

ENTERING A NEW DIMENSION – O.E.C.D. TRANSFER PRICING GUIDANCE AS HARD TAX LAW

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Tags

B.E.F.I.T. Directive
Hard Law
O.E.C.D. Guidelines
Soft Law
Taisei
Transfer Pricing

INTRODUCTION

Multilateral transfer pricing guidance from the O.E.C.D. was first released in 1979. A version of *O.E.C.D. Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*¹ (the “O.E.C.D. T.P. Guidelines”) has been in print since 1995, long enough that U.S. international tax practitioners are by now accustomed to hearing foreign colleagues talk sometimes interchangeably about country transfer pricing legislation and the O.E.C.D. T.P. Guidelines.

U.S. transfer pricing regulations, the commensurate with income standard, and the economic substance doctrine are codified under Code §§482 and 7701(o) and Treas. Reg. §§1.482-1 through 1.482--9. The only external references that guide the I.R.S. and taxpayers are applicable Revenue Procedures published by the I.R.S. (such as Rev. Proc. 2007-13 concerning certain specified covered services referenced in the services regulations) and case law.

Foreign transfer pricing law, by contrast, frequently includes a provision that references the O.E.C.D. T.P. Guidelines as the guidance that must be used to interpret other provisions of relevant law. O.E.C.D. member tax administrations and other national tax administrations publish their own interpretive guides to the O.E.C.D. T.P. Guidelines and add to a body of administrative guidance over time with subject-specific bulletins or memoranda. Often, material is published by a national tax administration following a court decision or a trend in controversy. Like other wide variations in standard practices some might think should be more alike, a tax administration’s deviation from the median interpretation of the O.E.C.D. T.P. Guidelines can change over time and can also differ between treaty partners. Double tax controversy leads companies and tax administrations into Competent Authority proceedings where the agreed common interpretation of the arm’s length principle is none other than the same O.E.C.D. T.P. Guidelines.

The European Commission has recently proposed a Council Directive on transfer pricing released as part of the *Business in Europe: Framework for Income Taxation* (“B.E.F.I.T.”). The Directive proposes to codify the arm’s length principle and elements of its interpretation from the O.E.C.D. T.P. Guidelines, clarify the role of the O.E.C.D. T.P. Guidelines in Member State law, and homogenize the interpretation of the same guidelines among the tax administrations of E.U. Member States. In addition to the Directive itself, we are interested in how a new approach between E.U. members will influence each individual E.U. Member State’s tax administration approach to interpreting the O.E.C.D. T.P. Guidelines when examining transactions of E.U. resident companies with group companies resident in treaty partner countries

¹ O.E.C.D. (2022), *O.E.C.D. Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*, O.E.C.D. Publishing, Paris.