



Lund University

School of Economics and Management
Department of Business Law

**Secondary Transfer Pricing Adjustments: Interpretation Challenges
within the EU and International Perspectives**

by

Andrii Falendysh

HARN60 Master Thesis
Master's Programme in European and International Tax Law
2020/2021

Spring semester 2021
Supervisor: Cecile Brokelind
Examiner: Sigrid Hemels

Author's contact information:
Email: falendyshandriy@gmail.com
Telephone: +46 072 443 63 27

Submission date: 26 May 2021

Wordcount: 13 968

Contents

| | |
|---|----|
| Summary | iv |
| Preface..... | v |
| Abbreviation list..... | vi |
| 1. Introduction..... | 1 |
| 1.1. Background | 1 |
| 1.2. Subject and purpose..... | 2 |
| 1.3. Research method and materials | 3 |
| 1.4. Delimitations | 4 |
| 1.5. Outline | 4 |
| 2. Secondary transfer pricing adjustment and secondary transactions | 5 |
| 2.1. Nature of the secondary adjustment | 5 |
| 2.2. Constructive dividends transaction | 7 |
| 2.3. Constructive capital injection transaction | 9 |
| 2.4. Constructive loan transaction | 10 |
| 3. Interpretation of the secondary transactions in view of the OECD MC provisions on the specific type of income..... | 11 |
| 3.1. Correlation between the phenomenon of constructive dividends and Article 10 of the OECD MC..... | 11 |
| 3.2. Correlation between the phenomenon of constructive interest and Article 11 of the OECD MC..... | 14 |
| 3.3. Other options of applying the OECD MC to constructive dividends and interest?..... | 15 |
| 4. Specific of the national and the EU legislation on the secondary adjustments..... | 16 |
| 4.1. Overview of the national legislation on secondary adjustments ... | 16 |
| 4.2. Application of the Parent-Subsidiary Directive to the constructive dividends in the framework of the EU law..... | 20 |
| 5. Dispute resolution and its prevention in view of secondary transfer pricing adjustments | 25 |

| | |
|--|----|
| 5.1. Advance pricing agreements as a mean of disputes prevention in the area of secondary transfer pricing adjustments | 25 |
| 5.2. Mutual agreement procedure and secondary transfer pricing adjustments | 26 |
| 5.3. Arbitration and other alternative dispute resolution tools as a possible solution | 29 |
| 6. Conclusions..... | 31 |
| Bibliography..... | 33 |
| Table of Cases | 37 |

Summary

This master thesis elaborates on the issues of the secondary transfer pricing adjustments that are common yet not regulated in an efficient manner by the states. The core problem of the double taxation issues to follow is the unwillingness of the states to accept the administrative tax decisions of each other in such sensitive fields as transfer pricing. Even though the primary and correlative transfer pricing adjustments are addressed within the framework of the international tax instruments (such as the OECD MC), no common ground is developed with respect to the secondary transfer pricing adjustments. This, in turn, contributes to the development of the interpretation issues in terms of the payments underlying the secondary transactions (quasi-transactions to arise after the secondary transfer pricing adjustment was made).

This research is concentrating on the search for possible solutions with respect to fitting the constructive payments, which might follow the secondary transfer pricing adjustments, into the existing international tax instruments system so to confer to such payments a tax treatment that would not differentiate from the 'ordinary' equivalent payments. However, this process is deeply tied to the approaches different states have with respect to the treatment of the constructive payments that go deeply with their roots to the peculiarities states have in their civil, commercial and company legislations. In the EU the non-application of certain tax treatment to the constructive payments may, in principle, raise the issue of compatibility of such legislation with the Community law. That is where the CJEU steps up with the solution, which generally supports the possibility to accord tax treatment of 'ordinary' payments for the constructive payments. However, in terms of judicial double taxation, that might eventually arise, the CJEU seems to be reluctant to support the taxpayers.

Naturally, the states and taxpayers may try to avoid these controversial situations with the use of such instruments as the APA, MAP and arbitration (or other alternative means of dispute resolution). Nevertheless, the application of such instruments requires seamless cooperation between the states, which, in turn, may contribute to the formation of more consistent state practices with respect to the secondary transfer pricing adjustments. Also, the main focus in using such instruments should be put on the interpretation issues rather than on the transfer pricing rules themselves (that is why the application of the Arbitration Convention to such disputes is unlikely to be effective). Another point is that the interpretation issues arising from secondary transfer pricing adjustments require 'reasoned opinion' approach in the arbitration stage but not the 'baseball arbitration' so to elaborate on the very problem itself rather than accepting the already developed approaches.

The issue of the secondary transfer pricing adjustments may not be the most ideal sphere of cooperation between the states given that the recognition of the foreign tax administrative decision, in principle, hinders the territoriality principle of taxation and may not be accepted by the states.

Preface

I would like to express my sincere gratitude to everybody who has been standing with me throughout this challenging yet one of the most eventful years of my life filled with passion for the international taxes. This year would not have been that amazing without excellent groupmates and teachers I met, who are a never-ending source of inspiration for my professional and personal development. The academic challenges we have been through shaped us as more confident and skillful professionals.

Special thanks go to my tutor, Cécile Brokelind, who understood my interest in the topic of this master thesis and supported me during my academic journey with her most helpful advices.

Abbreviation list

| Abbreviation | Explanation |
|---------------------|--|
| AG | Advocate General |
| APA | Advance Pricing Agreement |
| BEPS | Base Erosion and Profit Shifting |
| CJEU | Court of Justice of the European Union |
| DRD | Dispute Resolution Directive |
| e.g. | exempli gratia |
| etc. | et cetera |
| EU | European Union |
| Ibid. | Ibidem |
| i.e. | id est |
| IFRS | International Financial Reporting Standards |
| IRC | Internal Revenue Code |
| IRD | Interest-Royalty Directive |
| MC | Model Convention |
| MAP | Mutual Agreement Procedure |
| MLI | Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting |
| MNE | Multinational enterprise |
| OECD | Organisation on Economic Cooperation and Development |
| pp. | pages |
| para(s). | paragraphs |
| PSD | Parent-Subsidiary Directive |
| Rev. Proc. | Revenue Procedure |
| TFEU | Treaty on the Functioning of the European Union |
| UN | United Nations |
| US | United States of America |

1. Introduction

1.1. Background

The OECD has a long-established goal of preventing base erosion and profit shifting, which is entailed in the BEPS Plan. The BEPS Plan itself is aiming at exploring the gaps as well as mismatches used by the MNEs to artificially shift profits to more welcoming jurisdictions in terms of tax regime.¹ To tackle this, the OECD has come up with 15 Actions needed to be undertaken in order to effectively deal with the said issues. In particular, Actions 8-10 deal with the issue of transfer pricing as well as correct and clear value creation-driven taxation of the MNEs profits. Hereby, the OECD acknowledged the weight of transfer pricing regulations in the clash with base erosion and profit shifting.

The arm's length principle has been developed as an international standard of setting prices between the associated entities, which defines the fair basis of profits allocation in the cross-border transactions.² The issue of transfer pricing adjustments in general is deriving its roots from the tax audits and, consequently, the administrative tax decisions of such tax authorities. The secondary transfer pricing adjustment is of itself a consequence of primary adjustment that is implemented for the purposes of reflecting the operation in accordance with arm's length principle. However, the secondary transfer pricing adjustment is an act of one of the states and, without appropriate international tax instruments, it can lack recognition on the other side of the transaction (i.e., in the other state). Through the means of primary adjustment, the element of profits diverted to the advantage of an entity is taxed in the hands of an entity to what it should be allocated according to the arm's length principle. The corresponding adjustment reflects the relief of the other entity regarding the tax it incurred due to non-compliance of the price with arm's length principle. However, both means do not cancel the actual advantage. This is dealt within the secondary transfer pricing adjustments field. Even though secondary adjustment can occur, there is no common approach to this issue and the problem is decided under the laws of one country without giving due recourse to the other countries' specifics.

When transposed to a cornerstone issue, the secondary transfer pricing adjustments (i.e., the decisions following the tax audit) require states to basically rely on the reciprocity with respect to the administrative decisions of one another so not to hinder the taxpayers' rights. However, this cannot always be the case given that the tax authorities are interested in preserving the interests of their respective states. The issue is especially sensitive given that up-to-date versions of the international tax instruments do not contain

¹ OECD, Background Brief - Inclusive Framework on BEPS, (2017), 7, accessed 26 May 2021, <https://www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf>

² HMRC, Introduction of Secondary Adjustments into the UK's Domestic Transfer Pricing Legislation, (2016) (**HMRC Guide**), 4, accessed 26 May 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524598/Introduction_secondary_adjustments_into_UKs_domestic_transfer_pricing_legislation.pdf

explicit obligations of the states to accord obligatory character to the administrative decisions of the other states. Thus, the unwillingness of the states to acknowledge the administrative tax decisions of another states may result in double taxation and gives raise to the vast amount of disputes trying to reconcile the position of two states. All of this effectively may create certain disadvantages of being part of the MNE when it comes to the aligning of the positions of the jurisdictions involved in the transaction giving raise to the transfer pricing adjustments.

1.2. Subject and purpose

The lack of reciprocity with respect to recognition of the other states' tax administrative decisions results in the collision of taxpayers' interests of avoiding double taxation and tax authorities' interests of preserving the tax revenue. This is especially important given that Article 9 of the OECD MC, indeed, requires the states to conduct primary and corresponding transfer pricing adjustments without really resolving the issue completely in terms of secondary transfer pricing adjustments (i.e., leaving secondary transfer pricing adjustments consequences unanswered). These collisions effectively lead to the issue of interpretation of the secondary transactions and the underlying payments with respect to the possibility of fitting them under the umbrella of the international tax instruments. This creates an imbalance for the recipient of a payment (emerging due to the secondary transfer pricing adjustment) that cannot benefit from certain tax treatment because of the interpretation problem that arises after the tax audit. The issue of interpretation goes even further. It may result in denial of beneficial treatment accorded by such instruments as double tax treaties as well as the EU directives, given that those instruments do not provide for explicit application of the relevant provisions to the payments stemming from secondary transactions.

Still, such conflicts can be prevented with the possible solution to be reached via the application of such mechanisms as APA, MAP, arbitration and other means of alternative dispute resolution.

In the master thesis at hand, the author examines the possibility to fit the constructive payments underlying the secondary transactions into the framework of existing international tax instruments such as double tax treaties and the PSD so to answer the question whether the same treatment can be accorded to these payments as to the ordinary equivalents (i.e., dividends, distribution of profits and interest) and to what extent the administrative decisions of the foreign tax authorities are taken into account in view of the possible double taxation. For this the author reflects on the nature of the secondary transfer pricing adjustments so to align their characteristics with the possible interpretation of the international tax instruments that might imply some specifics stemming from the national legislation.

The aim of this thesis is to establish the correlation between the possibility to put the constructive payments stemming from the secondary transactions under the umbrella of the existing international tax instruments and to elaborate on the legal nature of the problems contributing to leaving such

payments aside of the international framework. This aim is genuinely connected with the search for possible solutions under the existing dispute resolution mechanisms as well.

The conclusions and findings of this master thesis should contribute to further development of the international tax instruments from more inclusive point of view so to provide clear and exhaustive answers on whether the payments underlying secondary transactions should be granted the same treatment as ordinary equivalents (i.e., whether autonomous interpretation should prevail over national specifics accorded to the question). For this the author firstly examines the technical aspects of the secondary transfer pricing adjustments and secondary transactions. Further on, the author analyses the possible ways of fitting the secondary transactions within the framework of current international tax instruments framework. Consequently, the analysis is conducted in view of possible resolution of different treatment accorded by states to the secondary transactions in the context of currently available dispute resolution and prevention mechanisms.

1.3. Research method and materials

The research is built upon the legal-dogmatic method so to analyse the law as it stands in an attempt to reconcile the interpretation approaches to more coherent way of application³ with respect to the secondary transfer pricing adjustments and double taxation as well as stemming from them dispute resolution issues. In the context of this research the author also touches upon the comparative method so to reflect the possible different approaches of the states to the issue of qualification⁴ of the payments underlying the secondary transactions.

The methods are applied with respect to such legal instruments as the OECD MC, PSD as well as the interpretative instruments such as the Commentaries to the OECD MC. The OECD MC is chosen as the representation of the common approach of the international community for prevention of double taxation (also, the OECD MC provides for the provisions indirectly relating to the secondary transfer pricing adjustments). The PSD, in turn, is the perspective of the EU-based approach in a more closely related market.

The interpretation of such mechanisms is also done through the lenses of national law perspectives and the available pieces of the law-application products such as the decisions of the courts (including the CJEU and national courts). The cases were chosen based on the topic matter being treatment of deemed dividends both under the national law and in the broader perspective of the EU law, given that constructive dividends are the most common payment underlying the secondary transactions.

³ S. Douma, *Legal Research in International and EU Tax Law*, (Wolter Kluwer, 2014) (**Douma**), 35-41

⁴ K. Zweigert, H. Kotz, *Introduction to Comparative Law* (Clarendon Press, 1995), 34-37

Following the application of the said methods, the sources of law will be analysed and, accordingly, interpreted as well as confronted for the purposes of this thesis.⁵

1.4.Delimitations

This thesis analyses only the issues arising from and related to the secondary adjustments stemming from the transfer pricing regulations (the ones following upward primary adjustments). The analysis is limited to the qualification problems arising from the different interpretation by the states of the payments underlying secondary transactions and possible ways of aligning such positions. The research does not elaborate on the issue of possible state aid implications connected with the secondary transfer pricing adjustments. During the research several authors (such as R. Teixeira, J. Bungaard and M. Helminen) were identified writing on the issue of secondary transfer pricing adjustments and more generally on the issue of constructive payments. However, to the best of the author's knowledge, no research is looking at the issue of secondary transfer pricing adjustments from the point of view of inclusivity created by the international tax instruments and the Community law so to address the possible negative consequences of the states' non-recognition of each other interpretations of the payments underlying the secondary transfer pricing adjustments. Moreover, the existing research of the mentioned authors needs to be complemented by the considerations arising from the introduction of the DRD and, therefore, needs an update. The research is limited to the sources available as of 26 May 2021.

The analysis focuses on the treatment of constructive payments under the OECD MC as well as the PSD and national laws of some states. The thesis does not explore the treatment accorded to the constructive payments under the UN Model Tax Convention as well as does not set aim of analysing all the potential tax treatment approaches of the national laws. Quite to the contrary, the research is aimed at the identification of the common features that would facilitate the unification of the approaches.

Further on, the research is concentrating on the possible ways of dispute resolution with regard to the interpretation problems arising from the treatment of constructive payments. The analysis is limited to the mechanisms available under the OECD MC (including the MLI) as well as the DRD and the Arbitration Convention. The research does not intend to analyse every possible tool of the dispute resolution that is applicable to the issue of the secondary transfer pricing adjustments.

1.5.Outline

The author starts off with the explanation of the phenomenon of the secondary transfer pricing adjustment by demonstrating the situations giving raise to different secondary transactions. Further on, the research concentrates on the investigation of the constructive payments under the prism of the OECD MC and possible ways of its application to such payments. After that the research

⁵ Douma, 20

continues with the examination of the EU and the national legislation of some states on the constructive payments and their tax treatment. Having identified the most common problems, the author proceeds with the investigation of the available tax dispute settlement mechanisms application to the issue of secondary transfer pricing adjustments. Consequently, the author provides answers to the research question.

2. Secondary transfer pricing adjustment and secondary transactions

2.1. Nature of the secondary adjustment

The issue of secondary transfer pricing adjustments is naturally connected with the broader topic of transfer pricing rules and derives its rationale from the cornerstone term of the whole transfer pricing regulations – arm’s length level of the prices.⁶ Article 9 of the OECD MC states that the transactions between the associated enterprises should be treated for tax purposes as if they were carried out between non-related parties.⁷ For this the OECD MC suggests to conduct adjustments (the primary ones) and reiterates the importance of having a corresponding adjustment so to correctly reflect the statement positions of both counterparties to the transaction.⁸ In fact, the laws obliging to recognise the primary adjustment by the way of corresponding adjustment were examined from the perspective of state aid regulations in *Belgium v. Commission* (T-131/16).⁹ Nevertheless, the Commentaries to the OECD MC remain silent on the issue of secondary transfer pricing adjustments providing that secondary adjustments may be done pursuant to the domestic laws of a particular country.¹⁰ Importantly, no imperative rule is available obliging the states to conduct secondary transfer pricing adjustments and, accordingly, everything is brought down to the will of the particular states to establish laws on secondary transfer pricing adjustments. Currently, there are rules on secondary transfer pricing adjustments in force in such countries as the US, Canada, Italy, Spain, Bulgaria, Austria, Germany, Denmark, Luxembourg, Slovenia, the Netherlands¹¹, Ukraine and others. However, one cannot state that the practice of secondary transfer pricing adjustments is widespread in a same manner as other transfer pricing-related rules.

The systematic character of the secondary transfer pricing adjustments is stemming from the whole idea of adjusting the prices in line with arm’s length principle. This is a process, which includes several steps: (i) identification of

⁶ J. Monsenego, Introduction to Transfer Pricing, (Wolters Kluwer, 2015) (**Monsenego (2015)**), 17; OECD, OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, (OECD Publishing, 2017) (**OECD TP Guidelines**), 35

⁷ OECD, Model Tax Convention on Income and on Capital: Condensed Version, (OECD Publishing, 2017) (**OECD MC 2017**), Art. 9

⁸ *Ibid.*

⁹ No infringement of state aid rules was found

¹⁰ OECD MC 2017, para. 9 of the Commentaries on Article 9

¹¹ European Commission, EU Joint Transfer Pricing Forum: Final (Meeting of 25 October 2012), (Directorate-General: Taxation and Customs Union, 2013) (**EU Joint Transfer Pricing Forum**), 4

the arm's length prices for the particular transaction given all the factors that should be taken into account for such analysis; (ii) conducting of the primary adjustment and (in case there is such a possibility) conducting the corresponding adjustment at the level of the counterparty; (iii) conducting secondary adjustment.

The OECD in its Transfer Pricing Guidelines defines secondary transfer pricing adjustment as 'an adjustment that arises from imposing tax on a secondary transaction'.¹² This brings into the light the secondary transaction itself, which is defined as 'a constructive transaction that some countries will assert under their domestic legislation after having proposed a primary adjustment in order to make the actual allocation of profits consistent with the primary adjustment. Secondary transactions may take the form of constructive dividends, constructive equity contributions, or constructive loans'.¹³ The OECD noted that in the issue of secondary transfer pricing adjustments the priority should be given to avoidance of double taxation in such cases.¹⁴

The reason for secondary transfer pricing adjustment to emerge is that the primary and corresponding adjustments are not enough to deal with the economic effect of aligning prices of the controlled transactions with the arm's length principle. Indeed, what is left after the primary and corresponding adjustments is a representation of a difference between arm's length price and contractual price of the transaction. However, the cash advantage that exists after such process is still held with the counterparty of the party subject to primary or corresponding adjustment.¹⁵ This cash advantage evidently constitutes the difference between the arm's length and non-arm's length levels of price. Henceforth, the whole process of aligning contractual prices of the associated enterprises with the arm's length level of prices cannot be deemed fully accomplished without accurate and correct secondary transfer pricing adjustments. However, the enforcement of secondary transfer pricing adjustments raises a number of issues that require seamless cooperation between the states. Particularly, this is necessary since secondary transfer pricing adjustments will likely lead to withholding tax or other tax implications and, hence, affect the tax and cashflow position of the taxpayers involved.

The OECD Transfer Pricing Guidelines slightly touch upon this topic by noticing that where the states provide for secondary transfer pricing adjustments, 'the repatriation could be effected either by setting up an account receivable or by reclassifying other transfers, such as dividend payments where the adjustment is between parent and subsidiary, as a payment of additional transfer price (where the original price was too low) or as a refund of transfer price (where the original price was too high)'.¹⁶

¹² OECD TP Guidelines, 30

¹³ *Ibid.*

¹⁴ OECD TP Guidelines, para. 4.73

¹⁵ HMRC Guide, 4

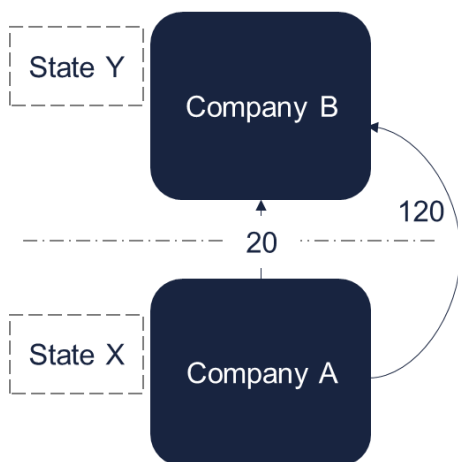
¹⁶ OECD TP Guidelines, para. 4.74

That is where the additional cash advantage emerges – there is a need of identifying the nature of the secondary transaction. Naturally, this will depend on the national legislation at hand and the features of the transaction itself. The EU Commission observed that it is a more feasible way of solution to recognise only constructive (deemed) dividends and capital injection secondary transactions as they are more straightforward and easier to align within different legal systems.¹⁷ However, in reality, the transactions may entail very different features and may have peculiarities not allowing to boil it down solely to the constructive dividends or capital injections transaction, which is demonstrated in the next subchapters (2.2; 2.3 and 2.4).

2.2. Constructive dividends transaction

To demonstrate the constructive dividends transaction scenario, one may look at the following situation:

- Company A, resident of State X for tax purposes, fully owned subsidiary of Company B, buys goods from Company B, resident of State Y for tax purposes, for 120;
- tax authorities of State X conduct tax audit of Company A and find out that the arm's length price for the transaction between Company A and Company B should be established at a level of 100;
- thereby the tax authorities of State X conduct primary adjustment of Company A that decreases its deductible expenses by 20, which may lead to increase by 20 in the taxable base of Company A in State X;
- to compensate the economic disbalance from the transaction, the tax authorities of State X impose secondary adjustment and allocate 20 to the deemed distribution of dividends subject to withholding tax (the illustration is below).

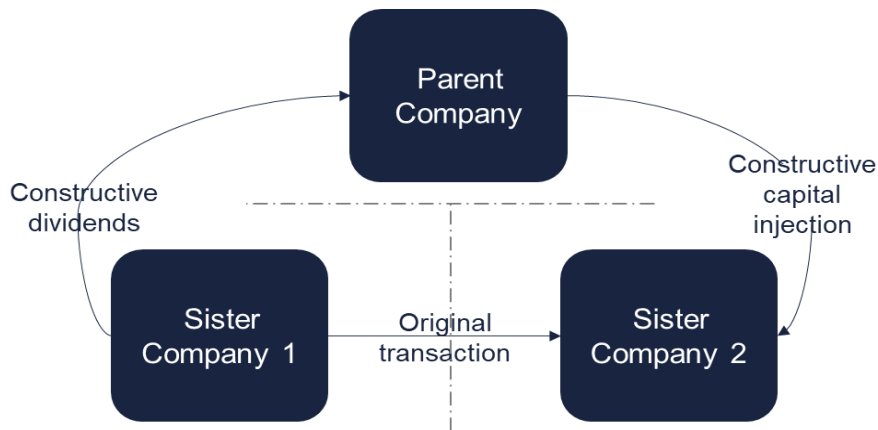


- Company A is a subsidiary of Company B
- Company A pays 120 to Company B for goods
- Tax authorities in State X decide that arm's length price is 100 and reduce the deductible expenses of Company A by 20
- Company B is left off with the additional cash benefit 20 (presumably subject to withholding tax)

Under this set-up the tax authorities of State X will basically recognise a new transaction between Company A and Company B, which results in the deemed repatriation of profits originating from State X to Company B without any dividend payment. Hence, State X (if provided by the national laws) will impose withholding tax on the dividends recognised under the secondary

¹⁷ EU Joint Transfer Pricing Forum, 3

transaction. This situation seems straightforward as there is a parent-subsidary relationship. However, the situation becomes complicated where such transactions would have taken place between sister companies or companies that share one ultimate beneficial owner but through the chain of tiered subsidiaries. In essence, it may be seen as if the Sister Company 1 makes a dividend distribution to the Parent Company, which, in turn, makes capital injection to the Sister Company 2 (as explained in illustration below).¹⁸



Even though it may make sense from the economic rationale point of view, it is rather complicated in terms of legal formalities and it is hard to provide some definite answers as to how to treat such transaction. Indeed, where the transaction at hand is to be treated as two separate transactions involving dividend distribution and subsequent capital injection, such treatment would entail lack of actual legal analysis without needed adjustments and corrections. For example, no due consideration in this situation is given to the fact that the Parent Company could have used the funds available to it in a different way. This would undermine the beneficial owner capacity of the Parent Company over the income that represents the excess that was paid to the Sister Company 2. The beneficial owner concept is decisive in this analysis since only the capacity of the parent company of a beneficial owner offers a possibility to elaborate on the subsequent capital injection as if it was the decision of the parent company. For example, an entity is not considered to be a beneficial owner of an income where ‘recipient’s right to use and enjoy the [dividend] is constrained by a contractual or legal obligation to pass on the payment received to another person’.¹⁹ Even though the concept of a beneficial owner may be examined both from perspectives of legal and economic peculiarities,²⁰ it is in common for both of these points of view that the beneficial owner should enjoy the possibility to decide on the fate of the income. Therefore, presuming the subsequent transaction to take form of capital injection into the Sister Company 2 would be equal to limiting the Parent Company in its beneficial owner capacity. Moreover, more complex discussion may arise where the Parent Company is not the sole owner of the

¹⁸ R. R. Teixeira, *Tax Treaty Consequences of Secondary Transfer Pricing Adjustments*, 37(8/9), (Intertax, 2009), pp. 449-472 (Teixeira (2009)), at 454

¹⁹ OECD MC 2017, para. 12.4 of Commentary on Article 10

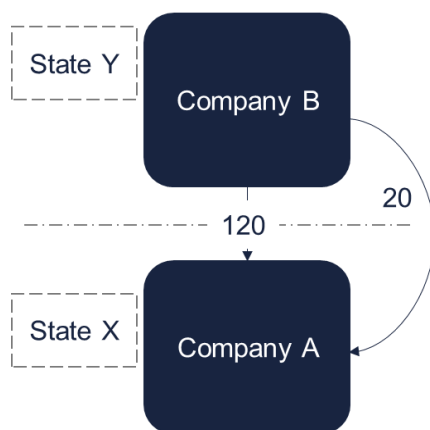
²⁰ J. J. M. Janssen, M. S. Garibay, *What Should Be the Scope of the Beneficial Owner Concept?*, 48(12), (Intertax, 2020), pp. 1087-1104, at 1088

Sister Company 1. If that is the case, then referring to initial dividend distribution and subsequent capital injection may be not the most reasonable solution and, instead, the constructive loan transaction should be considered. The reason for this is that in a situation of multiple owners the corporate governance may require and impose (depending on a jurisdiction) different rules as to the decision-making process with respect to distribution of profits and granting of loans. Moreover, a separate issue may arise as to the division of share of amounts that would constitute profit under the secondary transaction.

2.3. Constructive capital injection transaction

The constructive capital injection results from the situation a little bit different from the one with constructive dividends:

- Company A, resident of State X for tax purposes, fully owned subsidiary of Company B, sells goods to Company B, resident of State Y for tax purposes, for 120;
- tax authorities of State Y conduct tax audit of Company B and find out that the arm's length price for the transaction between Company A and Company B should be established at a level of 100;
- thereby the tax authorities of State Y deny the deduction of 20 from the taxable base of Company B;
- where State X and State Y agree on the secondary adjustments in their legislation, the excess of 20 can be regarded as a constructive capital injection in Company A.



- Company A is a subsidiary of Company B
- Company B pays 120 to Company A for goods
- Tax authorities in State Y decide that arm's length price is 100 and reduce the deductible expenses of Company B by 20
- Company B is considered to make an additional capital injection in amount of 20

Importantly, such decision for the excess of additional cash left off with the subsidiary is considered to be a very practical solution since it does not entail any adverse consequences in terms of taxes²¹ by, inter alia, not imposing any withholding tax on the excessive cash that was paid to the subsidiary.

Nevertheless, even if the tax position of Company A is not affected by the capital contribution treatment of excess cash, it definitely creates some sort of uncertainty for the accounting statements. The IFRS itself does not provide

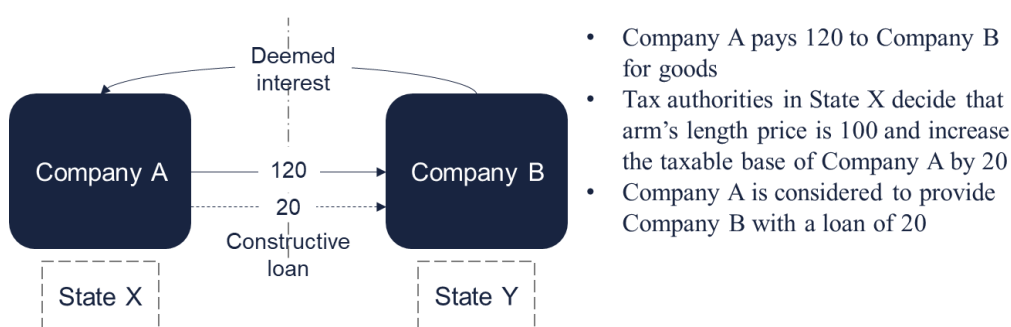
²¹ S. D. Peterson et al., *Secondary Adjustments and Related Aspects of Transfer Pricing Corrections* (Deventer: Kluwer, 1996), 16

for the definition of capital contribution. However, the reference may be made to the equity definition, which is ‘the residual interest in the assets of the entity after deducting all its liabilities’.²² The equity may be further divided into share capital, retained earnings as well as reserves. While at first sight this might not raise any major issues and considerations, in a long run it may lead to different outcomes. For instance, upon the sale or dissolution of the subsidiary, different tax treatments may be accorded to hidden reserves and share capital, which, in turn, may lead to the qualification of such payments as capital gains or as dividends and, subsequently, entail different withholding taxation etc. Still, the root of the problem is that in this case, no correlation would be preserved between the tax and accounting reflection of the transaction. Therefore, a constructive capital injection may have long-lasting consequences, which should be considered in view of the further business strategy of the sister company being injected with additional capital.

2.4. Constructive loan transaction

A constructive loan transaction will generally not involve any parent-subsidary relations directly. The following may be considered for the purposes of constructive loan transaction:

- Company A, resident of State X for tax purposes, sells goods to Company B, resident of State Y for tax purposes, for 100;
- tax authorities of State X conduct tax audit of Company A and find out that the arm’s length price for the transaction between Company A and Company B should be established at a level of 120;
- thereby the tax authorities of State X increase the taxable base of Company A by 20;
- State X may treat such 20 as the loan provided by Company A to Company B;
- tax authorities of State X determine that the arm’s length level of interest accrued on constructive loan (20) at rate of 5% per annum.



Under the set-up described above, Company A will be deemed to receive interest at an arm’s length from Company B until the principal of the loan is repaid.

²² IAS 32 — Financial Instruments: Presentation, accessed 26 May 2021, <https://www.iasplus.com/en/standards/ias/ias32>

If State Y is to accept State X approach as to assertion of the secondary transaction, State Y will impose withholding tax on the deemed interests due to Company A (unless there is a possibility to benefit from the withholding tax exemption stemming from the peculiarities of the tax laws in question). However, this situation requires a straightforward acknowledgment of the tax administrative decisions of State X in State Y. Hence, there might be as well a situation where State Y would treat a secondary transaction to follow as the distribution of dividends (which can be anticipated given that the majority of states supports such approach in terms of secondary transactions).

3. Interpretation of the secondary transactions in view of the OECD MC provisions on the specific type of income²³

3.1. Correlation between the phenomenon of constructive dividends and Article 10 of the OECD MC

Following Article 10 of the OECD MC, dividends are defined as ‘income from shares, “jouissance” shares or “jouissance” rights, mining shares, founders’ shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident’.²⁴ Since the definition of the dividends is directly provided by Article 10 of the OECD MC, no room is left for the possible domestic interpretations of the term ‘dividends’. Hence, what is important is that the definition of dividends or, in fact, constructive (deemed) dividends under the domestic legislation of the jurisdiction making secondary adjustment, should correspond with the definition of dividends and other conditions provided in Article 10 in order to qualify for the benefits of a double tax treaty. On a separate note, the OECD MC benefits conferred to the parent companies with respect to dividends may also be conferred to the sister companies where the relations between the sister companies are very close and they belong to the same group of companies.²⁵

There might be different situations with respect to the width of the dividends’ definition under the domestic law and tax treaty.²⁶ While the definition of the tax treaty is broader than the domestic law definition – no adverse qualification consequences should be implied by using the double tax treaty given that the broader scope should cover bigger variety of dividend-treated items. However, the situation changes where the definition of dividends under the domestic law is broader than the one adopted by the tax treaty. If that is the case, the possibility to apply benefits accorded to dividends taxation is not

²³ For the purposes of this analysis the latest up to date OECD MC was used (i.e., 2017 version)

²⁴ OECD MC 2017, para.3 of Commentaries on Article 10

²⁵ *Ibid.*, para. 29 of Commentaries on Article 10

²⁶ M. Helminen, *The Dividend Concept in International Tax Law*, (Kluwer, 2010), (Helminen (2010)), 46

deemed to be possible and, consequently, the search for other applicable articles in the double tax treaty should be continued.

Importantly, the qualification problems with respect to the OECD MC provisions arising predominantly due to the differences in defining of the dividends under the company laws and tax laws of different states. Naturally, the attempts to align both of these worlds do not always go flawlessly. Worth mentioning that the definition of dividends for the tax law purposes derives its rationale from the economic categories.²⁷

The definition of dividends as defined by the OECD MC may be divided into three parts:²⁸ (1) shares, “jouissance” shares or “jouissance” rights, mining shares, founders’ shares; (2) other rights, not being debt-claims, participating in profits and (3) income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

Such analysis of the above definition makes it possible to state that (a) the expression ‘other corporate rights’ in part (3) alludes that the parts (1) and (2) refer to the corporate rights as well; and that (b) the statement ‘other rights, not being debt-claims, participating in profits’ in part (2) provides that part (1) cannot be debt claims and that such kind of restriction is not inherent to part (3).²⁹ This analysis is important for the correct interpretation of the profits deemed to be distributed by different entities.

While parts (1) and (2) of the dividends’ definition are clear and refer mostly to the situation of standard dividends, part (3) of the dividends definition creates broader playfield for the dividends treatment by stating ‘income from other corporate rights’. The wording itself is very ambiguous and leaves the doors open to the question of whether it covers income from other corporate rights that are subject to the same taxation as income from shares or all income, which falls under the tax treatment of income from shares. The Commentaries to the OECD MC also state that the disguised distribution of profits should generally fall under Article 10 of the OECD MC.³⁰ Some clarity may be induced from the correlation of thin capitalisation rules and excessive interest payments. In particular, the OECD Report on Thin Capitalisation touched upon the issue of interpreting ‘other corporate rights’. It is stated in the OECD Report on Thin Capitalisation that some of the states were not recognizing by ‘other corporate rights’ expression any instruments of other financial relationships ‘not clearly constituting a participation in the membership of a corporate body’.³¹ In contrast, the majority of states adopted a broader approach allowing to include income from any financial relationship that is deemed to be equal and treated as constituting a corporate

²⁷ Helminen (2010), 69

²⁸ J. F. Avery Jones et. al, *The Definitions of Dividends and Interest in the OECD Model: Something Lost in Translation?*, 1(1), (British Tax Review, 2009), pp. 406-452 (**Avery Jones (2009)**), pp.406-407

²⁹ Teixeira (2009), 460

³⁰ OECD MC 2017, para. 28 of Commentaries on Article 10

³¹ OECD, *Report on Thin Capitalisation*, Paris, (OECD Publishing 1986) (**Thin Capitalisation Report**), para. 56

right under the national laws. J. Bungaard also supports the view under which Article 10 of the OECD MC may apply to payments reclassified as dividends under the national law (while referring to the interest subsequently reclassified as a dividend).³² Somewhat coherent understanding is provided in the OECD Commentaries which state that the term ‘capital’ for the purposes of Article 10 2(a) includes loans if an income is treated as a dividend in the context of thin capitalisation cases.³³ The OECD Report on Thin Capitalisation concluded that the broader interpretation should prevail, even though this was not formally restated in other OECD documents, including the OECD MC.³⁴ It is also worth mentioning K. Vogel’s opinion on this issue, which was to state that dividends treatment need an inherent relationship to be established between the recipient of the payment and the payor.³⁵ In other words, a party to which arm’s length excess is owed should possess the capacity of a shareholder. To reflect this on the situation with constructive dividends, it may be stated that the associated entities status between the two entities subject to secondary transaction should, in most cases, indicate the special shareholder relationship and, thus, should provide some ground for treating underlying secondary transaction payments as dividends under the OECD MC. M. Helminen is of the opinion that state of residence of the parent company should accept the interpretation of the source state in case of relying on part (3) of the dividends definition.³⁶

From the practical standpoint, as outlined by N. Webb, French tax authorities stand on the premises that allow to treat as dividends only those payments that would qualify as such under the French Civil Code and the French Commercial Code.³⁷ This illustrates that interpretation by the states of Article 10 of the OECD MC may involve some domestic law specifics, which derive their rationale from the civil/company law. If that is to happen, then, in principle, French tax authorities would allow to rely on the Article 21 (Other Income) of the OECD MC. As an alternative to this, the possibility to treat constructive dividends as capital gains may be considered. The reason for that is the peculiarities of Article 13 (Capital Gains) of the OECD MC, which, in principle, also leaves the door open to the parent-subsidiary relationships. Germany (as reported by R. R. Teixeira), in contrast, is less strict in this sense and would generally allow even 1% shareholding in entity to qualify for the constructive dividend transaction where there is an issue of secondary adjustment given that following the case law, the existence of shareholder relationship constitutes a constructive dividend for the tax law purposes.³⁸

³² J. Bungaard, *Hybrid Financial Instruments in International Tax Law*, (Ex Tuto Publishing 2017) (**Bungaard**), 186

³³ OECD MC 2017, para. 15 of Commentaries on Article 10

³⁴ Thin Capitalisation Report, para. 60

³⁵ K. Vogel, J. Marin, Klaus Vogel on double taxation conventions: a commentary to the OECD-, UN- and US model conventions for the avoidance of double taxation of income and capital with particular reference to German treaty practice, (Deventer: Kluwer Law, 1991), Commentaries on Article 10

³⁶ Helminen (2010), 60

³⁷ N. Webb, *Tax Management International Forum Discusses Additional Adjustments To Be Made in the Wake of a Transfer Pricing Adjustment and the Tax Treatment of Supplemental Retirement Plans*, 36(2), (Tax Management International Forum, 2007), pp. 77–85

³⁸ Teixeira (2009), 456

Another issue to consider in the context of Article 10 of the OECD MC is that it relates to the ‘dividends paid by (*emphasis added*) a company’. In other words, it may be argued that the application of the beneficial treatment conferred by Article 10 of the OECD MC may be accorded only where there is an actual transfer of the dividend (i.e., where not only secondary transfer pricing adjustment was made formally but the money is sent to a tax resident of another state). The OECD Commentaries state that ‘the term “paid” has a very wide meaning, since the concept of payment means the fulfilment of the obligation to put funds at the disposal of the shareholder in the manner required by contract or by custom’.³⁹ The OECD Commentaries remain silent on the questions of whether the funds should be actually transferred by simply stating that such funds should be ‘put at the disposal’ of the particular shareholder. Given that there is no definition of ‘paid to’ in the OECD MC itself, the meaning of this may be derived from the national law, unless it would be contrary to the context of the treaty itself.⁴⁰ Worth mentioning that not everybody supports this line of argumentation and there are some commentators stating that the term ‘paid to’ should be given an international meaning that would not depend on the peculiarities of the national law systems.⁴¹ P. J. Wattel argues that Article 10 of the OECD MC is not likely to cover any fictitious payments and therefore advocates the approach, which supports that title over income should be passed and obligations to pay such income should be fulfilled (i.e., value should be passed).⁴² Still, it seems like the concept of ‘put at the disposal’ may be construed very broad so to cover the situations where constructive dividends were not paid out as such but were made available in one form or another to the shareholder since such approach would generally preserve the relationship of shareholder-subsidary inherent to dividend payments.

3.2. Correlation between the phenomenon of constructive interest and Article 11 of the OECD MC

Where a secondary transaction is defined as a constructive loan, the issue arises as to how the underlying interest (constructive interest) should be treated for the purposes of the OECD MC. Following the OECD MC, interest means ‘income from debt claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor’s profits’.⁴³ The Commentaries further go on to state more generalised meaning of the interest as ‘remuneration on money lent, being remuneration coming within the category of “income from movable capital” (*revenus de capitaux mobiliers*)’.⁴⁴ The definition of interest is deemed to be exhaustive in the OECD MC and does not require any references to be made to the domestic laws, which, in turn, should provide more clarity as to what should be covered

³⁹ OECD MC 2017, para. 7 of Commentaries on Article 10

⁴⁰ *Ibid.*, para 2 of Article 3

⁴¹ P. A. Harris, J. D. Oliver, *International Commercial Tax* (Cambridge Tax L. Series, 2010); W. Haslechner, Article 10 Dividends, in Klaus Vogel on Double Taxation Conventions 4th edn., vol. 1, pp. 809-810, 815, 903

⁴² P. J. Wattel, O. Marres, *Characterization of Fictitious Income under OECD-Patterned Tax Treaties*, 43(3), (European Taxation, 2003), pp. 66-79 (P. J. Wattel (2003)), pp. 67-69

⁴³ OECD MC 2017, para. 3 of Article 11

⁴⁴ *Ibid.*, para. 1 of Commentaries on Article 11

under the definition of interests. In particular, it is stated that such approach is employed also to: (i) cover almost every kind of income that may be treated as an interest in different jurisdictions; and (ii) prevent the impact of any changes in domestic laws.⁴⁵ It can be deduced that the interest definition provided in the OECD MC can be treated as a standard definition that may be widened by the provisions of the particular double tax treaties (where such provisions would be built upon the fundamentals of the existing definition in the OECD MC).

Constructive interest itself is an income that has a distinct nature as compared to ‘traditional’ interest. In particular, while traditional interest arises predominantly from the transaction special purpose of which was to make available funds to the borrower, constructive interest is an outcome of secondary recharacterization of the original transaction and, thus, stems from the different purpose (i.e., has a different legal nature). For this the OECD Commentaries clarify that the ‘payments made under certain kinds of non-traditional financial instruments where there is no underlying debt’⁴⁶ should not fall within the ambit of Article 11 of the OECD MC. However, the carve-out is made that where interest is recognised as a consequence of applying substance over form or prevention of abuse of rights principles, such interest should fall into the definition of interest under Article 11 of the OECD MC. If one to refer to Article 9 of the OECD MC, it can be concluded that para. 2 of the former is the reinstatement of substance over form principle. Moreover, the substance over form principle is deemed to be inherent to the whole system of transfer pricing regulations as such.⁴⁷ Therefore, the possibility to use benefits of Article 11 of the OECD MC with respect to constructive interest seems to be apparent.

Turning to the term ‘paid to’ contained in Article 11 of the OECD MC, it seems to follow the approach envisaged by Article 10 of the OECD MC as the OECD Commentaries state that it should be accorded with broad meaning and include situations where funds are put at the disposal of the recipient entity. P. J. Wattel again notes that Article 11 of the OECD MC should not be applied with respect to fictitious payments (i.e., which were not actually made).⁴⁸

3.3. Other options of applying the OECD MC to constructive dividends and interest?

Assuming that the interpretation of the OECD MC would not allow to include constructive dividends and interest into the respective articles of the OECD MC, there still might be some options to rely on in the OECD MC provisions. In particular, the recourse may be given to Article 21 (Other Income) of the OECD MC. This would also come along with the declared goal in the Preamble of the OECD MC of elimination of double taxation. However, one cannot be sure of such approach given that Article 21 of the OECD MC is the

⁴⁵ *Ibid.*, para. 21 of Commentaries on Article 11

⁴⁶ OECD MC 2017, para. 21.1 of Commentaries on Article 11

⁴⁷ OECD TP Guidelines, 48

⁴⁸ P. J. Wattel (2003), 77

one that accords no withholding tax to be levied within the source state. Moreover, it is arguable whether secondary transactions that have their 'primary' equivalents should be qualified as other income. As to the Article 21 itself, it states that it applies to 'income...not dealt with in the foregoing Articles...'.⁴⁹ The current wording of the OECD MC uses expression 'not dealt' as opposed to the one used up to 1977, where it was stated 'not expressly mentioned'.⁵⁰ This is a clarification, which basically imposes an obligation to firstly fit the income at question under the umbrella of the other articles of the OECD MC and to refer to Article 21 only as to the mean of last resort. P. J. Wattel states that in terms of broader term of 'fictitious payment' it would be too narrow to think that the states have not intended to include any type of those payments into the OECD MC, especially given that Article 21 does not explicitly prohibit nor include such payments into its operation.⁵¹ Consequently, the possibility to use Article 21 of the OECD MC as a last resort for constructive payments may be an option.

4. Specific of the national and the EU legislation on the secondary adjustments

4.1. Overview of the national legislation on secondary adjustments

The US establishes a separate rule with respect to secondary adjustments, which is called conforming adjustments rule.⁵² Following the IRC 482, a 'conforming' adjustment must be made to conform a taxpayer's account to reflect the allocated amount.⁵³ The basic rationale of the conforming adjustment under the US legislation is to reflect the changes made pursuant to primary adjustments. The US follows traditional approach to secondary adjustments and requires qualifying payments (if any) under such adjustments as whether dividends or capital contributions, thereby leaving complicated implications from qualification of such payments as interest behind. In principle, the US legislation describes both situations where actual repatriation of allocated income is conducted and where such repatriation does not occur. If a taxpayer elects to repatriate a cash advantage (if any) as an interest-bearing account receivable or account payable pursuant to Rev. Proc. 99-32 no secondary transaction is deemed to take place. On the contrary, where no such cash repatriation was done, the tax authorities will recognise a secondary transaction of constructive dividends or constructive capital injection. Importantly, in order for the US taxpayer to benefit from the provisions of Rev. Proc. 99-32, the set of requirements have to be fulfilled. One of such requirements is that the counterparty receiving a cash repatriation should have a tax treatment of a foreign corporation that is engaged in trade and business in the US. One may assume that such link is needed in order to

⁴⁹ *Ibid.*, para.1 of Article 21

⁵⁰ OECD MC 2017, 57

⁵¹ P. J. Wattel (2003), 69

⁵² J. M. Hill, Dealing with the Secondary U.S. Tax Consequences of Transfer-Pricing Adjustments, (2013), accessed 26 May 2021, <https://www.thetaxadviser.com/issues/2013/jun/hill-june2013.html>

⁵³ Internal Revenue Service, Revenue Procedure 99-32 Inbound Guidance, (2014) (**IRS Guidance**), 3, accessed 26 May 2021 https://www.irs.gov/pub/int_practice_units/ISI9422_09_08.pdf

prevent double non-taxation of the cash (i.e., profits) being transferred. Also, counterparties that are individuals and treated as partnerships for tax purposes are not covered by Rev. Proc. 99-32. The whole process of application of Rev. Proc. 99-32 confines in the conclusion of the agreement between the tax authorities and a taxpayer, where the main points such as amount of cash repatriation, day of such repatriation and other terms are determined and agreed with the tax authorities of the US. The practical application of this provision and subsequent connected implications may be seen from the case *BMC Software Inc v. Commissioner of Internal Revenue* (dealing with agreement on transfer pricing treatment) and cannot be described as flawless.⁵⁴ In particular, the conclusion of closing agreement cannot prevent the following requalification on the side of the tax authorities, which may deny the previous treatment of the transactions between, for example, parent and subsidiary, which happened in *BMC Software Inc v. Commissioner of Internal Revenue* but was successfully challenged by a taxpayer.

Importantly, where the US taxpayer is about to receive the amount representing the difference between non- and arm's length level of price, such receivable should bear interest on the moneys used by the relevant counterparty.⁵⁵ This points to the fact that effectively the US tax authorities require the counterparty of the US taxpayer to treat the constructive transaction leading to the repatriation of cash to the US as a constructive loan due to the interest condition. This may create a mismatch in the treatment of the same payment on the part of the US and the relevant counterparty's jurisdiction. Indeed, the majority of states try to avoid the qualification of difference between non- and arm's length level of price as a constructive interest since it creates a set of issues for the payor jurisdiction. Nevertheless, the US unilaterally obliges other nationals (i.e., foreign entities) to treat payments in a certain way, which may not particularly align with the domestic treatment and, consequently, raise a tax issue. For example, this may occur where the foreign jurisdiction would treat such payment as a constructive capital injection without any withholding tax due while the US tax authorities would recognise this as a constructive interest. This would lead to the taxation at the level of the US in the hands of the US taxpayer without any possibility to offset the withholding tax, which normally should have been due on the interest payments (even though there might be some exceptionally beneficial domestic exemptions or double tax treaty benefits).

In the Netherlands, the legislation at question requires a taxpayer to make secondary adjustments so to recognise the effect of secondary transactions. Such secondary transactions are compulsory in their nature. Following the Dutch legislation (as reported by L. Sahin and J. Andriessen), such options as adjustment in current account, constructive dividends and constructive capital injection may take place.⁵⁶ However, an important feature of the Dutch

⁵⁴ United States Court of Appeal, Fifth Circuit, Case No. 13-60684, *BMC Software, Inc., v. Commissioner of Internal Revenue*, (13 Mar. 2015), accessed 26 May 2021, <https://caselaw.findlaw.com/us-5th-circuit/1694630.html>

⁵⁵ IRS Guidance, pp. 17-18

⁵⁶ L. Sahin, J. Andriessen, *Transfer Pricing in the Netherlands: Overview* (2018), accessed 26 May 2021, [https://uk.practicallaw.thomsonreuters.com/w-007-8798?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-007-8798?transitionType=Default&contextData=(sc.Default)&firstPage=true)

legislation is that it basically provides for the exemption from application of compulsory secondary adjustments on constructive dividends if: **1)** the other state does not recognise secondary transaction and, as a result of it, does not provide credit with respect to withholding tax paid on dividends in the Netherlands; and **2)** there is no abuse of law in evading the withholding tax otherwise due on the dividends.⁵⁷ Even though such system establishes the necessity to prove conditions **1)** and **2)** in order not to incur withholding tax consequences, it provides taxpayer with a possibility to rebut the application of the tax in the Netherlands. It is worth noting that the Dutch transfer pricing adjustment system is very liberal and even provides the possibility to make downward transfer pricing adjustments without clear establishing of a link with upward transfer pricing adjustments in the relevant jurisdiction.⁵⁸ This could effectively create a situation where the Dutch companies were used for the tax planning purposes with the possibility to deduct tax base in the Netherlands. For example, the Dutch entity could have entered into the royalty-free license agreement and then impute expenses in a form of deemed royalty expenses. As of May 2021, there is a legislative proposal to restrain such loopholes. In particular, it is planned to tie downward adjustments of the Dutch entities with the upward adjustments in the relevant jurisdiction. The downward adjustment would be allowed if the other jurisdiction taxes the corresponding profits with corporate income tax within the hands of the relevant taxpayer.⁵⁹ The burden of proof with this respect is planned to be on the Dutch taxpayer. Basically, the legislative proposal is targeted to tackle such cornerstone issue as mismatches in transfer pricing and subsequent base erosion in certain jurisdictions. If proposal is to be implemented, the issue of secondary adjustments tracing their substantiation from primary downward adjustments will be apparently linked to the other jurisdiction's acknowledgment of primary adjustments made in the Netherlands. Hence, it is reasonable to expect that the state acknowledging primary adjustment of the other state, will be lenient towards acknowledging the secondary transaction and adjustments, especially where such secondary adjustments will contribute to reflect the increase in the taxable base in that first state.

In Germany secondary transfer pricing adjustments practice and rules follow the usual path of recognising only constructive dividends and constructive capital injections. Even in the situations where sister companies are involved,

⁵⁷ Directorate-General for Tax and Customs Policy and Legislation, International Tax Policy and Consumer Taxes Directorate, Decree no. 2018/6865 (22 Apr. 2018) on International Tax Law. Transfer prices, application of the arm's length principle and the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines), chapter 4, accessed 26 May 2021, <https://www.government.nl/documents/decrees/2014/03/25/ifz2013-184m-international-tax-law-transfer-pricing-method-application-of-the-arm-s-length-principle-and-the-transfer-pricing-g>; B. de Bik, M. van der Weijden, Netherlands in *The Transfer Pricing Law Review*, 4th Edition, (S. Edge et al. eds.), (The Law Reviews, 2020), pp. 191-192

⁵⁸ Dutch government announces limitation to unilateral downward transfer pricing adjustments, accessed 26 May 2021, <https://www.atlas.tax/en/news/item/542-dutch-government-announces-limitation-to-unilateral-downward-transfer-pricing-adjustments>

⁵⁹ R. Bouwman, J.-C. Ku, I. Lagerweji, The Netherlands initiates public consultation procedure addressing transfer pricing mismatches, accessed 26 May 2021, <https://www.dlapiper.com/en/us/insights/publications/2021/03/netherlands-public-consultation-transfer-pricing-mismatches/>

the German tax authorities tend to bifurcate such transactions into two separate transactions of, firstly, paying constructive dividends to the parent company and, secondly, streaming such funds in a form of constructive capital injection to another sister company. Contrary to the current Dutch legislation, the German legislation on the secondary transfer pricing adjustments does not take into account the intention of the taxpayer and, in principle, does not allow to argue that the intention of the transaction leading to the imposition of secondary transfer pricing could in itself bear some legitimate purpose as opposite to the avoidance of withholding tax on the distribution of profits.⁶⁰ Importantly (as reported by M. Helminen), there is a possibility under the German tax law not to impose withholding taxation on the constructive payment where the return payment is made prior to the balancing of the accounts.⁶¹

Turning to Ukraine, the recognition of secondary transfer pricing adjustments in Ukraine has started from 2021. In particular, the Tax Code of Ukraine explicitly deals with such type of secondary transaction as constructive dividends. The Ukrainian legislation contains special provisions, which define as dividends (i.e., constructive dividends are treated in a same way as the ordinary dividends) the following transactions depending on their correlation with arm's length level of prices: **1)** purchase of goods (apart of certain positions) from the associated parties above the arm's length level of prices; **2)** sale of goods (apart of certain positions) to the associated parties below the arm's length level of prices; **3)** payments under the securities or corporate rights to the associated parties above the arm's length level of prices.⁶² Importantly, the Ukrainian tax legislation implicitly regulates the way of withholding tax imposition with respect to constructive dividends stating that the applicable double tax treaties can apply to such payments where all of the necessary conditions provided by the relevant double tax treaty have been satisfied. This result is reached through the legislative technique where constructive dividends are incorporated into the legislative framework of Ukraine through the inclusion of such types of dividends into the 'ordinary' dividends definition. Still, the Ukrainian tax legislation does not elaborate on the issue of constructive capital injections and constructive interest. While the constructive capital injections are not expected to cause some debates with respect to the nature of the payment as well as its tax treatment, the constructive interest issue seems to be more ambiguous. Given that constructive interest is not mentioned in the legislation explicitly, it is hardly expected that the Ukrainian courts will accept the substantiations of the tax authorities as to the existence of constructive interest.

The analysis of some EU and non-EU jurisdictions leads to the conclusion that the national legislations mainly refer in the context of secondary adjustments to constructive dividends and capital injections leaving aside constructive interest. This might be due to the practical implications of

⁶⁰ European Commission, EU Joint Transfer Pricing Forum: Member States' Responses to Questionnaire on Secondary Adjustments (Meeting of 26 October 2011), (Directorate-General: Taxation and Customs Union, 2011), pp. 24-25

⁶¹ Helminen (2010), 239

⁶² Tax Code of Ukraine, Article 14.1.49

acknowledging secondary loan transactions and identifying the ways of withholding tax application to the issue. On a separate note, some countries provide for special provisions allowing to disregard secondary transactions and, consequently, not to initiate any secondary transfer pricing adjustments where it can be argued by a taxpayer that there was no intent in avoiding withholding tax in the course of relevant transaction. Some other countries (such as the US) are confirming the non-application of the secondary adjustments conditional also to actual repatriation of cash advantage. However, the countries are trying to prevent the use of loopholes (such as those in the Netherlands) so to limit the possibility to leave aside transfer pricing adjustments effectively resulting in the taxpayers' base erosion.

4.2. Application of the Parent-Subsidiary Directive to the constructive dividends in the framework of the EU law

The PSD is clear in a way of requiring the parent-subsidiary (i.e., shareholder) relationship for the PSD benefits to apply. Therefore, the PSD cannot be applicable to the situations of constructive payments between sister companies (i.e., to the sequence of constructive payments starting with deemed distribution of dividends and followed by the deemed capital injection). However, the conclusions with respect to the constructive dividends paid from the subsidiaries to their parent companies should be quite to the opposite where all of the PSD requirements are satisfied. The reason for such broad interpretation of the PSD is that it operates such term as 'distribution of profits', which as opposed to the term 'dividends', should give more leeway in terms of its application.

The EU Joint Transfer Pricing Forum conducted the latest survey (dated 2012) amongst the EU countries that applied at the time the secondary transfer pricing adjustments as to the applicability of the PSD to the constructive dividends. The results showed that the majority of countries (i.e., 7 at that time) supported the applicability of the PSD to the constructive dividends, while such countries as France and Bulgaria considered constructive dividends to fall out of the PSD scope.⁶³ Considering that the PSD should be viewed as part of the domestic tax law (i.e., through the means of its implementation into the domestic tax law), the interpretation issues and different tax treatment of profit distributions are basically the conflicts between the domestic laws of the EU Member States. However, this should not raise a question of the domestic tax law compatibility with the PSD provisions themselves where the domestic tax law provides for more broad and extended scope of the PSD.⁶⁴ The applicability of the PSD from the source state perspective may play a major role in the subsequent tax treatment of the parent company residence state. As mentioned by J. Bungaard, 'to some extent the state of residence should respect the source state classification'.⁶⁵

The PSD itself states that 'the objective of this Directive is to exempt dividends and other profit distributions paid by subsidiary companies to their

⁶³ EU Joint Transfer Pricing Forum, 4

⁶⁴ Helminen (2010), 48

⁶⁵ Bungaard, 265

parent companies...'⁶⁶ The PSD does not provide for the exhaustive definition of dividends nor 'other profit distributions'. The possible solutions to that may be looked up at the legislative history. In particular, some insights may be found in the IRD draft 1998, where it was stated that 'interest that has been re-characterized as a distribution of profits shall accordingly be subject instead to the provisions of Council Directive 90/435/EEC [the one effective before the PSD], where it is paid between companies to which the present Directive applies'.⁶⁷ Consequently, it was expected that the excess amount of interest/royalties (i.e., the one above arm's length level of price) would fall within the ambit of the PSD.⁶⁸ However, no explicit provisions on this were included in the both directives: the PSD and the IRD. Still, the issue itself has not disappeared. For example, constructive dividends positioning within the meaning of the PSD was dealt in *Lankhorst-Hohorst* case.⁶⁹ Advocate General Mischo concluded that the PSD should be interpreted in a broad way so to cover not only the overt distribution of profits but also covert distribution of profits.⁷⁰ This AG's statement was not rejected by the CJEU in *Lankhorst-Hohorst*. In other words, the wording of the PSD in part of the 'other profit distributions' should be interpreted broadly. This is also supported by the EU Commission Report of 2009, where it was reiterated that 'any amount reclassified as a profit distribution should be granted the benefits of the Parent-Subsidiary Directive'.⁷¹ Importantly, where the source state accords certain interpretation to the payment in question (e.g., constructive dividends) and apply the PSD, it may influence the tax treatment of this payment from the parent company state of residence as well. As reported by J. Bungaard, one of the PSD previous version contained a provision requiring the residence state to accord the PSD benefits to the payments acknowledged by the source state as the distribution of dividends.⁷² Evidently, such position may be contradictory given that it may lead to the decrease of the parent company residence state tax revenue.⁷³ The cornerstone issue, however, is that it comes down to the national legislation to allow or disallow the application of the PSD to the non-arm's length distributions (i.e., in terms of qualifying such payments as 'distribution of profits') and to the requalification of the part of the initial transaction into the secondary transaction resulting in constructive payments.

⁶⁶ Council Directive (EU) 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (2011) OJ L 345 as amended, recital 3

⁶⁷ Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (1998) COM 67 final (**1998 IRD Draft**), Article 4

⁶⁸ Explanatory Memorandum commentary on Article 4 of the 1998 IRD Draft, part 1, note 5

⁶⁹ CJEU, *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt*, C-324/00, EU:C: 2002:749 (12 Dec. 2002)

⁷⁰ Opinion of AG in *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* (C-324/00), EU:C:2002:545 (26 Sep. 2002), para 100-120

⁷¹ Secretary-General of the European Commission, Report from the Commission to the Council in accordance with Article 8 of Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, (Council of the European Union, 2009), para 3.3.8

⁷² J. Bungaard, 263

⁷³ M. Helminen (2010), 267

For example, some unique approach to the characterization of constructive dividends was proposed by the Federal Fiscal Court of Austria. In the case at question the loss-making subsidiary granted a grandparent the loan with interest rate that was above arm's length level.⁷⁴ The Austrian tax authorities went on to state that such distribution (i.e., the portion that is above arm's length level) should be recognised as the distribution of constructive dividends. The Federal Fiscal Court of Austria rejected such position of the tax authorities since the distribution of profits entails the situation where company is capable of being in position of surplus but not in the loss-making position. However, there is a concurrent judgment of the higher court – Supreme Administrative Court of Austria. In this decision the court stated that the availability of profit is not necessary for the tax authorities to recognize the hidden distribution of profits (i.e., to basically recognise the constructive dividends distribution).⁷⁵

Another issue to consider is that states may seek to limit the application of the PSD artificially by applying thin capitalisation rules to the interest excess over the arm's length level of prices.⁷⁶ Indeed, if this is the case, the excess amount of interest simply becomes non-deductible for certain length of time⁷⁷ in the hands of the paying company without possibility to apply the benefits of the PSD (if all of the other conditions prescribed by the PSD are fulfilled). This may clearly put to the detriment those taxpayers that decided to distribute their profits through such payments as interest (which can happen, for example, due to some specifics of the paying company jurisdiction of incorporation rules regarding the distribution of profits) as compared to those companies that could rely on the ordinary distribution of profits. However, J. F. Avery Jones admits that this was actually intended by the Member States so to limit the application of the PSD where it is not evident that such payments should benefit from the PSD provisions.⁷⁸

This can also be looked from the perspective of the prevention of abuse of rights principle. One may state that using the PSD benefits to the constructive distribution of dividends, which is of itself stems from incorrect price levels (i.e., not in conformity with arm's level of prices) could be seen as the exploiting of the PSD not in a way it was intended to be. For example, the CJEU in Danish cases on the application of the PSD noted that 'to permit the setting up of financial arrangements whose sole aim is to benefit from the tax advantages resulting from the application of Directive 90/435 would not be consistent with such objectives and, on the contrary, would undermine the effective functioning of the internal market by distorting the conditions of competition'.⁷⁹ This was also the opinion of the AG in the case stating that

⁷⁴ Federal Tax Court of Austria, RV/7105237/2015, (28 Dec. 2018)

⁷⁵ Supreme Administrative Court of Austria, Ra 2018/15/0037, (22 Nov. 2018)

⁷⁶ S. M. Fernandes et. al, *A Comprehensive Analysis of Proposals To Amend the Interest and Royalties Directive – Part 2*, 11, *European Taxation* (2011), pp. 445-464, at 459

⁷⁷ Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (2016) OJ L 193 as amended, para. 6 of Article 4

⁷⁸ Avery Jones (2009), pp. 444-450

⁷⁹ CJEU, *Joined cases T Danmark, Y Denmark Aps v. Skatteministeriet*, C-116/16 and C-117/16, EU:C:2019:135 (26 Feb. 2019), para. 79

‘[it] would also be the case even if the transactions at issue do not exclusively pursue such an aim, as the Court has held that the principle that abusive practices are prohibited applies, in tax matters, where the accrual of a tax advantage constitutes the essential aim of the transactions at issue’.⁸⁰ Still, the abuse of rights analysis in the Danish cases is built mainly upon the doctrine established by the CJEU in its decision in *Cadbury Schweppes* case.⁸¹ This means that the examination of the application of the PSD to the situations where there is an excess of interest over the level of arm’s length should generally consider the objective and subjective elements. While the subjective element may be different if the assessment is conducted in the context of the constructive dividend since the intention of the taxpayer may be to overcome the conditions imposed on the relevant transactions, the issue of objective element is quite different. Indeed, where all of the formal requirements with respect to the PSD are satisfied (i.e., the constructive dividend is paid to the company satisfying the requirements of qualifying company) the objective side of the analysis should pertain to the fact that the transaction of itself is not ‘wholly artificial’.

In the majority of cases the initial transaction between parent and subsidiary would not bear any evidence outlining clearly some intent of the taxpayer to hinder the Community law and also to circumvent the purpose of the PSD by performing a transaction at a non-arm’s length level of prices. The issue, however, is whether there might be a possibility where the hidden distribution itself is done for the purpose to achieve benefits under the PSD. This argument seems not to be tested successfully given that for this to happen, a taxpayer has to rely on the fact that the initial transactions (the one with non-arm’s length level of prices) will be requalified by the tax authorities of its state as a deemed distribution of profits. From that perspective, it seems like for the taxpayer at question this would be rather a negative result than the positive one it expected to get from the initial transaction as, for example, such requalification will limit the tax base deduction etc. Therefore, it would be far fetching to state that taxpayer implementing a transaction at a non-arm’s length level of prices may expect and count on the requalification (especially given that not all Member States accept and use the secondary transfer pricing adjustments in the same vein).

If the source state decides that the PSD is not applicable in case of the constructive dividends and imposes withholding tax on the constructive distribution of profits, then the situation of juridical double taxation may occur. For example, the parent company receiving constructive distribution of profits pays withholding tax in the source jurisdiction and, following the non-recognition of such secondary transaction in its home jurisdiction, receives no right to credit such withholding tax against the corporate profit tax at home jurisdiction. If that is the case, the recourse to primary legislation from more general and fundamental freedoms perspectives should be given. The CJEU is quite reluctant to treat juridical double taxation as the

⁸⁰ Opinion of AG in Joined cases T Danmark, Y Denmark Aps v. Skatteministeriet, C-116/16 and C-117/16, EU:C:2018:144 (1 Mar. 2018), para. 51

⁸¹ CJEU, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, C-196/04, EU:C:2006:544 (12 Sept. 2006)

infringement of the fundamental freedoms. For example, in *Haribo and Salinen* case the CJEU basically stated that the main consideration in cases of parent company residence jurisdiction taxation of dividends received is whether there is an effective negative difference in the taxation of domestically and foreign dividends.⁸² Moreover, the CJEU stated that ‘the Court has already ruled that the disadvantages which may arise from the parallel exercise of powers of taxation by different Member States, in so far as such an exercise is not discriminatory, do not constitute restrictions prohibited by the Treaty’.⁸³ In essence, the CJEU distanced itself from the issue of juridical double taxation by referring to *Kerckhaert-Morres* case and reiterating that ‘Article 63 cannot be interpreted as obliging a Member State to provide, in its tax legislation, that a credit is to be granted for the withholding tax levied on dividends in another Member State in order to prevent the juridical double taxation – resulting from the parallel exercise by the Member States concerned of their respective powers of taxation – of the dividends received by a company established in the first Member State’.⁸⁴ Therefore, in case of constructive distribution of profits the CJEU is likely to have the same position with regard to the double taxation emerging on such income in the hands of the parent company, since the legal nature of the problem is alike with the problem in *Haribo and Salinen* case and concerns the parallel exercising by different states of their right to tax. No positive answer may be found for the taxpayer by the recourse to double tax treaties as well through the means of the CJEU, as the CJEU stated in *Damseaux* case that ‘It follows from the case-law that the Court does not have jurisdiction, under Article 234 EC, to rule on a possible infringement, by a contracting Member State, of provisions of bilateral conventions entered into by the Member States designed to eliminate or to mitigate the negative effects of the coexistence of national tax regimes’.⁸⁵ Hence, even though the CJEU practice with respect to juridical double taxation emerging in the hands of the parent company is quite controversial⁸⁶ and, in principle, deviates from the CJEU practice on the economic double taxation, it can be concluded that the taxpayers should not rely on the CJEU interpretation of the Community law (as of May 2021) to eliminate the double taxation arising from the non-recognition of secondary transfer pricing adjustments.

⁸² CJEU, Joined cases *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, (10 Feb. 2011)

⁸³ CJEU, Joined cases *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, (10 Feb. 2011), para. 149

⁸⁴ *Ibid.*, para. 171

⁸⁵ CJEU, *Jacques Damseaux v Belgian State*, C-128/08, EU:C:2009:471, (16 Jul. 2009), para. 22

⁸⁶ H. Vermeulen, *Cross-Border Dividend Taxation in European Tax Law*, vol. 1, Student edition, (P. J. Wattel et al. eds.), (Wolters Kluwer, 2018), pp. 420-421

5. Dispute resolution and its prevention in view of secondary transfer pricing adjustments

5.1. Advance pricing agreements as a mean of disputes prevention in the area of secondary transfer pricing adjustments

APAs have been a widespread instrument used in different jurisdictions so to align the position of the taxpayers with regard to transfer pricing issues. In particular, the OECD Transfer Pricing Guidelines define APA as ‘an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time’.⁸⁷ In principle, the APAs may cover every kind of issue that might arise in the context of transfer pricing rules application, however, the APAs may also relate only to the portion of the controlled transactions (i.e., certain transaction with particular associated enterprise).⁸⁸

The very wording of the OECD Transfer Pricing Guidelines suggests that the APAs may be used as the instrument of limiting the disputes arising with regard to the secondary transfer pricing adjustments. In fact, such APAs may prevent the situation where any transfer pricing adjustments would be needed by simply establishing the clear rules from the very beginning. However, the fact that the APA can be requested prior to filing a relevant tax return but can have a roll-back effect on transaction potentially giving raise to secondary transfer pricing adjustments,⁸⁹ may involve some practical problems. These problems lay in the different approaches of states to the issue of secondary transfer pricing adjustments and non-existence of a uniform approach. When it comes to the secondary transfer pricing adjustment it should be stated that consistency is important. Otherwise, there might be a possibility where a taxpayer will request two separate APAs leading to different results on what is in essence the same subject matter (i.e., the issue of primary transfer pricing adjustment and consequent secondary transfer pricing adjustment). Thus, it is important that the secondary transfer pricing adjustment is applied notwithstanding whether there was an APA on giving raise to primary transfer pricing adjustments so to prevent the behavioural changes of taxpayers.⁹⁰ The border line, however, is that each APA issued in the context of secondary transfer pricing adjustments should contain the same rationale with respect to secondary transactions. Even though this might hinder the aim of the APAs, which is to accord more individual approach to each particular case, the stability with respect to secondary transfer pricing adjustments is more desirable given the sensitivity of the issue.

⁸⁷ OECD TP Guidelines, para. 4.134; Monsenego (2015), 147

⁸⁸ OECD TP Guidelines, para. 4.147

⁸⁹ HMRC, INTM422060 - Transfer pricing: methodologies: Advance Pricing Agreements: term of agreement, accessed 26 May 2021, <https://www.gov.uk/hmrc-internal-manuals/international-manual/intm422060>

⁹⁰ HMRC Guide, 12

Apparently the only possible type of the APAs that might satisfy the criterion of reciprocity with regard to the secondary transfer pricing adjustment should be bilateral or multilateral APAs involving the states where associated enterprises are tax residents. In fact, only bilateral or multilateral APAs have the capacity and potential of eliminating double economic and juridical taxation as well as ensuring the consistency in interpretation of certain situations.⁹¹ On a separate point, the conclusion of bilateral and multilateral APAs would also contribute to ensuring the non-circumvention of the position on the arm's length level of prices in different jurisdictions⁹² and, what is important in the context of secondary transfer pricing adjustments, would provide for accuracy in terms of the amount of payment that is considered to be underlying the secondary transaction.

The majority of states do have rules on the multilateral (at least bilateral) APA process. For example, the Irish tax authorities are of the position that bilateral APA process is likely to be initiated where the transaction at hand does not provide for common and ordinary issues⁹³ (which might be the case with the secondary transfer pricing adjustments). Nevertheless, one cannot say that concluding APA is a common practice when it comes to secondary transactions and secondary transfer pricing adjustments.

5.2. Mutual agreement procedure and secondary transfer pricing adjustments

Article 25 of the OECD MC provides for the possibility of the taxpayer to submit its case to the competent authorities of the contracting states where 'the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention'.⁹⁴ The OECD MC, in essence, encourages the competent authorities of the relevant state to enter into the negotiations with a view of fulfilling the aim of the double tax convention, which is elimination of double taxation.⁹⁵

Importantly, Article 25 of the OECD MC authorizes the competent authorities to 'resolve by mutual agreement difficulties or doubts concerning the interpretation or application of the Convention, both in individual cases (e.g. with respect to a single taxpayer's case) and more generally... or to complete or clarify the definition of a defined term, where such an agreement would resolve difficulties or doubts arising as to the interpretation or application of the Convention'.⁹⁶ However, such broad approach as to the understanding of the powers of the competent authorities to interpret the provisions of the double tax treaties is not supported by all states. For example, India is of the opinion that the competent authorities are not entitled to decide on the interpretation of the treaty terms that are not clearly defined in the treaty itself

⁹¹ OECD TP Guidelines, para. 4.156.

⁹² *Ibid.*, para. 4.173

⁹³ Irish Tax and Customs, Bilateral Advance Pricing Agreement Guidelines, (last reviewed 2020), 11-12, accessed 26 May 2021, <https://www.revenue.ie/en/tax-professionals/tadm/income-tax-capital-gains-tax-corporation-tax/part-35/35-02-07.pdf>

⁹⁴ OECD MC 2017, para. 1 of Article 25

⁹⁵ OECD MC 2017, Preamble

⁹⁶ *Ibid.*, para. 6.1 of Commentaries on Article 25

but, in contrast, such terms should be interpreted in accordance with the national laws of the states that concluded the double tax treaty in question.⁹⁷ This issue stems from the cornerstone problem of whether it is possible to accord national meaning to the terms in the double tax treaties or to refer to more mutual interpretation that can be found by applying the autonomous interpretation. Indeed, transfer pricing is one of the most common issues when it comes to the MAP.⁹⁸ This is especially evident with the corresponding transfer pricing adjustments that come as the result of primary transfer pricing adjustment and such MAPs predominantly deal with the issue of economical double taxation. In the context of MAP and secondary transfer pricing adjustments one would firstly think of the interpretation of the terms ‘dividend’ and ‘interest’ in the sense of articles 10 and 11⁹⁹ of the OECD MC-based double tax treaties. And, indeed, these two categories: correlative transfer pricing adjustments and interpretation of the double tax treaties form the biggest part of the MAP requests. However, the issue of secondary transfer pricing adjustment and the consequent interpretation approaches are not the widespread questions in the context of MAP. Therefore, the states are still yet to develop the approach for this type of requests. Still, the good sign is that issue of secondary transfer pricing adjustments follows from both most popular categories of MAP requests and, potentially, should not pose any problems for the tax authorities to combine these two so to effectively decide on the qualification of secondary transactions and issue of secondary transfer pricing adjustments as a whole. Also, there are countries (such as the US) that, in principle, do not oppose to the repatriation of excessive funds emerged as the result of the non-conformity with arm’s length principle. For example, in Canada, where it is possible to repatriate the excess over arm’s length level of prices prior to transfer pricing adjustment, it is necessary to agree the terms of such repatriation in the multilateral (bilateral) MAP.¹⁰⁰ Moreover, the Canadian tax authorities implicitly indicate the issue of constructive dividends stating that such multilateral MAP (where the issue of repatriation is decided) should contribute to avoiding withholding tax on the constructive dividend. The same position is true for the OECD. The OECD states that MAP is very desirable in view of repatriation of funds given that ‘most OECD member countries at this time have not had much experience with the use of repatriation, it is recommended that agreements between taxpayers and tax administrations for a repatriation to take place be discussed in the mutual agreement proceeding where it has been initiated for the related primary adjustment’.¹⁰¹

Importantly, the MAP is also one of the possible means of dispute resolution under the DRD. The DRD arose as a more balanced and broader tool for resolution of tax disputes as compared to the Arbitration Convention. In

⁹⁷ *Ibid.*, note 5 of Position on Article 25 of the non-OECD members

⁹⁸ R. Biçer The Effectiveness of Mutual Agreement Procedures as a Means for Settling International Transfer Pricing Disputes, 4, (International Transfer Pricing Journal, 2014), pp. 76-84, at 77

⁹⁹ OECD MC 2017, para. 9 of Commentaries on Article 25

¹⁰⁰ Canada Revenue Agency, Guidance on Competent Authority Assistance Under Canada’s Tax Conventions, (2005), paras. 56-58, accessed 26 May 2021, <https://www.canada.ca/content/dam/cra-arc/formspubs/pub/ic71-17r5/ic71-17r5-e.pdf>

¹⁰¹ OECD TP Guidelines, para. 4.78

particular, the subject scope of the DRD includes ‘those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital’.¹⁰² Moreover, even in its 2015 Action Plan the EU Commission considered that actions aimed at broadening the subject scope of the Arbitration Convention are the measures that might contribute to reduction of double taxation.¹⁰³ This is something that clearly distinguishes the DRD from the Arbitration Convention, since the latter provides only for transfer pricing disputes to be covered.¹⁰⁴ This might be very limited in view of the challenges posed by the secondary transfer pricing adjustment. The reason for this is that secondary transfer pricing adjustment of itself might not be the core issue in such disputes, but rather the results of such secondary transfer pricing adjustments (i.e., application of the international tax instruments to the payments underlying the secondary transactions). Indeed, what was stated by the EU Joint Transfer Pricing Forum is that ‘most Member States which apply secondary adjustments stated that they do not consider double taxation issues resulting from secondary adjustments as being covered by the Arbitration Convention (AC), only a few consider them covered by the AC Convention, and some other MS indicated that the applicability of the AC to secondary adjustments remains an open question for them’.¹⁰⁵ Considering that the main issue in view of the secondary transfer pricing adjustment is the potential juridical double taxation, the application of the DRD becomes justified as it provides the possibility to debate on the issues of law. This, however, comes with a certain disadvantage that due to the wide scope of the DRD the Member States may choose to rely on the domestic-originated rules without referring to the provisions of the double tax treaties (for example, the possible beneficial withholding tax treatment on the constructive dividends or interest may be denied based on the domestic anti-abuse rules as opposed to the provisions of the relevant double tax treaties).¹⁰⁶ Effectively this will result in avoiding (escaping) the subject scope of the DRD and, at the same time, would not be something that can be invoked under the Arbitration Convention. Importantly, the DRD encourages MAP even when one of the competent authorities decides that the request for the proceedings should not be opened by granting a right to taxpayer to ask for formation of an advisory commission so to try the admissibility of the case.¹⁰⁷

¹⁰² Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union (2017) OJ L 265 as amended (**Dispute Resolution Directive**), Article 1

¹⁰³ H. M. Pit, Commission Initiative To Improve Dispute Settlement Mechanisms within the European Union – The EU Arbitration Convention (90/436), 11, (European Taxation, 2016) pp. 507-523 (**H. M. Pit**), 509

¹⁰⁴ Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 90/463/EEC, (1990), L 225/10 as amended (**Arbitration Convention**), Article 4

¹⁰⁵ EU Joint Transfer Pricing Forum, para. 22

¹⁰⁶ S. Govind, J. Monsenego, Chapter 11: Multilateralism in Dispute Resolution: Some Thoughts on the OECD Multilateral Instrument and the EU Dispute Resolution Directive in International and EU Tax Multilateralism: Challenges Raised by the MLI (A. Dourado ed., IBFD), (Books IBFD, 2020) (**Govind, Monsenego**), para. 11.3.5.

¹⁰⁷ Dispute Resolution Directive, Article 6

5.3. Arbitration and other alternative dispute resolution tools as a possible solution

Arbitration in the sphere of international tax cannot be regarded as a typical arbitration given that it tends to combine the advantages of the classic arbitration (i.e., professionalism of the arbitrators etc.) by limiting the effect of the disadvantages (i.e., discretion by the tribunal and other autonomous rights of the tribunal).¹⁰⁸ Moreover, arbitration serves more as an extension of the MAP process that was unsuccessful.¹⁰⁹

In case the competent authorities of the states involved cannot reach a consensus during the MAP process and if taxpayer wishes so, the arbitration should be initiated.¹¹⁰ The arbitration provision is also envisaged by the MLI, where even though such provision is not the part of the minimum standard, it still provides for some variation with respect to the arbitration process.¹¹¹ Arbitration is not established as the only instrument of deciding issue of taxation not in accordance with double tax treaties and some other alternatives may be established on a case-by-case basis (e.g., mediation).¹¹² Worth mentioning that the MLI provides for the possibility of ‘baseball arbitration’. In essence, in ‘baseball arbitration’ the arbitrators are not expected to come up with their own decision but rather lean towards one of the decisions proposed by the competent authorities of both states (i.e., choosing the best offer).¹¹³ This particular type of arbitration is more suitable for the pure transfer pricing cases (even with risk that the price established would not be at arm’s length) than for more complicated questions of law.¹¹⁴ For the cases where issue of law is at stake the so-called ‘reasoned opinion’ type of arbitration would be more balanced solution as it, indeed, involves more peculiar assessment of the legal issue and providing clear decision (which might satisfy taxpayer or the tax authorities). This is particularly important in the context of the tax issues that might arise from the secondary transfer pricing adjustments given that in their nature they are connected with the issue of qualification of the payments underlying the secondary transactions and, as a result, possible existence of double taxation.

The Arbitration Convention also provides for the arbitration as the necessary tool to follow the MAP (where such MAP did not reach a constructive outcome). The Arbitration Convention of itself is a contradictory tool. Moreover, H. M. Pit is of the opinion that the Arbitration Convention should not be applicable with respect to the issues of secondary transfer pricing

¹⁰⁸ D. R. Muñoz, Chapter 7: A Game of Snakes and Ladders – Tax Arbitration in an International and EU Setting in *Litigating EU Tax Law in International, National and Non-EU National Courts* (D. Sarmiento, D. Jiménez-Valladolid de L’Hotellerie Fallois eds., IBFD), (Books IBFD, 2014) (Muñoz), chapter 7.2.2

¹⁰⁹ OECD MC 2017, para. 64 of Commentaries on Article 25

¹¹⁰ OECD MC 2017, para. 5 of Article 25

¹¹¹ E. Snodgrass, *Tax Controversies and Dispute Resolution under Tax Treaties: Insights from the Arbitration Sphere*, 19 (5), (Derivatives & Financial Instruments IBFD, 2017) (Snodgrass), chapter 3.1

¹¹² OECD Commentaries on Article 25, para. 86

¹¹³ Muñoz, chapter 7.5.1

¹¹⁴ Snodgrass, chapter 11.2.4

adjustments.¹¹⁵ There is no agreement in the literature as to whether the Arbitration Convention can be considered as part of the EU law.¹¹⁶ The drawback of such conclusion is that the taxpayers are not getting the guaranties pursuant to the EU law under the Arbitration Convention. The application of the Arbitration Convention to the transfer pricing disputes has proven its little efficiency throughout the use.¹¹⁷ As to the statistics available of May 2021, only 2 cases were pending at arbitration stage pursuant to the Arbitration Convention.¹¹⁸ However, such numbers can be anticipated considering *Electrolux* case (regarding the transfer pricing adjustment made in France), where the costs of the arbitration itself (not to mention the time spent on the arbitration) were identical to the disputed amount of transfer pricing adjustment at question.¹¹⁹

There is also a case of the CJEU deciding in the context of tax arbitration on a case stemming from the Austria-Germany double tax treaty (exercising the reservation provided in the relevant treaty).¹²⁰ Given that the CJEU has already dealt with the issues of tax treatment of secondary transactions and underlying payments, this can be seen as a positive practice if the court tends to stick to its previous practice on the matter (even though there are no formal obligations of the CJEU to follow its previous practice).

Considering the above, the DRD should be seen as a more viable solution when it comes to deciding on the secondary transfer pricing adjustments (as well as related to them) issues. Following the DRD, there is a possibility to establish an advisory committee or to set up an alternative dispute resolution body to decide on the dispute where no decision was reached in terms of the MAP.¹²¹ Hence, the DRD does not provide for the classic ‘arbitration’ as referred to in the Arbitration Convention and the OECD MC. However, the mechanisms are quite resemblant. The DRD is focused on the ‘reasoned opinion’ in terms of the ‘arbitration’ approaches and, therefore, is more suitable to the disputes arising from the secondary transfer pricing adjustments issues.¹²² Also, the DRD is focusing on preserving the dialogue between the tax authorities and provides for the representatives of the competent authorities to be part of the advisory committee. This should

¹¹⁵ H. M. Pit, *The EU Arbitration Convention: an evaluating assessment of the governance and functioning of the EU Arbitration Convention*, (Rijksuniversiteit Groningen, 2017), 231

¹¹⁶ M. van Herksen, *How the Arbitration Convention Lost Its Lustre – the Threat of Triangular Cases*, 36 (8/9), (Intertax, 2008), pp. 332-345, at 333; L. Hinnekens, *European Arbitration Convention: Thoughts on Its Principles, Procedures and First Experience*, 3, (EC Tax Rev., 2010), 112 and 115

¹¹⁷ H. M. Pit, 512

¹¹⁸ European Commission, *EU Joint Transfer Pricing Forum: Overview of numbers submitted for Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention (AC) at the End of 2018*, (Directorate-General: Taxation and Customs Union, 2019)

¹¹⁹ M. J. Tropin, *OECD Circulates Draft Arbitration Proposal Mirroring EU Convention*, Hearing March 13 (20), (Tax Management Transfer Pricing Report, 2006), 836

¹²⁰ S. Buriak, A. Miladinovic and J-P. Van West, *Conference Report: Tax Treaty Arbitration*, 73 (9), (Bulletin of International Taxation 2019), chapter 5

¹²¹ Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union (2017) OJ L 265 as amended, Articles 8 and 10

¹²² Govind, Monsenego, para. 11.3.4.

contribute to aligning of the different approaches to interpretation of legal terms for tax purposes in view of secondary transfer pricing adjustments.

When it comes to the binding force of the arbitral decisions (or, in case with alternative dispute resolution mechanisms – opinions), the OECD MC, the MLI (as the logical continuation of the OECD MC) as well as the DRD offer a taxpayer a possibility to appeal against decision in a given time period.¹²³ Obviously, this is a much-needed leeway that is left with the taxpayer in question so to rely on the domestic remedies where possible. This, however, is not an option under the Arbitration Convention and the only possibility not to adhere to the opinion is to have another decision adopted by the competent authorities.¹²⁴ Considering the complexity of such cases, it is safe to have the possibility of a taxpayer not to accept the opinion adopted and to refer to another means of dispute resolution.

6. Conclusions

Secondary transfer pricing adjustment is a complex phenomenon that is connected not only with the transfer pricing regulations themselves but also causes a lot of debates with regard to the related interpretation issues. Secondary transfer pricing adjustments always give raise to the secondary transactions, which serve as a quasi-contractual way of substantiation of the underlying payments. Such underlying payments are treated as the constructive income of the entity to be repaid with the difference between the arm's and non-arm's length level of prices. However, the quasi-contractual nature of the secondary transactions causes different approaches to the interpretation by the states. Considering that such situations are predominantly connected with the international element, it may lead to the effective double taxation, which should be dealt directly within the existing international tax instruments.

The majority of the states (including both the EU and non-EU states) recognises that the constructive payments should be treated as the constructive dividends and the constructive capital injections for the tax purposes. The reason for this is that these options can be seen as straightforward and, importantly, can serve as the building blocks for the secondary transactions between the sister companies via applications of the conjunction of the two. Also, both dividends and capital injections have a high probability of being exempt from the withholding tax and, henceforth, would not practically create the possibility of double taxation. However, this approach may compromise such ideas as the beneficial owner concept given that the fate of the cash flow is decided not by the beneficial owner itself (i.e., the parent company) but by the laws at question (or the legal practice). This becomes even more disputable when the ownership structure is more complicated and there are multiple owners of the sister companies.

International instruments such as the OECD MC and the PSD do not explicitly provide for the possibility to accord their benefits (i.e., reduced

¹²³ Snodgrass, chapter 4.1; Govind, Monsenego, para. 11.3.5

¹²⁴ Arbitration Convention, para. 1 of Article 12

withholding tax rates and/or exemptions from it) to the constructive payments. Hence, the interpretation is needed. In particular, some conclusions may be deduced from the legislative history. For example, it was intended that the PSD would cover any excess over the arm's length level of interest dealt within the IRD. However, this never crystallized in the final versions of both documents. Indeed, what follows from the practice of the CJEU is that the covert distribution of profits (which can be seen as the constructive dividend distribution) should be, in principle, covered by the provisions of the PSD. The discussion becomes broader if the fundamental freedoms are taken into account. The problem is that the CJEU is reluctant to recognise the issue of juridical double taxation (which is the most common issue with the constructive payments) to be the one finding recourse in the Community law. Hence, the unwillingness of the states to accord the benefits of the PSD to the constructive dividends may, in principle, lead to the double taxation.

When it comes to the OECD MC, it seems that the systematic approach alludes to the possibility to use the relevant articles (i.e., Article 10 and Article 11) to the constructive dividends and interest. However, even in case that such articles are not applicable, there is still a chance of using Article 21 to the constructive payments given that the aim of the OECD MC is to avoid double taxation. However, considering that in the application of the OECD MC a lot of issues depend to the discretion of the particular states with different legal systems, the different approaches to the interpretation are anticipated.

Naturally, the interpretation issues stemming from the secondary transfer pricing adjustments involve many possibilities for the potential disputes. The best way of avoiding such disputes is to conduct the repatriation of profits representing the difference between arm's and non-arm's length level of prices. This is encouraged in such jurisdiction as the US and Canada. Overall, the MAP may be seen as one of the best solutions for reconciling the positions with regard to qualification issues of the constructive payments. Crucial role may also be reserved for the APAs (in particular, multilateral APAs) that may help even to prevent the very possibility of the secondary transfer pricing adjustment to arise. In case the dispute cannot be settled between the competent authorities of the states, there might be a need in the arbitration or other tools of dispute resolution. Considering that the secondary transfer pricing adjustments issues concern the qualification of the payments underlying the secondary transactions, the dispute settlement should really concentrate on this rather than on elaboration of the transfer pricing rules. From this perspective, it can be concluded that the OECD MC and the DRD are the most appropriate platforms to decide on the said issues.

The focus should be made on a more inclusive treatment of the constructive payments in the framework of the international tax instruments. This would exclude any possible ambiguities with respect to the constructive payments coverage by such instruments. Such approach would also contribute to the unification of the national approaches given that there would be a common denominator that is less dependent on the national peculiarities of the particular jurisdictions. Consequently, this should contribute to the avoidance of double taxation.

Bibliography

Primary Legislation

1. Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C 326 as amended

Secondary Legislation

2. Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union (2017) OJ L 265 as amended
3. Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (2016) OJ L 193 as amended
4. Council Directive (EU) 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (2011) OJ L 345 as amended

Other Legislation

5. Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 90/463/EEC, (1990), L 225/10 as amended
6. Tax Code of Ukraine

Official Publications

7. Irish Tax and Customs, Bilateral Advance Pricing Agreement Guidelines, (last reviewed 2020), accessed 26 May 2021, <https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-35/35-02-07.pdf>
8. European Commission, EU Joint Transfer Pricing Forum: Overview of numbers submitted for Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention (AC) at the End of 2018, (Directorate-General: Taxation and Customs Union, 2019)
9. Directorate-General for Tax and Customs Policy and Legislation, International Tax Policy and Consumer Taxes Directorate, Decree no. 2018/6865 (22 Apr. 2018) on International Tax Law. Transfer prices, application of the arm's length principle and the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines), accessed 26 May 2021, <https://www.government.nl/documents/decrees/2014/03/25/ifz2013-184m-international-tax-law-transfer-pricing-method-application-of-the-arm-s-length-principle-and-the-transfer-pricing-g>
10. OECD, Background Brief - Inclusive Framework on BEPS, (2017), 7, accessed 26 May 2021,

<https://www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf>

11. OECD, Model Tax Convention on Income and on Capital: Condensed Version, (OECD Publishing, 2017)
12. OECD, OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, (OECD Publishing, 2017)
13. HMRC, Introduction of Secondary Adjustments into the UK's Domestic Transfer Pricing Legislation, (2016) (hereinafter – “HMRC Guide”), accessed 26 May 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524598/Introduction_secondary_adjustments_into_UKs_domestic_transfer_pricing_legislation.pdf
14. Internal Revenue Service, Revenue Procedure 99-32 Inbound Guidance, (2014) (hereinafter – “IRS Guidance”), accessed 05 May 2021 https://www.irs.gov/pub/int_practice_units/ISI9422_09_08.pdf
15. European Commission, EU Joint Transfer Pricing Forum: Final (Meeting of 25 October 2012), (Directorate-General: Taxation and Customs Union, 2013)
16. European Commission, EU Joint Transfer Pricing Forum: Member States' Responses to Questionnaire on Secondary Adjustments (Meeting of 26 October 2011), (Directorate-General: Taxation and Customs Union, 2011)
17. Secretary-General of the European Commission, Report from the Commission to the Council in accordance with Article 8 of Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, (Council of the European Union, 2009)
18. Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (1998) COM 67 final
19. OECD, Report on Thin Capitalisation, (OECD Publishing 1986)

Books

20. S. Edge et al. eds., The Transfer Pricing Law Review, 4th Edition, (The Law Reviews, 2020)
21. J. Bungaard, Hybrid Financial Instruments in International Tax Law, (Ex Tuto Publishing 2017)
22. S. Douma, Legal Research in International and EU Tax Law, (Wolter Kluwer, 2014)
23. A. Dourado ed., Dispute Resolution: Some Thoughts on the OECD Multilateral Instrument and the EU Dispute Resolution Directive in International and EU Tax Multilateralism: Challenges Raised by the MLI, (Books IBFD, 2020)

24. M. Helminen, *The Dividend Concept in International Tax Law*, (Kluwer, 2010)
25. L. Hinnekens, *European Arbitration Convention: Thoughts on Its Principles, Procedures and First Experience*, (EC Tax Rev., 2010)
26. J. Monsenego, *Introduction to Transfer Pricing*, (Wolters Kluwer, 2015)
27. S. D. Peterson et al., *Secondary Adjustments and Related Aspects of Transfer Pricing Corrections* (Deventer: Kluwer, 1996)
28. K. Vogel, *Klaus Vogel on Double Taxation Conventions 4th edn.*, vol. 1 (Cambridge Tax L. Series, 2010)
29. K. Vogel, J. Marin, *Klaus Vogel on double taxation conventions: a commentary to the OECD-, UN- and US model conventions for the avoidance of double taxation of income and capital with particular reference to German treaty practice*, (Deventer: Kluwer Law, 1991)
30. P. J. Wattel et al. eds, *European Tax Law*, vol. 1, Student edition, (Wolters Kluwer, 2018)
31. K. Zweigert, H. Kotz, *Introduction to Comparative Law* (Clarendon Press, 1995)
32. D. Sarmiento, D. Jiménez-Valladolid de L'Hotellerie Fallois eds., *International and EU Setting in Litigating EU Tax Law in International, National and Non-EU National Courts*, (Books IBFD, 2014)

Articles

33. J. F. Avery Jones et. al, *The Definitions of Dividends and Interest in the OECD Model: Something Lost in Translation?*, 1(1), (British Tax Review, 2009), pp. 406-452
34. R. Biçer *The Effectiveness of Mutual Agreement Procedures as a Means for Settling International Transfer Pricing Disputes*, 4, (International Transfer Pricing Journal, 2014), pp. 76-84
35. S. Buriak, A. Miladinovic and J-P. Van West, *Conference Report: Tax Treaty Arbitration*, 73 (9), (Bulletin of International Taxation 2019)
36. S. M. Fernandes et. al, *A Comprehensive Analysis of Proposals To Amend the Interest and Royalties Directive – Part 2*, 11, European Taxation (2011), pp. 445-464
37. J. J. M. Janssen, M. S. Garibay, *What Should Be the Scope of the Beneficial Owner Concept?*, 48(12), (Intertax, 2020), pp. 1087-1104
38. H. M. Pit, *The EU Arbitration Convention: an evaluating assessment of the governance and functioning of the EU Arbitration Convention*, (Rijksuniversiteit Groningen, 2017)
39. H. M. Pit, *Commission Initiative To Improve Dispute Settlement Mechanisms within the European Union – The EU Arbitration Convention (90/436)*, 11, (European Taxation, 2016) pp. 507-523

40. E. Snodgrass, Tax Controversies and Dispute Resolution under Tax Treaties: Insights from the Arbitration Sphere, 19 (5), (Derivatives & Financial Instruments IBFD, 2017)
41. R. R. Teixeira, Tax Treaty Consequences of Secondary Transfer Pricing Adjustments, 37(8/9), (Intertax, 2009), pp. 449-472
42. M. J. Tropin, OECD Circulates Draft Arbitration Proposal Mirroring EU Convention, Hearing March 13 (20), (Tax Management Transfer Pricing Report, 2006)
43. M. van Herksen, How the Arbitration Convention Lost Its Lustre – the Threat of Triangular Cases, 36 (8/9), (Intertax, 2008), pp. 332-345
44. P. J. Wattel, O. Marres, Characterization of Fictitious Income under OECD-Patterned Tax Treaties, 43(3), (European Taxation, 2003), pp. 66-79
45. N. Webb, Tax Management International Forum Discusses Additional Adjustments To Be Made in the Wake of a Transfer Pricing Adjustment and the Tax Treatment of Supplemental Retirement Plans, 36(2), (Tax Management International Forum, 2007), pp. 77–85

Websites

46. R. Bouwman, J.-C. Ku, I. Lagerweji, The Netherlands initiates public consultation procedure addressing transfer pricing mismatches, accessed 26 May 2021, <https://www.dlapiper.com/en/us/insights/publications/2021/03/netherlands-public-consultation-transfer-pricing-mismatches/>
47. J. M. Hill, Dealing with the Secondary U.S. Tax Consequences of Transfer-Pricing Adjustments, (2013), accessed 26 May 2021, <https://www.thetaxadviser.com/issues/2013/jun/hill-june2013.html>
48. L. Sahin, J. Andriessen, Transfer Pricing in the Netherlands: Overview (2018), accessed 26 May 2021, [https://uk.practicallaw.thomsonreuters.com/w-007-8798?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-007-8798?transitionType=Default&contextData=(sc.Default)&firstPage=true)
49. Dutch government announces limitation to unilateral downward transfer pricing adjustments, accessed 26 May 2021, <https://www.atlas.tax/en/news/item/542-dutch-government-announces-limitation-to-unilateral-downward-transfer-pricing-adjustments>
50. IAS 32 — Financial Instruments: Presentation, accessed 26 May 2021, <https://www.iasplus.com/en/standards/ias/ias32>
51. HMRC, INTM422060 - Transfer pricing: methodologies: Advance Pricing Agreements: term of agreement, accessed 26 May 2021, <https://www.gov.uk/hmrc-internal-manuals/international-manual/intm422060>

Table of Cases

52. CJEU, Joined cases T Danmark, Y Denmark Aps v. Skatteministeriet, C-116/16 and C-117/16, EU:C:2019:135 (26 Feb. 2019)
53. Opinion of AG in Joined cases T Danmark, Y Denmark Aps v. Skatteministeriet, C-116/16 and C-117/16, EU:C:2018:144 (1 Mar. 2018)
54. CJEU, Joined cases Haribo Lakritzen Hans Riegel and Österreichische Salinen, C-436/08 and C-437/08, EU:C:2011:61, (10 Feb. 2011)
55. CJEU, Jacques Damseaux v Belgian State, C-128/08, EU:C:2009:471, (16 Jul. 2009)
56. CJEU, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, C-196/04, EU:C:2006:544 (12 Sept. 2006)
57. CJEU, Lankhorst-Hohorst GmbH v Finanzamt Steinfurt, C-324/00, EU:C: 2002:749 (12 Dec. 2002)
58. Opinion of AG in Lankhorst-Hohorst GmbH v Finanzamt Steinfurt (C-324/00), EU:C:2002:545 (26 Sep. 2002)
59. Federal Tax Court of Austria, RV/7105237/2015, (28 Dec. 2018)
60. Supreme Administrative Court of Austria, Ra 2018/15/0037, (22 Nov. 2018)
61. United States Court of Appeal, Fifth Circuit, Case No. 13-60684, BMC Software, Inc., v. Commissioner of Internal Revenue, (13 Mar. 2015), accessed 26 May 2021, <https://caselaw.findlaw.com/us-5th-circuit/1694630.html>