corresponds to Article 6(1) of the ECHR. The Charter must be interpreted in a manner consistent with the ECHR[7]. The ECJ must therefore take into account the interpretation of the European Court of Human Rights (ECtHR) as a minimum standard when interpreting the rights guaranteed by the Charter.

It is clear from the case-law of the ECtHR that Article 8(1) of the ECHR protects the confidentiality of all correspondence between individuals and affords greater protection to exchanges between lawyers and their clients. Like this provision, the protection of which extends not only to defence but also to legal advice, Article 7 of the Charter necessarily guarantees the

[7] In accordance with Article 52(3) of the Charter, which seeks to ensure the necessary coherence between the rights enshrined in the Charter and the corresponding rights guaranteed by the ECHR without undermining the autonomy of Union law, the Court should, when interpreting the rights guaranteed by Articles 7 and 47 of the Charter, the corresponding rights guaranteed by Articles 8(1) and 6(1) of the ECHR, as interpreted by the European Court of Human Rights, as a threshold of minimum protection, see, similarly, the judgment of 2nd February, 2021, *Consob*, C-481/19, EU:C:2021:84, paragraphs 36, 37.

secrecy of such legal advice, both as to its content and as to its existence. As the ECtHR has pointed out, persons who consult a lawyer have a reasonable expectation that their communication will be private and confidential. Those persons must, therefore, save in exceptional circumstances, have a legitimate expectation that their lawyer will not disclose to anyone the fact that they are consulting him without their consent[8].

The specific protection afforded by Article 7 of the Charter and Article 8(1) of the ECHR to legal professional privilege, which takes the form, first and foremost, of obligations on lawyers, is justified by the fact that lawyers have a fundamental role to play in a democratic society, namely that of defending litigants[9]. That fundamental task entails, on the one hand, the requirement, the importance of which is recognised in all the Member States, that every person must be able to consult freely a lawyer whose profession by its very nature involves the giving of independent legal advice to all those who need it and, on the other hand, the correlative duty of the lawyer to act in good faith towards his client[10].

The obligation laid down in Article 8ab(5) of Directive 2011/16, as amended, for a lawyer-intermediary, where he/she is exempted from the reporting obligation laid down in Article 8ab(1) by virtue of legal professional privilege under national law, to inform without delay other intermediaries who are not his/her clients of their obligation to report under Article 8ab(6) of that directive, necessarily entails the consequence that those other intermediaries become aware of the identity of the notifying lawyer-intermediary, of his/her assessment that the arrangement in question is reportable and of his/her having been consulted in connection with the arrangement. In those circumstances, and to the extent that those other intermediaries do not necessarily have knowledge of the identity of the lawyer-intermediary and of the fact that he/she has been consulted on the reportable cross-border arrangement, the obligation to notify laid down in Article 8ab(5) of Directive 2011/16, as amended, in the opinion of

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[8] See, ECtHR judgment of 9th April, 2019, *Altay v. Turkey* (No 2), CE:ECHR:2019:0409JUD001123609, § 49; ECtHR judgment of 6th December, 2012, *Michaud v. France*, CE:ECHR:2012:1206JUD001232311, §§ 117 and 118.

[9] ECtHR, judgment of 6th December, 2012, *Michaud v. France*, CE:ECHR:2012:1206JUD001232311, §§ 118 and 119.

[10] See, to that effect, judgment of 18th May, 1982, *AM & S Europe v Commission*, 155/79, EU:C:1982:157, § 18.

the ECJ entails an interference with the right to respect for communications between lawyers and their clients, guaranteed by Article 7 of the Charter.

In addition, the ECJ stated that the obligation to report indirectly leads to a further infringement of this right, which results from the fact that the third party intermediaries thus notified disclose to the tax authorities the identity of the lawyer-intermediary and the fact that he has been consulted. It follows from Article 8ab(1), (9), (13) and (14) of the amended Directive 2011/16 that the identification of the intermediaries is one of the items of information to be provided under the reporting obligation, this identification being the subject of an exchange of information between the competent authorities of the Member States.

The rights enshrined in Article 7 of the Charter are not absolute rights, but must be considered in relation to their function in society. Accordingly, the ECJ examined whether those restrictions on the right to respect for communications between lawyers and their clients, guaranteed by Article 7 of the Charter, could be justified. As can be seen from Article 52(1) of the Charter, that provision allows limitations to be imposed on the exercise of those rights, provided that such limitations are provided for by law, that they respect the essence of those rights and that, in accordance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others[11].

In that regard, the ECJ held, first, that Article 8ab(5) of Directive 2011/16, as amended, expressly imposes on a lawyer-intermediary who is exempted from the obligation to provide information by virtue of the legal professional privilege to which he/she is subject an obligation to inform other intermediaries of their obligation to provide information under Article 8ab(6). Secondly, as has been pointed out by the ECJ, the interference with the right to respect for communications between lawyers and their clients, as enshrined in Article 7 of the Charter, is the direct consequence of such a notification by the lawyer to another intermediary who is not his/her client, in particular where, up to the time of that notification, that client was unaware of the identity of that lawyer and of the fact that he/she had been consulted on the cross-border arrangement to be notified.

[11] See, to that effect, judgment of 6th October, 2020, Privacy International, C-623/17, EU:C:2020:790, §§ 63 and 64.

The principle of legality has been complied with. Article 8ab(5) of Directive 2011/16, as amended, expressly requires a lawyer-intermediary who is exempted from the obligation to provide information by virtue of legal professional privilege to inform other intermediaries of their obligation to provide information under its Article 8ab(6).

With regard to the interference resulting indirectly from that obligation to notify, by reason of the disclosure by the notified third party intermediaries of the identity of the lawyer- intermediary and of the fact that he/she has been consulted to the tax authorities, that disclosure is due to the extent of the obligations to provide information resulting from Article 8ab(1), (9), (13) and (14) of Directive 2011/16, as amended.

Secondly, as regards respect for the essence of the right to respect for communications between lawyers and their clients, guaranteed by Article 7 of the Charter, in the Court's opinion, the obligation to provide information laid down in Article 8ab(5) of Directive 2011/16, as amended, entails, to a limited extent only, the lifting of the confidentiality of communications between the lawyer-intermediary and his/her client *vis-à-vis* a third party intermediary and the tax authorities. In particular, this provision does not oblige, or even authorise, the lawyer-intermediary, without the consent of his/her client, to communicate information on the content of those communications to other intermediaries, and those intermediaries will therefore not be able to communicate such information to the tax authorities. In those circumstances, in the Court's view, it cannot be considered that the obligation to provide information laid down in Article 8ab(5) of the amended Directive 2011/16 undermines the essence of the right to respect for communications between lawyers and their clients enshrined in Article 7 of the Charter.

Thirdly, as regards compliance with the principle of proportionality, that principle requires that the restrictions which may be imposed, in particular by acts of EU law, on the rights and freedoms enshrined in the Charter must not exceed the limits of what is appropriate and necessary in order to meet the legitimate objectives pursued or the need to protect the rights and freedoms of others; where there is a choice between several appropriate measures, recourse must be had to the least onerous. Moreover, a general interest objective may not be pursued without taking into account the need to reconcile it with the fundamental rights affected by the measure, by striking a proper balance between the general interest objective and the rights in question, in order to ensure that the disadvantages caused by the measure are not disproportionate to the objectives pursued. Thus, the possibility for Member States to justify a limitation of the rights guaranteed by Article 7 of the Charter must be assessed by measuring the seriousness of the interference which such a limitation entails and by verifying that the importance of the general interest objective pursued by that limitation is proportionate to that seriousness[12]. Thus, the ECJ underlined that the possibility for Member States to justify a limitation of the rights guaranteed by Article 7 of the Charter must be assessed by measuring the seriousness of the interference which such a limitation entails and by verifying that the importance of the general interest objective pursued by that limitation is proportionate to that seriousness. If so, ECJ pointed out that it is necessary to ensure, first, that the obligation is proportionate to the achievement of that objective and, second, that the interference with the fundamental right to respect for communications between lawyers and their clients which may result from that obligation to report is limited to what is strictly necessary, in the sense that the pursued objective could not reasonably be achieved as effectively by other means less restrictive of that right and, thirdly, if that is indeed the case, that that interference is not disproportionate to that objective, which implies in particular a balancing of the importance of the objective and the gravity of the interference[13].

The amendment made to Directive 2011/16 by DAC 6 falls within the scope of international tax cooperation to combat aggressive tax planning, which is manifested in the exchange of information between Member States. The fight against aggressive tax planning and the prevention of the risk of tax avoidance and tax evasion constitute an objective of general interest recognised by the European Union within the meaning of Article 52(1) of the Charter, which may make it possible to restrict the exercise of the rights guaranteed by Article 7 of the Charter[14].

However, in the ECJ's view, the obligation laid down in Article 8ab(5) of amended Directive 2011/16 cannot be regarded as being strictly necessary in order to achieve those objectives and, in particular, to ensure

[12] See ECJ judgments of 26th April, 2022, *Poland v Parliament and Council*, C-401/19, EU:C:2022:297, § 65, and of 22nd November, 2022, *Luxembourg Business Registers and Sovim*, C-37/20 and C-601/20, EU:C:2022:912, § 64.

[13] See, the ECJ judgment of 22nd November, 2022, *Luxembourg Business Registers and Sovim*, C-37/20 and C-601/20, EU:C:2022:912, § 66.

[14] See also ECJ judgment of 6th October, 2020, *État luxembourgeois*, C-245/19 and C-246/19, EU:C:2020:795, § 87.

that the information relating to the reportable cross-border arrangements is filed with the competent authorities. The ECJ confirmed that the second subparagraph of Article 8ab(5) of Directive 2011/16, as amended, provides that lawyer-intermediaries may only be entitled to a waiver under the first subparagraph of that provision to the extent that they operate within the limits of the relevant national laws that define their profession. However, the purpose of the reporting and notification obligations laid down in Article 8ab of that Directive is not to check whether lawyer-intermediaries operate within those limits, but to combat potentially aggressive tax practices and to prevent the risk of tax avoidance and evasion by ensuring that information on reportable cross-border arrangements is filed with the competent authorities. The ECJ noted that the Directive ensures that such information is communicated to the tax authorities without the necessity to disclose to them the identity of the lawyer-intermediary and the fact that he/she has been consulted. In those circumstances, the possibility that lawyer-intermediaries might wrongly invoke legal professional privilege in order to avoid their obligation to report cannot lead to the conclusion that the obligation to report laid down in Article 8ab(5) of that Directive and the disclosure to the tax authorities of the identity of the reporting lawyer-intermediary and of the fact that he/she has been consulted are strictly necessary.

The Court therefore concluded in case C-694/20 that Article 8ab(5) of the Directive is invalid under Article 7 of the Charter if its application has the effect of requiring a lawyer acting as an intermediary and covered by legal professional privilege to inform any other intermediary – who is not his/her client – of his reporting obligations. It is not necessary to know the identity of the lawyer, since legal professional privilege would exempt the lawyer from answering any questions which might subsequently be asked by the tax administration.

In the light of the judgment delivered on 8th December, 2022, in case C-694/20 the *Conseil d'État* in France informed the Court that it did not intend to maintain its reference for a preliminary ruling in case C-398/21 and this case has be removed from the Court's register. Request for a preliminary ruling from the *Cour Constitutionnelle* in Belgium lodged in the case C-623/22 is still pending.

4. The implications for the Court's judgment

In the case of *Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v Vlaamse Regering* (C-694/20), the CJEU confirmed its jurisdiction to give preliminary rulings in the specific case where the Member State's national law refers to the provisions of a directive in order to determine the application of the relevant provision to the purely internal situation of that State. The court clarified the exemption of lawyers from the obligation to report information to the tax authorities under EU law. The ECJ ruled that the obligation imposed on lawyers under the DAC6 to inform intermediaries other than their own clients infringes the right to respect for communications between lawyers and their clients, as guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union.

The CJEU emphasises that information obtained by a lawyer in the course of the provision of legal advice, both as to its content and as to its existence, remains covered by the obligation of professional secrecy even outside the context of litigation. In the *Reyners* judgment of 21st June, 1974[15], it was held that, notwithstanding the differences in the organisation of the legal profession in the various Member States, the most typical activities of the legal profession are, on the one hand, to provide legal advice and assistance and, on the other, to represent and defend parties before the courts. In the opinion of the CJEU, the exemption of lawyers from the obligation to provide information to the tax authorities applies to all typical activities of the legal profession, since the function of a lawyer is broader than simply representing a client in court. Until Case C-694/20, the CJEU had only explicitly recognised that legal professional privilege covers communications with EU qualified external counsel made for the purposes and in the interests of a client's defence in competition proceedings[16].

With regard to the implications of the judgment in case C-694/20, it should also be emphasised that the CJEU gave priority to primary law (Charter of Fundamental Rights) over secondary law (DAC 6). It follows directly from this ruling that the legal professional privilege of lawyers takes precedence over their obligation to report to the authorities

[15] See CJEU judgement of 21st June, 1974, in the case *Asia 2/74 Jean Reyners v. Belgian valtio*, ECLI:EU:C:1974:68.

[16] See CJEU judgment of 18th May, 1982, *AM&S v. Commission*, Case 155/79, EU:C:1982:157, § 21.

various activities carried out by their clients that are considered to be aggressive tax planning. The reporting obligation is contrary to legal professional privilege, because it infringes the right to respect for private life and the right to a fair trial and because the obligation is not strictly necessary to ensure that relevant cross-border arrangements are reported. In order to ensure compliance with the judgment, Member States will need to review their rules on reporting obligations. It may be that the obligations of intermediaries subject to legal professional privilege will be limited to informing only the taxpayer concerned of their respective obligations.

It should also be noted that, in the light of this ruling, the protection of legal professional privilege under EU law covers communications relating to legal advice beyond those relating to litigation[17]. The CJEU made it clear that legal professional privilege under EU law applies to legal advice in general, such as regulatory or commercial advice, and not only to advice given in the context of the client's right to be heard in legal proceedings. Furthermore, in the author's view, the case generally may affect the position of approved tax advisers and accountants, as there is a possibility that tax advisors and accountants could invoke the same professional privilege, even though the *Orde van Vlaamse Balies* case was brought by the Flemish Bar and is therefore framed in the context of lawyers subject to legal professional privilege. Clarifications in national laws may be necessary in this respect as to whether approved tax advisers and accountants as intermediaries could still have an obligation to notify other intermediaries, whereas lawyers clearly now do not have such an obligation following the CJEU's decision. These intermediaries (who may at this stage still by obliged by national laws to notify other intermediaries) should at the same time consider the compatibility of this obligation with the rules on professional secrecy that apply to them. In Poland, according to article 37 sec. 1 of the Tax Advisers Act, tax advisers are obliged to maintain secrecy about facts and information that come to their knowledge in connection with the exercise of their profession, so there is no doubt that the judgment also applies to them.

[17] Enrico Salmini Sturli, Thibault Henry, Extension of EU Legal Professional Privilege: Case C-694/20 *Orde Van Vlaamse Balies*, *Journal of European Competition Law & Practice*, vol. 14, Issue 3, April 2023, pp. 165–167, https://doi.org/10.1093/jeclap/lpad016

However, the main consequence of the CJEU judgment in case C-694/20 is that lawyers in EU Member States are no longer obliged to inform other intermediaries who are not their clients. This conclusion also applies to Polish tax advisors, lawyers, and legal counsellors, who, under Polish law, are obliged to inform not only other intermediaries who are not their clients of their obligation to notify the tax authority of the tax scheme, but also the beneficiary itself and, in addition, the Head of the National Fiscal Administration.

The situation in which the CJEU annuls a directive (in whole or in part) is relatively rare and complex in its implications. For this reason, the case law of the CJEU does not provide comprehensive guidance on the implications of such preliminary rulings, both in terms of the validity of the DAC 6 at the level of the EU legal system and the consequences for national measures transposing the Directive into national law. Following a judgment of the CJEU on the basis of Article 263 TFEU, an act of EU law which has been declared invalid ceases to have effect in the EU legal order. When the Court of Justice annuls an act of the EU institutions in proceedings under Article 267 of the Treaty on the Functioning of the European Union, the consequence of this judgment is that the relevant EU institutions must take the necessary measures to put an end to the illegality established in accordance with Article 266 of the Treaty on the Functioning of the European Union. A preliminary ruling by the CJEU annulling a directive at EU level has no direct bearing on the validity of the act transposing the directive into national law, although it is binding on the national court which made the reference to the CJEU for a preliminary ruling. In particular, a judgment of the CJEU does not automatically invalidate an act of national law implementing a directive. Such a ruling may constitute sufficient grounds for any other national court to consider that the decision which it is called upon to take is invalid, although it is addressed only to the court which made the reference.

It should also be noted that, in the past, the CJEU had been reluctant to undertake a substantive review of secondary Union law, particularly where legislation has been adopted unanimously by the Member States. In this judgment, however, the Court reviewed a tax directive on the basis of the Charter of Fundamental Rights. More recently (22nd November, 2002), it also ruled that the conditions for access to beneficial ownership information under the EU's Fifth Anti-Money Laundering Directive 2018/843 (AMLD) violated the fundamental rights enshrined in Articles 7 and 8 of the Charter of Fundamental Rights[18]. In particular, the AMLD was adopted under the ordinary legislative procedure, which requires only a qualified majority of Member States for adoption by the Council. In the *Sovim SA* case, the Court of Justice ruled that the AMLD requirement that information on beneficial ownership registers be displayed online and remain accessible to all members of the public violated the EU right to the protection of personal data. The European Court of Justice is emboldened to strike down any new EU legislation that may be in breach of fundamental rights, including tax directives. In this situation, a challenge to the Council Directive on ensuring a global minimum level of taxation for multinational enterprise groups and large domestic groups in the Union, or to the possibly adopted amended version of the Directive setting out rules to prevent the abuse of shell companies for tax purposes, the so-called "Anti Tax Avoidance Directive 3" (ATAD3), could be considered[19].

5. Constitutional doubts raised before the Polish Constitutional Tribunal against the provisions on the reporting of tax schemes

As of 1st January, 2019, the provisions of Chapter 11a of the Tax Ordinance entered into force in Poland. Tax Ordinance, as amended by Article 3(22) of the Act of 23rd October, 2018, amending the Act on Income Tax of Natural Persons, the Act on Income Tax of Legal Persons, the Act on tax on the income of legal persons, the Act – Tax Ordinance and certain other acts[20], introduced an obligation to notify Polish tax authorities of tax arrangement schemes. The provisions were aimed at implementing DAC 6. Poland was one of the first countries in Europe to incorporate the recommendations of the DAC 6 into its legal system and to significantly expand the definition of tax arrangements subject to reporting requirements, including, for example, the need to report on domestic tax arrangements.

Under article 86b § 1 of the Tax Ordinance, the promoter shall provide to the Head of the National Fiscal Administration the information

[18] See, joined CJEU judgement dated from 22nd November, 2022, cases C-37/20 and C-601/20, *WM and Sovim SA v. Luxembourg Business Registers,* EU:C:2022:912.

[19] Proposal for a COUNCIL DIRECTIVE laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU.

[20] Journal of Laws of 2018, item 2193; hereinafter: the Amending Act.

on the tax arrangement scheme within 30 days of: the next day after making the tax arrangement scheme available, the next day after preparing to the tax arrangement scheme implementation or the day of performing the first act related to the tax arrangement scheme implementation – whichever comes first[21]. These provisions provide also for the possibility of exempting a tax advisor or a lawyer who is a promoter (or an assisting person) from the obligation of legal professional privilege (Article 86b § 4 of the Tax Ordinance) and specify situations in which the provision of information does not constitute a breach of the obligation to legally protected professional secrecy (Article 86b § 7 of the Tax Ordinance). Provisions introduced to implement DAC 6 raise more than constitutional concerns[22].

The rules governing the various professions of public trust treat professional secrecy as a duty incumbent on the members of these professions and not as a right. Moreover, the obligation of confidentiality is part of the code of ethics of the members of these professions, the breach of which constitutes the basis for disciplinary and criminal sanctions[23].

The National Council of Tax Advisers in Poland, by its resolution of 17th December, 2009, declared that the provisions of Article 86b, Article 86d, Article 86e and Article 86f of the Tax Code, as amended by the Act of 5th July, 1996, on Tax Advisers, in conjunction with Article 37(4) of the Act of 5th July, 1996, on Tax Advisers, to the extent that the implementation of the provisions of these regulations concerning the provision of information on the tax system results in the tax adviser's obligation to observe professional secrecy are incompatible with Article 2, Article 17(1) in conjunction with Article 31(3), Article 47, Article 49, Article 51(2) and Article 58(1) of the Constitution of the Republic of Poland, insofar as the implementation of

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21 M. Wilk, *Ujawnianie schematów podatkowych a tajemnica zawodowa doradcy podatkowego*, "Przegląd Podatkowy" 2019, no. 2, p. 16

22 See A. Ladziński, D. Wasiul, *O nieprawidłowej implementacji dyrektywy 2018/822 (MDR) i jej konsekwencjac*, "Przegląd Podatkowy" 2019, no. 5, p. 9.

In addition, on 15th September, 2022, also the Belgian Constitutional Court issued a judgment in a joint case between Belgian lawyers and the Institute of Tax Advisers and Accountants concerning the implementation of DAC6 in Belgian law. In a new judgment, the Belgian Constitutional Court recognised the application of legal professional privilege for lawyers, tax advisers and accountants and declared the "non-privileged" periodic reporting of market contracts invalid.

23 Article 266, paragraph 1 of the law of 6th June, 1997, Criminal Code, Journal of Laws of 2018, item 1600, as amended.

the provisions of these regulations concerning the provision of information on the tax regime results in an obligation on the part of the tax adviser to breach professional secrecy.

According to the National Council of Tax Advisors in Poland, the contested provisions lack clarity, precision and definition. Their entry into force on 1st January, 2019, violates the principle of trust in the State and the laws it enacts, the principles of proper legislation and the principle of proper *vacatio legis*, as enshrined in Article 2 of the Constitution. Furthermore, the legislation introducing the obligation to provide information on tax arrangements is restricting the freedom of establishment and the freedom to exercise the profession of tax advisor, and thus violates the principle of legal certainty, as well as the provision of Article 31(3)(1) of the Constitution of the Republic of Poland, according to which restrictions of freedom must be regulated by law, and in line with the principle of the rule of law (Article 2 of the Constitution of the Republic of Poland).

The contested provision, in so far as it requires a promoter (or promoters) who is a tax adviser to provide the Head of the National Fiscal Administration with information relating to a tax scheme implemented before the date on which the amending law entered into force, is incompatible with the Constitution, since it infringes the principle of lex retro non agit.

Furthermore, in the opinion of the National Council of Tax Advisors in Poland, Articles 86a–o of the Tax Code, added as of 1st January, 2019, by Article 3(22) of the Amending Act, to the extent that their entry into force violates the principle of trust in the State and the law enacted by it, the principles of correct legislation and the principle of proper *vacatio legis*, are inconsistent with Article 2 of the Constitution and with Articles 22 and 65(1) in conjunction with Article 2, Article 7, Article 17(1) and Article 31(3) of the Polish Constitution.

The National Council of Tax Advisers also pointed out that these provisions are incompatible with Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993, no. 61, item 284), in conjunction with Article 2 and the Preamble of the Constitution, as well as Articles 17(1) and 45(1) of the Constitution, in that they violate the principles of the rule of law with regard to the constitutional right of citizens to benefit from the services of the self-government of a public profession and the right to a court, by creating a public institution in a form that prevents it from functioning in a reliable and efficient manner.

Finally, it challenged the provision of Article 28 of the Amending Law, to the extent that it obliges a promoter or facilitator who is a tax advisor to provide the Head of the National Fiscal Administration with information regarding a tax scheme that was implemented before the Amending Law entered into force, as being inconsistent with Article 2 of the Constitution.

The request submitted by the National Council of Tax Advisers to review the constitutionality of the above provisions was received by the Constitutional Court on 30th December, 2019, and registered under the reference number K 13/20. It has not yet been examined. If the mechanism provided by DAC 6 violates the right to respect for private life because it consists in obliging the lawyer or a tax adviser who has invoked the legal professional privilege to provide information about the evasion of the obligation to inform the authorities about the cross-border arrangement, even more so the Polish solutions violate the right to privacy referred to in Article 47 of the Constitution, which has been indicated in the motion of the National Council of Tax Advisers to the Polish Constitutional Tribunal[24]. This conclusion applies equally to reporting on cross-border as well as domestic tax arrangements.

A lawyers' obligation to inform other intermediaries involved is not necessary and infringes also the constitutional right to respect for communications with his/her client. Since the request for a preliminary ruling from the Belgian *Cour Constitutionnelle* in case C-623/22 also raises doubts as to the compatibility of the provisions of DAC 6 with the principle of legal certainty, the Polish Constitutional Tribunal should suspend the proceedings pending the judgment in that case[25]. The vague nature of certain concepts of the DAC 6 and, in particular, the concepts of 'intermediary', 'arrangement', 'participant', 'associated enterprise', the terms 'cross-border', various 'hallmarks', and the 'main benefit test' raise legitimate doubts whether there are sufficiently precise and clear and provide legal

[24] See also A. Franczak, *Zwolnienie z obowiązku zachowania tajemnicy zawodowej w zakresie raportowania schematów podatkowych narusza art. 7 Karty Praw Podstawowych Unii Europejskiej. Uwagi na tle wyroku Trybunału Sprawiedliwości z 8.12.2022 r.*, C-694/20, Orde van Vlaamse Balies i in., "Przegląd Podatkowy" 2023, no. 4, pp. 8–16; A. Franczak, *Granice ingerencji w prawo do zachowania tajemnicy zawodowej doradcy podatkowego w świetle międzynarodowych i unijnych standardów ochrony praw podatnika – część 1*, "Kwartalnik Doradca Podatkowy" 2021, no. 1.

[25] See request for a preliminary ruling from the Cour constitutionnelle (Belgium) lodged on 29th September, 2022, in the case C-623/22 *Belgian Association of Tax Lawyers and Others v Premier ministre/ Eerste Minister*.

certainty. Since the contested Polish provisions reproduce those of the DAC 6 and taking into account the fact that those concepts cannot be interpreted differently from one Member State to another, it is necessary, before ruling on the substance, to refer to the CJEU ruling in this respect.

6. Conclusions

The judgment of the CJEU in case C-694/20 *Orde van Vlaamse Balies and Others* extends the protection of legal professional privilege. In the context of combatting aggressive tax planning, a lawyers' obligation to inform other intermediaries involved is not necessary and infringes the right to respect for communications with his/her client. The main novelty of this case is that the CJEU has recognised that lawyers' legal professional privilege prevails over tax objectives and obligations. Individuals who consult a lawyer as well as a tax adviser can reasonably expect that their communication is private and confidential. Therefore, other than in exceptional situations, those persons must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him/her. The judgment shall be followed by a legislative initiative by the European Commission to amend the DAC 6 to bring it into line with the requirements of EU primary law, as indicated by the Court.

The judgement is important also because it recognises that legal professional privilege is not limited to advice given in the context of legal proceedings, which was the restrictive view taken by European competition authorities.

In the CJEU *Orde van Vlaamse Balies & Othersupheld* judgement concluding that the obligation to inform other intermediaries imposed by article 8ab(5) of the DAC 6 interferes with the right to respect for communications between lawyers and their clients guaranteed in Article 7 of the Charter of Fundamental Right, the Court gave priority to primary law (Charter of Fundamental Rights) over secondary law (DAC 6). A new jurisprudential trend can be observed in this context: there was a substantive review of a tax directive on the basis of the Charter of Fundamental Rights. The CJEU has generally been reluctant to undertake substantive review of EU secondary legislation. Recently, however, the CJEU seems to be closely considering the provisions of EU directives that are not in line with the fundamental rights. The Court of Justice has not said the last word on the DAC 6, given that another case is pending to see if it complies with the Charter of Fundamental Rights. In a judgment dated 11th July, 2023, the Luxembourg Higher Administrative Court referred several questions to the CJEU for a preliminary ruling[26]. The questions focus on the application of legal professional privilege in the context of the exchange of information upon request in tax matters introduced by the Directive 2011/16/EU.

Due to the fact that the DAC 6 has been declared unlawful by the Court of Justice, it can be interpreted that the Polish regulations implementing the above-mentioned regulations in the Polish legal system in relation to both cross-border and domestic tax arrangements are also unlawful, and, therefore, the lawyers and tax advisors who are exempt from the obligation to report on the basis of legal professional privilege should not be obliged to disclose this exemption in a legally valid manner to the other intermediaries involved in the tax planning arrangements subject to the obligation to report. Therefore, such lawyer-intermediaries cannot be held accountable in case of incomplete, inaccurate, or late notification of another intermediary.

The Constitutional Tribunal is also due to rule on the compatibility of the reporting requirements with the Polish Constitution, and it appears that taking into account the scope of constitutional protection in the light of Article 47 of the Constitution it shall follow the CJEU in its criticism of these requirements, although the chances of resolving this issue in the near future appear to be low.

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[26] The case is registered under the number C-432/23.

Salmini Sturli E., Thibault H., *Extension of EU Legal Professional Privilege: Case C-694/20 Orde Van Vlaamse Balies*, "Journal of European Competition Law & Practice" 2023, vol. 14, Issue 3, April.

Wilk M., *Ujawnianie schematów podatkowych a tajemnica zawodowa doradcy podatkowego*, "Przegląd Podatkowy" 2019, no. 2.

Zgłaszanie schematów podatkowych narusza tajemnicę zawodową

Streszczenie. W niniejszym artykule Autorka omawia wyrok TSUE w sprawie C-694/20 Orde van Vlaamse Balies i inni, który rozszerza ochronę tajemnicy zawodowej prawników. W kontekście zwalczania agresywnego planowania podatkowego Trybunał Sprawiedliwości orzekł, że obowiązek informowania przez prawników licencjonowanych innych zaangażowanych pośredników w schemat podatkowy nie jest konieczny i narusza prawo do poszanowania komunikacji z klientem. Główną nowością w analizowanym wyroku jest to, że TSUE uznał, że przywilej zawodowy prawników ma pierwszeństwo przed celami i obowiązkami podatkowymi. Osoby, które konsultują się z prawnikiem, a także doradcą podatkowym, mogą zasadnie oczekiwać, że ich komunikacja pozostanie prywatna i poufna. Dlatego też, poza wyjątkowymi sytuacjami, osoby te mają uzasadnione oczekiwanie, że ich prawnik nie ujawni nikomu, bez ich zgody, że się z nim konsultują. W ślad za wyrokiem, Komisja Europejska podejmie inicjatywę legislacyjną mającą na celu zmianę dyrektywy DAC 6, tak aby była ona zgodna z wymogami unijnego prawa pierwotnego, na co wskazał Trybunał.

Wyrok jest ważny również dlatego, że uznaje, że tajemnica zawodowa prawników nie ogranicza się do porad udzielanych w kontekście postępowania sądowego, co było restrykcyjnym poglądem przyjmowanym w sprawach dotyczących ochrony konkurencji.

W wyroku TSUE Orde van Vlaamse Balies i inni, w którym stwierdzono, że obowiązek informowania innych pośredników nałożony w art. 8ab ust. 5 DAC 6 koliduje z prawem do poszanowania komunikacji między prawnikami a ich klientami zagwarantowanym w art. 7 Karty Praw Podstawowych, Trybunał przyznał pierwszeństwo prawu pierwotnemu (Karta Praw Podstawowych) przed prawem wtórnym (DAC 6). W tym kontekście można zaobserwować nowy trend orzeczniczy, w którym dokonano merytorycznej kontroli dyrektywy podatkowej na podstawie Karty Praw Podstawowych. TSUE generalnie niechętnie podejmował się merytorycznej kontroli unijnego prawa wtórnego. Ostatnio jednak TSUE wydaje się uważnie analizować przepisy dyrektyw UE, które nie są zgodne z prawami podstawowymi.

Słowa kluczowe: tajemnica adwokacka, schematy podatkowe, MDR, Karta Praw Podstawowych, prawo do prywatności

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JM17111

https://doi.org/10.18778/1509-877X.2023.04.10

Articles

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The Income Tax Designation for the Benefit of PBOs: Correct Financial Support for Public Benefit Activities by Taxpayers Within the Institution of the Income Tax Designation?

Summary. Since 1st January, 2004, the institution of a designation of part of the income tax in favour of public benefit organisations has been functioning in the Polish tax system. The right to the allocation may be exercised by PIT taxpayers. However, CIT taxpayers do not exercise such an entitlement. This situation in the Polish legal system is the starting point for further analysis of the correctness of financial support for public benefit activities by taxpayers within the institution of the income tax designation in order to – if necessary – formulate some *de lege ferenda* postulates.

Keywords: income tax designation, public benefit organisations, financial support for public benefit activities

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Received: 8.08.2023. Verified: 12.09.2023. Accepted: 1.10.2023.

1. Introduction

Since 1st January, 2004, the Polish tax system has had in place the institution of a 1% (as of 1st July, 2022, the amount of the designation has increased to 1.5%[1]) income tax designation for the benefit of public benefit organisations (PBOs), hereinafter: the designation. It was introduced into the tax law by the *Act of 24th April, 2003, Introductory Provisions of the Act on Public Benefit Activities and Volunteerism*[2] and it was applied for the first time to tax settlements made in 2004 for the year 2003. In the subsequent years of its functioning, the institution has become increasingly popular[3]. The number of taxpayers who in 2020 declared tax designation in favour of PBOs from the 2019 settlement amounted to 14.8 million and the total amount of funds – 908 million PLN (in 2004, it was 80 thousand taxpayers and 10.4 million PLN, respectively); in 2021, the figures for the 2020 settlement amounted to: 15.3 million taxpayers and 973 million PLN; and in 2022 (the figures for the 2021 settlement): 15.9 million taxpayers and 1,115 million PLN. In 2023, the figures for the 2022 settlement were as

[1] Amendment introduced by the *Act of 9th June, 2022, amending the Personal Income Tax Act and certain other acts* (Journal of Laws item 1265, as amended), the so-called "Polish Deal 2.0".

[2] Journal of Laws of 2003, no. 96, item 874, as amended.

[3] Comparative data for the years 2004–2023 is presented in the table below (Ministerstwo Finansów, *Informacja dotycząca kwot 1,5% należnego podatku dochodowego od osób fizycznych przekazanych organizacjom pożytku publicznego w 2023 roku (z rozliczenia za 2022 rok*), Warszawa 2023, p. 5):

Year	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of taxpayers (in thousands)	80	681	1 157	1 604	5 135	7 325	8 624	10 135	11 166	11 537
Total designations (in PLN million)	10.4	41.6	62.3	105.4	298.3	381.5	360.9	403.9	459.4	482.2

Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Number of taxpayers (in thousands)	12 034	12 457	13 178	13 614	14 131	14 499	14 794	15 337	15 943	12 652
Total designations (in PLN million)	511	560	619.1	662.2	763.9	876.7	908	973	1 115.1	1 530.4

follows: 12.7 million taxpayers and 1,530 million PLN[4]. A certain decrease in the number of taxpayers opting for the designation should above all be associated with the effects of the so-called "Polish Deal"[5] and "Polish Deal 2.0" (reduction in the number of taxpayers paying the tax and therefore entitled to designate), which was expected[6] and which finally resulted in an already mentioned increase in the percentage of the designation to 1.5%[7], owing to which[8] – despite the smaller number of designators – the sum of designations did not decrease (but even increased).

2. The right to decide on tax funds allocation within designation

2.1. Taxpayers entitled to decide on a designation

The group of taxpayers entitled to make the designation includes both non-entrepreneurs and entrepreneurs, although this possibility only applies to personal income tax (PIT) taxpayers[9]. Meanwhile, both PIT and corporate income tax (CIT) taxpayers are entitled to exercise the right to deduct from their pre-tax income (subject to certain conditions) donations made for the purposes of public benefit activities carried out by non-governmental organisations (NGOs). This is because both Acts on income tax – the PIT Act (in Article 26(1)(9)(a)) and the CIT Act[10]

[4] Ministerstwo Finansów, *Informacja dotycząca kwot 1,5% należnego podatku dochodowego od osób fizycznych przekazanych organizacjom pożytku publicznego w 2023 roku (z rozliczenia za 2022 rok)*, Warszawa 2023, p. 5.

[5] The *Act of 29th October, 2021, amending the Personal Income Tax Act, the Corporate Income Tax Act and certain other acts* (Journal of Laws item 2105, as amended), the so-called "Polish Deal".

[6] See: *Justification of the so-called "Polish Deal 2.0"*, pp. 38–39.

[7] Amendment introduced by the *Act of 9th June, 2022, amending the Personal Income Tax Act and certain other acts* (Journal of Laws item 1265, as amended), the so-called "Polish Deal 2.0".

[8] Although this was probably not the only factor, the analysis in this area goes beyond the established scope of this article.

[9] Art. 45c of the *Act of 26th July, 1991, on Personal Income Tax* (consolidated text: Journal of Laws 2022, item 2647, as amended), hereinafter: PIT Act and also Art. 21b of the *Act of 20th November, 1998, on Lump Sum Income Tax on Certain Revenues Earned by Natural Persons* (consolidated text: Journal of Laws 2022, item 2540, as amended), hereinafter: LSIT Act.

[10] The *Act of 15th February, 1992, on Corporate Income Tax* (consolidated text: Journal of Laws of 2022, item 2587, as amended), hereinafter: CIT Act.

(in Article 18(1)(1)) – provide for such a possibility, albeit differentiating the maximum deduction (6% of income in the PIT and 10% of income in the CIT, but no more than the value of the donation).

Tax deduction of donations for public benefit activities and designation are two most important tax instruments that can encourage[11] financial support for public benefit activities by taxpayers. It is beyond the scope of this article whether such support should be provided at all by means of tax instruments[12], in which it was assumed that such instruments – as is

[11] How effectively and properly is a separate issue; some problems related to this have been highlighted in this article and also recently in: M. Supera-Markowska, *Odliczenia darowizn dokonywanych na cele działalności pożytku publicznego w polskim systemie podatkowym — stan obecny i postulowane zmiany*, [in:] M. Szafranek, Sz. Wójcik (eds.), *W poszukiwaniu perpetuum mobile. Dobre prawo dla trzeciego sektora*, Warszawa 2023; M. Szafranek, Sz. Wójcik, *Opinie przedstawicieli organizacji pozarządowych na temat otoczenia prawnego i propozycji zmian prawnych – wyniki badań empirycznych*, [in:] M. Szafranek, Sz. Wójcik (eds.), *W poszukiwaniu perpetuum mobile. Dobre prawo dla trzeciego sektora*, Warszawa 2023. See also, *inter alia*: S. Czetwertyński, *Konkurencja na rynku jednego procenta*, "Społeczeństwo i Ekonomia" 2016, no. 1; T. Perkowski, *Mechanizm jednego procentu jako "fałszywa" filantropia*, "Kwartalnik Trzeci Sektor" 2011, no. 24; G. Piechota, *Alokacja jednoprocentowa w perspektywie regionalnej – współpraca samorządu z organizacjami pożytku publicznego,* "Polityka i Społeczeństwo" 2013, no. 3; G. Piechota, *Fakty i mity o jednym procencie podatku. Odpis podatkowy w procesie kreowania społeczeństwa obywatelskiego*, Kraków 2015; G. Piechota, *Motywacje Polaków przy wyborze organizacji pożytku publicznego (której przekazują 1% podatku) a budowanie lokalnej społeczności obywatelskiej*, "Zarządzanie Publiczne" 2010, no. 3(13); G. Piechota, *Organizacje pożytku publicznego – w drodze do społeczeństwa obywatelskiego?*, Katowice 2011; U. Smołkowska, *Wspieranie organizacji pożytku publicznego z 1% podatku dochodowego od osób fizycznych*, "INFOS. Zagadnienia społeczno-gospodarcze" 2011, no. 22 and the literature cited therein.

[12] This issue is part of a broader discussion on the use of taxes for non-fiscal purposes (especially their stimulating function, which is not universally (fully) acceptable) – see: *Wstęp do nauki polskiego prawa podatkowego*, W. Modzelewski (ed.), Warszawa 2005, pp. 24–27; W. Wójtowicz, *Problem "prorodzinności" podatku dochodowego osób fizycznych*, [in:] T. Romanowska-Dębowska, S. Jankiewicz (eds.), *Konstytucja – ustrój, system finansowy państwa: księga pamiątkowa ku czci prof. Natalii Gajl*, Warszawa 1999, p. 409. On the function of taxes in general, see also, for example: M. Bitner, E. Chojna-Duch, M. Grzybowski, J. Chowaniec, P. Karwat, E. Kornberger-Sokołowska, M. Lachowicz, H. Litwińczuk, W. Modzelewski, K. Radzikowski, M. Supera-Markowska, M. Ślifirczyk, K. Tetłak, M. Waluga, *Prawo finansowe. Prawo finansów publicznych. Prawo podatkowe. Prawo bankowe*, Warszawa 2017, pp. 274–275; B. Brzeziński, *Prawo podatkowe. Zagadnienia teorii i praktyki*, Toruń 2017, pp. 66–67; J. Głuchowski, *Polskie prawo podatkowe*, Warszawa 2004, pp. 16–20; A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe,* Warszawa 2008, p. 261 et seq.; A. Gomułowicz, *Zagadnienie neutralności systemu podatkowego*, "Ruch Prawniczy Ekonomiczny i Socjologiczny" 1990, no. 2, pp. 79–88.

the case in Poland, but also in other tax systems[13] – can be used, but on the condition that they are normatively adequately shaped for the correct financial support of public benefit activities; and it is on this question of "correctness" that further considerations will be concentrated.

As already mentioned, only PIT taxpayers can make decisions on allocations within the designation; corporate income taxpayers are not entitled to exercise such a right. Considering the respective scope of personal income tax[14] and corporate income tax[15], the dividing line between the taxpayers entitled to decide on the designation is between natural persons (possibly enterprises in inheritance) as PIT taxpayers and all other income taxpayers liable to corporate income tax. It does not matter whether the taxpayer is an entrepreneur or a small taxpayer, nor where he/she derives his/her income from (employment, business, or any other source). This emphasis is all the more important as the discussion in the third sector environment concerning the designation[16] often uses differentiation between taxpayers who can decide about allocation and those who are deprived of this possibility by being an entrepreneur. However, already in the current status of the law, some entrepreneurs can exercise such a right[17]. In fact, if we are dealing with a natural person conducting a business activity individually or in the form of a civil law partnership, such an entrepreneur, being a taxpayer of personal income tax, may exercise a right to designation on the same principles as a natural person deriving taxable income from an employment contract, a contract of mandate, or other sources. It should also be emphasised that an entrepreneur who is an individual has the right to exercise the designation both in a situation where taxation is based on general rules and when it is rooted in special rules: the so-called flat tax (fixed rate of 19%) or a lump sum tax on registered revenues. Moreover, the actual right to exercise the designation exists in the case of certain commercial law entities, namely partnerships, where the taxpayers are their partners being natural persons

[13] For some comparative highlights and analysis, see: Donors and Foundations Networks in Europe AISBL (Dafne) and European Foundation Centre, *Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe*, Brussels 2021 and *Assessment of the Impact of the Percentage Tax Designations: Past, Present, Future*, ed. B. Strečanský, M. Török, Vienna 2016.

[14] See: Art. 1–1a of the PIT Act and Art. 1–1a of the LSIT Act.

[15] See: Art. 1–1a of the CIT Act.

[16] See: https://instytutsprawobywatelskich.pl/1-procent-od-firm-podpisz-petycje/.

[17] See also: M. Maj, *Firma też może się podzielić PIT*, "Rzeczpospolita", 16th March, 2017.

(and, therefore, are entitled to exercise the designation when paying PIT on the partnership's income). However, in the case of other entrepreneurs who, due to their legal form, are subject to CIT (including in particular limited liability companies and joint stock companies), such a possibility does not exist – similarly to other legal persons (e.g. foundations, associations) or other organisational units (e.g. housing communities, ordinary associations)[18].

2.2. Supporting public benefit activities: not only a "personal" – but also a "corporate" – issue

The group of taxpayers entitled to make the designation includes only PIT taxpayers, while at the same time, both PIT and CIT taxpayers are entitled to exercise the right to deduct from their pre-tax income (subject to certain conditions) donations made for the purposes of public benefit activities carried out by NGOs. Assuming that financial support for the third sector concerns the personal sphere (which might justify the existence of certain regulations in PIT – as a personal tax – only and their absence in CIT – as a corporate tax – in which such regulations would be inadequate due to its nature[19]) – deductible donations for this purpose should appear only in PIT. Meanwhile, they appear in both income tax acts. Therefore, it can be noted that the legislator itself recognises that supporting public benefit activities does not belong to the only personal sphere. Since both natural persons and other income taxpayers making donations to NGOs can benefit from certain tax deductions, it is illogical that in the case of a different instrument (designation), but with essentially the same purpose (supporting public benefit activities), their situation is differentiated. The fact that supporting public benefit activities is not only a "personal" but also "corporate" issue might be also be confirmed by the already well-established and widely-implemented concept of corporate social responsibility (CSR)[20].

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[18] Which, even when not carrying out economic activities, may generate income subject to corporate income tax (for more on this topic, see: M. Supera-Markowska, *Opodatkowanie organizacji pozarządowych*, Warszawa 2016).

[19] Such as, among others, in the case of voluntary blood donation deduction or the so-called child relief.

[20] See more, e.g.: G. Bartkowiak, *Społeczna odpowiedzialność biznesu w aspekcie teoretycznym i empirycznym*, Warszawa 2011; K. Bulgiewicz, *Społeczna odpowiedzialność biznesu: nowa wartość konkurencyjna*, Warszawa 2017; *Społeczna odpowiedzialność biznesu: w poszukiwaniu nowego paradygmatu*, ed. U. Ornarowicz, P. Płoszajski, Warszawa 2020.

2.3. Proposals to extend the catalogue of entities entitled to decide on the designation to CIT taxpayers

The presented differentiation between PIT and CIT taxpayers with regard to the right to decide on the designation, in view of the universal possibility of making the said deduction for donations (the amount of which, for the sake of consistency, should be unified in both Acts on Income Taxes[21]), which is a starting point for proposing the introduction of the designation also in CIT. Since the legislator allows both categories of taxpayers to deduct the donations in question and by doing so, it accepts the tax consideration of supporting public benefit activities not only by natural persons but also corporate entities, in order to ensure also the systemic coherence of both Acts on Income Taxes, it should also allow the same categories to be entitled to the designation. This leads to *de lege ferenda* proposals to introduce the possibility of deciding on the designation also by taxpayers subject to CIT[22].

It is worth mentioning that there are already some countries (and in the EU) – e.g. Spain and Slovakia – that provide for the designation for public benefit activities not only from PIT but also from CIT. In the Spanish income tax system, taxpayers of both income taxes can allocate 0.7% of their tax to socially-useful purposes[23] and they can also make deductions for donations in the case of both PIT and CIT taxpayers[24], which, therefore, implements the postulate of systemic coherence of income tax regulations concerning the

[21] Whether 'down' (i.e. to 6% of income as in PIT) or 'up' (i.e. to 10% – as in CIT) should depend on the overall assessment of the impact of the proposed changes and the new designation arrangements and other tax regulations relevant to the third sector. See more: M. Supera-Markowska, *Odliczenia darowizn dokonywanych na cele działalności pożytku publicznego w polskim systemie podatkowym — stan obecny i postulowane zmiany*, [in:] M. Szafranek, Sz. Wójcik (eds.), *W poszukiwaniu perpetuum mobile. Dobre prawo dla trzeciego sektora*, Warszawa 2023, pp. 61–67.

[22] See: M. Supera-Markowska, *Założenia do projektu przepisów wprowadzających w polskim systemie prawa 1% odpis z podatku dochodowego od osób prawnych na rzecz organizacji pożytku publicznego*, Łódź 2022.

[23] See: *Renta 2022: ¿En qué consiste la casilla de la iglesia y la de fines sociales?*, https://www.bankinter.com/blog/finanzas-personales/renta-casillas-iglesia-fines-sociales.

[24] See more: M. Supera-Markowska, *Odliczenia darowizn dokonywanych na cele działalności pożytku publicznego w polskim systemie podatkowym — stan obecny i postulowane zmian*, [in:] M. Szafranek, Sz. Wójcik (eds.), *W poszukiwaniu perpetuum mobile. Dobre prawo dla trzeciego sektora*, Warszawa 2023, pp. 59–60.

financial support of public benefit activities. In Slovakia[25], three years after the PIT allocation had been launched there, it was decided (in 2004) that an additional allocation mechanism from CIT should be introduced. In doing so, Slovakia combined the institution of the designation with the promotion of taxpayers' own involvement, namely by differentiating the amount of the allocation according to the involvement of the taxpayer's own resources. In the case of natural persons, the amount of the designation is increased from 2% to 3%, provided that the taxpayer can document voluntary work of at least 40 hours, while in the case of CIT taxpayers, it is increased from 1% to 2%, provided that donations exceeding 0.5% of tax are made to the third sector[26]. Such a solution may constitute *de lege ferenda* an interesting element of the designation reform in the Polish system, which is burdened with the problem defined in the literature as "false" philanthropy[27].

2.4. The limitation of the scope of the recipients of the designation

The possibility of using the income tax allocation under the institution of designation has been restricted to PBOs. These are organisations that do not act for the benefit of their own members, but for the common good within the framework of their public benefit activities. Not every NGO can acquire the status of a PBO – certain conditions need to be fulfilled[28]. Organisations with this status are subject to certain specific reporting obligations[29], which justifies the right to receive public funds allocated through the designation

[25] See: *Assessment of the Impact of the Percentage Tax Designations: Past, Present, Future*, ed. B. Strečanský, M. Török, Vienna 2016, pp. 62–65.

[26] *Assessment of the Impact of the Percentage Tax Designations: Past, Present, Future*, ed. B. Strečanský, M. Török, Vienna 2016, p. 21 and p. 63.

[27] See: T. Perkowski, *Mechanizm jednego procentu jako "fałszywa" filantropia*, "Kwartalnik Trzeci Sektor" 2011, no. 24.

[28] See more, e.g.: A. Ceglarski, *Organizacje pożytku publicznego*, Warszawa 2005 or M. Supera-Markowska, *Podstawy prawne tworzenia i funkcjonowania organizacji pozarządowych*, Warszawa 2015, pp. 73–89.

[29] See, in particular, Art. 23 of the *Act of 24th April, 2003, on Public Benefit Activities and Volunteerism* (consolidated text: Journal of Laws of 2023, item 571), hereinafter: PBAV Act and the *Regulation of the Minister of Finance of 13th November, 2018, on the obligation to audit the financial statements of public benefit organisations* (Journal of Laws, item 2148) and the *Regulation of the Chairman of the Committee for Public Benefit of 24th October, 2018, on the templates of the annual substantive activity report and the annual simplified substantive activity report on the activity of a public benefit organisation* (Journal of Laws, item 2061, as amended).

as the only third sector entities. In the context of the proposed extension of the scope of entities entitled to decide on the designation to CIT taxpayers, it is pointed out that there may be doubts regarding the transfer of the designated funds to the foundations established by them (the so-called corporate foundations)[30]. To express the matter in a slightly different way, there is the threat of privatisation of CIT resources by using the allocation mechanism to finance the private needs of entrepreneurs establishing their own foundations and directing funds to them (which is nothing negative *per se*), but not to ensure financing of public benefit activities but their own needs (e.g. marketing) or even to avoid taxation[31]. Hence, it is proposed to exclude these entities from the scope of the recipients of the designation[32]; however, the existence and enforcement of such an exclusion may be problematic as, in the absence of a similar restriction for PIT taxpayers (especially in the case of those running an economic activity), a potential allegation of unequal treatment of entrepreneurs could arise. Therefore, an advisable alternative approach could be to focus on the substantive control of the correct use of designated funds for public benefit purposes.

3. Proposed new legal arrangements to ensure the correct use of the designated funds

3.1. The main problem areas

In the public discussions[33] and literature[34], other problems of the designation functioning have been pointed out than those related to the limited scope of entities entitled to decide about it; these are, in

[30] See: J. Wygnański*, 1% podatku od firm dla organizacji pożytku publicznego. Ekspertyza 2020*, Łódź 2020, pp. 21–22.

[31] See: *Assessment of the Impact of the Percentage Tax Designations: Past, Present, Future*, eds. B. Strečanský, M. Török, Vienna 2016, p. 65. See also: J. Wygnański, *1% podatku od firm dla organizacji pożytku publicznego. Ekspertyza 2020*, Łódź 2020, pp. 21–22.

[32] M. Supera-Markowska, *Założenia do projektu przepisów wprowadzających w polskim systemie prawa 1% odpis z podatku dochodowego od osób prawnych na rzecz organizacji pożytku publicznego*, Łódź 2022, p. 20.

[33] See, e.g.: *Na trudne czasy potrzebujemy 1% CIT. Można to zrobić "od ręki". Skorzystają wszyscy,* https://instytutsprawobywatelskich.pl/na-trudne-czasy-potrzebujemy-1-cit-mozna-to-zrobic-od-reki-skorzystaja-wszyscy/; *Ustawa o 1% z CIT coraz bliżej – relacja z debaty*, https://instytutsprawobywatelskich.pl/ustawa-o-1-z-cit-coraz-blizej-relacja-z-debaty/.

[34] See, among others, S. Czetwertyński, *Konkurencja na rynku jednego procenta*, "Społeczeństwo i Ekonomia" 2016, no. 1; K. Hanyga, *Pożytki z 1%*, "Sprawy Nauki", 2011,

particular, issues related to the definition of the so-called specific objective and the practice of creating the so-called sub-accounts, the occurrence of a peculiar competition for the funds from the designation, the recurring concentration of the funds from the designation in only a few organisations, the problem of the so-called false philanthropy, and, paradoxically, the negative impact of the designation at the level of civic involvement in the activities of the third sector. It is therefore postulated, among other aspects, to eliminate the possibility of defining the so-called specific objective and creating the so-called sub-accounts or certain changes in the control of the use of the designated funds[35]. Generally, it seems advisable to focus on the creation of such normative arrangements that would ensure the correct use of designated funds for public benefit purposes, including, in the first instance, the introduction of a certain maximum period for their use.

3.2. Introducing a maximum period for the use of designated funds

Currently, there is no indication of a time period in which the designated funds should be used (however, this solution is applied in case of certain income intended for public benefit activities, which is,

http://www.sprawynauki.edu.pl/index.php?option=com_content&view=article&id=1975:poytki-z-1&catid=312&Itemid=30; D. Jegorow, *Odpis podatkowy "1%" jako źródło finansowania podmiotów ekonomii społecznej w Polsce – retrospekcja i projekcja poziomu zaangażowania społecznego*, "Ekonomia Społeczna" 2017, no. 1; *List otwarty w sprawie przekazywania 1%*, http://www.isp.org.pl/aktualnosci,64,641.html; T. Perkowski, *Mechanizm jednego procentu jako "fałszywa" filantropia*, "Kwartalnik Trzeci Sektor" 2011, no. 24; G. Piechota, *Alokacja jednoprocentowa w perspektywie regionalnej – współpraca samorządu z organizacjami pożytku publicznego,* "Polityka i Społeczeństwo" 2013, no. 3; G. Piechota, *Fakty i mity o jednym procencie podatku. Odpis podatkowy w procesie kreowania społeczeństwa obywatelskiego*, Kraków 2015; U. Smołkowska, *Wspieranie organizacji pożytku publicznego z 1% podatku dochodowego od osób fizycznych*, "INFOS. Zagadnienia społeczno-gospodarcze" 2011, no. 22; M. Supera-Markowska, *Równość i nierówność w prawie podatkowym – studium przypadku instytucji odpisu z podatku dochodowego na rzecz organizacji pożytku publicznego*, "Studia Iuridica" 2022, no. 94; M. Supera-Markowska, *Założenia do projektu przepisów wprowadzających w polskim systemie prawa 1% odpis z podatku dochodowego od osób prawnych na rzecz organizacji pożytku publicznego*, Łódź 2022; J. Wygnański, *1% podatku od firm dla organizacji pożytku publicznego. Ekspertyza 2020*, Łódź 2020.

[35] See more: M. Supera-Markowska, *Równość i nierówność w prawie podatkowym – studium przypadku instytucji odpisu z podatku dochodowego na rzecz organizacji pożytku publicznego*, "Studia Iuridica" 2022, no. 94 and M. Supera-Markowska, *Założenia do projektu przepisów wprowadzających w polskim systemie prawa 1% odpis z podatku dochodowego od osób prawnych na rzecz organizacji pożytku publicznego*, Łódź 2022.

therefore, exempt from taxation[36]). An interesting example in this context are the regulations in this respect in the already mentioned Slovak system, where the organisation must spend the funds received from the designation by the end of the next year after the year of their receipt (whereby, for amounts exceeding 3,320 EUR, it is necessary to publish an appropriate report on the use of the funds and, in case of receipt of 33,000 EUR or more, to undergo an audit)[37].

In the future, in Polish regulations there should be a solution limiting in time the possibility of using the designated funds and ordering their return with an appropriate interest to the budget in the event of failure to use them in an adequate manner within a maximum period of time, and an organisation which would act in this way should be excluded (at least for a certain period of time) from the possibility of obtaining the allocated funds. There are already some regulations in the PBAV Act which provide the basis for the exclusion of PBOs from the list of entities entitled to receive allocated funds[38]; however, it is worth considering supplementing them with the premise of the failure to adequately use the designated funds within a certain period of time. In fact, it should be made clear at this point that the designated funds are public funds and not private funds of taxpayers. The allocation mechanism does not deprive them of such a character, while at the same time it has the effect of reducing public resources to finance expenditure set out in public budgets already suffering from deficits, so these funds should be appropriately used as soon as possible. A year (counted from the end of the year following the year in which the funds from the designation are received) seems to be a natural time limit for taxes with an annual tax period.

Following the example of the aforementioned Slovak solution, this should be coupled with making the reports of PBOs more detailed in the part concerning the use of the designated funds and subjecting them to

[36] See: Art. 17(1)(5a) of the CIT Act, which provides for an exemption from taxation of the income of sports clubs allocated and expended in the tax year or the following year for the training and sports competition of children and young people in specific age categories.

[37] *Assessment of the Impact of the Percentage Tax Designations: Past, Present, Future*, ed. B. Strečanský, M. Török, Vienna 2016, pp. 102–103.

[38] This refers to Art. 23(6a) of the PBAV Act, on the basis of which a PBO which has failed to publish in a proper place and time an approved financial report and a factual report on its activities shall not be included in the list of PBOs entitled to receive the designation.

a compulsory audit in the event of their significant amount[39]. In addition, there should be an obligation to report on the use of the designated funds in tax returns and, in the event of misuse, these funds should be paid back to the tax authority with an appropriate interest (rather than being transferred to other funds[40]).

3.3. The abolition of the so-called specific objective

The designated funds should be used to finance public benefit activities; it refers to a closed, albeit extensive, catalogue of activities[41], the selection of which is in principle related to the concept of the common good[42]. However, in the practical operation of the designation institution, the overwhelming majority of these funds are channeled to meet individual needs, which is done through processes related to the so-called specific objective and the so-called sub-accounts. Under these, a sub-account is allocated by the PBO for an individual who has become a "beneficiary" of the PBO, to which the funds from the designation can be transferred for his/her individually-defined needs within the framework of the so-called specific objective. In such a system, the designation actually becomes a mechanism for the transfer of public funds to specific individuals[43] who "win" in a kind of competition between PBOs and their beneficiaries to

[39] Currently, PBOs are subject to the obligation to audit their financial statements in the event that they fulfil the general prerequisites of Art. 64 of the *Accounting Act of 29th September, 1994* (consolidated text: Journal of Laws of 2023, item 120, as amended), hereinafter: Accounting Act or specific prerequisites defined in the *Regulation of the Minister of Finance of 13th November, 2018, on the obligation to audit the financial statements of public benefit organisations* (Journal of Laws, item 2148), which, however, does not include the prerequisite of the amount of funds from the designation. See more: M. Supera-Markowska, *Rachunkowość organizacji pozarządowych*, Warszawa 2014, pp. 52–53.

[40] At present, some reallocation is made to the Fund for the Support of Public Benefit Organisations, referred to in Art. 27ab of the PBAV Act.

[41] Defined in Art. 4 of the PBAV Act.

[42] See: M. Supera-Markowska, *Realizowanie celów społecznie użytecznych w ramach działalności pożytku publicznego organizacji pozarządowych a ich obowiązki prawno-podatkowe – próba oceny adekwatności rozwiązań prawno-podatkowych do specyfiki działalności NGO*, [in:] D. Bach-Golecka (ed.), *Solidarność i dobro wspólne jako wartości w prawie*, Warszawa 2021, p. 113.

[43] K. Hanyga, *Pożytki z 1%*, "Sprawy Nauki", 2011, http://www.sprawynauki.edu.pl/index.php?option=com_content&view=article&id=1975:poytki-z-1&catid=312&Itemid=30.

obtain them[44]. Those who, for a variety of reasons (including, above all, being aware of the existence of such mechanisms, but also, for example, having a wider circle of taxpayers' friends with high incomes and the resulting taxes willing to contribute the designation to them) will "do better" under the conditions of this competition, will find themselves in a more favourable financial position than less "resourceful" subjects. In fact, by introducing them to the designation "market", organisations enable them to gain a privileged financial position at the expense of other subjects with the same needs which do not benefit from the allocation. This "favouritism" consists in the fact that public funds – which should be allocated to the common good – go to satisfy particularistic (which does not mean unjustified) needs. It may be that those who are more in need and less "entrepreneurial" or with a narrower circle of taxpayers' friends with high incomes able to identify their needs under a specific objective are the ones in the worst situation. The presented mechanism, in which the personal contacts of the people in need themselves and their families play an important role, clearly gives more opportunities to those who move in an affluent environment than to those who do not have such contacts. Such real inequalities, resulting from a certain "resourcefulness" or even "entrepreneurship" (manifested by mailings or leaflets as part of a kind of 'marketing action' of a specific objective), may be understandable and acceptable in the case of economic activities aimed at individual profit, but not in the case of public benefit activities and tax public funds, which should serve the common good and finance socially-useful tasks[45]. This is because the mechanisms described result, *de facto*, in the transformation of public benefit into private benefit[46]. The biggest recipients[47] of the tax designation use the institution of the so-called sub-accounts with the main focus on financing individual medical expenses or helping the

[44] See: S. Czetwertyński, *Konkurencja na rynku jednego procenta*, "Społeczeństwo i Ekonomia" 2016, no. 1.

[45] Cf. the definition of public benefit activities under Art. 3(1) of the PBAV Act, according to which *public benefit activities are socially useful activities* (…).

[46] G. Piechota, *Alokacja jednoprocentowa w perspektywie regionalnej – współpraca samorządu z organizacjami pożytku publicznego,* "Polityka i Społeczeństwo" 2013, no. 3, p. 24.

[47] See: Ministerstwo Finansów, *Informacja dotycząca kwot 1,5% należnego podatku dochodowego od osób fizycznych przekazanych organizacjom pożytku publicznego w 2023 roku* (*z rozliczenia za 2022 rok*), Warszawa 2023, Attachment no. 2 and analogous statements for an earlier period (available at: https://www.gov.pl/web/finanse/1-procent-podatku-dla-opp).

disabled (as well as social assistance)[48]; therefore, the literature[49] argues that the charitable – and not civic – nature of the tax designation funding should be recognised, which also shapes this – i.e. charitable[50] – model of PBO activity.

Simultaneously, it becomes questionable whether the activity of the PBO carried out in this way can still be considered public benefit activity at all under the described mechanism. By its very definition[51], it should be a socially-useful activity, i.e. one aimed at the common good[52]. Public benefit, therefore, excludes individualism, understood as securing the needs of specific individuals or specific closed communities. It should also not be overlooked that the so-called sub-accounts relieve organisations of the responsibility for deciding how to spend the amounts they receive in allocations, and that the role of PBOs is basically limited to managing the sub-account system; PBOs become only 'revenue channels"[53]. Such management and financial activities do not fall within the scope[54] of the public benefit activities in question.

[48] Such an object-orientation of the designation – i.e. financial support through it to PBOs carrying out activities in the area of securing basic social needs in the field of treatment and healthcare and assistance to disabled persons and social assistance – has already been in place for years (for such experiences in the operation of the designation in the years 2004–2014, see: G. Piechota, *Fakty i mity o jednym procencie podatku. Odpis podatkowy w procesie kreowania społeczeństwa obywatelskiego*, Kraków 2015, p. 185).

[49] G. Piechota, *Fakty i mity o jednym procencie podatku. Odpis podatkowy w procesie kreowania społeczeństwa obywatelskiego*, Kraków 2015, p. 60.

[50] Meanwhile, charitable activity is only one of several dozen types of activities that can be the object of public benefit activities (see Art. 4 of the PBAV Act).

[51] According to Art. 3(1) of the PBAV Act *public benefit activities are socially useful activities* (…).

[52] Cf. M. Supera-Markowska, *Realizowanie celów społecznie użytecznych w ramach działalności pożytku publicznego organizacji pozarządowych a ich obowiązki prawno-podatkowe – próba oceny adekwatności rozwiązań prawno-podatkowych do specyfiki działalności NGO-sów*, [in:] D. Bach-Golecka (ed.), *Solidarność i dobro wspólne jako wartości w prawie*, Warszawa 2021, p. 107.

[53] See: *Assessment of the Impact of the Percentage Tax Designations: Past, Present, Future*, red. B. Strečanský, M. Török, Vienna 2016, p. 19 (although the term is used in this study in the context of funding public sector through allocations, it fully reflects the issue of designations described).

[54] Defined in Art. 4 in relation to Art. 3(1) of the PBAV Act.

The literature even uses terms such as "the distortion of the idea of public benefit"[55] or "a source of pathology"[56] in this context (representatives of some NGOs themselves also point out that the described mechanisms related to the so-called specific objective and the so-called sub-accounts contradict the idea of public benefit[57]); attention is also drawn to the problem that to a large extent the designation serves as a kind of mechanism for supplementing deficits in the financing of medical procedures for selected persons[58]. Therefore, the tax designation finances tasks for which the public sector should, in principle, be responsible[59]. The presented issues justify the need for changes to the designation institution[60], in particular – *de lege ferenda* – the need to abolish the so-called specific objective.

3.4. Ensuring effective control of the substantive use of designated funds

Systemic assurance of the most effective use of the designated funds requires transparency and substantive control in this regard. In order to ensure this, there should be a corresponding expansion of PBOs' tax returns (Annex CIT-D or, alternatively, the development of a new annex, e.g. CIT-OPP), their substantive activity reports[61], and their financial statements, which would make it clear whether, when, and for what exact purpose the funds allocated under the designation have been used. Therefore, the necessary legal changes concern not only tax legislation,

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55 E.g.: G. Piechota, *Alokacja jednoprocentowa w perspektywie regionalnej – współpraca samorządu z organizacjami pożytku publicznego,* "Polityka i Społeczeństwo" 2013, no. 3, p. 23; G. Piechota, *Fakty i mity o jednym procencie podatku. Odpis podatkowy w procesie kreowania społeczeństwa obywatelskiego*, Kraków 2015, p. 171; J. Wygnański, *1% podatku od firm dla organizacji pożytku publicznego. Ekspertyza 2020*, Łódź 2020, p. 4. See also: *List otwarty w sprawie przekazywania 1%*, http://www.isp.org.pl/aktualnosci,64,641.html.

56 U. Smołkowska, *Wspieranie organizacji pożytku publicznego z 1% podatku dochodowego od osób fizycznych*, "INFOS. Zagadnienia społeczno-gospodarcze" 2011, no. 22, p. 4.

57 G. Piechota, *Fakty i mity o jednym procencie podatku. Odpis podatkowy w procesie kreowania społeczeństwa obywatelskiego*, Kraków 2015, p. 174.

58 J. Wygnański, *1% podatku od firm dla organizacji pożytku publicznego. Ekspertyza 2020*, Łódź 2020, p. 19.

59 Cf. G. Piechota, *Fakty i mity o jednym procencie podatku. Odpis podatkowy w procesie kreowania społeczeństwa obywatelskiego*, Kraków 2015, p. 185.

60 Cf. D. Jegorow, *Odpis podatkowy „1%" jako źródło finansowania podmiotów ekonomii społecznej w Polsce – retrospekcja i projekcja poziomu zaangażowania społecznego*, "Ekonomia Społeczna" 2017, no. 1, p. 52.

61 See: Art. 23 of the PBAV Act and relevant implementing provisions.

but also the PBAV Act and balance sheet law[62], as well as the content of the relevant implementing regulations[63]. Such regulations should ensure greater transparency in the use of the designated funds, reduce certain irregularities in this area, and ensure better use of public funds for socially-useful purposes and for the common good.

4. Conclusions

The conducted analysis leads to the conclusion that the designation institution in many respects does not provide the correct financial support for public benefit activities. Hence, a *de lege ferenda* proposal has been formulated to extend the subjective scope of the designation to CIT taxpayers (combined with the equalisation in both income tax laws of the maximum amount of deductions for donations for public benefit purposes). Simultaneously, the funds from the designation are intended to support public benefit activities; in order for this fundamental premise to be effectively realised, certain amendments to the current legislation are required. Therefore, some further *de lege ferenda* proposals have been formulated, namely: to define a maximum time for the use of the designated funds, to abolish the so-called specific objective, and to increase control over the substantive use of the designated funds. The implementation of the above-mentioned proposals is intended to enable the enforcement of correct support for public benefit activities by all income taxpayers under the institution of income tax designation in favour of PBOs.

[62] The Accounting Act. It would be advisable to add an obligation in the PBO's profit and loss account to indicate separately the receipt and use of funds allocated under the tax designation.

[63] E.g. in the *Regulation of the Minister of Finance of 13th November, 2018, on the obligation to audit the financial statements of public benefit organisations* (Journal of Laws, item 2148), it is proposed to add – alternatively to the conditions indicated there whose fulfilment results in the obligation to audit the financial statements of the PBO – the condition of receiving the designation or a sum of designations of at least PLN 100,000 in the financial year, the fulfilment of which would result in the obligation to audit the financial statements of the PBO.

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Odpis z podatku dochodowego na rzecz OPP – prawidłowe wsparcie finansowe działalności pożytku publicznego przez podatników w ramach instytucji odpisu z podatku dochodowego?

Streszczenie. Od 1 stycznia 2004 r. w polskim systemie podatkowym funkcjonuje instytucja odpisu części podatku dochodowego na rzecz organizacji pożytku publicznego. Z prawa do alokacji mogą korzystać podatnicy PIT. Natomiast podatnicy CIT nie mają takiego uprawnienia. Ta sytuacja w polskim systemie prawnym stanowi punkt wyjścia do dalszej analizy prawidłowości finansowego wspierania działalności pożytku publicznego przez podatników w ramach instytucji odpisu z podatku dochodowego, w celu – jeśli zajdzie taka potrzeba – sformułowania pewnych postulatów *de lege ferenda*.

Słowa kluczowe: odpis z podatku dochodowego, organizacje pożytku publicznego, wsparcie finansowe działalności pożytku publicznego

https://doi.org/10.18778/1509-877X.2023.04.11

Articles

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The VAT Treatment of Cryptocurrencies

Summary. Since their creation in 2009, crypto-assets have evolved from niche products into assets held and used much more widely. These assets pose challenges for policymakers and tax administrations, because, as pointed out by the OECD, they can be transferred and held without the participation of traditional financial intermediaries and without central administrators being aware of the transactions carried out or the location of crypto-assets holdings.

On the indirect taxation side, the VAT Committee discussed the issues relating to the VAT treatment of crypto-assets and, in particular, of cryptocurrencies, on several occasions. The discussion on the most recent of the working papers on this subject, No. 1037 on the *VAT treatment of crypto-assets,* resulted in the adoption of the Guidelines which aim at harmonising tax administrations' practice regarding the VAT implications of the different transactions linked to crypto-assets.

The article highlights the main challenges posed by cryptocurrencies in terms of VAT while focusing on the main supplies with the use of cryptocurrencies and their qualification for the VAT purposes. Those transactions range from the creation, verification, validation, and supply of cryptocurrencies through their modification, storage, transfer, to exchange. The article explains in this context the position of the VAT Committee reflected in the Guidelines.

Keywords: VAT, cryptocurrency, tax exemptions, currencies transactions, payment or transfer transactions, *Hedqvist*

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Received: 25.09.2023. Verified: 5.10.2023. Accepted: 10.10.2023.

1. Introductory remarks

Since their creation in 2009, crypto-assets have evolved from niche products into assets held and used much more widely[1]. A. Olbrecht and G. Pieters refer to the number of blockchain-based digital tokens of over 22,000[2]. These assets pose challenges for policymakers and tax administrations, because, as pointed out by the OECD, they can be transferred and held without the participation of traditional financial intermediaries and without central administrators being aware of the transactions carried out or the location of crypto-assets holdings[3]. Those challenges are, moreover, linked to the volatile rise in the crypto-assets' market capitalisation and their growing correlation with other financial assets[4]. The IMF emphasises that the strong push to design appropriate policies to deal with crypto-assets comes from the collapse of some of them and failures of exchanges in the crypto-ecosystem amid the recent slide in crypto-valuations[5].

The OECD issued in October 2022 *Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard*[6] for the purposes of direct taxation. These developments at the OECD level have been reflected in the EU in a proposal for an amendment to the Directive for Administrative Cooperation (DAC 8), adopted by the Commission on 8th December, 2022[7]. The proposal puts forward new tax transparency rules for all service providers facilitating transactions in crypto-assets for customers resident in the EU[8].

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1 See OECD, *Taxing Virtual Currencies: An Overview of Tax Treatments and Emerging Tax Policy Issues,* 2020, p. 7.

2 A. Olbrecht, G. Pieters, *Crypto-Currencies and Crypto-Assets: An Introduction,* "Eastern Economic Journal" 2023, no. 49, p. 201.

3 OECD, *Crypto-Asset Reporting: Framework and Amendments to the Common Reporting Standard,* 2022, p. 6.

4 IMF, *IMF Policy Paper: Elements of Effective Policies for Crypto Assets,* February 2023, p. 5.

5 Idem, p. 5; See also e.g. *Crypto's downfall*, p. 13 and *Hold on for dear life,* pp. 63–65, "The Economist", 19.11.2022.

6 https://www.oecd.org/tax/exchange-of-tax-information/crypto-asset-reporting-framework-and-amendments-to-the-common-reporting-standard.pdf (access: 16.09.2023).

7 Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final, Brussels, 8.12.2022.

8 See Press release IP/22/7513, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7513 (access: 16.09.2023).

On the indirect taxation side, the VAT Committee, set up under Article 398 of the VAT Directive[9] to promote its uniform application, discussed the issues relating to the VAT treatment of crypto-assets – and, in particular, of cryptocurrencies – on several occasions[10]. The discussion on the most recent of the working papers on this subject, No. 1037 on the *VAT treatment of crypto-assets*[11], resulted in the adoption of the Guidelines which aim at harmonising tax administrations' practice regarding the VAT implications of the different transactions linked to crypto-assets[12]. Even though the Guidelines are not legally-binding[13], they are important because they reflect common position of tax administrations in the Member States and are often referred to in the CJEU's case law.

The present article highlights the main challenges posed by cryptocurrencies in terms of VAT and explains in this context the position of the VAT Committee reflected in the Guidelines.

2. Definitions

The definitions included in the Guidelines of the VAT Committee are, for consistency reasons, based on the Regulation on markets in crypto-assets (MiCA Regulation)[14] and the Regulation on a pilot regime for market infrastructures based on distributed ledger technology[15].

[9] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006).

[10] See Working papers No. 811 *VAT treatment of Bitcoin*, 854 *VAT treatment of Bitcoin (II)*, 892 *CJEU Case C-264/14 Hedqvist: Bitcoin* and 1037 *VAT treatment of crypto-assets,* available at https://taxation-customs.ec.europa.eu/vat-committee_en (access: 16.09.2023). See also the Guidelines resulting from the 120th meeting of 28 March 2022, document B-taxud.c.1(2023)3625373-1045, available at https://taxation-customs.ec.europa.eu/system/files/2023-05/guidelines-vat-committee-meetings_en.pdf (access: 16.09.2023).

[11] Referred to above.

[12] Guidelines resulting from the 120th meeting of 28 March 2022, document B-taxud.c.1(2023)3625373-1045, referred to above.

[13] The VAT Committee is an advisory committee and has not been attributed any legislative powers.

[14] REGULATION (EU) 2023/1114 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 May 2023, on markets in crypto-assets, and amending Regulations (EU) No. 1093/2010 and (EU) No. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, OJ L 150, 9.06.2023, p. 40.

[15] REGULATION (EU) 2022/858 OF THE EUROPEAN PARLIAMENT AND OF

Point 1(a) of the Guidelines stipulates that crypto-assets are *a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology.*

The Guidelines further provide the definitions of a distributed ledger technology, distributed ledger, consensus mechanism, and DLT network node. Notably, they specify that:

– *"distributed ledger technology"* or *"DLT"* means *a technology that enables the operation and use of distributed ledgers*;

– *"distributed ledger"* means *an information repository that keeps records of transactions and that is shared across, and synchronised between, a set of DLT network nodes using a consensus mechanism*;

– *"consensus mechanism"* means *the rules and procedures by which an agreement is reached, among DLT network nodes, that a transaction is validated*;

– *"DLT network node"* means *a device or process that is part of a network and that holds a complete or partial replica of records of all transactions on a distributed ledger*.

A broader notion of crypto-assets comprises three main categories of digital financial assets, namely payment tokens, security tokens, and utility tokens[16].

Payment tokens, also referred to as virtual currencies, operate as a unit of account and means of payment.

Security tokens, also referred to as investment, assets, and financial tokens[17], are tradeable assets held for investment purposes and qualified as a security in several national legal systems.

Utility tokens function as a pre-payment or voucher for a good or service and are designed to facilitate the exchange of or access to specific goods or services[18].

THE COUNCIL of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No. 600/2014 and (EU) No. 909/2014 and Directive 2014/65/EU, OJ L 151, 2.06.2022, p. 1.

[16] See the VAT Committee Working paper No. 1037, *VAT treatment of crypto-assets,* taxud.c.1(2022)1585400, p. 3 and OECD, *Taxing Virtual Currencies*…, quoted above, p. 9; See also European Banking Authority, *Report with advice for the European Commission on crypto-assets*, 9.01.2019, p. 7.

[17] See European Parliament, Study requested by the ECON committee, *Crypto-assets. Key developments, regulatory concerns and responses,* April 2020, p. 21.

[18] See the VAT Committee Working paper No. 1037, *VAT treatment of crypto-assets,* p. 3.

The above categories are, however, only indicative, given that, as pointed out by the OECD, they may be interpreted differently in different national legal systems, which may trigger distinct tax implications. Moreover, some assets may be difficult to classify under any of these categories, while others may constitute "hybrids" that could be classified under multiple categories[19]. The assessment of crypto-assets is further complicated by the fact that tokens' character may also change in the course of their lifetime.

The focus of the present article is on **payment tokens**, i.e. **virtual currencies or cryptocurrencies**. Most guidance issued by the different tax administrations concerns this type of tokens[20], also the VAT Committee Guidelines resulting from the 120th meeting of 28 March 2022 focus actually on crypto-currencies.

The Guidelines define cryptocurrencies as *crypto-assets that are accepted as a unit of account and means of payment in accordance with the case-law of the Court of Justice of the European Union (CJEU).*

Let us take a look now at the supplies in which cryptocurrencies may be involved and for which the determination of the VAT treatment is needed.

3. Supplies at stake and their VAT treatment

The key supplies with the use of cryptocurrencies – the VAT implications of which should be considered – include the following:

– supplies of goods and services remunerated in crypto-currencies;

– the creation, verification, validation, and supply of cryptocurrencies (mining and forging);

– modification for own use;

– storage and transfer;

– exchange.

3.1. Supplies of goods and services remunerated in cryptocurrencies

As regards the supplies of goods or services remunerated in cryptocurrencies, there is little doubt as to their VAT implications. The VAT Committee unanimously agreed that **such supplies should be treated**

[19] OECD, *Taxing Virtual Currencies…*, quoted above, p. 12; see also European Parliament, Study requested by the ECON committee, *Crypto-assets…*, p. 22.

[20] Idem.

in the same way as any other supplies for VAT purposes. Following the judgment of the CJEU in case C-264/14 *Hedqvist*[21], it is clear that within such transactions, cryptocurrencies constitute a means of payment and no VAT should be levied on the value of the cryptocurrencies themselves[22]. The above principles are reflected accordingly in points 2 and 3 of the VAT Committee Guidelines resulting from the 120th meeting of 28 March 2022, referred to above.

In case of such supplies, the taxable amount is, on the basis of Article 73 of the VAT Directive, everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party. If consideration is paid in cryptocurrency, it is necessary to convert the amount in cryptocurrency into the currency of the Member State where the supply takes place. The way to carry out such a conversion is analysed in the VAT Committee Working papers No. 854[23] and 892[24].

3.2. The creation, verification, validation, and supply of cryptocurrencies (mining and forging)

3.2.1. The assessment of whether these transactions are subject to VAT

The creation of virtual currency units can happen in a number of ways. **Mining** is a process by which transactions in crypto-assets are verified and added to the blockchain-based ledger, which constitutes the record of transactions[25]. Blockchain itself is a technology that enables secure sharing of information and distributes the power to update the database between the nodes of a computer network[26]. Under the **proof of work protocol**, the miner carries out the necessary computer processes by being the first one to solve complicated equations[27].

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[21] CJEU, judgment of 22 October 2015 in C-264/14, Hedqvist, EU:C:2015:718.

[22] See the VAT Committee Working paper No. 892, p. 8 and Working paper No. 1037, p. 10.

[23] Section 3.5.1.

[24] Section 5.2.2.

[25] The VAT Committee Working paper No. 1037, *VAT treatment of crypto-assets,* p. 6.

[26] See McKinsey & Company, *What is proof of stake?*, 3.01.2023, https://www.mckinsey.com/featured-insights/mckinsey-ecplainers/what-is-proof-of-stake (access: 16.09.2023).

[27] OECD, *Taxing Virtual Currencies*…, quoted above, p. 13.

In order to determine whether mining constitutes a transaction subject to VAT, one must examine whether it can be considered a supply of service for consideration by a taxable person acting as such, within the meaning of Article 2(1)(c) of the VAT Directive. The focus of the analysis will therefore naturally be on the existence of **consideration** and on the supply being effected by a **taxable person acting as such**. According to Article 9(1) of the VAT Directive, a taxable person is any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity[28]. Article 9(1) further clarifies that any activity of producers, traders, or persons supplying services – including mining and agricultural activities and activities of the professions – must be regarded as economic activity and that the concept also covers the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis.

According to a settled case-law of the CJEU, a supply of services is effected for consideration within the meaning of Article 2(1)(c) of the VAT Directive only if there is a **direct link** between the services supplied and the consideration received as well as a reciprocal performance between the provider and the recipient of the service[29].

The VAT Committee Working paper No. 892 highlights the difficulties with the assessment of the existence of consideration and the direct link in the case of mining. In particular, the existence of the direct link between the mining service and the consideration may be questioned where the miner receives no transaction fee, but is rewarded with the cryptocurrency automatically generated by the system. The transaction fees seem to be, however, becoming a norm and in the future they might be indeed necessary to obtain a verification of a transaction request. That is so because virtual currencies are designed with a hard cap or a maximum limit[30]. As the supply of cryptocurrencies diminishes, so does the automatic reward

[28] As regards the notion of a taxable person, see e.g. CJEU, judgment of 13 June 2019 in case C-420/18 *IO v. Inspecteur van de rijksbelastingdienst* EU:C:2019:490, paragraph 21 and the following; judgment of 12 October 2016, *Nigl and Others*, C340/15, EU:C:2016:764, paragraph 27 and the case-law cited.

[29] See e.g. CJEU, judgment of 27 March 2014 in case C-151/13 *Le Rayon d'Or* EU:C:2014:185, paragraph 29; Case C-16/93 *Tolsma* EU:C:1994:80, paragraph 14; Case C174/00 *Kennemer Golf* EU:C:2002:200, paragraph 39.

[30] See How many bitcoins are there and how many are left to mine? – Blockchain Council (blockchain-council.org) (access: 2.09.2023).

for the mining, which may become insufficient for the creation of the profit for miners. As a result of this evolution, the assessment of the existence of consideration and the direct link between the mining services and the consideration will be rendered more straightforward[31].

The qualification of miners as taxable persons raises less doubt, because in order to carry out mining, it is necessary to operate some powerful hardware capable of solving complex mathematical problems. This element would certainly impact the analysis of mining as an economic activity[32].

An alternative to the proof of work protocol is **the proof of stake mechanism**. Under this mechanism, shares or validation rights are assigned to users according to the stake they have in the blockchain. The methods to measure the stakes vary and may be linked to the amount of owned tokens, the holding period, or an amount of assets locked in the blockchain as collateral. Validators, who are referred to as forgers or stakers, must have a minimum stake in the blockchain as a pre-condition for participation in the verification process[33]. They "stake" some of their cryptocurrency as collateral and if a trader adds a transaction to the blockchain that other validators deem to be invalid, forgers may lose a part of what they staked[34]. For their service they receive a transaction fee or new tokens. Under the proof of stake, no mathematical equations are required in order to verify a transaction, which makes the system much more energy-efficient than a proof of work protocol[35].

It stems from the above that the main difference between the proof of work and the proof of stake systems is the connection of the validator, i.e. the miner or forger, with the network. Miners do not need to own a type of tokens they are mining, while forgers can only receive tokens or transaction fees in respect of their prior holdings of a given type of crypto-assets and in proportion to their share of the crypto-assets in question[36]. While this difference may be relevant from the point of view of direct tax, it is not necessarily so from the point of view of VAT. The most significant elements of the service supplied in the case of both mining and forging

31 See the VAT Committee Working paper No. 1037, *VAT treatment of crypto-assets,* p. 6.

32 Idem.

33 OECD, *Taxing Virtual Currencies…*, quoted above, p. 11; see also the VAT Committee Working paper No. 1037, *VAT treatment of crypto-assets,* p. 7.

34 See McKinsey & Company, *What is proof of stake?*, quoted above.

35 OECD, *Taxing Virtual Currencies…*, quoted above, p. 11.

36 See the VAT Committee Working paper No. 1037, *VAT treatment of crypto-assets,* p. 7.

for their qualification as taxable transactions under the VAT Directive include the verification and validation of transactions. As concluded in the VAT Committee Working paper No. 1037[37], the principles governing the VAT assessment of the supplies of the mining services apply also to the forging services.

3.2.2. The assessment of whether the transactions in question are exempt

If the conditions relating to the existence of consideration, direct link, and the qualification of miners/forgers as taxable persons are met, mining and forging fall within the scope of VAT and it should be examined whether they are exempt under Article 135(1) of the VAT Directive. In this context, the most relevant exemptions relate to **transactions concerning currency** (under Article 135(1)(e)) and **transactions concerning payments or transfers** (under Article 135(1)(d)). Both provisions must be interpreted in line with the general principle of equal treatment, entrenched in Article 20 of the Charter of Fundamental Rights[38], as well as the principle of neutrality, requiring similar transactions to be taxed similarly[39] .

In accordance with the settled case law, the exemptions laid down in Article 135(1) of the VAT Directive constitute independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system between Member States. The terms used to specify those exemptions are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by the exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Therefore, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 135(1) must be construed in such a way as to deprive the exemptions of their effect[40].

As regards the **exemption for transactions concerning currency** under Article 135(1)(e) of the VAT Directive, the VAT Committee Working

[37] P. 8.

[38] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391.

[39] See B. Terra, J. Kajus, Z. Szatmari, *Commentary on European VAT,* IBFD 2023, section 9.3.2.5.6. *Cryptocurrencies,* Document – Chapter 9 – Exemptions – Tax Research Platform – IBFD (access: 16.09.2023).

[40] CJEU, judgment in C-264/14, *Hedqvist*, paragraphs 33–35 and the case-law cited.

paper No. 892 clarifies that such transactions must be closely related to the supply of currency *per se* in order to be exempt[41]. In this context, it should be noted that the services provided by the miners and forgers not only lead to the creation of new units of the crypto-currency, but are also essential for keeping the system functional and trustworthy. Therefore, it can be concluded that **the services supplied by the miners and forgers are sufficiently related to the supply of cryptocurrencies to consider them to be transactions concerning currency within the meaning of Article 135(1)(e) of the VAT Directive**[42].

As regards the exemption for **transactions concerning payments or transfers** pursuant to Article 135(1)(d) of the VAT Directive, according to A.G. Kokott, such transactions must comprise the execution of cash and non-cash payments to a particular third-party recipient[43].

In SDC, the CJEU held that in order to qualify for the exemption referred to above, the services must

> …form a distinct whole, fulfilling in effect the specific, essential functions of a service described in those two points. For 'a transaction concerning transfers', the services provided must therefore have the effect of transferring funds and entail changes in the legal and financial situation. A service exempt under the Directive must be distinguished from a mere physical or technical supply, such as making a data-handling system available to a bank…[44].

While it could be argued that the mining and forging services are linked to technical aspects and the passing-on of information[45], the role of these services actually goes beyond this. A miner and a forger check whether the information included in a transaction request is valid and consistent with the information on past transaction registered in a ledger. Their role is of crucial importance to the functioning of the cryptocurrency systems and it can be argued that their services constitute an actual transfer of funds.

It can therefore be concluded that **mining and forging qualify as exempt supplies under Article 135(1)(d) of the VAT Directive.**

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[41] P. 11.

[42] See the VAT Committee Working paper No. 892, p. 17.

[43] Opinion in C-264/14, *Hedqvist,* point 47.

[44] CJEU, judgment of 5 June 1997 in C-2/95, *Sparekassernes Datacenter (SDC) v Skatteministeriet,* EU:C:1997:278, paragraph 66; see also e.g. CJEU, judgment of 13 December 2001 in case C-235/00 *CSC Financial Services,* EU:C:2001:696, paragraph 25.

[45] See the VAT Committee Working paper No. 892, p. 18; see also e.g. CJEU, judgment of 28 July 2011 in case C-350/10 *Nordea,* EU:C:2011:532, paragraph 13.

The VAT Committee Guidelines resulting from the 120th meeting of 28 March 2022 endorse the above reasoning by stating in point 3(b) that "…the creation, the verification and validation (mining and forging), the supply (…) of crypto-currencies shall be treated as taxable, but exempt under Article 135(1)(e) or (d) of the VAT Directive, where they are made for consideration directly linked to the supply at stake."

It must be stressed that the above analysis is only valid when the cryptocurrencies are supplied for consideration. If the supplies are carried out for free, i.e. without remuneration, they fall out of the scope of VAT. Such is the case of an airdrop, which constitutes the distribution of tokens for free, generally undertaken to increase the awareness of a new token and to increase liquidity in the early stages of a new cryptocurrency project[46].

3.3. Modification for own use

There is one exception to the rule that where miners or forgers receive no transaction fee in return for their verification services, the transaction falls outside the scope of VAT. It is established in Article 26(1)(b) of the VAT Directive which taxes private use. This provision stipulates that the supply of services carried out free of charge by a taxable person for his/her private use or for that of his/her staff or, more generally, for purposes other than those of his/her business should be treated as a supply of services for consideration. That is so if, in the first place, the miner or the forger qualifies as a taxable person. On the basis of Article 26(2), Member States may, however, derogate from this principle, provided that such derogation does not lead to a distortion of competition.

This principle is reflected in point 3 of the VAT Committee Guidelines resulting from the 120th meeting of 28th March, 2022, which refers to the modification of cryptocurrencies for own use, even though the wording of this point in this respect may not be entirely clear.

It must be noted that the evolution of a token is listed by the OECD among the key taxable events related to virtual currencies[47]. Modifications of a token may improve its performance, i.e. the speed at which transactions are processed. As explained in their report *Taxing Virtual Currencies*, the rules defining the functioning of a virtual currency are established by

[46] OECD, *Taxing Virtual Currencies*…, quoted above, p. 13.

[47] OECD (2020), *Taxing Virtual Currencies*…, quoted above, p. 14 and the following.

the underlying protocol and most changes to the functioning of a token require a change in the underlying protocol. These changes are referred to as **forks** in the chain and they trigger a need to update the protocol software by the users. A fork requires an agreement of the majority of users running the protocol to enter into force. The OECD report makes a distinction between two main types of fork[48]:

– A **hard fork** (also known as a chain split) changes the protocol code and creates a new version of the blockchain alongside the old version. The original token continues to operate despite a new token being created.

– A **soft fork** updates the protocol with the aim of being adopted by all users on the network without creating any new token[49].

For the VAT purposes, modifications would be treated similarly to mining and forging[50].

Point 3 of the VAT Committee Guidelines refers to the specific case of the modification of the existing cryptocurrencies already in use. The creation of a new cryptocurrency following the modification would be covered by the notion of "creation" referred to earlier in point 3 of the Guidelines.

3.4. Storage and transfer (digital wallets)

Digital wallets are needed to hold cryptocurrency accounts, keep record of balance, and carry out transactions with the use of cryptocurrencies. Digital wallets are software platforms, devices, or programmes that store cryptocurrency keys and allow users to access their assets[51]. They can be either connected to the Internet or not[52].

3.4.1. The assessment of whether these transactions are subject to VAT

From the VAT perspective, it is not necessarily relevant whether the wallets are "hot" or "cold", i.e. connected to the Internet or not[53]. In order to assess whether the supply of services by digital wallet providers constitutes

[48] Idem, pp. 14–15.

[49] See also the VAT Committee Working paper No. 1037, p. 10.

[50] Idem, p. 10.

[51] See for example: Cryptocurrency Wallet: What It Is, How It Works, Types, Security (investopedia.com), (access: 10.09.2023).

[52] See the VAT Committee Working paper No. 892, p. 9; the VAT Committee Working paper No. 1037, p. 8; OECD, *Taxing Virtual Currencies*…, p. 13 and the following.

[53] The VAT Committee Working paper No. 1037, p. 8.

a taxable transaction, it needs to be established whether these services are supplied for **consideration** by a **taxable person acting as such**, within the meaning of Article 2(1)(c) of the VAT Directive[54].

At the outset of the analysis, it must be noted that where **digital wallet providers supply their services free of charge**, such supplies are considered to fall outside the scope of VAT[55]. That is so because due to the lack of consideration, they do not qualify as taxable transactions within the meaning of Article 2(1)(c) of the VAT Directive.

If **digital wallet providers ask for the payment of fees for their services,** there is little doubt that such fees would constitute a remuneration for the services supplied and the services would therefore *prima facie* qualify as taxable transactions in the sense of Article 2(1)(c) of the VAT Directive.

The qualification of digital wallet providers as **taxable persons** raises little doubt, in particular given the broad scope of the notion of a taxable person under the VAT Directive.

The development, management, and exploitation of the software platforms, devices, or programmes made available to the users of cryptocurrencies in exchange for a consideration constitute an economic activity in the sense of Article 9(1) and, in consequence, digital wallet providers qualify as taxable persons.

Services supplied for a fee by digital wallet providers can therefore be considered to be provided for consideration by taxable persons acting as such within the meaning of Article 2(1)(c) of the VAT Directive and constitute taxable transactions in the meaning of that Directive.

3.4.2. The assessment of whether the transactions in question are exempt

Once it is established that the supplies of services by digital wallet providers constitute taxable transactions, one should consider whether they could be covered by one of the exemptions set out in Article 135(1) of the VAT Directive. Similarly, as in the case of mining and forging, the most relevant exemptions relate to **transactions concerning currency** (under Article 135(1)(e)) and **transactions concerning payments or transfers** (under Article 135(1)(d)). As recalled in section 3.b.ii, these exemptions are to be interpreted strictly, since they constitute exceptions to the general

[54] See section 3.b.i.

[55] The VAT Committee Working paper No. 892, p. 9.

principle that VAT is to be levied on all services supplied for consideration by a taxable person.

The VAT Committee Working paper No. 892 analyses the application of **Article 135(1)(e)** of the VAT Directive to the services supplied by the Bitcoin digital wallet providers. It states that an application of the exemption set out in this provision to the services which allow Bitcoin users to hold and operate with this virtual currency would be in line with the current application of the exemption in the traditional banking field, which would be compatible with the principle of fiscal neutrality. It is pointed out, in particular, that services provided by banks and financial institutions which consist in making bank accounts available for a service fee resemble the activities of Bitcoin digital wallets and are also exempt[56].

This assessment remains valid in relation to digital wallets operated in relation to any other cryptocurrencies. The services supplied by digital wallet operators concern directly means of payment: they make the cryptocurrencies available to the users and create rights and obligations in relation to the means of payment. Such services are covered by the exemption provided for in Article 135(1)(e) of the VAT Directive.

The Commission services considered also the possibility to apply the exemption for **transactions concerning payments or transfers pursuant to Article 135(1)(d) of the VAT Directive** to the services provided by the digital wallet operators[57].

As indicated in section 3.b.ii, in order to qualify as "a transaction concerning transfers", the services provided must have the effect of transferring funds and entail changes in the legal and financial situation. In order to qualify for this exemption, the services in question should not only constitute an input to another exempt service, but must have the characteristics of an exempt service themselves.

Digital wallets allow a connection between cryptocurrency users and the miners or forgers who are tasked with the verification of transactions. Supplying a service which allows this connection does not result in any transfer of funds. It does not entail changes in the legal and financial situation independently of the fact that the services may be necessary for a transaction in cryptocurrency to take place.

[56] The VAT Committee Working paper No. 892, p. 11.

[57] The VAT Committee Working paper No. 892, pp. 12–13; the VAT Committee Working paper No. 1037, p. 9.

In the light of the above, Working paper No. 892 goes on to conclude that **taxable services supplied by digital wallet providers in exchange for a consideration do not fall within the exemption established in Article 135(1)(d) of the VAT Directive**[58]. This finding is then reflected also in the Working paper No. 1037[59] and in the VAT Committee Guidelines resulting from the 120th meeting of 28 March 2022, which in point 4 state that "storage and transfer of crypto-currencies, such as made through the digital wallets, shall be treated as taxable, but exempt under Article 135(1)(e) of the VAT Directive".

3.5. Exchange

Exchanges allow users to trade cryptocurrencies for other assets, such as conventional fiat money or other digital currencies. They may take place online and offline, peer to peer or be brokered by a third-party intermediary[60].

Let us refer once again to the judgment of the CJEU in case C-264/14 *Hedqvist* to quote its sentence:

1. Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that transactions such as those at issue in the main proceedings, which consist of the exchange of traditional currency for units of the 'bitcoin' virtual currency and vice versa, in return for payment of a sum equal to the difference between, on the one hand, the price paid by the operator to purchase the currency and, on the other hand, the price at which he sells that currency to his clients, constitute the supply of services for consideration within the meaning of that article.
2. Article 135(1)(e) of Directive 2006/112 must be interpreted as meaning that the supply of services such as those at issue in the main proceedings, which consist of the exchange of traditional currencies for units of the 'bitcoin' virtual currency and vice versa, performed in return for payment of a sum equal to the difference between, on the one hand, the price paid by the operator to purchase the currency and, on the other hand, the price at which he sells that currency to his clients, are transactions exempt from VAT, within the meaning of that provision.
   Article 135(1)(d) and (f) of Directive 2006/112 must be interpreted as meaning that such a supply of services does not fall within the scope of application of those provisions.

[58] p. 13.
[59] p. 9.
[60] The VAT Committee Working paper No. 1037, p. 9.

It stems from the judgment that the CJEU treated a cryptocurrency, a bitcoin in this case, in the same way as traditional currencies as regards the exchange services[61]. The factual circumstances in *Hedqvist* concerned the exchange of cryptocurrency for the traditional currency. The VAT Committee Guidelines extend this VAT treatment to exchanges of crypto-assets for other crypto-assets. **All these exchanges are therefore to be considered taxable, but exempt from VAT on the basis of Article 135(1)(e) of the VAT Directive**. This is reflected in point 4, second paragraph of the VAT Committee Guidelines.

4. Concluding remarks

Cryptocurrencies constitute a new and evolving phenomenon, and the determination of their legal status and tax consequences is under way. As pointed out by Terra, Kajus, and Szatmari, cryptocurrencies "…have a unique identity and cannot, therefore, be directly compared to any other form of investment activity or payment mechanism"[62]. That is why the assessment of cryptocurrencies also from the point of view of the VAT is not a straightforward task.

The VAT Committee Guidelines resulting from the 120th meeting set some basic principles for such an assessment. They provide definitions and cover a set of possible transactions involving cryptocurrency. The Guidelines remain quite general and do not elaborate on every conceivable variation of these transactions, but they provide useful criteria that make it possible to assess which transactions are within the scope of the VAT and which exemptions may apply to them.

The Guidelines reflect a pragmatic approach which reckons with the constant evolution of cryptocurrencies. Owing to their general character, they will remain relevant for a while despite the changes in the way in which the cryptocurrencies function and in the way in which the transactions with the use of cryptocurrencies are carried out.

[61] See, e.g., *The Implications of Online Platforms and Technology for Taxation*, IBFD April 2023, Editor: Dennis Weber, Chapter 6: Beyond *Hedqvist* (C-264/14): The Characterization of Cryptoassets under European VAT by Giorgio Beretta, The Implications of Online Platforms and Technology on Taxation | IBFD (access: 16.09.2023).

[62] B. Terra, J. Kajus, Z. Szatmari, *Commentary on European VAT,* section 9.3.2.5.6. *Cryptocurrencies*, Document – Chapter 9 – Exemptions – Tax Research Platform – IBFD (access: 16.09.2023).

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Anna Nykiel-Mateo

Opodatkowanie VAT-em krypto walut

Streszczenie. Od czasu ich stworzenia w 2009 r. kryptoaktywa przekształciły się z dóbr niszowych w aktywa posiadane i wykorzystywane w znacznie szerszym zakresie. Aktywa te stanowią wyzwanie dla decydentów politycznych i administracji podatkowych, ponieważ – jak wskazała OECD – mogą być przenoszone i przechowywane bez udziału tradycyjnych pośredników finansowych oraz bez wiedzy centralnych administratorów o przeprowadzanych transakcjach lub miejscu działalności ich uczestników.

Komitet ds. VAT kilkakrotnie omawiał kwestie związane z opodatkowaniem kryptoaktywów, a w szczególności kryptowalut, podatkiem VAT. Dyskusje nad najnowszym Dokumentem roboczym na ten temat, nr 1037 w sprawie opodatkowania kryptoaktywów podatkiem VAT, doprowadziły do przyjęcia Wytycznych mających na celu harmonizację praktyk administracji podatkowych w zakresie kwalifikacji różnych transakcji związanych z kryptoaktywami z punktu widzenia podatku VAT.

W artykule wskazano główne wyzwania, z punktu widzenia podatku VAT, związane z kryptowalutami, przy czym skoncentrowano się na najważniejszych dostawach z wykorzystaniem kryptowalut i ich kwalifikacji dla celów podatku VAT. Transakcje te obejmują m.in. tworzenie, weryfikację, walidację i dostawy kryptowalut, ich modyfikację, przechowywanie, transfer i wymianę. Artykuł wyjaśnia w tym kontekście stanowisko Komitetu ds. VAT odzwierciedlone w Wytycznych.

Słowa kluczowe: VAT, kryptowaluta, zwolnienia, transakcje dotyczące walut, transakcje dotyczące płatności lub przelewów, *Hedqvist*

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https://doi.org/10.18778/1509-877X.2023.04.12

Articles

Włodzimierz Nykiel*

What can I do for Europe?

Paper presented at the conference "What can I do for Europe?" organised by the Saint Louis University, Brussels (Institute of European Studies) and IPLI Foundation, which took place on 28 March 2019 at the European Parliament, in Brussels.

Ladies and Gentlemen,

I am not young anymore, I do not have the energy and enthusiasm of young idealists changing the world, but I have a lot of confidence in you, the young generation, being builders of an even better future for Europe.

I was asked to provide my insight on what you, young people can do for Europe and I will do it not only as a university professor, a member of parliament, but also as a father of my two daughters and a grandfather of my three grandchildren who live in Europe and care a lot about its future.

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Received: 25.09.2023. Verified: 5.10.2023. Accepted: 10.10.2023.

Europe is going through difficult times and faces challenges on many fronts. In several Member States populists are growing in power and lure people to the idea that only strong nation states can protect them and secure their welfare. Many Europeans seem to be forgetting how things had been before the EU came into being and what the Union has brought them.

You will remember that the story of the 20th century European integration started with the European Coal and Steel Community, founded in 1951[1]. In 1957, the Treaty of Rome established the European Economic Community (EEC) and a new stage of progressively closer cooperation in Europe[2]. What we know today as the European Union was created with the aim of ending the frequent and bloody wars between neighbours, which culminated in the Second World War, the deadliest military conflict in history[3]. An estimated total of 70–85 million people perished in it. In my country, every family suffered terribly from this war. Poland lost in the World War II about 17% of its 1939 population[4]. And then, after the war, it remained under the Soviet domination and the communist rule until the fall of communism in 1989.

As you know, the original development of the European Union was based on a supranational foundation that would "make war unthinkable and materially impossible" and reinforce democracy amongst its members as laid out by Robert Schuman and other leaders in the Schuman Declaration.

The EU delivered on its objectives and in 2012 the EU was awarded the Nobel Peace Prize. The Nobel Committee applauded the EU for its contribution over six decades to "the advancement of peace and reconciliation, democracy and human rights in Europe" and for being instrumental in "transforming most of Europe from a continent of war to a continent of peace."

The EU is, however, not an accomplished project, it has to be developed and strengthened every day.

What role can you play in all this? I would point out 3 main challenges that you must take:

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1 The Treaty establishing the European Coal and Steel Community was signed on 18 April 1951. The European Coal and Steel Community itself came into being in 1952.

2 The Treaty of Rome was signed on 25 March 1957. The EEC came into being in 1958.

3 See: History of the European Union – 1945–1959 | European Union (europa.eu) (access: 13.01.2023).

4 See: https://wyborcza.pl/alehistoria/7,121681,17844725,ile-milionow-zginelo-ofiary-ii-wojny-swiatowej.html; https://www.fakt.pl/wydarzenia/ilu-ludzi-zginelo-w-czasie-ii-wojny-swiatowej-to-az-nieprawdopodobne/9nhzf5m (access: 13.01.2023).

1) First, you should make use of the opportunities given by the European Union;
2) Second, you should contribute to further, sustainable development of Europe as a place where peace, understanding and unity in diversity are not just slogans;
3) Third, you should defend EU values in everyday life and during the elections.

1) Regarding the opportunities, I would like to share with you the experience of my generation.

I grew up in Poland, which at that time was part of the Eastern Block, stuck behind the so-called Iron Curtain. In general, when we were students, travelling abroad, studying and making friends in other countries was beyond our reach and, of course, we did not have the Internet.

Your situation is totally different. You can travel freely and study in other EU Member States.

Please, use this opportunity:

– to meet young people from different backgrounds and cultures,
– to become an expert in carrying out projects in international teams,
– to make lifetime friends,
– and to broaden your horizons.

EU projects and funding, common educational and scientific standards and simplified recognition of academic achievements make it possible to study and do research anywhere in the EU and then to pursue a successful career at home or abroad.

I therefore encourage you to make good use of the opportunities that are offered to you by the EU and to become truly European students.

2) Contributing to further, sustainable development of Europe will be more demanding. There are many dimensions to cover.

I firmly believe that highly motivated, passionate young people driven by values, can make a change for the better.

3) Remember, that each of you can protect and promote EU values on a daily basis:

– Support and develop civil society, take part in NGOs' activities;
– Express your opinions, have your say, take part in elections;
– Fight intolerance and hatred, accept differences in other people;

- Take care of those most vulnerable: children, elderly, handicapped, sick. They need your support. Be prepared to face the challenges of European societies getting older;
- Contribute to the social development of Europe;
- But do not forget its economic and technological development;
- Make use of the opportunities given by digitalisation, by the new technologies;
- Be creative. Be brave enough to shape the new reality;
- Remember that the UE is supporting social and technological innovation, start-ups, automatization;
- The Internet community gives you great opportunities. You can unite with people sharing your values. You can express yourself and your creativity. You can access information from all over the world. The Internet makes your learning opportunities limitless. In your own interest, defend the freedom of Internet. Do not let it be limited. Fight with preventive censorship, but also fight with hatred in the Internet. Do not let negative emotions spoil the miracle of the Internet;
- Also remember that we are a part of the environment we live in. Do not lose touch with the nature. Sustainable development requires eco-values to be promoted and implemented every day. You can contribute to the preservation of the EU ecosystems by small changes in your habits: recycle, save energy and water, and … educate your parents on the importance of the little habits.

Europe is an amazing place and the European Union is a unique organisation integrating people on the basis of a common set of values, safeguarding peace and economic, technological and social development. This uniqueness must be preserved for generations to come.

Sadly, now some divisions are re-emerging, some black clouds have gathered, but we must remember that from a global perspective none of the EU Member States can compete with or stand up to such powers as the United States of America, China, India or Russia alone. Only united can we be a global player.

I trust that you, the young Europeans with values, can re-unite Europe. Your enthusiasm and your values, can give Europe a new momentum. Please, take the challenge!