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Constitutional Issues Arising from the Principal Purpose Test: The Lesson from Poland

Wątpliwości konstytucyjne dotyczące klauzuli jednego z głównych testów (Principal Purpose Test – PPT)

SUMMARY

The principal purpose test (PPT) has been chosen by all signatories to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) signed in Paris, on 7 June 2017, with a view to meeting the minimum standard as set out in the Action 6 Report, "Preventing the Granting of Treaty Benefits in Inappropriate Circumstances". The PPT was considered the easiest way to meet the minimum standard, since it is a self-standing and default option. It was also considered the preferable approach by the tax administrations of the signatory States because it gives them such wide discretionary powers. While this level of discretion follows from the rather vague language of the PPT, it also raises issues in respect of its constitutionality. One may ask, in particular, whether the PPT meets the constitutional standards of the rule of law, as generally manifested under the principle of legal certainty. This study examines the constitutionality of the PPT through the lens of the Polish Constitution and respective jurisprudence of the Constitutional Tribunal (CT). The author finds that the PPT may be seen as unconstitutional not only under the Polish Constitution, but also (by analogy) under the constitutions of many other democratic countries, raising serious concerns at a legislative level and, when and if implemented, in its application.

Keywords: tax avoidance; agreements on UPO, OECD, BEPS, PPT; general clause; constitutionality

INTRODUCTION

The PPT is embodied within Article 7(1) of the MLI. It reads as follows:

Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit,

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unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.

Once the MLI is ratified by legislators of the current Signatories (78), the rule will apply in over 1,100 treaties[1]. The PPT, therefore, constitutes not only the most important anti-treaty abuse rule, it also entails a 100% match between the tax treaties of the current Signatories.

The crucial outcome of the PPT is that it identifies treaty abuse at the tax treaty level. Nevertheless, the PPT has a very wide scope and its phraseology is not too precise, with expressions such as "reasonable to conclude", "one of the principal purposes", and "accordance with the object and purpose of the relevant provisions". The proposed Commentary on the PPT strongly emphasises the need to apply the PPT in *the broadest manner*[2].

The approach of the OECD[3], on the one hand, follows from the essential nature of the PPT, as a tax treaty GAAR, and is needed to achieve the purpose of the PPT,

[1] The PPT could reach even further than the MLI (i.e. more than 78 countries and jurisdictions), such many protocols to tax treaties have recently demonstrated. See, for example, protocols to tax treaties between Switzerland and the UK, Uzbekistan and the UK, and Brazil and Argentina amended the respective tax treaties by, among others, including the rule with the wording of the PPT, although neither Uzbekistan nor Brazil is not a party to the MLI, while the Swiss-UK tax treaty is not included in the list of Covered Tax Agreements by the UK and Swiss governments. See: J. Schwarz, *Multilateral or Bilateral Implementation of BEPS Treaty-Related Measures? Swiss-UK and UK-Uzbekistan Protocol Show the Way*, Kluwer International Tax Blog, 21 February 2018, http://kluwertaxblog.com/2018/02/21/multilateral-bilateral-implementation-beps-treaty-related-measures [access: 10.04.2018]. For the Brazil-Argentina protocol see: R. Tomazela, *Brazil's Absence from the Multilateral BEPS Convention and the New Amending Protocol Signed between Brazil and Argentina*, Kluwer International Tax Blog, 5 September 2017, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/?print=print#_ftn10 [access: 19.03.2018]. There also are other examples of including a PPT that is similar to Article 7(1) of the MLI to tax treaties amended/introduced in 2017, e.g. China-Kenya tax treaty, Ireland-Kazakhstan tax treaty, Kosovo-Switzerland tax treaty, and Belarus-United Kingdom tax treaty. Already in 2014, Portugal-Senegal tax treaty included a PPT similar to Article 7(1). See: J. Hattingh, *The Impact of the BEPS Multilateral Instrument on International Tax Policies*, "Bulletin for International Taxation" 2018, Vol. 72(4/5), section 2.3.1.

[2] Cf. V. Kolosov, *Guidance on the Application of the Principal Purpose Test in Tax Treaties*, "Bulletin for International Taxation" 2017, Vol. 71(3/4), section 3. See: *Preventing the Granting of Treaty Benefits in Inappropriate Circumstance, Action 6 – 2015 Final Report*, 2015 (further also as Action 6 Final Report), International Organizations' Documentation IBFD, §§ 7, 9, 10, 12 and 13 of the proposed Commentary on the PPT, pp. 56–58.

[3] This approach caused an outrage and disagreement between scholars. See, in particular, a general criticism expressed by Lang (*BEPS Action 6: Introducing an Antiabuse Rule in Tax Treaties*, "Tax Notes International" 2015, May 19, pp. 655–664) who was largely followed by De Broe and Luts (*BEPS Action 6: Tax Treaty Abuse*, "Intertax" 2015, Vol. 43(2), pp. 131–134) and Pinetz (*Final Report on Action 6 of the OECD/G20 Base Erosion and Profit Shifting Initiative: Prevention of Treaty Abuse*, "Bulletin for International Taxation" 2016, Vol. 70(1/2), pp. 115–120). By contrast, Palao Taboada (*OECD Base Erosion and Profit Shifting Action 6: The General Anti-Abuse Rule*, "Bulletin

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which is to cover and prevent the widest possible range of treaty abuse cases[4]. That is to say, the drafters of the PPT seem to have been motivated by a desire to design a very vague and broad anti-treaty abuse rule, which will function as a deterrent for taxpayers. On the other, it means that delineating the borderline of an application of the PPT is an arduous, if not impossible, task, triggering issues of legal certainty. Moreover, the vast discretionary power of tax authorities under the PPT means that the separation of powers doctrine in constitutional democracies, manifested in the area of tax law by the principle of "no taxation without representation", risks being retained[5]. It means that taxes can be levied only by the virtue of statutory law (legality of the imposition of taxes) passed by the legislative power, not taxed on the discretion of an executive power.

Accordingly, the real challenge with the PPT[6] is to discourage taxpayers from entering into the widest possible range of treaty abusive practices with a sufficient degree of a precision and foreseeability for taxpayers to comply with the principle of legal certainty. This should also be done without giving too much administrative discretion to tax authorities to avoid jeopardising the principles of legal certainty and legality of taxation. As a result, the June 2017 victory of the executives may turn into a failure at the level of legislatures and/or jurisprudence in the near future.

Those concerns are of the utmost importance to ensuring the effective functioning of the PPT in countries and jurisdictions in which these principles are derived from constitutional and EU law[7], and where uncertainty will undermine the rule

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for International Taxation" 2015, Vol. 69(10), pp. 603–608) and Kok (*The Principal Purpose Test in Tax Treaties under BEPS 6*, "Intertax" 2016, Vol. 44(5), pp. 407–412) took more balanced approaches to the analysis and criticism of the PPT.

[4] See: V. Kolosov, *op. cit.*, n. 1, section 1; C. Palao Taboada, *op. cit.*, n. 3, pp. 603–604.

[5] See more in: B. Bailyn, *The Ideological Origins of the American Revolution*, Harvard 1992, pp. 22–229. Cf. F.A. Hayek, *The Road to Serfdom*, Chicago 1944, pp. 75–76.

[6] Cf. the findings with respect to domestic GAARs in: R. Prebble, J. Prebble, *Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law?*, "The Saint Louis University Law Journal" 2010, Vol. 55(1), pp. 21–46; C. Atkinson, *General Anti-Avoidance Rules: Exploring the Balance between the Taxpayer's Need for Certainty and the Government's Need to Prevent Tax Avoidance*, "Journal of Australian Taxation" 2012, Vol. 14(1), p. 18 ff.; G.S. Cooper *International Experience with General Anti-Avoidance Rules*, "SMU Law Review" 2001, Vol. 54(83), pp. 83–130; C. Evans, *Barriers to Avoidance: Recent Legislative and Judicial Developments in Common Law Jurisdictions*, "Hong Kong Law Journal" 2007, Vol. 47(1), pp. 103–137; J. Freedman, *Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance. Principl*e, "British Tax Review" 2004, Vol. 4, pp. 332–357.

[7] Constitutions are supreme law and, therefore, are higher in the hierarchy of sources of law than tax treaties. The supremacy of EU law over tax treaties, in turn, stems from the principle of the primacy of EU law over the laws of its Member States, including laws implemented in result of the ratification of a tax treaty. This conclusion is also supported by the principle of loyalty in EU law under Article 4(3) of the Treaty on European Union, signed at Maastricht on 7 February 1992 (entered into force on 1 November 1993) (Official Journal C 326, 26/10/2012, pp. 13–390), consolidated

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of law[8]. Accordingly, in the absence of such compatibility, the PPT might not be deemed acceptable under the legal systems of many countries and jurisdictions. It is, therefore, the duty of the legislature of every country and jurisdiction that is planning to implement the MLI to ensure the compatibility of the PPT with constitutional and EU law. The OECD is aware of these issues insofar as it says in the Action 6 Final Report, "some countries may have constitutional restrictions or concerns based on EU law that prevent them from adopting the exact wording of the model provisions that are recommended in this report"[9].

It seems wise to continue this discussion with a reference to the principle upon which the tax systems of democratic countries has been historically founded: "No taxation without representation"[10], which means that taxes can be levied only by the virtue of statutory law (legality of the imposition of taxes). The realization of that principle largely depends on the effective safeguarding of legal certainty. That is to say, tax law provisions must be clear, precise, and certain in their application[11]. If not, tax authorities may have too much discretion in levying taxes and, as a result, may play a quasi-legislative function. As an imposition of taxes will follow from the executive rather than the legislative power, the principle of legality of taxation will be broken[12].

That being said, the PPT raises various constitutional issues, including the PPT's compatibility with the constitutional principle of the rule of law. The purpose of this article is to identify and verify the constitutional issues, which may be triggered

version, and CJEU case law, see Greece: ECJ, 4 October 2001, Case C-294/99, *Ahinaïki Zythopoiia AE v Elliniko Dimosi*, ECR I-06797, ECJ Case Law IBFD.

[8] The issues regarding the compatibility of the PPT with constitutional laws of certain countries, because of insufficient certainty caused by the PPT's wording, have thus far been raised by various scholars. See: P.A. Barreto, C.A. Takano, *The Prevention of Tax Treaty Abuse in the BEPS Action 6: A Brazilian Perspective*, "Intertax" 2015, Vol. 43(12), p. 838; M. Lang, *op. cit.*, n. 3, p. 660; E. Pinetz, *op. cit.*, n. 3, p. 117.

[9] See the Action 6 Final Report, the first indent of § 6, p. 14.

[10] See more in: B. Bailyn, *op. cit.*, pp. 22–229.

[11] See generally: J. Raz, *The Rule of Law and Its Virtue, in the Authority of Law: Essays on Law and Morality*, Oxford 2009. See also the following jurisprudence of the European Court of Human Rights (ECHR): the ECHR's judgment of 25 March 1999 in the *Iatridis* case, No. 31107/96, § 58; the ECHR's judgment of 5 January 2000 in the *Beyeler* case, No. 33202/96, §§ 107–109; the ECHR's judgment of 14 October 2010 in the *Shchokin* case, No. 23759/03 and 33943/06, §§ 56; the ECHR's judgment of 14 May 2014 in the *N.K.M.* case, No. 66529/11, § 48.

[12] Of course, achieving absolute certainty in the application of legislation, including tax legislation, is impossible given the inherent ambiguities of any language. See: C. Atkinson, *op. cit.*, n. 6, p. 15. Cf. the ECHR's judgment of 20 September 2011 in the *Yukos* case, No. 14902/04, § 598. Moreover, the biggest advantage of the PPT, like other GAARs, lies precisely in its vague and ambiguous wording, allowing it to target the widest possible range of treaty abusive practices and play a supplementary role to specific anti-treaty abuse provisions. Cf. S. Barkoczy, *The GST General Anti-Avoidance Provisions – Part IVA with a GST Twist?*, "Journal of Australian Taxation" 2000, Vol. 3(1), p. 35; T. Endicott, *Law Is Necessarily Vague*, "Legal Theory" 2001, Vol. 7(4), DOI: https://doi.org/10.1017/S135232520170403X, pp. 384–385.

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by the PPT. Because the question of the PPT's compatibility with constitutional principles is very dependent on the constitutional provisions of the respective country or jurisdiction, it cannot be analysed from an abstract point of view. For that reason, this analysis will be conducted on the basis of the Polish Constitution.

In addition to the author's expertise in Polish law, there are good factual and legal arguments for using the Polish Constitution for measuring the compatibility of the PPT with the rule of law (the principle of legal certainty). The former Polish GAAR[13] was the only GAAR in the world which had been effectively challenged before the Constitutional Tribunal (CT) for violating the Constitution. It was eventually declared null and void by the CT in its judgment of 11 May 2004[14]. Of relevance is also the circumstance that the Polish Constitution is very democratic, modern and liberal. Its principles are, therefore, common to the constitutional principles of democracies across the world[15]. This makes the analysis particularly relevant to other jurisdictions where the issue may arise under their own constitutional laws. Moreover, the CT's perception of the principle of legal certainty, as one of the standards for good legislation[16], converges largely with the CJEU's perception of the principle of legal certainty[17] under the proportionality test[18], i.e. the stage in the evolution of reasoning on proportionality of justification for restrictive effects of anti-avoidance measures on fundamental freedoms. All this speaks to the global relevance of the analysis of the compatibility of the PPT with the principle of certainty under the Polish Constitution.

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[13] The former Article 24b § 1 of the Tax Ordinance Act of 29 August 1997 (Journal of Laws of 1997, No. 137, Item 926).

[14] Case No. K 4/03.

[15] See, for instance, the evident similarity between the principle of ability to pay under the Polish and Italian Constitution (see: Articles 2, 32 and 84 of the Polish Constitution; C. Garbarino, *Italy*, [in:] *A Comparative Look at Regulation of Corporate Tax Avoidance*, ed. K.B. Brown, Dordrecht 2012, p. 218) and between the principles of good legislation under the Polish Constitution (see: Articles 2, 84 and 217 of the Polish Constitution) and principles of predictability and specificity of legislation under the Austrian constitutional law (for the latter see: E. Pinetz, *op. cit.*, n. 38, p. 117). Cf. more generally: T. Bingham, *The Rule of Law*, UK 2010.

[16] I.e. laws must be sufficiently clear and precise to be understood by their addressees and enforceable by courts and administrative bodies.

[17] I.e. domestic laws of Member States must be sufficiently clear, precise and predictable as regards their effects to be compatible with the EU law. By contrast, domestic law which does not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued, see the CJEU's judgments of 5 July 2012 in case C-318/10, *Société d'investissement pour l'agriculture tropicale SA (SIAT) v État belge*, ECLI:EU:C:2012:415, §§ 58–59 and of 3 October 2013 in case C-282/12, *Itelcar – Automóveis de Aluguer Lda v Fazenda Pública*, ECLI:EU:C:2013:629, § 44.

[18] The law in question, for example the PPT, must be suitable to achieve the purpose for which it was adopted and must not go beyond what is necessary to achieve that purpose, see: *Cadbury Schweppes* (C-196/04), §§ 57, 59–60. See more in: A. Zalasiński, *Case-Law-Based Anti-Avoidance Measures in Conflict with Proportionality Test: Comment on the ECJ Decision in Kofoed*, "European Taxation" 2007, Vol. 47(12), pp. 571–576; *idem*, *Proportionality of Anti-Avoidance and Anti-Abuse Measures in the ECJ's Direct Tax Case Law*, "Intertax" 2007, Vol. 35(5), pp. 310–321.

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Many features of the PPT could be seen as raising constitutional issues. To see them clearly, this rule will be first broken down and analysed in section 2, and then examined under the respective constitutional principles in section 3. Conclusions will follow in section 4.

CLOSER LOOK AT THE PPT: EXTREMELY VAGUE LEGAL INSTRUMENT ENSURING AN AMPLE DISCRETION TO TAX AUTHORITIES

1. Rule of precedence: Favouring tax authorities over taxpayers

The PPT begins with the words "Notwithstanding any provisions of [a tax treaty]". This constitutes a rule of precedence over all treaty provisions. It means that the PPT applies irrespective of all other tax treaty provisions, including the MLI's LOB rule (if the treaty contains this provision) or any other specific anti-treaty abuse rules (e.g. the MLI's LOB rule)[19]. The precedence of the PPT over the tax treaty specific anti-abuse rules is a tax policy issue which favours addressing treaty abuse in a general way[20]. The solution under the PPT certainly favours tax authorities as it vests them with a right to use both specific rules and the PPT in the same tax case. Here, taxpayers cannot be sure that complying with the specifics will allow them to obtain treaty benefits since the benefits guaranteed under these rules may be denied under the PPT. This reduces their rights to choose the most favourable tax route (freedom of contract) in a tax treaty scenario, not least because the application of specific is much more foreseeable than that of the PPT.

The rule of precedence under the PPT actually raises the bar for receiving treaty benefits to an extreme level. Taxpayers that are residents of a Contracting State, beneficial owners of an income, entitled to treaty benefits under the MLI's LOB rule, and/or comply with all other potential treaty specific anti-abuse rules, may nevertheless be deprived of treaty benefits under the PPT. This, in conjunction with

[19] See also the rules on transparent entities, dual resident entities, dividend transfer transactions, clause on capital gains from the alienation of shares in land-rich vehicles, all the amendments aiming to prevent abuse of the notion of permanent establishment, in Articles 3, 4, 8–10, and 12–14 of the MLI. References to "SAARs" have been avoided in this analysis because the label "SAARs" is used in respect of domestic anti-avoidance/anti-abuse rules that target specific tax avoidance practices and in that sense is a reactive response to well-known tax avoidance schemes. The level of discretion accorded to tax authorities (large or minimal) is irrelevant to the consideration of certain rules such as SAARs. The distinction between GAARs and SAARs lies, therefore, primarily in the range of tax avoidance practices covered by these rules. In contrast, the PPT provides much wider discretion to tax authorities than specific anti-treaty abuse rules proposed in the MLI. Labelling the latter rules as tax treaty SAARs may, therefore, be confusing.

[20] See: C. Palao Taboada, *op. cit.*, n. 3, p. 605.

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the fact that in addition to amending the title and preamble of tax treaties, the PPT is a default and standalone option to meet the minimum standard under Action 6[21], indicates how convinced the OECD was of the idea that bestowing tax authorities with a general legal instrument was the best possible approach to dealing with treaty abuse as effectively as possible.

2. "One of the principal purposes of any arrangement or transaction": Very low standard for treaty abuse

The standard of one of the principal purposes gives rise to grave concerns. The wording of the PPT delivers a clear message to its addressees. If you have two equally important reasons to establish an arrangement or carry out a transaction, one being a tax-related reason which manifests itself in pursuit of a treaty benefit and the other, a commercial non-tax-related reason (such as expanding one's business into new markets with a high demand for your services), you may lose treaty benefits under the PPT because in this scenario one of the two principal purposes is to obtain treaty benefits[22].

To begin with, a dangerously low threshold for treaty abuse appears to be invoked by the phrase "one of the principal purposes of any arrangement or transaction". As the origin and ultimate purpose of tax treaties indicates, they are designed to promote the free movement of goods, services, capital and persons between jurisdictions by, *inter alia*, eliminating double taxation[23]. In other words, States conclude tax treaties fundamentally to create incentives for taxpayers to do businesses or investments across different States – the residence State of the investor or businessman, and the State where the business is expanding or the investment is realised – neither of which would have taken place were it not for the treaty[24]. In any other situation, tax treaties would not be functional. If the notion of treaty abuse is formulated too widely under the anti-treaty abuse rule, such as it is in the PPT, it may destroy treaties rather than effecting a balance between eliminating double taxation and preventing abusive treaty shopping. These concerns have been raised by numerous scholars and the CJEU itself (by analogy to the abuse of EU treaties).

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[21] See the Action 6 Final Report, § 22, p. 19; the Explanatory Statement (ES) to the MLI, §§ 88–90, p. 22.

[22] Cf. R. Kok, *op. cit.*, n. 3, p. 408; M. Lang, *op. cit.*, n. 3, p. 658; L. De Broe, J. Luts, *op. cit.*, n. 3, p. 132; E. Pinetz, *op. cit.*, n. 3, p. 116.

[23] See: *History of the OECD MC Tax Convention*, http://impatriation-au-quotidien.com/en/ressources/history/186.html [access: 06.07.2017] and § 7 of the OECD Commentary on Article 1.

[24] Cf. A. Bergmans, *The Principal Purpose Test: Comparison with EU-GAAR Initiatives*, [in:] *Preventing Treaty Abuse*, eds. D.W. Blum, M. Seiler, Wien 2016, p. 331; *Recommendation of the Council concerning the Model Tax Convention on Income and on Capital*, 23 October 1997, C(97)195/FINAL, EU Law IBFD.

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According to scholars, one can speak of tax treaty abuse only if the *sole* or *essential* intention of the taxpayer's arrangement or transaction was to avoid or reduce tax by using the treaty contrary to its purpose and object[25]. The same can be inferred by analogy from the CJUE's case law regarding abuse of EU treaties[26]. That being the case, *the principal purpose test* would seem to be too low to deny treaty benefits in light of international standards on the abuse of treaties (*fraus conventionis*) and to meet the test of proportionality under the EU law[27]. Most importantly, the threshold for denying treaty benefits should "balance avoidance and non-avoidance intent attached to the same transaction(s)"[28]. As advised by a guiding principle, it "should not be lightly assumed" that a taxpayer is entering into the type of abusive transactions to which the guiding principle refers. So while balancing avoidance and non-avoidance intentions, the tax authorities should establish whether the intention of the arrangement or transaction was primarily/essentially (i.e. around 80–90% likeliness) to avoid taxation, not simply probably (i.e. more than 50% likeliness)[29]. The test leading to determine whether "one of the principal purposes" of an arrangement or transaction was to obtain treaty benefits, not only does not comply with these standards, but also introduces a new, lower standard.

In the Action 6 Final Report, the OECD looks as if it is trying to raise the standard of abuse. According to the OECD, if an arrangement "can only be reasonably explained by a benefit that arises under a treaty" then one of the principal purposes of that arrangement will obviously be to obtain the benefit[30]. This may be seen as a confirmation that the PPT should only be applied if the purpose of a transaction

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[25] See, for instance, R. Kok, *op. cit.*, n. 3, p. 407; L. De Broe, J. Luts, *op. cit.*, n. 3, p. 325; M. Lang, *op. cit.*, n. 3, p. 659; S. van Weeghel, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, London–Boston–Cambridge 1998, p. 258; D.A. Ward [et al.], *The Business Purpose Test and Abuse of Rights*, "British Tax Review" 1985, Vol. 2, p. 68.

[26] See Portugal: ECJ, 3 October 2013, Case C-282/12, *Itelcar – Automóveis de Aluguer Lda v Fazenda Pública (Itelcar)*, ECLI:EU:C:2013:629, § 34, ECJ Case Law IBFD; UK: ECJ, 13 November 2014, Case C-112/14, *European Commission vs United Kingdom of Great Britain and Northern Ireland (Commission vs UK)*, ECLI:EU:C:2014:2369, § 25, ECJ Case Law IBFD; UK: ECJ, 12 September 2016, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue (Cadbury Schweppes)*, ECR I-07995, §§ 63 and 76, ECJ Case Law IBFD; UK: ECJ, 21 February 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise (Halifax)*, ECR I-01609, §§ 59–60, 69, 75, and 86, ECJ Case Law IBFD.

[27] Cf. E.C.C.M. Kemmeren, *Where is EU Law in the OECD BEPS Discussion?*, "EC Tax Review" 2014, Vol. 23(4), p. 192; A.P. Dourado, *Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6*, "Intertax" 2015, Vol. 43(1), p. 56.

[28] See: F. Zimmer, *General Report. Form and Substance in Tax Law*, "IFA Cahiers" 2002, Vol. 87a.

[29] See: E. Furuseth, *The Relationships between Domestic Anti-Avoidance Rules and Tax Treaties*, PhD thesis series, Oslo 2016, p. 115.

[30] See: the Action 6 Final Report, § 10 *in fine* of the proposed Commentary on the PPT, p. 58.

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or arrangement is solely or predominantly to obtain a treaty benefit[31]. This, however, does not seem to be a correct observation[32] because other parts of the Action 6 Final Report clearly state that the reference to "one of the principal purposes" in the PPT means that obtaining the benefit under a tax treaty "need not be the sole or dominant purpose of a particular arrangement or transaction". On the contrary, "it is sufficient that at least one of the principal purposes was to obtain the benefit"[33]. Furthermore, the wording of the PPT cannot be rectified via the Action 6 Final Report[34]. To achieve basic compliance between the PPT and international standards on treaty abuse, the wording in the former should be changed by replacing the phrase "one of the principal purposes" with "essential or predominant purpose".

3. "In accordance with the object and purpose of the relevant [treaty] provisions": Problematic determination of the taxpayer's defensive rule

When tax authorities reasonably concluded that one of the principal purposes of a taxpayer's arrangement or transaction is to obtain treaty benefits, the taxpayer may still obtain treaty benefits if it "is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the tax treaty".

The OECD did not provide with any guideline in that regard and, therefore, it is open for various approaches and deteriorates legal certainty and feasibility. This may be the reason for a significant confusion of scholars in determining the purpose of the relevant treaty provisions under the PPT. For example, Edoardo Traversa and Charlène Herbain claim that the only clear purpose of relevant treaty provisions is to allocate taxing rights to the two Contracting States[35]. Luc De Broe pointed out that the distributive rules (i.e. the relevant treaty provisions under the current discussion) do not seem to have a different purpose than the ultimate purpose of the tax treaty since the allocation of taxing rights represents the means allowing the elimination of double taxation[36]. He appears to agree on that point, although elsewhere he argues that the purpose of distributive rules is to allocate the taxing

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[31] See: L. De Broe, J. Luts, *op. cit.*, p.132.

[32] Cf. C. Palao Taboada, *op. cit.*, n. 3, p. 604.

[33] See: the Action 6 Final Report, § 11 of the proposed Commentary on the PPT, p. 58.

[34] Cf. M. Lang, *op. cit.*, n. 3, p. 660.

[35] See: E. Traversa, Ch.A. Herbain, *General Assessment of BEPS and EU law: Hybrid Mismatches, Interest Deductions, Abuse of Tax Treaties and CFC Rules*, [in:] *Base Erosion and Profit Shifting (BEPS) – Impact for European and International Tax Policy*, ed. R. Danon, Lausanne 2016, p. 305. Cf. D.A. Ward, *Canada's Tax Treaties*, "Canadian Tax Journal" 1995, Vol. 43, p. 1728.

[36] See: L. De Broe, *International Tax Planning and Prevention of Abuse: A Study under Domestic Tax Law*, *Tax Treaties and EC Law in Relation to Conduit and Base Companies*, Amsterdam 2008.

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rights over the various items of income among the Contracting States[37]. Finally, Andrés B. Moreno claims that distributive rules are generally not suitable for a purposive interpretation because of their design and due to the fact that defining their purpose in light of the ultimate purpose of tax treaties is serving and circular[38].

It shows how complicated the question of determining the purpose of treaty provisions is. If we add to this the very fact that tax authorities of contracting states may have different views on what is the purpose of relevant treaty provisions, how taxpayers can establish that their arrangements or transactions are in accordance with relevant treaty provisions?

4. Tax authorities' wide discretionary powers to determine legal consequence and the taxpayer's restricted right to an independent appeal

If the first (positive) condition for the application of the PPT is met and the second condition (negative) is not, the tax authority *shall not* grant a benefit under the tax treaty in respect of an item of income or capital. Since the term "shall not" is strong, tax authorities should, in general, deny a treaty benefit if: (i) one of the principal purposes of the taxpayer's arrangement or transaction is to obtain a treaty benefit; (ii) that arrangement or transaction resulted directly or indirectly in the treaty benefit; (iii) the taxpayer failed to convince the tax authority that granting the treaty benefit in the given circumstances would be in accordance with the object and purpose of the relevant provisions of the tax treaty[39]. This effect of the PPT follows clearly from its wording and is confirmed in the Commentary on it[40].

There is, however, nothing in the PPT or the Commentary on the further consequences of the PPT's application[41]. The OECD's approach has spawned an avalanche of criticism[42]. Clearly, it enhances the already ample discretional powers

[37] See: L. De Broe, *op. cit.*, n. 39, p. 334.

[38] See: A.B. Moreno, *GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test. What Have We Gained from BEPS Action 6?*, "Intertax" 2017, Vol. 45(6/7), p. 449.

[39] Cf. A. Rust, *Art. 1*, [in:] *Klaus Vogel on Double Taxation Conventions*, eds. A. Rust, E. Reimer, "Wolters Kluwer Law & Business" 2015, Vol. 1.

[40] See: § 2 of the Commentary on the PPT in OECD, n. 1, p. 55.

[41] The PPT is, therefore, labelled by some scholars as a (tax treaty) GAAR with limited effects, see: A.B. Moreno, *op. cit.*, n. 38, p. 442.

[42] See primarily: M. Lang, *op. cit.*, n. 3, pp. 661–663; L. De Broe J. Luts, *op. cit.*, n. 3, pp. 133–134. Contra: Palao Taboada claims that this criticism reflects rather an attitude of clear opposition to GAARs, in general, than a specific pool of observations on the PPT. See: C. Palao Taboada, *op. cit.*, n. 3, pp. 603–604. Palao Taboada's observations are not very convincing because domestic GAARs have typically unlimited (expanded) effects – they determine what happens after the denial of tax benefits, e.g. the re-characterisation of a tax object (cf. § 22.1 of the current Commentary on Article 1), while the PPT has limited effects – it is explicitly designed to enable the denial of treaty benefits. See: A.B. Moreno, *op. cit.*, p. 442. A kind of unlimited effect under the PPT brings Article 7(4) of

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of tax authorities to determine the legal consequences of an application of the PPT at the cost of legal certainty.

Moreover, a taxpayer may have a very restricted right to appeal to an independent body against a decision issued under the PPT because, in most cases, such decisions will be issued by the authority of a foreign State (the State of source with respect to the taxpayer of the State of residence). The courts of the taxpayer's residence State will, in principle, not have the jurisdiction to rule on the decision of the tax authority of the source State. The taxpayer may, of course, ask for the review the courts of the source State. However, defending their position in front of a foreign court would be a way more time-consuming and expensive than doing so at a domestic court. And a review may appear to be very problematic, not least because courts may assume that the treaty abuse standard under the PPT is too vague to allow them to determine the existence of the abuse[43].

Nevertheless, an independent review of government officials' decisions is a basic human right, as indeed recognized by the constitutional laws of many States[44]. The combination of a rule stipulating that a treaty benefit ought to be awarded or withheld solely at the discretion of a tax authority, which clearly has a conflict of interest with an addressee of such a rule (i.e. a taxpayer), and a very restricted right of appeal to a court or any other independent body appears to be an unacceptable solution under the law of democratic States.

CONCERNS REGARDING CONSTITUTIONALITY: POLISH CONSTITUTION AND JURISPRUDENCE

The question of the constitutionality of the PPT will be conducted on the basis of the Polish Constitution[45] and the relevant jurisprudence of the CT, in particular that regarding the constitutionality of the former Polish GAAR.

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the MLI, but this provision does not constitute the minimum standard and may be applicable only if all Contracting States choose to include it in their tax treaties via the notification to the Depositary of the MLI in addition to Article 7(1) of the MLI. See: Article 7(3) and (17)b) of the MLI.

[43] Cf. the US District Court for the District of Columbia decisions of 18 September 2015 and 2 February 2016, Case No. 14-cv-01593 (CRC), Tax Treaty Case Law IBFD. For the academic discussion of the case see: Y. Brauner, *United States: The Starr Int'l Case*, [in:] *Tax Treaty Case Law around the Globe 2016*, eds. E.C.C.M. Kemmeren, D.S. Smit, P. Essers, M. Lang, J. Owens, P. Pistone, A. Rust, Tilburg 2017, pp. 367–372. See also: M. Sapirie, A. Velarde, *Can Courts Review a Competent Authority's Decision?*, "Tax Notes International" 2015, March 16, pp. 934–936.

[44] Cf. KPMG Ireland's report on *Action 6 and Fairness for Smaller Economies*, replicated in KPMG's response to OECD/G20 *BEPS Project Follow up work on BEPS Action 6: Preventing Treaty Abuse (Fairness for Smaller Economies)*, p. 8 (9 January 2015).

[45] See: The Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws, No. 78, Item 483).

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The former Polish GAAR reads as follows:

> Tax authorities and authorities of tax audit, in deciding in tax cases, shall disregard the tax effects of [taxpayers'] legal actions, if these authorities have proved that entry into these legal actions could not have resulted in other important benefits than those stemming from diminution of the amount of tax obligation, increase of loss, increase of overpaid tax or the tax to be reimbursed[46].

The President of the Supreme Administrative Court (*Naczelny Sąd Administracyjny*) and the Ombudsman (*Rzecznik Praw Obywatelskich*) were ordered to examine the constitutionality of the former Polish GAAR before the CT[47] because the provision gave the tax authorities wide discretion to disregard for tax purposes any transaction aimed at lawfully diminishing tax liability. In particular, the wording of the provision in question left it largely unclear whether the tax authorities would indeed deem valid legal transactions carried out by taxpayers as constituting tax law avoidance. This, in the view of the applicants, conflicted with the principle of legal certainty, as stemming from the constitutional principle of the rule of law (Article 2), requiring the decisions of public bodies to be foreseeable and predictable[48]. The overly vague language was the essential issue.

The CT agreed with the applicants and ruled that the former Polish GAAR violated Article 2 (the principle of rule of law) in conjunction with Article 217 (the principle of legislative base for tax liability) of the Polish Constitution and hence declared it to be null and void. It meant in effect that the legal basis of the unconstitutionality of the former Polish GAAR was its incompatibility with the rule of law which, in turn, was triggered by the violation of the principle of legal certainty.

The Tribunal stated that although the constitutional obligation to pay taxes was specified by law, Article 84 did not stipulate an obligation for taxpayers to pay the maximum amount of tax:

> […] no constitutional difficulties arise as a result of the legislature's response to economic phenomena that are harmful to the State's fiscal interests, even where this concerns the sphere of taxpayers' contractual relationships or takes the form of a general norm of circumvention of tax law. Any such response should, however, observe the necessary constitutional requirements and respect the rights and freedoms of taxpayers.

So while there is no general ban on general anti-avoidance rules under the Polish Constitution, and such a rule is needed to protect the State's fiscal interests and,

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[46] The translation after A. Zalasiński, *Poland – Branch Report: Tax Treaties and Tax Avoidance: Application of Anti-Avoidance Provisions*, "IFA Cahiers" 2010, Vol. 95a, n. 4, p. 637.

[47] CT cannot itself initiate a case regarding the constitutionality of a legal act; this can be done only by subjects entitled to do so under Articles 191–193 of the Polish Constitution.

[48] See: A. Zalasiński, *Poland – Branch Report*..., n. 47, p. 639.

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thus, indirectly, to ensure the ability to pay principle[49], its wording and structure must satisfy the constitutional principles of good legislation (*zasady przyzwoitej legislacji*) in ensuring the constitutionality of the prevention of tax avoidance.

By referring to its established case law, the CT stated that the principles of good legislation require the legislature to enact laws that are sufficiently clear and precise to be understood by their addressees, on the one hand, and enforceable by courts and administrative bodies, on the other[50]. Only such laws may be considered compatible with the Constitution. CT underlines the *particular importance* of the *specificity* of legal provisions in the fields of criminal and *tax law*, since their application restricts the rights of citizens to freedom and to hold private possessions, respectively[51]. Tax laws whose wording is too vague or too ambiguous constitute, therefore, a violation of Articles 2, 84 and 217 by challenging the legality of the imposition of taxes[52].

In the CT's view, the use of vague phrases by the legislature, including those in GAARs, can be seen as constitutional if they meet three conditions imposed to ensure the maximum predictability of decisions taken on the basis of provisions containing such phrases: (i) vague phrases must be comprehensible enough to prevent exceedingly wide options of individualized interpretation; (ii) vague phrases must be accompanied by substance guaranteeing the uniformity of jurisprudence (decisions applying the law); and, finally, (iii) the interpretation of ambiguous terms must not permit bodies applying such terms to engage in quasi-law-making. These conditions must be treated in a particularly restrictive manner when the legislator delegates the interpretation of ambiguous phrases to administrative bodies, e.g. to tax authorities[53].

Indeed, the former Polish GAAR delegated the interpretation of ambiguous phrases to tax authorities and, therefore, the examination of whether the aforementioned conditions of the constitutionality are met should be particularly strict. As the result of such an examination, the CT was convinced that the GAAR included several aspects that failed to meet the standards of constitutionality. The core of the critique regarded the use of general and ambiguous phrasing, such as "one could not have expected", "other important benefits", and "[benefits] stemming from

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[49] The ability to pay principle requires that the tax burden should be allocated between taxpayers in accordance with their financial resources and capacity to pay taxes. This principle has been considered by the CT as a factor that must be taken into account in order to ensure equality in taxation. See: CT's judgments of 7 June 1999, Case No. K 18/98 and of 26 November 2007, Case No. P 24/06. See more in: A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warszawa 2010, p. 82.

[50] See: CT's judgments of 21 March 2001, Case Co. K 24/00 and of 19 December 2008, Case No. K 19/07.

[51] See: CT's judgments of 12 June 2002, Case No. P 13/01 and 20 November 2002, Case No. K 41/02.

[52] See: CT's judgments of 3 December 2002, Case No. P 13/02 and 19 September 2006, Case No. K 7/05.

[53] See: A. Zalasiński, *Poland – Branch Report*..., n. 47, p. 640.

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the diminution amount of tax obligation". In the view of the CT, these phrases were not comprehensible enough to prevent an overly broad opportunity for individualized interpretations – condition (i) above was not met. They did not allow tax authorities and courts to conduct a uniform interpretation, possibly resulting in a quasi-law-making application – conditions (ii) and (iii) above were not met. Moreover, the GAAR did not include any norm requiring the tax authorities to establish whether an arrangement or transaction other than that carried out by the parties would have been "appropriate" to achieve the economic result intended by the parties, thereby requiring the tax implications to be assessed on the basis of such an alternative (appropriate) transaction[54]. Consequently, the GAAR did not meet the requirement of maximum predictability of decisions taken on the basis of provisions containing such phrases and, therefore, did not comply with the principles of good legislation, including the principle of legal certainty.

According to the CT's reasoning here, then, the PPT can only be deemed compatible with the Constitution under the principle of legal certainty if it is drafted as specifically as possible, both in terms of content and form, such that the tax authorities and courts do not apply the PPT in quasi-law-making way. The precision with which the content and form of the PPT are worded, therefore, constitutes a benchmark against which to evaluate its compatibility with the principle of legal certainty. This rule should also include a legal norm requiring the tax authorities to draw tax consequences of an arrangement or transaction other than that carried out by the parties to obtain treaty benefits which would have been "appropriate" to achieve the economic result intended by the parties in accordance with the purpose of treaty provisions. Such a rule should require the tax authorities to assess tax consequences on the basis of an alternative and appropriate arrangement or transaction.

The PPT rule has a very wide scope and uses vague phrases, i.e. "reasonable to conclude", "one of the principal purposes", or "accordance with the object and purpose of the relevant provisions". The proposed Commentary on the PPT in the Action 6 Final Report strongly highlights the need for applying the PPT in the broadest manner. Moreover, the analysis in previous sections revealed the extensive discretion of tax authorities under the PPT at all stages of its application, i.e. when deciding upon the conditions to apply and the consequences stemming from its application. Also, the determination of the conditions to apply the PPT is a highly complex and strenuous task. The level of vagueness of the PPT entails a high risk of a non-uniform interpretation, conceivably resulting in a quasi-law-making mode of application. Finally, the PPT lacks a legal norm requiring the tax authorities to draw implications in accordance with an alternative and appropriate arrangement or transaction[55]. Hence,

[54] *Ibidem*, p. 641.

[55] See: *ibidem*, n. 4. Tax authorities' wide discretionary powers to determine legal consequence and the taxpayer's restricted right to an independent appeal.

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the PPT is very likely to fail the requirements under the principle of legal certainty as enshrined in the Polish Constitution[56] and, by analogy, in the constitutions of other jurisdictions[57].

Table 1. The list of similarities between the PPT and the Polish former GAAR that may be challenged under the principle of legal certainty and, thus, the rule of law

The PPT	The former Polish GAAR
General and ambiguous phrasing: "reasonable to conclude", "one of the principal purposes", or "accordance with the object and purpose of the relevant provisions"	General and ambiguous phrasing: "one could not have expected", "other important benefits", and "[benefits] stemming from the diminution amount of tax obligation"
The absence of any legal norm requiring tax authorities to draw tax consequences after denying treaty benefits of taxpayers' arrangements or transactions	The absence of any legal norm requiring tax authorities to draw tax consequences after disregarding the tax effects of taxpayers' legal actions
Immense discretion for tax authorities to decide on an application of the PPT and its consequences	Immense discretion for tax authorities to decide on an application of the GAAR and its consequences
The level of vagueness of the PPT entails a high risk of non-uniform interpretation, conceivably resulting in a quasi-law-making mode of application	The level of vagueness of the GAAR entails a high risk of non-uniform interpretation, conceivably resulting in a quasi-law-making mode of application

Source: own work.

CONCLUSIONS: POTENTIAL LEGAL (LEGISLATION AND APPLICATION) TURBULENCES

The legislative process in each country or jurisdiction needs to be complete to implement the provisions under the MLI, such as the PPT. Hence, although the purpose of the MLI is to implement in swift succession the tax treaty-related BEPS

[56] Cf. *ibidem*, n. 47, p. 646.

[57] See: *ibidem*; Articles 2, 32 and 84 of the Polish Constitution; C. Garbarino, *op. cit.*, n. 15, p. 218. And between the principles of good legislation under the Polish Constitution (see: Articles 2, 84 and 217 of the Polish Constitution) and principles of predictability and specificity of legislation under the Austrian constitutional law (for the latter see: E. Pinetz, *op. cit.*, n. 38, p. 117). See also the declaration of the French Constitutional Council (*Conseil Constitutionnel*) on 29 December 2013 (dec. 2013-685) in which the Council declared a tax law provision similar to the PPT rule unconstitutional because the provision replaced the "exclusive purpose" test by a "principal purpose" test to identify acts constituting the abuse of tax law (*abus de droit*, L. 64 of *Livre des Procédures Fiscales*). The Council stated that such a test is too broad and too vague to meet the standard of legality of taxation under the French Constitution (the discretion of tax authorities in application of the PPT test is too wide and the terms used in that provisions are too imprecise). See also the declaration of the French Constitutional Council on 29 December 2015 (dec. 2015-726).

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measures to existing and future tax treaties worldwide[58], its achievement chiefly depends on the legislative decisions of the different countries and jurisdictions[59]. At the end of the day, even if governments sign the international agreement committing them to implement the MLI, their legislations may simply decline to ratify it[60], especially if they have strong arguments for doing so[61]. Indeed, there are strong arguments not to implement the PPT insofar as it hands vast discretionary power to the executive, which makes its suitability to prevent treaty abuse (the purpose of the PPT) questionable[62] (the lack of a sufficient degree of legal certainty), and may escape a proper judicial review. These arguments will be seen best in light of the most important and probable process of vetting the MLI by parliaments of countries and jurisdictions considering the implementation of the MLI.

On a very fundamental level, the process of implementing the MLI will require parliaments to analyse the wording of its provisions from the perspective of constitutional democracy. This is because adoption of the MLI will lead to the abrogation of some of the country's sovereignty in the tax area which is otherwise critical to the existence and proper functioning of every country and jurisdiction. Here, the principle of "no taxation without representation" will be scrutinized carefully. The wording of the MLI's provisions will be considered also from a rule of law perspective. Provisions will, therefore, have to be clear, precise, accessible and reasonably intelligible to all users, amenable to dispute in public courts, and shorn of discretionary powers for unelected civil servants, or at least subject to express and clear legal safeguards to protect the taxpayer's rights[63].

The analysis of the PPT shows that its wording, construction, and possible application fail to meet almost all of the above-mentioned fundamental criteria of tax

[58] See the Preamble to the MLI and §§ 5–6 and 14 of the ES to the MLI at pp. 1–3.

[59] Cf. P. Valente, *BEPS Action 15: Release of Multilateral Instrument*, "Bulletin for International Taxation" 2017, Vol. 45(3), p. 228.

[60] See: L.E. Schoueri, R.A. Galendi Júnior, *Interpretative and Policy Challenges Following the OECD Multilateral Instrument (2016) from a Brazilian Perspective*, "Bulletin International Taxation" 2017, Vol. 71(6), section 2.4. In other words, it is always possible for countries and jurisdictions to agree to implement a legal instrument internationally but then fail to address the issue domestically. See: I. Grinberg, *The International Tax Diplomacy*, "The Georgetown Law Journal" 2016, Vol. 103(5), p. 1182 ff.

[61] Cf. J. Hattingh, *The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?*, "Bulletin for International Taxation" 2017, Vol. 71(3/4), section 5.

[62] The choice of legislatives to implement the PPT will be rational, and based on an assessment of its suitability to prevent treaty abuse. This suitability is defined in the PPT's text as the potential to depict a pattern of behaviour the members of the legislative powers (usually parliaments) find useful in preventing treaty abuse. Cf. M. Matczak, *Three Kinds of Intention in Lawmaking*, "Law and Philosophy" 2017, Vol. 36(6), DOI: https://doi.org/10.1007/s10982-017-9302-8, p. 10.

[63] See: J. Hattingh, *The Multilateral Instrument from a Legal Perspective…*, n. 62, section 2 with reference to the late Lord Bingham's articulation of the tenants of the rule of law as depicted in: T. Bingham, *op. cit*.

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law under the constitutional principles of good legislation, including legal certainty. Moreover, it raises serious doubts with regard to an appropriate judicial review of tax administrative decisions that may be issued under the PPT[64]. Transferring such wide discretionary powers from the courts to the tax authorities to control tax avoidance involving tax treaties is hitherto without precedence[65] and has sparked justified doubts among scholars[66]. Such doubts will most likely re-surface during the parliamentary scrutiny of the wording of the PPT. This prediction is supported by the fact that the discretion provided to tax authorities under the PPT is much wider than is granted by the domestic GAARs in many countries[67], the CJEU's standard on prevention of tax avoidance[68], and the opinion of most international tax scholars on the treaty abuse concept[69].

All in all, then, the PPT does not secure a proper balance between different countries, jurisdictions, taxpayers, and tax authorities. The PPT speaks more to tax authorities, especially in developed countries and jurisdictions with a significant interest in preventing the abuse of their tax treaties[70]. Even there, however, the PPT may cause concerns at a legislative level and, if implemented, in its application.

Taking all the stakeholders into consideration along with the need for tax treaties to function appropriately, the PPT in its current wording should not be adopted by countries or jurisdictions. What should really matter is not the OECD's agenda to empower its institutional position globally, but the proper functioning of the tax

[64] See: *ibidem*, n. 4. Tax authorities' wide discretionary powers to determine legal consequence and the taxpayer's restricted right to an independent appeal.

[65] Cf. J. Hattingh, *The Multilateral Instrument from a Legal Perspective*…, n. 62, section 2.

[66] See: *ibidem*, n. 64, sections 2 and 7–8; L.E. Schoueri, R.A. Galendi Júnior, *op. cit.*, n. 56, section 4.1; R.S. Avi-Yonah, H. Xu, *Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight*, "Harvard Business Law Review" 2016, Vol. 62, pp. 208, 220–221.

[67] See: J. Hattingh, *The Multilateral Instrument from a Legal Perspective*…, n. 62, section 4.1 in relation to the GAARs in force in the United Kingdom, India, and South Africa. Similar observations are valid with respect to other countries as well.

[68] See: the CJEU's case law, n. 27.

[69] See: L. De Broe, J. Luts, *op. cit.*, n. 3, p. 132; C. Palao Taboada, *op. cit.*, n. 3, p. 604; M. Lang, *op. cit.*, n. 3, p. 660; C.H.J.I. Panayi, *Advanced Issues in International and European Tax Law*, Oxford 2015, pp. 230–231; S. van Weeghel, *op. cit.*, n. 28, p. 258; D.A. Ward [et al.], *op. cit.*, n. 28.

[70] Interestingly, in the context of the MLI, the US decided not to belong to this club insofar as it is considered a country that negotiated the MLI text on the basis that it is not obliged to accede to the MLI as a signatory, at least not with respect to the implementation of the MLI's LOB rule due to the fulfilment of the BEPS's minimum standard under its tax treaties beyond the MLI, i.e. by implementing a comprehensive LOB provision to its tax treaties as included in the 2016 US Model and addressing conduit financing structures by domestic rules. See Article 7(15)(a) of the MLI. Cf. J. Hattingh, *The Multilateral Instrument from a Legal Perspective*…, n. 62, section 3.2. See the in-depth analysis of the MLI's LOB in B. Kuźniacki, *The Limitation on the Benefits (LOB) Provision in BEPS Action 6/MLI: Ineffective Overreaction of Mind-Numbing Complexity – Part 1 and Part 2*, "Intertax" 2018, Vol. 47(1–2).

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treaties of countries and jurisdictions. In any case, the OECD's ambition should not trump the supreme law of Signatories of the MLI. In case of Poland, however, the fate of the PPT has been already decided by the legislature, since the MLI was ratified in November 2017 without any discussion or reflection of the legislature over the potential constitutional issues[71]. Perhaps, the ignorance of the legislature towards such issues is just another manifestation of Poland's constitutional crisis which still exists and happens to escalates[72]. Consequently, the author may merely wish for the proper scrutiny of the PPT's constitutionality by jurisprudence in the future.

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[71] See: ustawa z dnia 29 września 2017 r. o ratyfikacji Konwencji wielostronnej implementującej środki traktatowego prawa podatkowego mające na celu zapobieganie erozji podstawy opodatkowania i przenoszeniu zysku, sporządzonej w Paryżu dnia 24 listopada 2016 r. (Dz.U. z 2017 r., poz. 2104), http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170002104 [access: 10.03.2018].

[72] For the basic information see: V. Gera, *New Polish government sparks constitutional crisis*, "The Salt Lake Tribune" 2015, No. 2 (December), http://archive.sltrib.com/article.php?id=3254986&itype=CMSID [access: 10.03.2018].

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STRESZCZENIE

W dniu 7 czerwca 2017 r. przedstawiciele rządów 68 państw i jurysdykcji (sygnatariusze) podpisali tzw. Konwencję Wielostronną (*Multilateral Instrument* – MLI). Obecnie jest już 78 sygnatariuszy MLI, w tym Polska. Celem MLI jest szybka, skoordynowana i spójna zmiana jak największej liczby umów o unikaniu podwójnego opodatkowania (UPO) zgodnie z planem działania BEPS nr 6. Najważniejszą zmianą w zakresie zwalczania nadużyć umów o UPO jest tzw. *principal purpose test* (test głównego celu – PPT), czyli ogólna klauzula skierowana przeciwko nadużyciom umów o UPO, której mechanizm zastosowania opiera się na tzw. teście jednego z głównych celów struktury lub transakcji. W związku z tym, że PPT to bardzo niejasny i kompleksowy przepis prawa, przyznający ogromną władzę uznaniową organom podatkowym, budzi to wątpliwości konstytucyjne. Autor w niniejszym artykule identyfikuje i analizuje te wątpliwości, udowadniając finalnie tezę o niekonstytucyjności PPT w świetle orzecznictwa Trybunału Konstytucyjnego. Nieprecyzyjność PPT jest tak duża, że oprócz niekonstytucyjności pociąga za sobą też duże ryzyko nieprawidłowego stosowania umów o UPO przez organy podatkowe. Zatem rola sądów dla zapewnienia prawidłowego stosowania umów UPO przez właściwą interpretację PPT w świetle nowej preambuły jest znacząca.

Słowa kluczowe: unikanie opodatkowania; umowy o UPO, OECD, BEPS, PPT; ogólna klauzula; konstytucyjność