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Transfer Pricing and Selected Problems Related to Their Implementation

Ceny transferowe i wybrane problemy związane z ich implementacją

SUMMARY

Changeability is an immanent feature of tax systems. Over the last years, it has been even more noticeable. The domestic systems of the member states strive for the widest possible scope of co-operation in order to fulfill all the demands of the fast developing society. In this article, the authors describe the development of the international cooperation with regard to countering the double taxation problem as well as tax avoidance in general. Against this background, the publications of the OECD from 2016 are most certainly worth mentioning, seeing that due to them the Base Erosion and Profit Shifting (BEPS) was published. Regulations set forth therein are aimed mostly at the interactions of different tax provisions that lead to non-taxation of the profit parts of international enterprises. One of the key objectives of the Project is referred to as Action 13, which introduces an obligation of three-tier transfer pricing documentation. Representing a standpoint that – from the legislative point of view – creating efficient and clear legal provisions is of paramount importance, the authors have attempted to examine the problems encountered by the legislator while the implementation process of the transfer pricing directives.

Keywords: international cooperation; transfer pricing; tax law system; affiliated entities; Organisation for Economic Co-operation and Development

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INTRODUCTION

The purpose of this article is to describe the most important problems associated with the implementation of transfer pricing regulations. The authors assumed that the fast-moving changes in tax law could involve problems within the meaning of the rules and also in terms of norms for real action. In this respect, the following describes the international and national actions aimed at introducing an improved legal-tax standard.

The issues related to introducing international norms to the domestic order are of universal character. Law must be adapted to the changing society, which may lead to the conclusion that this changeability is an immanent feature of international relations. The major factors that exert impact on the country's functioning (that is i.a.: its political system, legislation and sovereignty) encompass globalisation and intra-community integration processes. The tax law development dates back to the 1850s. At this stage, it was of an administrative character, however, countries were gradually beginning to conclude bilateral agreements that touched upon controversial tax issues[1].

The first attempts to create a document facilitating the cooperation of the member states with regard to taxation began as early as in 1921 due to the League of Nations' contribution[2]. These foundations enabled the OECD (Organisation for Economic Co-operation and Development) to quickly develop the publication on the first recommendation with regard to the cooperation of countries concerning taxation[3].

In 1963, the Tax Committee presented the first report entitled *The Convention Project on Double Taxation on Income and on Capital*[4], and in 1995, the OECD presented the guidelines for transfer pricing documentation. In Chapter V, it was attempted to create a classification system for this documentation. It was supposed to provide reliable information acknowledging the market character of transactions accompanied by a simultaneous prevention of excessive burdens related to preparing the documentation. Therefore, it can be concluded that at the beginning of the 1990s, the importance of the cooperation between taxpayers and treasury organs was noticed[5].

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[1] Z. Kukulski, *Konwencja Modelowa OECD i Konwencja Modelowa ONZ w polskiej praktyce traktatowej*, Warszawa 2015, pp. 31–33.

[2] The League of Nations' Committee of Technical Experts was the first to indicate that a single taxation of the income from the cross-border business activity is a manifestation of the most rudimentary and unquestionable principle of fiscal justice – the single tax principle.

[3] *Modelowa konwencja w sprawie podatku od dochodu i majątku, wersja skrócona 15 lipca 2014*, Warszawa 2016, pp. 10–15.

[4] *Draft Double Taxation Convention on Income and on Capital*, OECD, Paris 1963.

[5] M. Paszek, *Wpływ regulacji międzynarodowych na kształt polskich przepisów w zakresie cen transferowych*, [in:] *Ceny transferowy. Lokalna i grupowa dokumentacja podatkowa oraz inne obowiązki sprawozdawcze*, red. E. Ścierska, Warszawa 2016, pp. 29–30.

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THE OECD'S ACTIONS ON TAX REGULATIONS

The regulations set forth in the Base Erosion and Profit Shifting Project (hereinafter referred to as BEPS) are aimed mostly at the interactions of different tax provisions that lead to non-taxation of the profit parts of international enterprises. The flagship programme that has been already implemented by the OECD concerned i.a. agreements regarding taxation restriction or avoidance through profit shifting from tax jurisdictions where this profit was earned and should be therefore taxed in countries of a more favourable taxation policy[6].

The international character of tax planning together with a disharmonious actions of particular countries were not sufficient, and in some cases they could even worsen the situation. That is why unifying the undertaken actions so that both developed and developing countries could be provided with tools against tax violation. Nevertheless, it should be admitted that the tax regulation challenges for the developed countries vary from those with which the developing countries have been struggling as regards character and scale. For instance, a poor development of legislation or administration may lead to a more daring tax avoidance than it is the case in the countries of more advanced economies. Thus, the solutions introduced within the OECD framework are to focus on other aspects in the case of the developing countries than in the already developed economies[7].

Therefore, faced with the ever-increasing problem of reducing tax base in the country in which the income has been gained and shifting it to a place where tax rates are lower, measures aimed at its eradication have been introduced. In the OECD's opinion, providing countries with the necessary tools, so that the profit would be taxed in the country in which it is generated, is indispensable. Both domestic legislators and international organisations, led by the OECD, cooperated with one another to create provisions allowing for connecting the country's financial interest with freedom of business activity[8]. With this goal in mind, the BEPS Project was introduced. Within its framework, 15 areas were presented in which measures aimed at taxation system are supposed to be undertaken. One of them is the measure regarding transfer pricing, which indicates the manner and character of settlements and reporting[9].

The aforementioned actions cannot interfere with the freedom-of-contract principle. It concerned the already mentioned manner of documenting and reporting as

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[6] G. Janowski, *Wpływ BEPS na polski system podatkowy*, „Zeszyty Naukowe Wydziału Nauk Ekonomicznych Uniwersytetu Łódzkiego" 2016, nr 20, p. 130.

[7] *Ibidem*, pp. 130–131.

[8] D. Mączyński, *Międzynarodowe prawo podatkowe*, Warszawa 2015, p. 178.

[9] See: *Ceny transferowe. Base Erosion and Profit Shifting (BEPS)*, www.ey.com/pl/pl/services/tax/transfer-pricing-and-operating-model-effectiveness/ey-ceny-transferowe-beps [access: 09.10.2017].

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well as of a follow-up audit. Within this aspect, it should be noted that the growing complexity of the international trade is inseparably connected with the permanent development of international corporations, which put emphasis on maximising the financial result. The aforementioned premises constituted a foundation for introducing Action 13 of the BEPS, which is focused on documentation and its introduction for the purpose of transfer pricing. As Małgorzata Paszek indicates, the insufficient transfer pricing documentation was a considerable problem for tax organs, as the lack of aforementioned data may potentially lead to an inefficient tax collection[10]. Considering the business activity scope of the given affiliated entities, the revenue loss for the state treasury is far bigger than in the case of tax optimisation, which concerns one enterprise. As the doctrine representatives indicate, the former regulations were not efficient enough to identify the transfer pricing mechanism[11].

DOMESTIC ACTIONS ON TAX REGULATION

Benefits from creating more transparent and coherent principles have also been noticed by the Polish legislator. Thus, the collection of new provisions have been developed and introduced in order to protect the fiscal advantages. The introduced amendments occur in an almost analogical manner in the Act on Personal Income Tax (hereinafter referred to as the PIT Act)[12] and the Act on Corporate Income Tax (hereinafter referred to as the CIT Act)[13]. They constitute a transformation of the national system as regards i.a. the question of the tax practice applied so far in terms of transfer pricing documentation.

Undoubtedly, in connection with the global character of transfer taxes, the provisions set forth at the international level have a considerable impact on these regulations. As a member state of the European Union, Poland is obliged to abide by the provisions of the European law, which is of a particular kind, as it is based on autonomy of the legal order and, on the other hand, its objective is to unify legal systems of all member states. In the event when the given domestic provisions are not concurrent with the provisions of the European law, the latter one has the priority[14].

The question of tax regulation is of a dual character, seeing that there are EU regulations, which – pursuant to the Treaty of Lisbon – Poland is obliged to apply,

[10] M. Paszek, *op. cit.*, p. 30.

[11] D. Mączyński, *op. cit.*, p. 178.

[12] The Act of 26 July 1991 on Personal Income Tax (Journal of Laws 2016, Item 2032).

[13] The Act of 15 February 1992 on Corporate Income Tax (Journal of Laws 2016, Item 1888).

[14] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Journal of Laws 2009, No. 203, Item 1569).

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and that, on the other hand, there are the OECD guidelines, which refer to Poland as well. At this stage, it is, therefore, important to present correlations between the aforementioned organisations.

The OECD system has a structure of a monitoring platform of both global and European economic situation, which generates principles and guidelines regarding procedures in i.a. international economic relations, and it is a place for a less official dialogue with other countries[15]. Thus, it merely indicates guidelines for the member states and the EU. More complex OECD's reports help create law at the European level, followed by the domestic one. An example of such cooperation are i.a. activities of the European Commission within the EU Joint Transfer Pricing Forum, which since 2002, has been on the lookout for solutions aimed at hindering the problem of applying the market pricing principle within the inner market. Those publications are complementary to the OECD actions, and their effects are reflected in the European Commission's reports, with the help of which the member states are required to introduce the guidelines to their domestic law orders[16].

The above-mentioned facts indicate unequivocally that in the matter of law (not exclusively tax law) Poland is obliged to implement the EU directives, which are often based on the reports issued by the OECD.

TRANSFER PRICING INCLUDED IN BEPS PROJECT NO. 13

Even though legal tax provisions are often subject to amendments, entrepreneurs find more and more solutions for tax optimisation. Among the last up-dates of the regulations were provisions referring to transfer pricing. Since January 2017, the provisions have come into force, which (for the first time in over 20 years), which have drastically changed the documenting obligation (hereinafter referred to as TPD – Transfer Pricing Documentation). These regulations introduce the 13 Action of the BEPS Project. This action is to introduce new common TPD standards for greater transparency of the international actions of "capital groups for tax administrations and providing information allowing for effective compliance procedures of transfer pricing"[17].

Pursuant to the regulations set forth in the CIT Act, the following persons may be regarded as affiliated entities:

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[15] *Udział Polski w pracach OECD*, www.paryzoecd.msz.gov.pl/pl/polska_w_oecd/udzial_polski [access: 14.10.2017].

[16] E. Ścierska, *Ceny transferowe, lokalna i grupowa dokumentacja podatkowa oraz inne obowiązki sprawozdawcze*, Warszawa 2016, pp. 17–19.

[17] M. Saja, *Ceny transferowe: Jak przygotować Dokumentację Lokalną w 2017 roku*, http://wtssaja.pl/publikacje-pl/657-ceny-transferowe-jak-przygotowac-dokumentacje-lokalna-w-2017-roku [access: 11.10.2017].

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- a natural person, a legal person or an organisational entity not having a legal personality, having its residence, seat or management board on the territory of the Republic of Poland, hereinafter referred to as a domestic entity, which is directly or indirectly involved in managing the enterprise located outside the Republic of Poland or in its control or holds a share in the capital of this enterprise, or
- a natural person, a legal person or an organisational entity not having a legal personality, having its residence, seat or management board outside the territory of the Republic of Poland, hereinafter referred to as a foreign entity, which is directly or indirectly involved in managing the domestic enterprise or in its control or holds a share in the capital of this domestic enterprise, or
- the same natural person, legal person or organisational entity not having a legal personality, which is simultaneously directly or indirectly involved in managing both the domestic and foreign enterprise or in their control or holds a share in the capital of these enterprises.

Since 1 January 2017, the amendments in the Polish law have been in force, which were caused by introducing documents: the Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States[18] as well as the Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States[19]. The aforementioned amendment:

- has re-regulated the obligation within drawing up the transfer pricing documentation,
- introduced several documentation forms, taking into account the comparative analysis obligation,
- imposed the obligation to draw up documentation for shareholders of partnerships,
- changed the threshold of capital relations, which is a condition for preparing the transfer pricing documentation.

The aforementioned amendments to the legal provisions result in the fact that drawing up the documentation by taxpayers will be equally important as preparing

[18] The Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

[19] The Council Directive 2011/96/EU of 30 November 2011 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, www.ey.com/pl/pl/services/tax/transfer-pricing-and-operating-model-effectiveness/ey-ceny-transferowe-beps [access: 09.10.2017], p. 1.

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the annual financial statements[20]. From the legislator's standpoint, strengthening the importance of transfer pricing documentation seems to be a rational move. Additionally, the introduced amendments result from the international agreements, which emphasises their role even more. The Act directly indicates the taxpayers obliged to prepare such a documentation. Pursuant to Article 9a Item 1 of the CIT Act and Article 25 Item 1 of the PIT Act, these are taxpayers[21]:

1) those whose income or costs, within the meaning of accounting principles, set forth on the basis of accounting ledgers, which exceeded the amount of EUR 2 000 000 in the year preceding the fiscal year:
   a) an entity undertaking transactions with affiliated entities (in the fiscal year), within the meaning of Article 11 Item 1 and 4, which exert a considerable impact on their income or losses,
   b) covering (in the fiscal year) in accounting ledgers other events, the conditions of which have been settled (or imposed) with affiliated entities, within the meaning of Article 11 Item 1 and 4, which exert a considerable impact on their income or losses;
2) those who directly or indirectly transfer their liabilities for the benefit of an entity having its residence, seat or management board on the territory or in the country applying harmful tax competition, resulting from transactions or another event set forth in the accounting ledgers, provided that the total amount of the tax consideration (or its equivalent) due for a given fiscal year arising from the agreement or paid in the given fiscal year exceeds the equivalent of EUR 20 000;
3) those who conclude an agreement with an entity having its residence, seat or management board on the territory or in the country applying harmful tax competition, whereby such an agreement is:
   a) of a company which is not a legal person, provided that the total amount of the contributions made by shareholders exceeds the equivalent of EUR 20 000, or
   b) a joint-venture agreement or another agreement of a similar character, in which the value of the jointly undertaken action is set forth in the agreement, and in the event of the lack of stating its value therein, the value shall be deemed as the one envisaged as of the day of the agreement conclusion, provided that it exceeds the equivalent of EUR 20 000.

[20] T. Kosieradzki. R. Piekarz, *Ceny transferowe. Nowe zasady dokumentacji*, Warszawa 2016, p. 230.

[21] The authors present regulations set forth in the CIT Act, however, analogous solutions have been introduced by the legislator in the PIT Act.

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TRANSFER PRICING DOCUMENTATION – THEORETICAL AND PRACTICAL ISSUES

In order to accomplish the objective, which is to tighten the international tax system, a normalised three-tier reporting system has been introduced. As a consequence of Action 13 of the BEPS, new standards related to documentation have been introduced along with a new sample form for country-by-country reporting regarding the income value, profits, taxes paid and other economic activity measurements; and the affiliated entities are obliged to meet those requirements.

The aforementioned obligations have been divided into three major groups: Local File, Master File, Country-By-Country Reporting. However, not every single taxpayer will be obliged to draw up all these documentation forms. The documentation obligation has been made directly dependent upon the scope of the conducted business activity, which is stated on the basis of income value and the costs incurred.

As regards the transfer pricing regulations, preparing the documentation constitutes a taxpayer's basic obligation[22].

The legislator did not decide to impose the obligation to prepare a detailed documentation between all affiliated entities. In order to distinguish between the actions causing the reporting obligation, the term "relevant transactions" has been introduced[23], which refers to events, the value of which exceeds EUR 50 000 in a given fiscal year. Hence, these are transactions or event which exert a considerable impact on income.

If the revenue of the taxpayers running a business activity exceeds the equivalent of EUR 2 000 000, such taxpayers apply yet another definition of a relevant transaction. The relevance threshold is gradual, however, it is of no flat-rate character, as it is dependent exclusively upon exceeding the following values:

- entities whose revenue exceeded EUR 2 000 000 but was lower than EUR 20 000 000; a relevant transaction is in this case the equivalent of EUR 50 000, enlarged by EUR 5 000 for every EUR 1 000 000 of the revenue over EUR 2 000 000,
- entities whose revenue exceeded EUR 20 000 000 but was lower than EUR 100 000 000; a relevant transaction is in this case the equivalent of EUR 140 000 enlarged by EUR 45 000 for every EUR 10 000 000 of the revenue over EUR 20 000 000,
- entities whose revenue exceeded EUR 100 000 000; a relevant transaction is in this case the one whose value exceeds the equivalent of EUR 500 000.

[22] T. Kosieradzki, R. Piekarz, *op. cit.*, p. 230.

[23] Relevant transactions – definition pursuant to Article 9a Item 1d of the CIT Act and Article 25a Item 1d of the PIT Act.

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Due to the fact that tax regulations do not envisage any obligatory documentation samples, as they merely indicate the information supposed to be included therein[24] and state that such documentation should be prepared in a descriptive manner, entrepreneurs will select their own system of presenting the documentation, which, in their opinion, will best present the situation of their enterprises, and respecting the catalogue included in the described provisions will guarantee that they will not be subject to a sanction (50% of the tax rate)[25].

DOCUMENTATION FORMS

Taking into account three reports described below, taxpayers are obliged to present a coherent layout of positions subject to transfer pricing, and by doing so, they will provide information indispensable for transfer pricing risk assessment for tax administrative organs. Therefore, they will facilitate identification in the case of controls or audits conducted in order to state whether the given entities have applied aggressive tax optimisation policies, consisting in transferring relevant income sums to the more favourable tax environments[26].

The basic reporting form is the so-called local tax documentation, that is, a Local File. Only after fulfilling the additional conditions, will this document be complemented by a wider group accounting, Master File and Country-By-Country Reporting. On 1 January 2017, an amendment to the Act on Corporate and Personal Income Tax came into force, which implements the international regulations. Prior to this amendment, reports of the affiliated entities had not been in a classified relation to one another. The situation has changed since 1 January, as the requirements within the content of the description of those relations were established.

The rudimentary element of this documentation form is the description of transactions, in particular, agreements on financial liquidity management, cost division, concluded between a taxpayer or a company not being a legal person and affiliated entities. It is indispensable to include the following information: comparative data analysis[27] and the description of a taxpayer's tax data, which will allow for comparing the accounting with the data stemming from the approved financial statements. Furthermore, it is necessary to include a taxpayer's description, which sets forth

[24] Article 9a Item 1 of the CIT Act and Article 25 of the PIT Act.

[25] T. Kosieradzki, R. Piekarz, *op. cit.*, p. 236.

[26] OECD/G20 Base Erosion and Profit Shifting Project: 2015 Final Reports Executive Summaries, OECD, Paris 2015, pp. 37–39.

[27] This term should be understood as an analysis description of the data agreed upon with an independent entity or independent entities, which are regarded as comparable to the conditions set forth in a transaction or other events applied for accounting calculation accompanied by the source reference. It is indispensable to meet the requirement of the given scope of business activity included in the CIT Act.

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the description of: structure, object and scope of business activity, implemented economic strategy, competition background. Last but not least, it is obligatory to attach documents, that is, agreements and settlements concluded between affiliated entities, as well as settlements regarding income tax concluded with countries other than the Republic of Poland[28]. The documentation introduced as of 1 January 2017 is far more detailed. One of the most relevant issues is the description of transaction, which is of focus here. Undoubtedly, the element which may bring about the biggest problems is the obligation to prepare a comparative analysis.

The master file documentation imposes an obligation to prepare a group documentation on the entities which have reached a given scope of business activity. However, it is imposed only on taxpayers whose revenue or costs, defined pursuant to the Accounting Act, exceeded the equivalent of EUR 20 000 000.

The group documentation should encompass: indication of the entity, which has drawn up the document on the group, organisational structure of entities, transactional pricing policy description, object and scope description of the business activity, presentation of intangible assets considered relevant, description of the financial situation of affiliated entities and description of settlements on income tax concluded by the group with the administration of countries other than the Republic of Poland. Preparing the master file documentation demands from a taxpayer to see his business activity from a more general perspective. The introduced obligation may cause a difficulty in the event when a Polish company is a part of an international group.

The last stage of the documentation is Country-by-Country Reporting (hereinafter referred to as CbC). It refers to the largest international groups and imposes an obligation on them to submit annually the reports, the so-called country-by-country reporting, which identify all entities in every tax administration in which such a group is present, and indicate the kind of business activity[29].

The annual report is envisaged for international corporations of revenues reaching more than EUR 750 000 000. This form of reporting is related to transferring information to the tax administration, within which the given group runs any activity. The transferred information incorporates i.a. sales revenue, pre-tax profit, income tax, number of employees, capital size, retained profit, and assets value in each tax jurisdiction[30].

Within the three-tier context of documentation approach, the CbC Report is an element which was given the utmost attention during its creation process. Particular emphasis was put on the question as to where the Report will be transferred, and how it should be applied[31].

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[28] E. Ścierska, *op. cit.*, pp. 106–108.

[29] *Ibidem*, p. 31.

[30] G. Janowski, *op. cit.*, p. 136.

[31] A. Hickman, S. Abdelghani, P. Hondius, *Action 13: Transfer pricing documentation and country-by-country reporting*, "International Tax Review", 09587594, 1/4/2016.

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CONCLUSIONS

From the above, the issue of transfer prices shows that cooperation between States at international level plays an important role in this area. It has many advantages for national systems, and the manifestations of this cooperation are evident in many facets of law. In this paper, new regulations for the documentation of transfer prices are presented so as to illustrate the importance the international regulations apply to the national tax order. It is difficult to imagine the existence of a purely domestic solution, which in such an efficient way as the three-stage sharing of documentation the threat of tax fraud.

The three-tier documentation division reflects the need of cooperation between particular tax jurisdictions, which is extremely necessary in times of constant economic changes, which is illustrated i.a. in the international enterprises' expansion. This issue is relevant, as the aforementioned provisions constitute an answer to taxpayers' actions aimed at tax optimisation, and even tax avoidance. Due to the OECD publications, a large number of countries have adopted the norms referring to transfer pricing. In consequence, the international tax system has gained a tool aimed at fighting dishonest taxpayers' practices.

It is also worth noting that the solutions put in place are intended to seal the tax system, but they are also a duty imposed on the taxpayer. Increasingly complex responsibilities can be an obstacle to the development for new entrepreneurs who increase the scale of their business. The tax system should be constructed in such a way as to enable business to grow, while taking into account the interests of the exchequer.

Lastly, it should be emphasised that taxpayers will never stop looking for manners allowing for more favourable taxation, therefore, the speed of both the cooperation of the countries and the measures undertaken by state administration organs is so important.

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STRESZCZENIE

Zmienność jest cechą immanentną systemów prawnych, na przestrzeni ostatnich lat jest ona jeszcze bardziej zauważalna. Systemy krajowe państw członkowskich Unii Europejskiej zmierzają do jak najszerszej współpracy, a wszystko po to, by jak najpełniej spełniać wymagania szybko rozwijającego się społeczeństwa. W niniejszym artykule autorzy zajęli się opisaniem rozwoju międzynarodowej współpracy w zakresie zwalczania problemu podwójnego opodatkowania oraz unikania opodatkowania. Na tym tle dużą rolę odgrywają prace OECD z 2016 r., dzięki którym powstał projekt zatytułowany *Base Erosion and Profit Shifting* (BEPS). Regulacje w nim zawarte dotyczą głównie przypadków, gdzie interakcje odmiennych przepisów podatkowych prowadzą w efekcie do nieopodatkowania części zysków międzynarodowych przedsiębiorstw. Jedno z kluczowych zadań projektu zostało określone jako działanie nr 13, a wprowadza ono obowiązek trójstopniowej dokumentacji w odniesieniu do cen transferowych. Jako że autorzy uważają, iż najistotniejsze z punktu widzenia ustawodawstwa jest stworzenie efektywnych, a zarazem jasnych przepisów prawa, w niniejszej publikacji podjęto rozważania na temat problemów, jakie stoją na drodze ustawodawcy krajowego podczas procesu implementacji dyrektyw dotyczących cen transferowych.

Słowa kluczowe: współpraca międzynarodowa; ceny transferowe; system prawa podatkowego; podmioty powiązane; Organizacja Współpracy Gospodarczej i Rozwoju