

LEGAL REGULATION FOR ADVANCE PRICING AGREEMENTS IN THE CZECH REPUBLIC AND POLAND – A COMPARATIVE CASE STUDY

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Abstract

An appropriate transfer pricing policy and procedures help to reach a win-win situation between involved parties – taxpayers and tax administration authorities. The paper deals with one of the instruments that could help to reach such a desirable status – namely with the Advance Pricing Agreement (hereinafter referred to as “APA” only). The aim of the paper is to identify fundamental rules as stated for the APAs in the standards of the OECD and subsequently describe, assess and compare general rules for the APAs in the Czech and Polish domestic law.

The research realized is based on a qualitative research; a case study was selected for its realization. A content analysis of a text was a technique used for the collection of relevant data and information. On the basis of results reached, one can observe that the Czech domestic legal regulation does not meet the criteria, unlike Polish one, for the APAs as stated by the OECD. The legal regulation contained in the Czech domestic law is insufficient and in this respect the provisions contained in the Polish domestic law can be considered as a suitable and inspiring. Following this conclusion, authors present some *de lege ferenda* proposals for the Czech domestic law rising from the Polish domestic law.

Keywords: advance pricing agreements, advance/binding ruling, Czech Republic, Poland, transfer pricing

INTRODUCTION

One of the most frequent tax topic connected not solely with multinational enterprises (hereinafter referred to as “MNEs” only) is the topic of transfer prices which plays a significant role in MNEs

decision-making process (see e.g. Cooper *et al.*, 2016). Many authors in the literature emphasized that gaining tax benefits through appropriate transfer pricing is an important factor in the growth of capital groups and/or tax optimization (e.g. Tang, 2002; Wilson-Rogers and Pinto, 2015; Kim, 2008; Plesner

Rossing and Rohde, 2014; Sulik-Górecka, 2010). As stated by Cooper *et al.* (2016, p. 6), “Over the past two decades, transfer pricing has become one of the most important international tax issues faced by MNE groups operating in developed, transition, and developing economies. To ensure that their tax policy is not undermined, an increasing number of countries have introduced transfer pricing legislation for direct taxation purposed and increased the resources allocated to building the capacity of their tax administrations”. Transfer pricing legislation should protect public budget incomes from being eroded through transfer mispricing. At the same time an appropriate transfer pricing policy and procedures should enable taxpayers to achieve consistency and transparency in terms and conditions under which transactions between associated entities are established. Furthermore, an appropriate transfer policy should contribute to the achievement of the best possible settlement between associated entities and tax administration authorities. An Advance Pricing Agreement (hereinafter referred to as “APA” only) can be one of the instruments helping to reach such a desirable status.

MATERIALS AND METHODS

The paper is built on a qualitative research. As stated by Neergaard and Ulhøi (2007, p. 4), “the goal of qualitative research is to develop concepts that enhance the understanding of the social phenomena in natural settings”. Peshkin (1993) specified four types of outcomes of qualitative research: description, interpretation, verification and evaluation. To reach the goal of the paper the authors use a case study which is, as pointed out by Stake (2000), a common framework for conducting qualitative research. According to Eisenhardt (1989), case studies can be used to provide description, test theory or generate theory, and “theory developed from case study research is likely to have important strengths like novelty, testability, and empirical validity, which arise from the intimate linkage with empirical evidence”. The purpose of the paper is to describe, assess, compare and to provide a basis for a follow-up research: the case study is a perfect tool for reaching such a goal.

A content analysis of a text was a technique used for the collection of relevant data and information. Basic pair logical methods were used for processing the information and data gained. The base used for the identification of the requirements and rules as stated by the OECD, the latest OECD Transfer Pricing

Guidance for Multinational Enterprises and Tax Administrations (OECD, 2017d) was used. The legal regulations as valid and effective as of 01 July 2017, if not stated otherwise, were used for the purposes of the paper. The structure of the paper is as follows. Following this subchapter the attention is paid to the standards set by the OECD for the APAs. Subsequently, the Polish and Czech legal regulations are described and compared. Before the final conclusion there is included a discussion of the results reached. A special attention is devoted to *de lege ferenda* consideration.

Background and analysis

Significant changes and improvements in current OECD standards have been provoked by the Action Plans connected with the Base Erosion and Profit Shifting project (hereinafter referred to as „BEPS project“ only) – for more details see OECD (2017a). BEPS project that includes series of reports on possible ways of implementing of the Action Plans (Flipsen and Duteweert, 2014) has initiated significant changes not only in international but also in the European Union law which reacted relatively and surprisingly fast. As empirically proved, these changes have been necessary because current state cannot be considered as that corresponding to fair allocation of tax bases – MNEs are utilizing tax avoidance strategies shifting profits from high to low tax jurisdictions (Jansky and Prats, 2015). Standards for transfer pricing policy are those covered, not solely, by Action Plans 8–10 (Transfer Pricing) – see OECD (2017b). An update of the Transfer Pricing Guidance for Multinational (OECD, 2017c) has been a result for OECD activities in this area. The Transfer Pricing Guidance for Multinational 2017 (hereinafter referred to as „Transfer Pricing Guidance“ only), which replaced its previous version from the year 2010 (OECD (2010), OECD (2017c)), generally relates, as well as European Direct Tax Law (Lang *et al.*, 2010), to the situations with an international element. That is because of their main objective, which is an avoidance of double taxation. However, Transfer Pricing Guidance incorporates general valid recommendations and rules which can be considered eligible even for solely domestic situations.

APA is described in the OECD (2017d) Transfer Pricing Guidance under issue 4.134 (Chapter F. Advance pricing arrangements; subchapter F.1 Definition and concept of advance pricing arrangements) 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. An APA is formally initiated by a taxpayer and requires negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations“. Based on the definition of the associated entities as stipulated by the OECD (2015), two entities are associated, where, a person/enterprise participates, „directly or indirectly in the management, control or capital“ of other person/enterprise. The full and precise definition as intended for the purposes of Article 9 (Associated Enterprises) of the OECD Model Convention (OECD, 2015) presumes existence of an international element in the relation. However, it does not represent a necessary condition for the application of the transfer pricing rules, neither does for the APA itself. Domestic legal regulations have to cover also the situations without international element – i.e. intrastate transactions between association persons/enterprises. For intrastate transactions so called unilateral APA is intended. As pointed by the OECD (2017d, item 4.140) in the Transfer Pricing Guidance, “Some countries allow for unilateral arrangements where the tax administration and the taxpayer

in its jurisdiction establish an arrangement without the involvement of other interested tax administrations. However, a unilateral APA may affect the tax liability of associated enterprises in other tax jurisdictions”.

Unilateral APA represents one of the three types distinguished (see the Tab. I below).

On the basis of the standards included in the OECD (2017d) Transfer Pricing Guidance one can identify several fundamental rules/principles for the APAs. These principles are as follows:

- existence of an agreement;
- determination in advance of controlled transactions;
- setting appropriate criteria;
- fixed period of time;
- initiation by a taxpayer and last but not least
- negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations.

Based on a grammatical interpretation of the definition provided by the OECD it is obvious that the attributes should be met for all types of the APA. This can be deduced from the last stated attribute of the definition. On the other hand, unilateral APA is not paid very much attention on the part of the OECD. The annex II to Chapter IV is devoted to the issues connected with Conducting

I: Types of APA

Type of APA	Definition	Note
Unilateral	An arrangement between the taxpayer and one tax administration.	In case it is not stated otherwise, an APA is not intended to include a unilateral arrangement except where specific reference to a unilateral APA is made in the relevant sections of the Transfer Pricing Guidance.
Bilateral	An arrangement in which two countries concur.	Detailed Guidance for conducting APAs under the mutual agreement procedure (hereinafter referred to as MAP) are found as an Annex to chapter F of the Transfer Pricing Guidance.
Multilateral	An arrangement in which three or more countries concur.	The bilateral (or multilateral) approach is far more likely to ensure that the arrangements will reduce the risk of double taxation and will provide greater certainty to the taxpayers concerned.

Source: own elaboration using OECD (2017d), Slovenian Ministry of Finance (2017).

II: Differences between APAs and traditional private rulings.

APA	More traditional private rulings
Generally deals with factual issues.	Tend to be limited to addressing questions of a legal nature based on facts presented by a taxpayer.
Facts are likely to be thoroughly analysed and investigated.	The facts underlying a private ruling request may not be questioned by the tax administration.
Usually covers several transactions, several types of transactions on a continuing basis, or all of a taxpayer's international transactions for a given period of time.	Usually binding only for a particular transaction.

Source: own elaboration using OECD (2017d).

APAs under MAP (OECD, 2017d) – the objective of the Guidance for Conducting APAs under MAP is to improve the consistency of application of APAs by providing guidance to tax administrations on how to conduct mutual agreement procedures involving APAs.

Under item 4.143 of the Transfer Pricing Guidance the OECD (2017d) points to one important issue that is relevant for the assessment of the legal regulations contained in domestic law. There is stated, “APAs, including unilateral ones, differ in some ways from more traditional private rulings that some tax administrations issue to taxpayers”. Fundamental differences between APAs and traditional private rulings as understood by the OECD are specified in Tab. II below.

Latest summarized information and data on the APAs for the EU Member States was published by the European Commission (2016b) for the state as of 31 December 2015. The information shows that there are significant differences in the rules for the APAs among the EU Member States for the year assessed. The data bear also evidence on different level of information gathered by the European Commission for the area of APAs.

Tab. III below shows the types of APAs which were identified in the EU Member States as of 31 December 2015 together with average time in months to negotiate bi- or multilateral APAs.

The last updated information published by the European Commission (2016) can be considered out-dated now. That is due to a factual impact of the OECD activities connected with the BEPS project. For example Croatia (Anastasiou and Jakovljevic (2017), Deloitte (2017)) and Slovenia (Slovenian Ministry of Finance, 2017) have already introduced APAs. Anyway, the most prevailing conception is that of including all three types of APAs in EU Member States. This is also stated for two compared countries – the Czech Republic and Poland.

APAs as regulated in the Czech Republic domestic tax law

In the Czech Republic the transfer pricing issues have been regulated by the EU, international and naturally also by Czech domestic law. As for the first type of law mentioned, the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/463/EEC) (hereinafter referred to as *Convention*) (Eur-lex, 2017) plays its role. There is, of course, an influence of soft-law connected not solely with the application of this Convention

which aim is “only”, as stated in its title, to eliminate possible double taxation. That is to say, not every DDT concluded between EU Member States includes a provision which secures corresponding adjustments to eliminate double taxation (Solilová, 2010a). Of course, there is also an influence of other EU soft-law which more or less takes over the standards of the OECD. However, the most significant influence in the area of transfer pricing is that of international law. As stated already several years ago by Solilová (2010b), prevailing number of the EU Member States had based their transfer pricing regulation on the OECD standards. It is also the case of the Czech Republic for bilateral and multilateral APAs.

The legal regulation for transfer pricing currently contained in the Czech domestic law is some kind of problematic one, even in relation to APA as pointed by Solilová and Sobotková (2010). In fact the term APA has not been used in the Czech Acts – instead of it the Czech domestic tax law introduced the term *Binding Ruling* (hereinafter referred to as “BR” only). Rules governing the BR in the Czech domestic law are established in the Act No. 586/1992 Coll., on Income Taxes, as amended (hereinafter referred to as “Czech ITA” only) (Czech Republic, 1992) and by the Act No. 280/2009 Coll., Tax Procedural Code, as amended (hereinafter referred to as “Czech TPC” only) (Czech Republic, 2009). The latter to the first mentioned act is in relation *lex generalis* to *lex specialis* which results from the wording of Section 4 of the Czech TPC; so in case of a collision the legal regulation contained in the Czech ITA prevails over that contained in the Czech TPC. Czech TPC embodies general provisions for the procedure of binding ruling in its Head II (*Procedure on Binding Ruling*) under its Sections 132 and 133. Besides, the Guidance D-22 (for a uniform procedure within the application of some provisions of the Act No. 586/1992 Coll., on Income Taxes, as amended) refers, in respect of transfer pricing, to the rules as stated by the OECD standards – especially to the length-arm principle (see commentary to Section 23 para. 7 of the Czech ITA included in the Guidance D-22) (General Financial Directorate, 2015). References to the rules and standards as stated by the OECD and EU can be found also in other, transfer pricing focused, Guidances – namely Guidance D-332 (Communication by the Ministry of Finance in respect of international standards application in taxation of transactions between associated enterprises – transfer pricing) (Ministry of Finance of the Czech Republic, 2010b); Guidance D-333 (Communication by the Ministry of

III: *Types of APA available in the EU Member States as of 31 December 2015.*

EU Member State	Types of APA available	Average time in months to negotiate bi- or multilateral APAs (in months)	
		EU	Non-EU
Belgium	Unilateral (Advance rulings); Bilateral; Multilateral.	8	
Bulgaria	No regulations available as of 31 December 2015.		
Czech Republic	Unilateral (Advance rulings legislation from 1st of January 2006); Bilateral and Multilateral (possible under MAP).	33	
Denmark	Unilateral (Advance rulings legislation from 1st of January 2006); Bilateral and Multilateral (possible under MAP).	35	21
Germany	Bilateral; Multilateral (Unilateral rulings on transfer pricing are only available under exceptional circumstances specified in a 2006 Federal Ministry of Finance circular).	38	53
Estonia	No APAs or advance rulings of any kind. Bilateral APAs in principle possible under MAP.		
Ireland	Bilateral under treaties. Multilateral to the extent that they consist of a series of bilateral agreements.	45	22
Greece	Unilateral, Bilateral, Multilateral APAs.		
Spain	Unilateral; Bilateral; Multilateral.	32	69
France	Unilateral; Bilateral; Multilateral.	35	28
Croatia	No APAs or advance rulings available as of 31 December 2015.		
Italy	Unilateral, bilateral and multilateral APAs are available pursuant to Article 8 of Decree-Law no.269/2003, as converted into Law no.326 of 24th November 2003, and the MAP Article of the relevant Tax Treaty.	39	41
Cyprus	APAs are not available. Advance rulings on the interpretation/ application of the tax laws are available on request.		
Latvia	Unilateral APAs.		
Lithuania	APA legislation from 01/01/2012. Unilateral, Bilateral or Multilateral APAs, Advance rulings.		
Luxembourg	Unilateral, Bilateral, Multilateral APAs.		
Hungary	Unilateral, Bilateral, Multilateral APAs.		
Malta	No formal rules as of 31 December 2015.		
Netherlands	Unilateral; Bilateral; Multilateral; Advance rulings.	24	24
Austria	Unilateral (Advance rulings); Bilateral; Multilateral.		
Poland	Unilateral; Bilateral; Multilateral.	8	33
Portugal	The Tax Code on CIT (Art. 138) and the Ministerial Order n.º 620-A/2008, 16 July, allow Unilateral, Bilateral and multilateral APAs.		
Romania	Unilateral; Bilateral; Multilateral; Advance rulings.	12 months for unilateral APAs; 18 months for the others	
Slovenia	No APAs or advance rulings of any kind as of 31 December 2015.		
Slovak Republic	Unilateral, Bilateral, Multilateral APAs.		
Finland	Advance rulings (Unilateral APA) are available. Bilateral and Multilateral APA's are possible according to the tax treaties concluded by Finland.		
Sweden	APA legislation from 1 January 2010. Only Bilateral or Multilateral APAs.	36 months	36 months
UK	Unilateral; Bilateral	16 months	30 months

Source: own elaboration using (European Commission, 2016b).

Finance in respect of Binding Ruling on transfer price in related parties' transactions) (Ministry of Finance of the Czech Republic, 2010c) and Guidance D-334 (Communication by the Ministry of Finance in respect of the scope of transfer pricing documentation) (Ministry of Finance of the Czech Republic, 2010d). In the Guidance D-332 (item 1.4) (Ministry of Finance of the Czech Republic, 2010b) there is stated, "The principles of the Guidelines have not been directly implemented in tax laws of the Czech Republic nor there is any direct reference to them. Nevertheless its binding effect in interpretation of the Treaties arises from the fact that the Czech Republic is a signatory to multilateral Vienna Convention on Law of Contracts ... In this respect the Guidelines may be used for tax purposes in the same way as other OECD member states use them – as interpretation rule for the Article 9 of the Treaties.". At the same time the validity of the OECD standards has been declared applicable in relation to transactions between associated entities seated in the Czech Republic (see Guidance D-332, item 1.4).

General principles for the BR as stated in the Czech TPC (Czech Republic, 2009) are shown in Tab. IV below.

Special legal regulation as stated under Section 38nc of the Czech ITA (Binding Ruling on the Way the Price Negotiated between Associated Entities was created) has been effective since 01 January 2006; the basic rules as stated by the Czech ITA are shown in Tab. V below.

In the Guidance D-333 (Ministry of Finance of the Czech Republic, 2010c) there is stated as follows, "When applying provisions of section 38nc of AIT, the tax administrator shall follow especially the procedures recommended by the OECD Guidelines, and shall take into consideration the results of discussions in EU working bodies concerning APA, namely those of EU Joint Transfer Pricing Forum ...".

Assessment of the BR as stated in the Czech domestic law (comprehending even the regulation contained in the relevant Czech Guidances) in comparison with the principles given by the OECD standards is shown in Tab. VI below.

IV: General principles stated by Czech TPC.

Section	General principles as stated by the Czech TPC
132	<ul style="list-style-type: none"> • initiation by a taxpayer (issuing a decision upon a taxpayer's request) • assessment of tax consequences resulting from already occurred or future tax relevant facts • procedure applicable for the cases where a particular act admits so
133	<ul style="list-style-type: none"> • specification of the conditions on which the decision on binding assessment is/is not effective: • decision effective towards a tax administration authority which decides on tax duty of the taxpayer • effective in case the factual state is in harmony with the data on basis of which the decision was delivered • decision becomes ineffective in case of a change in relevant legal regulation on basis of which the decision was delivered • time limitation for the decision • decision cannot be used in case the conditions under which the decision was delivered are not met

Source: own elaboration using Czech TPC (Czech Republic, 2009).

V: General principles stated by the Czech ITA

General principles stated by the Czech ITA	
Situation covered	<ul style="list-style-type: none"> • assessment whether the price negotiated between associated subject corresponds to the price that would be negotiated between non-associated subjects in common business relationships on the same or similar conditions
Content of the application	<ul style="list-style-type: none"> • specification of all parties to business relation for which the application for a decision on BR on the price is asked • description of the organizational structure in which participating entities are included (even those from abroad) • description of business activities of participating entities • description of business relation for which the application is submitted • specification of taxable period to which the decision shall be related • description and documentation of the way how the price was created included all relevant facts • proposal of the statement for the decision on the BR

Source: own elaboration using Czech ITA (Czech Republic, 1992).

VI: *Assessment of the BR as stated in the Czech domestic law*

Assessment of the criterion	
existence of an agreement	<ul style="list-style-type: none"> the character of the BR does not correspond to an agreement – it is not actually based on a negotiation between taxpayer and tax administration authority the procedure is based on classical tax procedure governed by the principles of cooperation between taxpayer and tax administration authority and on burden of evidence (the taxpayer has the right and at the same time the obligation to cooperate by submitting relevant documents, providing explanations, etc. – see Section 92 of the Czech TPC (Czech Republic, 2009) in fact, only two results can be reached - acceptance or rejection of the taxpayer's proposal (a taxpayer has a right to withdraw the proposal)
determination in advance of controlled transactions	<ul style="list-style-type: none"> not explicitly stated in the Czech ITA (Czech Republic, 1992) in the Guidance D-333 (Ministry of Finance of the Czech Republic, 2010d) there is stated, "It is impossible to apply for the binding ruling concerning the business relations that have already influenced the level of tax liability (tax base or tax loss) for the taxable period, which already was subject to the obligation to file a tax return."
setting appropriate criteria	<ul style="list-style-type: none"> essentials of the application are set the criteria are specified in more details in the Guidance D-333 (Ministry of Finance of the Czech Republic, 2010c) and Guidance D-334 (Ministry of Finance of the Czech Republic, 2010d) with reference to the OECD and EU standards
fixed period of time	<ul style="list-style-type: none"> yes (3 years)
initiation by a taxpayer	<ul style="list-style-type: none"> yes
negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations	<ul style="list-style-type: none"> no; BR as stated in the Czech ITA (Czech Republic, 1992) supposes a participation of a domestic tax authority only Guidances, however, contain a lot of references to the EU and OECD standards.

Source: own elaboration using Czech ITA (Czech Republic, 1992), Guidance D-332 (Ministry of Finance of the Czech Republic, 2010b), Guidance D-333 (Ministry of Finance of the Czech Republic, 2010c) and Guidance D-334 (Ministry of Finance of the Czech Republic, 2010d).

An administrative charge connected with the BR amounts to CZK 10,000.00 (see Table of Charges, part I, item 1, letter n) of the Act No. 634/2004 Coll., on Administrative Charges, as amended) (Czech Republic, 2004). Neither the Czech ITA, nor the Czech TPA, specify whether the charge relates to one transaction or one submitted materials. There is a specification in the Guidance D-333 (point 1.3 *Number of transactions*) (Ministry of Finance of the Czech Republic, 2010c) as follows, "The application is usually submitted in respect of one transaction. If there are several transactions closely related (several transactions between the same entities concerning the same business, combined transactions), it is more appropriate to assess the business relation as a whole.". However, the last mentioned is connected with a risk. In case the taxpayer applies for the BR in respect of a set of transactions which are not closely related to each other and the tax administration authority does not agree with the price in respect of any of the transactions, the negative ruling shall apply to the application filed (i. e. to all

the transactions stated in the application). There is also stated a logical condition in the Guidance D-333 (Ministry of Finance of the Czech Republic, 2010c) – the requirement cannot be generalized (it is always necessary to assess each case individually).

APAs as regulated in the Polish domestic tax law

Also in Poland the transfer pricing issues has been regulated by the European Union, international and domestic Polish law. The general facts stated for the Czech Republic can be considered valid even for Poland on the level of European and international law. However, there are huge differences in the domestic law which has already reacted to the requirements resulting from the OECD BEPS project (see e. g. OECD (2017a), OECD (2017b), OECD (2017e)).

The legal regulations of transfer pricing contained in Polish tax acts have passed changes with effect since 01 January 2017 (Ernst&Young, 2017). In the Polish domestic law there are two

fundamental material legal norms covering taxation of incomes – namely Corporate Income Tax Act of 15 February 1992, as amended (hereinafter referred to as Polish CITA) (Poland, 1992) and Personal Income Tax Act of 26 July 1991, as amended (hereinafter referred to as Polish PITA) (Poland, 1991) – and one procedural which is Tax Ordinance Act of 29 August 1997, as amended (hereinafter referred to as Polish TOA)

(Poland, 1997). APA (in Polish Porozumienia w sprawach ustalenia cen transakcyjnych; the word porozumienia stands for an English word agreement) is quite extensively regulated in the Polish TOA (Poland, 1997) under Articles 20a-20r. There are also several Ministry of Finance Decrees aiming at elimination of double taxation in case of associated parties' income adjustment.

VII: *General principles and rules as stated in the Polish TOA.*

Section	Principles and rules
20a	<ul style="list-style-type: none"> • Specification of competent tax authority and its competencies (the Head of National Revenue Administration in Polish Ministry of Finance). • The Head of National Revenue Administration, at the request of national entity recognizes the comparability of the essential conditions agreed between a domestic entity and its related entity or entities with conditions to be agreed between independent entities, and confirms the correctness of the choice of the method for determining transaction prices recognized by the competent authority, including: <ul style="list-style-type: none"> • the functional profile of related entities affected by recognized conditions, including in particular the functions performed, the risks assumed and the assets involved; • algorithm of transaction price calculation; • other rules of application of the method of setting transaction prices.
20b	<ul style="list-style-type: none"> • In case the conditions referred to in Article 20a § 1 relate to a foreign entity or entities, at the request of a domestic entity, in matters referred to in Article 20a, the competent authority for an agreement may communicate with the competent tax authority of a foreign entity (foreign unilateral APA) or the competent tax authorities of the foreign related entities with a domestic entity (foreign bilateral/multilateral APAs).
20c	<ul style="list-style-type: none"> • Specification of the situations in which the decision is not issued, for example, in transactions completed before the date of filing the application referred to in Article 20a or in respect of transactions commenced before the filing of the application but subject to taxation, tax audit, customs or fiscal control or proceedings before an administrative court.
20d	<ul style="list-style-type: none"> • Procedure for a situation when an agreement with an abroad tax authority is not reached. • A right of the taxpayer to propose changes (e. g. a change of a bilateral/multilateral APA to an unilateral/multilateral one).
20e	<ul style="list-style-type: none"> • A possibility to consult some issues before submitting the application before the formal application, which is connected with the need for payment, the taxpayer may apply to the Minister of Finance to clarify any doubts regarding the conclusion of an agreement concerning, among others, the advisability of concluding an agreement, the extent of necessary information, mode and time of conclusion of the APA. • According to the web portal of the Ministry of Finance, representatives of the Minister may invite the taxpayer to a meeting, during which they answer questions before submitting the application. This procedure is unformalized and free of any charges (Finanse, 2017).
20f	<ul style="list-style-type: none"> • specification of the content of the application • description of how the proposed method of determining the transfer price in relation to the subject of the proposal is provided by a taxpayer including circumstances being eligible to influence the transfer price
20g	<ul style="list-style-type: none"> • basic rules for negotiation between a taxpayer and tax administration office in case of doubts in the scope of the selected method by the applicant or content of the attached documents; results meeting protocol is carried out
20h	<ul style="list-style-type: none"> • the right to amend the method for fixing transfer price and the conditions referred to in section 20a until the decision of the competent authority is issued; in case of a negative opinion there is a possibility to submit a changed proposal (application) or provide other documents and explanations
20i	<ul style="list-style-type: none"> • the decision cannot be valid for a period before the date of proposal's submission • limitation of the validity of the decision/agreement for a set period (max. 5 years); it can be prolonged in case no significant changes will occur
20j	<ul style="list-style-type: none"> • setting the terms for the conclusion of unilateral APA (6 months), bilateral APA (12 months) and multilateral APA (18 months)

Section	Principles and rules
20k	<ul style="list-style-type: none"> a procedure in case of a significant change(s) in economic relationships, conditions, etc. Tax administration office can change or cancel the decision on the basis of an application of a party to the procedure or on own initiative, the proceedings for amending the decision should be completed no later than within two months after its initiation, and the proceedings to reverse the decision should be completed within one month from the initiation.
20l	<ul style="list-style-type: none"> the right to abolish the decision the competent authority in the event of non-compliance with the terms of the decision on the part of the taxpayer
20m	<ul style="list-style-type: none"> charges on the APA <ul style="list-style-type: none"> 1 % of the value of the transaction unilateral APA with domestic entities only – minimally PLN 5,000, maximally PLN 50,000 unilateral APA relating to an entity from abroad – minimally PLN 20,000, maximally PLN 100,000 bilateral or multilateral APA – minimally PLN 50,000, maximally PLN 200,000 for the prolongation of the agreement there is a half charge in the case where in one application separate transactions have occurred, the charge is demanded for each transaction
20n	<ul style="list-style-type: none"> adjustment of the charge in case the value of the transaction is undervalued
20o	<ul style="list-style-type: none"> budgetary allocation of the charges – state budget
20q	<ul style="list-style-type: none"> reference to general provisions applied for the APA – Section IV of the PTOA (<i>dział IV</i>)
20r	<ul style="list-style-type: none"> the obligation to apply the APA regulations also in relation to the relationship between an entity with its registered office or establishment in the territory of one state and its foreign establishment

Source: own elaboration using Polish TOA (Poland, 1997) and portal of Polish Ministry of Finance (Finanse, 2017).

General principles for the APA as stated in the Polish TOA are shown in Tab. VII below.

As stated under Section 20f of the Polish TOA, in addition to the content of the signed request and indicating an entity from which the request comes, the correct application for a conclusion of APA pricing agreement shall contain:

1. Description of how to use the proposed method with respect to the subject of the application, in particular:
 - a) an algorithm for the calculation of the transaction price,
 - b) financial projections on which the calculation of the transaction price is based,
 - c) an analysis of comparative data, which were used to calculate the transaction price.
2. Circumstances that may affect the proper determination of the transaction price, including:
 - a) the conditions agreed between the entities, including the description of the course of transactions between the related entities,
 - b) an analysis of assets, functions and risks of the related entities (functional analysis) and a description of the anticipated costs associated with the transaction,
 - c) a description of business strategy of related entities and other circumstances, if this strategy or circumstances affect the transaction price,
- d) data on the economic situation in the industry in which the applicant operates, including data on business transactions concluded by third parties, which were used to prepare the calculation of the transaction price,
- e) an organizational and capital structure of the applicant and related entities, as well as the description of financial accounting rules applied by these entities.
3. Documents which have a significant impact on the conditions agreed between related entities, including the texts of contracts, agreements and other documents indicating the intentions of the related entities.
4. Proposal of the duration of the agreement, together with an indication of whether the request concerns an agreement commencing from the date of submission of the application.
5. A list of related entities involved in setting the conditions along with their written consent on the agreement to be submitted to the competent authority along with all the documents relating to the subject of the decision on the agreement and the submission of the necessary clarifications.
6. A description of the critical assumptions on which the ability of the method to accurately reflect the transaction prices in accordance with the principle of the market price is based.

VIII: *Assessment of the APA as stated in the Polish domestic law.*

Assessment of the criterion	
existence of an agreement	<ul style="list-style-type: none"> the character of the APA corresponds to an agreement however, there are some logical situations on which the tax administration authority act on its own initiative procedure is based on special rules stated for the APA; aspects not governed by special rules are covered by general rules contained in the Polish TOA there is a stress put on the exchange of views in case of different opinions in fact, only two results can be reached - acceptance or rejection of the taxpayer's proposal (conclusion of the agreement); however there is a space for negotiation for both parties during the procedure
determination in advance of controlled transactions	<ul style="list-style-type: none"> explicitly stated it is not possible to ask for <i>ex post</i> consideration current or future transactions can be assessed
setting appropriate criteria	<ul style="list-style-type: none"> essentials of the application are set more details are provided compared to the Czech domestic law criteria are specified directly by law
fixed period of time	<ul style="list-style-type: none"> yes (period of validity of first decision cannot be longer than 5 years); validity of the APA can be prolonged
initiation by a taxpayer	<ul style="list-style-type: none"> yes more intensive participation of the taxpayer within the whole procedure
negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations	<ul style="list-style-type: none"> yes

Source: own elaboration.

As above stated description suggests, the assessment of the APA as stated in the Polish domestic law will be a more favourable one (see Tab. VIII below).

DISCUSSION

The extent and relevance of the transfer pricing issue can be seen from the related materials published by the OECD (2017e), as well as those published by the European Union (European Commission (2017a), European Commission (2017b)) which takes over the OECD standards. The rules for transfer pricing seem to be necessary. As stated by Afik and Lahav (2016, p. 203), "Transfer pricing (TP) regulations exist on a global scale to prevent multinational enterprises (MNEs) from shifting profits from high-tax countries to low-tax countries." Sometimes it seems that tax authorities a priori tend to accept this view. Associated entities are simply considered as classical taxpayers: taxpayers with tax resistance aiming at tax burden minimization and abusing the transfer pricing to shift the profits. Many studies, however, suggest this conclusion (see e. g. Padhi and Bal (2015)). Nevertheless, the OECD (2017d) stresses that, "Tax administrations should not automatically assume that associated enterprises have sought to manipulate their profits.

There may be a genuine difficulty in accurately determining a market price in the absence of market forces or when adopting a particular commercial strategy. It is important to bear in mind that the need to make adjustments to approximate arm's length conditions arises irrespective of any contractual obligation undertaken by the parties to pay a particular price or of any intention of the parties to minimize tax." It is a very difficult task to find a correct balance. Transfer pricing legislation should protect the country's tax base from being eroded through transfer mispricing and at the same time the appropriate transfer pricing policy and procedures should enable taxpayers to achieve consistency and transparency of terms and conditions under which transactions between associated entities are established and assessed. (Sulik-Górecka, 2010) The appropriate transfer policy should allow achieving the best possible settlement between associated entities and tax authorities. The strategy win-win based on clear rules and active participation of a taxpayer is a desirable state. In this respect an APA meeting the requirements as stated by the OECD (2017d) seems to be a useful tool. For example, positive effect of APAs has been demonstrated by Martini (2011). However, Afik and Lahav (2016, p. 203) argue that, "such an agreement to be based on

IX: *Advantages and disadvantages of APA.*

Advantages and possible effects	Disadvantages and possible obstacles
Taxpayers are guaranteed certainty as to the treatment of the valuation of transfer pricing, thus increasing the predictability of future tax burden.	Unilateral APAs create problems for administrations abroad that do not want to agree with the decisions contained in the APA. Taxpayers who have entered into such an agreement still do not have tax certainty, as there may in fact occur a double taxation.
Bilateral and multilateral APAs limit the incidence of double taxation.	APAs represent a big burden both taxpayers and tax administration offices. The negotiations are usually cost- and time-consuming. Intricacies are higher for multilateral agreements.
The atmosphere between the administrations and taxpayers is supposed to be much more friendly and less confrontational during negotiations before the conclusion of the transaction, than when examining transfer pricing after the transaction. Willingness to compromise is increasing, taxpayers are ready to disclose information: Note: it demands trust and willingness to cooperate on the part of both involved parties.	APA programs require employment of experienced professionals in the administration, as otherwise it may lead to the signing of unreliable agreements which do not take into account all conditions. In practice, the APA agreements require high efficiency of the tax system, which can only be found in highly developed countries.
Taxpayers eliminate the risk of incurring additional tax burden in the event that the tax administration office has made upward adjustment from the transfer.	Some tax administrations may require too much data from taxpayers, not always possible for them to obtain.
Taxpayers can plan costs and expenses better, primarily those related to fiscal burdens.	Administrations should ensure the confidentiality of trade secrets as well as other information and documents provided in the process of APA negotiation. Therefore, the provisions prohibiting the disclosure of information should be applied.
The renewal of the agreements generally takes less time.	

Source: own elaboration using OECD (2017d).

the principle of arm's length, the specified transfer price(s) should include a premium that captures the risk transferred from one entity to another. When this risk is not accounted for, the long-term transfer pricing policy specified in the agreement (although supported by tax authorities) is not arm's length.". Anyway, the institute of APA as such has been broadly promoted both by the OECD and European Union. In case the APA is realized properly, there are significant advantages for the taxpayers. Some of them together with some disadvantages and possible obstacles are shown in Tab. IX below

De lege ferenda proposals for the Czech legal regulation

Under item 4.145 of the OECD (2017) Transfer Pricing Guidance there is presumed that, "Typically, associated enterprises are allowed to participate in the process of obtaining an APA, by presenting the case to and negotiating with the tax administrations concerned, providing necessary information, and reaching agreement

on the transfer pricing issues.". This rule should be valid not only for bilateral/multilateral APAs but also for a unilateral one. This seems to be a problem due to the lacks and deficiencies in relevant domestic legal regulations (Czech domestic legal regulation can serve as an evidence). There is also a question which type of approaches for designation of the competent tax authority is a more suitable one. The first possibility involves the centralization of procedures and the creation of a special unit to deal with the issue of APAs: this is the case of Poland. A model based on centralization is also used e.g. in France (Gibert, 2005). The second approach leaves such powers in the hand of the local tax authorities: this is also the case of the Czech Republic. There are also mixed models like in Germany, where an intermediate model is used. In relation to bilateral and multilateral APA, the competence in this area belongs to the Federal Central Tax Office in Bonn (in German Das Bundeszentralamt für Steuern). In case of unilateral APA, the competent authority are the tax offices of the Land in which the taxpayer is established (German Federal Ministry of Finance, 2017)

One of the main advantages of the model used in Poland, based on the centralization of powers, seems to be the separation of the APA procedure from the fiscal and tax control procedure at the local level. Besides, the model based on the centralization of powers makes it possible to bring together competent people in the field of APA, thereby ensuring a uniform level of expertise of people involved in the APA, standardize procedures, and strive to achieve consistency in the interpretation of the APA rules and practice.

Czech law in relation to BR/APA suffers from many deficiencies which seem to be more obvious in comparison with the Polish law. BR as embodied in the Czech law does not have a character of an agreement: taking into account the title of the institute (*Binding Ruling*) it seems that the Czech legislator was conscious of this fact. Another deficit can be seen in the fact that the criteria as stated for the application for the BR in the Czech ITA are very general. Their specification in the guidances cannot be considered suitable and sufficient either. Polish legal regulation also includes, compared to the Czech one, a very powerful tool – by law guaranteed and explicitly stated possibility for a taxpayer to participate in the negotiation process. From the comparison of Polish and Czech legal regulation, it is obvious that the Polish law can serve as an inspiration for the Czech law. Authors are of the opinion that the Czech law should involve the provisions as follows:

- A definition of an APA, its three types and purposes which altogether could serve in connection with the basic principles for tax procedure as stated in the Czech TPC as an instrument for a teleological interpretation of related general provisions.

- Determination of competent tax authorities.
- Determination of the situations for which the agreement cannot be concluded.
- Description of the procedure in case an agreement with a foreign tax authority (cases of bilateral and multilateral APAs) is not reached.
- Imbedding the right/obligation for a taxpayer to propose changes and showing demonstrative list of situations under which the taxpayer can/shall make so.
- A procedure for an advance consultation as grounded in the Polish law.
- A more detailed description of the content of the application (as it is in Polish law – see the text of the paper above).
- Terms for a conclusion of an agreement for all the three types of APAs.

Note: Currently, only the term for the conclusion for the BR is stated in an internal directive for tax administration authorities (published in the Guidelines D-348 (6 months)) (Ministry of Finance of the Czech Republic, 2010a).

- Basic rules for the negotiations between the taxpayer and tax administration authority in case of doubts on the part of the latter.
- Explicitly stated right of the taxpayer to dispose with the application, amend and change it (with logical limitations).
- Explicitly stated possibility to submit a changed proposal (application) or provide other documents and explanations including determination of minimal terms for these acts of the taxpayer.
- Specification of the rights of the tax administration authority (including the abolishment of

X: Number of APAs/BRs in Poland and the Czech Republic

Numbers (EU/non-EU)	Czech Republic			Poland		
	2013	2014	2015	2013	2014	2015
Total Number of APAs in force at the end of the year	29/5	24/10	43/4	13/6	11/4	15/5
Total Number of Bilateral and Multilateral APAs in force at the end of the year	-/-	-/-	1/0	1/1	1/1	3/1
Total Number of Unilateral APAs in force at the end of the year	29/4	24/10	42/4	12/5	10/3	12/4
Number of APA requests received in the year	22/8	12/6	31/9	6/4	9/2	6/1
Number of APAs granted in the year	13/2	9/3	22/5	1/3	1/-	5/1
Number of APA applications rejected in the year	5/0	2/1	2/0	0/0	-/-	0/0
Number of APA applications where the taxpayer withdrew its request in the year	0/0	1/0	-/1	0/0	-/-	0/0

Source: own elaboration using European Commission (2014), European Commission (2015), European Commission (2016a). Note: the abbreviation APA is used in this context as an abbreviation used both for APA and BRs. The statistics published by the European Commission do not distinguish these two types of “agreement”.

the agreement) for the case a taxpayer does not fulfil his obligations and for the case significant change(s) in relevant circumstances occurred.

The list shown above can be considered as a demonstrative one. It presents only basic ideas that should be reflected in the legal regulation of the APA in the Czech law. As for the charges for the APA, the way used in the Polish procedural act can be seen, according to the opinion of this paper authors, as a more suitable one. The charge would be obvious directly from the Act, which is much

more amiable for the addressee of the legal norm, and at the same time the charge imposed would reflect the complexity of the transaction.

The question which still remains without an answer is whether the legal regulation plays a significant role in the interest of the taxpayers in the instrument of APA/BR. Anyway, from the figures stated below (see Tab. X) one can deduce that APAs/BRs are not, for some reasons, considered as a suitable/necessary form of hedging against the risk in transfer pricing; neither in the Czech Republic, nor in Poland.

CONCLUSION

An appropriate transfer pricing policy and procedures are necessary for reaching desirable state between involved parties – between taxpayer(s) and tax administration office(s). APA represents (or better to say can represent) a useful tool helping both parties. Its efficiency is however determined by many factors. The legal regulation can be, without any doubts, considered as a very important one: the aim of the law is to bring certainty into legal relationships. Thus, insufficient and/or wrong legal regulation can be an obstacle in this respect. Following this basic idea, the aim of this paper was to describe, assess and compare general rules for the APAs in the Czech and Polish domestic law. The research was based on a qualitative research: a case study was selected for its realization. A content analysis of the texts of selected OECD materials and Czech and Polish Acts was the technique for the collection of relevant data and information. For the identification of fundamental requirements for the APA, the definition as stated in the latest OECD Transfer Pricing Guidance (OECD, 2017d) was used.

The general summary of the results reached are as follows. Both in the Czech Republic and Poland the legal regulations of transfer pricing (including APAs) are regulated by international, European Union and domestic law. It is not a surprise. The differences lie in the extent and forms of domestic legal regulation on which the authors of the papers concentrated. It resulted from the comparison made that the Czech domestic law in fact does not include APA; BR as stated under Section 38nc of the Czech ITA is far from meeting the requirements for the APA as stated in the OECD standards. Czech legal regulation suffers both from the form and content of the legal regulation. On the other hand, the conception included in the Polish TOA meets these requirements. The analysis of Polish legal regulations shows that entities wishing to enter into APA know the exact requirements of the Polish tax authorities as to the structure of the proposal for an agreement. Since fulfilling the requirements is a complex and time-consuming, the Polish tax authorities declare the aid already in the initial phase of preparing the application. The requirements for the application in the Czech Republic are not determined in a suitable and sufficient way. The rules as stated in Polish legal regulation can, in many respects, serve as an inspiring source for the Czech domestic law. Following this idea the authors present some general *de lege ferenda* proposals which should be viewed as an input and inspiration for other analysis and proposals.

Authors would like to express their opinion that APAs when used properly (it means not abused by one party or another) can help to create a more friendly tax climate and support tax authorities in getting a detailed understanding of how entities operate. It is extremely important that governments understand that effective implementation of an APA program relies on the allocation or sufficient and trained sources with connection with suitable legal regulation for this legal (currently not extensively used) instrument.

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