

THE CONCEPT OF ASSOCIATED PERSONS AS A KEY AND POTENTIALLY PROBLEMATIC ASPECT IN TRANSFER PRICING

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Abstract

Transfer pricing (TP) is based on many principles – the essential one is the Arm’s Length Principle (ALP). In this respect, the term “associated persons” is of crucial importance: associated persons must be involved in transactions in order for the ALP to be applied. The aim of the paper is to contribute to existing comparative analysis of TP rules – specifically, to provide a critical analysis of the term “associated persons” as prescribed by domestic law in Brazil, the Czech Republic, and Latvia. The key goals of the research conducted were to provide a comprehensive picture of the variety of definitions, to indicate relationships between international law and domestic law, and last, but not least, to highlight various concepts of the term “associated persons” and to identify problematic aspects connected with the interpretation of the definitions and the applications of the related rules. The study, which is based on qualitative research, is exploratory and interpretative in its nature. Its results present a background for further research and point to the fragmentation of law on TP with respect to the investigated issue. On the basis of the results of the comparative study one can conclude significant differences among, and fragmentation in, the definitions of the term “associated persons” both in respect of the number of categories established and in respect of the absence of the autonomy of the definitions of the term “associated persons” as provided by public law (especially by income tax acts). At the same time one can conclude the same position regarding the application of double tax treaties in all the countries for which the study was carried out.

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INTRODUCTION

The phenomenon of transfer pricing (TP) has been a very hot topic in the last few decades: its importance has been significantly boosted by the OECD project against Base Erosion and Profit Shifting (BEPS) (for related aspects see: OECD, 2013; 2019; 2022a). The idea behind the need to regulate and set rules for TP between associated persons is clear and obvious – it is to ensure the fair allocation of a tax base when the profit is taxed in the country in which it originates. Considering this, TP rules are investigated in respect of their potential to avoid taxation, which is one of the most researched topics relating to TP (for selected issues, see: Kumar et al., 2021; Devereux & Keuschnigg, 2008). This sole understanding and assessment of TP would, however, ignore the complexity of TP and its related consequences (Holtzman & Nagel, 2014). Such a claim is supported, among other aspects, by the exponential growth in the literature on the subject of TP (Kumar et al., 2021). The literature dealing with this measure and how to replace it by another more suitable one is also growing (see for instance White, 2020). Nevertheless, despite existing critiques, one can conclude that TP rules will not be easily replaced by another concept in the near future. Until then, the Arm's Length Principle (ALP) applied for transactions between associated persons will remain in operation. The understanding and acceptance of this principle are not unified (for a summary, see: Barbosa & Santos, In: Edge & Dominic, 2020). Furthermore, it is obvious that despite OECD standards being globally and extensively accepted, there are still differences between particular domestic rules or rules as embodied in double taxation treaties (DTT) (for a comparison, see for instance OECD, 2022b). The existence of different rules can, without doubt, cause significant problems, and not exclusively in international relations when two associated persons are involved in the transaction. To explore and to better understand the topic of TP, Kumar et al. (2021) suggest addressing several research questions – one of them as follows: "What are the similarities and differences across TP rules and regulations and how can they be (re)configured and improved to promote accountability, ethics, and transparency among business conglomerates and multinational enterprises engaged in intra-firm transactions?" The aim of the paper is to address this particular question and to contribute to existing comparative analysis of TP rules – specifically, to provide a critical analysis of the term associated persons as prescribed by domestic law in Brazil, Czech Republic, and Latvia, as well as to identify potential and/or existing problems and knowledge gaps. These three countries have been chosen to compare the situation in a non-OECD country (represented by Brazil) and in

OECD and EU member countries (represented by the Czech Republic and Latvia). It is worth stressing that the concept selected for this research is of crucial importance in the application of the ALP principle, as associated persons must be involved in the transactions in order for the ALP to be applied (OECD, 2022a).

The structure of the paper is as follows. The following section describes the aim and objectives of the paper. The next section presents the results of the conducted research based on OECD standards (OECD, 2019), these standards serve as a background for the comparisons made and the related analysis. The final section of the paper includes discussion focusing on the identification of problematic issues and proposals for further research in this area, as well as a summary of the results obtained.

AIM AND METHODOLOGY

Considering the fact that there are many significant differences in the definitions of the term "associated persons", one can deduce that this "incoherency" (or absence of harmonization in this area) can cause problems in the application of TP rules. This topic, however, has not been widely investigated. The aim of the paper is thus to extend existing analysis while providing a critical comparison of the definitions of associated persons as embodied in the law of the selected countries, and to define and discuss potentially problematic aspects connected with the application of TP rules.

The main goals of article are:

- 1) To provide a comprehensive picture of the variety of definitions of the term "associated persons" in the selected countries.
- 2) To indicate relationships between international law (represented by DTTs (namely, by Art. 9 of the DTTs which follow OECD standards)) and domestic law in selected countries.
- 3) To highlight the various definitions of the term "associated persons" and to identify problematic aspects connected with the interpretation of the definitions and the application of the related rules (both on the international and domestic levels).

As such, this study is exploratory and interpretative in its nature. The paper itself is based on qualitative secondary research covering predominantly legal regulations in the above-stated countries. The method applied for the collection of information was the content analysis of text. The foundation for the subsequent analysis was the standards as provided by the OECD (2019), from which the basic criteria employed for the analysis were deduced. The research tasks were set as follows:

- 1) To provide a taxonomy of the categories of associated persons as embodied in the domestic law of the above-stated countries on the basis of the categories as deduced from the OECD standards.
 - a) The goal was to obtain a comprehensive picture of the situation in the specified countries along with a comparison with OECD standards.
 - b) Following the background standards as provided by the OECD (2019), we distinguished, on the elementary level, the following types of categories: enterprises / the same persons associated through management (1), control (2) and capital (3).
- 2) To assess the fragmentation of the existing legal framework. Here, we used a holistic approach while integrating the rules as embodied in international and domestic law. The relationships between international and domestic rules were investigated as well.
 - a) The goal of this task was to evaluate (generally speaking) any fragmentation in the definitions of the term and the necessity to identify the rules as embodied in other pieces of law.
 - b) Due to existing differences in the definitions as provided by international and domestic law, there was

a need to identify the relation between these two segments of law.

- 3) To identify gaps/insufficiencies in the definitions of associated persons as provided by domestic law, and to identify potential and existing problems within the application both on the international and domestic levels.

RESULTS

The results stated below follow the above-stated research question. The first issue to be investigated was the scope/complexity of the term “associated persons”. The definitions of “associated persons” as provided by OECD standards (namely OECD, 2019, Art. 9), which is followed with some potential deviations by particular DTTs in all the investigated countries, were the basis for the comparison made.

TAXONOMY OF “ASSOCIATED PERSONS” AS PRESCRIBED IN DOMESTIC LAW

Table 1, below, provides a basic taxonomy of categories of “associated persons” as provided by domestic law. For a detailed description, please see Attachment No. 1 of this paper.

Table 1: Categories of “associated persons” as provided by domestic law utilizing the criteria (links) as established by OECD standards

Category as provided by the OECD		Brazil	Czech Republic	Latvia
An enterprise participating directly or indirectly in an enterprise through:	Management	Yes - implicitly included (strong relation to control) - relationships of a parent company to subordinated subjects (e. g. affiliates)	Yes - explicitly state - general clause based on this criterion	Yes - implicitly stated - contractual agreements
	Control	Yes - explicitly stated - including exclusive agents, distributors, or concessionaires as well	Yes - explicitly stated - general clause based on this criterion	Yes - explicitly stated - person(s) having a majority of votes on the boards of directors
	Capital	Yes - explicitly stated - corporate control (50% + 1% share) - a share of at least 10% owned by a Brazilian domestic legal entity	Yes - explicitly stated - both an indirect and direct share - a share of at least 25% of the capital or voting rights	Yes - explicitly stated - both a direct and indirect share of more than 20% of capital share; - clearly related to the control issue

Category as provided by the OECD		Brazil	Czech Republic	Latvia
The same persons participate directly or indirectly in an enterprise of a Contracting State and in an enterprise of another Contracting State Note: this criterion was modified (extended) to cover even solely domestic relations: the same persons participate directly or indirectly in two different enterprises	Management	Yes - implicitly included (strong relation to control)	Yes - explicitly stated - general clause based on this criterion	Yes - implicitly stated - contractual agreements
	Control	Yes - explicitly and extensively stated	Yes - explicitly stated - based on a general clause + specific situations (controlling and controlled persons)	Yes - explicitly stated - including relatives and cross-relations
	Capital	Yes - explicitly stated - see the criteria for association through capital above	Yes - explicitly stated - see the criteria for association through capital above	Yes - explicitly stated for capital holders above 50%

Source: Own elaboration based on: Czech Income Tax Act (1992); OECD Model Convention (2019); Brazilian Normative Instruction RFB No. 1,312 (2012), Brazilian Act No. 9430, of December 27, 1996 (1996); Latvian Act on Tax and Fees (1995).

In fact, when compared to OECD standards, it is possible to identify all the categories of associated persons in all the investigated countries – there can be found categories of persons associated through management, control, and capital, which appears only logical. Having a closer look (for details, see Attachment 1), it can be observed that the scope of categories as provided in domestic law differs significantly among the countries and, furthermore, that there are categories not explicitly considered (stated) in the OECD standards (and subsequently in DTTs, which follow OECD standards). Those categories can be classified, generally speaking, as “persons associated otherwise”.

Speaking of domestic law and the rules embodied therein, it is worth evaluating the complexity of the issue when considering the number of acts covering the term “associated persons”. That is to say, there is significant fragmentation of the definition of “associated persons” provided by domestic law in all the considered countries. Even though most countries provide a definition within the specifications of the respective income tax acts (providing fundamental rules), these are not, as a rule, sufficient to identify all

the criteria for associated persons: particular features/ attributes for the categories of associated persons are specified in other acts, such as the commercial code or the civil code. This means that the law pertaining to the definition of “associated persons” must be interpreted while taking account of the rules/terms/specifications related to associated persons as embodied in other acts and regulations: income tax acts do not provide fully autonomous definitions of the term “associated persons”. For a detailed summary, see Attachment 2 of this paper.

RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW

Considering the fact that the scope of the meanings of the categories of associated persons covered differs between international law (represented by DTTs which follow OECD standards) and domestic law, the relationship between international and domestic law can be investigated in order for potential problems to be identified and resolved. A comparison of the rules for resolving conflicts can be found in Table 2.

Table 2: Relationship between international law (represented by DTTs) and domestic law

Country	Rule	Established by
Brazil	- International law rules have the same status as federal law (ordinary law). - Tax treaties of a contractual nature revoke or modify domestic tax law and shall be regulated by future rules.	- Articles 5, § 5, 102, III, b, of the Constitution of the Federative Republic of Brazil (Brazilian Constitution). - Art. 98 of the National Tax Code.
Czech Republic	- The application of international law rules takes priority over the application of domestic rules.	- Art. 10 of the Constitution of the Czech Republic.
Latvia	- The application of international law rules takes priority over the application of domestic rules.	- Art. 1 of the Declaration on the Restoration of Independence of the Republic of Latvia.

Source: Own elaboration based on: Constitution of the Czech Republic (1993); Brazilian Constitution (1988); Brazilian National Tax Code (1966); Latvian Declaration on the Restoration of Independence of the Republic of Latvia (1990).

DISCUSSION AND CONCLUSIONS

The results of the given research tasks are presented below, along with a discussion of some problematic areas and suggestions for further research. Special attention is paid to Brazilian domestic law, since this country has been shown to have relatively extensive and specific legal regulations in the given context compared with the remaining countries: transfer pricing rules in Brazil are considered to be specific in many respects (see for instance: Xavier, 2014; Barreto & Takano, 2014; Schoueri, 2013a; Edge & Robertson, 2020) and this conclusion seems to remain valid in relation to the attributes of the definition of “associated persons” as well.

TAXONOMY OF THE CATEGORIES OF “ASSOCIATED PERSONS” AND RELATED EVALUATIONS

Considering and evaluating the taxonomy of the term, the study shows (not surprisingly) that the categories of “associated persons” as set down in domestic law include all the links as prescribed (presumed) by the OECD standards (OECD, 2019, Art. 9): i.e., links via management, control, and capital. This conclusion can also be made for other countries (see, for instance: OECD, 2022b, and for EU countries, the European Commission, 2022). On the other hand, it must be stressed that the respective OECD standards (which are considered to be a form of “soft-law” for non-OECD Countries – see for instance Schoueri, 2013a) do not contain autonomous definitions of the term “association persons”, and that the term as included in particular DTTs (which obey the OECD standards) are in fact of a very general nature, providing significant space for domestic law rules. DTTs are connected with general categories and terms (for the situation in the Czech Republic, see for instance Ministry of Finance of the Czech Republic, 2022; for the situation in Brazil see: Receita Federal do

do Brasil, 2021). Particular DTTs provide no detailed specification either with respect to the attributes of the terms or related rules. The definitions as provided by DTTs thus cannot stand alone. Following the instruction as provided under Art. 3 para. 2 of particular DTTs (which obeys the OECD Model Convention (OECD, 2019), the content of the terms used can be determined only when using domestic law rules and definitions contained therein. This conclusion is valid also for Brazil, which – despite being a non-OECD country – follows OECD standards when interpreting DTTs (see: Schoueri, 2013a; Schoueri 2013b; OECD & Receita Federal do Brasil, 2019; Edge & Robertson, 2020). To sum up this aspect, one can conclude that very great autonomy is provided for particular countries when establishing the categories and criteria for determining the term “associated persons” and its attributes – even for international transactions between associated persons. This discretion, which makes reflection on the specificities and needs of a particular country possible, is liable to create a conflict situation in which parties involved in one transaction will be treated as associated persons in one country but not in another. This can provoke the need to initiate and pass through a Mutual Agreement Procedure (MAP), which can be connected with certain problems (see: Nikolaou, 2021; Al-Rawashded, 2020).

On the basis of a more general comparison between the categories as established in international and domestic law, there is one extra “explicit” category in domestic law when compared to the international one: a category which can be described as “persons associated otherwise”. The introduction of this relatively broad category can be considered as being in line with the idea of encompassing links which represent not only economic or personal links, but also other functionally equivalent connections (this specification of existing types of association was presented by the Czech Supreme Administrative Court in its judgement

of 27 January 2011 File No. 7 Afs 74/2010). A special category of associated persons has also been established for transactions having a link with a person based in a tax haven or a country with a preferential tax regime. Establishing such a category seem to be only logical and fully in line with the ideas of the OECD project against BEPS (see: OECD, 2013), as the abuse of intercompany transactions for the mitigation of profit/tax bases is a reality (see: Hájek, 2018; Guvenen et al., 2022). OECD standards do not explicitly establish the category of persons associated otherwise (for a comparison, see OECD, 2019, Art. 9). The question is whether this link can be deduced for international relationships from the general clauses of DTTs dealing with the prohibition on abusing DTT rules (for some more general analysis emphasizing EU law, see: Debelva et al., 2015; for aspects related to a purpose test, see for instance Mosquera & Valderrama, 2020). This aspect certainly deserves special attention in further research. Speaking of domestic law in Brazil, there has been established a specific category of associated persons based on a person's link to a tax haven or country with a preferential tax regime (Schoueri, 2013a; Brazilian Normative Instruction RFB No. 1,312, 2012, Article 2, item VIII, §§ 3 and 5; and Brazilian Act No. 9,430, 1996, Art. 24-A); in Latvian domestic law there is both a reference to a tax haven/country with a preferential tax regime (State Revenue Service's methodological material Transfer price documentation) and to an association occurring thanks to the existence of coordinated activities focusing on a reduction of the tax liability (Latvian Act on Taxes and Fees, 1995, Article 1 item 18h). Czech domestic law, however, does not contain such a specific clause. Nevertheless, the rule as embodied therein covers artificially established associations (if proven by a tax authority during a tax audit): there is the category of an association via a link created with the intention of reducing a tax base or increasing a tax loss (Czech Income Tax Act, 1992, Sec. 23 para. 2, letter b) item 5). This example clearly demonstrates that a higher number of categories included in the definition does not necessarily mean a more extensive scope and vice versa. In any case, a greater level of generality in the wording boosts the importance of case-law, which provides the interpretation of the law as such (Gealfow, 2020). Case-law and the limits established by case-law for the interpretation of the category of associated persons seem to be worth further investigation: the contents of some definitions suggest that a different wording does not necessarily mean a different scope and, at the same time, an identical or similar wording does not necessarily mean an identical or similar scope.

VARIETY AND SELECTED SIMILARITIES IN THE DEFINITIONS

Speaking of the variation in the particular (specific) definitions as provided by domestic law rules, the comparison itself (for details, see the Attachment 1 of the paper) exposed significant differences – both in terms of the number of categories and the details of the given attributes for the term “associated persons”. The highest level of fragmentation can be seen in Brazilian domestic rules, followed by the Latvian. When speaking of legal regulation as embodied in the main public law, legal regulation in the Czech domestic law can be described as relatively less extensive both in terms of its scope and degree of fragmentation: Czech Income Tax Act (1992, Sec. 23 para. 7).

Regarding the category of an association via capital (which can be connected with the category of a link via voting rights), there are significant differences among the countries. The legal regulation in the Czech Republic sets a rule of direct or indirect association via a threshold of at least 25% (see: Czech Income Tax Act, 1992, Sec. 23 para. 7, letter a). The Latvian domestic legal regulation establishes a link via parent-subsidiary relationships (while referring to the specification of the share in another piece of law) and, furthermore, operates with shares of over 20% when putting relevant clauses together (see: Act on Taxes and Fees, 1995, Art. 1 item 18 (a-e)). Brazilian domestic law established a threshold of at least 10% for one type of an association, while for another type of an association) which can be considered a connection via a majority, it established a threshold of more than 50% of the share in the capital (Brazilian Normative Instruction RFB No. 1.312, 2012, Art. 2, item V).

Brazilian, Czech, and Latvian domestic law contain many potential links occurring via control. For Brazilian and Latvian domestic law, we can find many situations which can be described as capital/control links. It is worth mentioning that in practice there is an overlap: persons can be considered to be associated thanks to meeting more than one criterion. Brazilian law contains a very specific category of associated persons: a type of association via control is set for an exclusive agent, distributor, or concessionaire for the trading of goods, services, or rights, or, in relation to which, a legal person domiciled in Brazil enjoys such exclusivity (Brazilian Normative Instruction RFB No. 1,312, 2012, Art. 2, item IX). This clause seems to be very specific in comparison with the respective legal regulation in the Czech Republic and Latvia. However, the existence of this link seems to have a logical basis.

Connection via management is also included in the domestic law of all the investigated countries. Brazilian domestic law provides quite a short definition of the

link via management: this type of link includes a parent company and its subsidiaries, affiliates or branches, when domiciled abroad (Brazilian Normative Instruction RFB No. 1,312, 2012, Art. 2, items I, II and IV; Act No. 9430, 1996, Art. 23, item I, II and III). The definition as provided by Czech domestic law seems to be more extensive (when considering the number of cases covered), while participation in a control committee or similar control body and exercising control for a reward is not considered as participation in the control (Czech Income Tax Act, 1992, Sec. 23 para. 7 letter b). Latvian domestic law explicitly establishes an association based on a contract (including that which has not been made public – see Latvian Act on Tax and Fees, 1995, Art. 1, item 18g).

In all countries there are specified links via filiations. In the Czech Republic there is quite a brief rule referring to the category of close persons (Czech Income Tax Act, 1992, Sec. 23 para. 7 letter b), which is defined in the Civil Code (Czech Civil Code, 2012). The definitions of links regarding filiations in Brazil and Latvian domestic law represent more autonomous definitions of the related terms – for instance, Brazilian domestic law refers to a person related up to the 3rd degree, or who is married to or lives in a marital-type arrangement with the directors or with the societal partner or controlling shareholder participating in the Brazilian legal person (Brazilian Normative Instruction RFB No. 1,312, 2012, Art. 2, item VIII). Latvian domestic rules take a similar position, when referring in certain cases to relatives up to the 3rd degree, spouses, or affines up to the 2nd degree (Latvian Act On Taxes and Fees, 1995, Art. 1 item 18 (letters e) and h)). Further, more comprehensive research is required to understand the situation relating to filiations more deeply.

OTHER ASPECTS CONNECTED WITH THE TERM “ASSOCIATED PERSONS”

In all the given countries, one can find a key act providing the definitions of associated persons. On the basis of the analysis of the rules contained therein it can be seen that the autonomy of the terms is, generally speaking, very low – to understand the term “associated persons” fully one cannot avoid becoming acquainted with other rules/terms/definitions as prescribed under other sections/articles of the key act and by other acts of public and private law (these include, for instance, civil codes, act on business corporations, normative instructions, and so on). For more details, see Attachment 2 of this paper. Accordingly, it must be concluded that the definition of the term “associated persons” is highly fragmented – at least in Brazil and the Czech Republic. This fact complicates the correct application of the rules.

Unlike Czech domestic law, both Brazilian and Latvian domestic law give an explicit link to subjects abroad, which Czech law does not. Brazilian domestic law significantly widens the scope by including foreign enterprises and foreign individuals. This actually means that even family relatives of directors and officers of a company, shareholders, or controlling partners are all considered related parties under Brazilian legislation (Brazilian Normative Instruction RFB No. 1,312, 2012, Art. 2, item VIII). The “associated persons” notion not only includes enterprises with an equity interest in another enterprise, but also exclusive agents, distributors and dealers working with a company’s goods, services, or rights. However, the TP rules, in these cases, will only apply where the transfers concern those specific goods, services or rights. Latvian domestic law gives just one explicit case in which an existing link to a foreign country creates an association. This is any transaction with a person who is located, set up, or established in a low-tax or tax-free jurisdiction (Latvian State Revenue Service, 2019).

The concept of associated persons as provided by domestic law is far more complex compared with the concept as provided by OECD standards, which has the potential to create a conflict between the scope provided by DTTs and by domestic law. In the Czech Republic and Latvia, this potential conflict seems to be eliminated more easily because of the supremacy of international law over the domestic. The question which remains for other related research is the procedure for the application of DTTs rules, because the application of the rules is far from clear (for some problematic aspects within the application of DTTs, see for instance Lang, 2020). In Brazil, there is a very specific situation connected with the hierarchy of international norms. Generally, in that country, international law rules have the same status as federal law (ordinary law) (Brazilian Constitution, 1988, Art. 102, III, letter b); however, when it comes to international tax law, one must consider the existence of two kinds of international treaties: contractual and normative. The distinction between these two types of treaty has been recognized by international law doctrine and by case law, and when it is applied to DTTs it means that, because of the contractual nature of those treaties, they prevail over ordinary law, as prescribed by art. 98 of the Brazilian National Tax Code (Schoueri, 2013a; Brazilian National Tax Code, 1966, Art. 98). Another interesting situation is that of treaties that prescribe individual rights or guarantees. In this case, it is possible to argue that these treaties would be incorporated in domestic law with constitutional status, as prescribed by the Brazilian Constitution (Schoueri, 2013a; Brazilian Constitution, 1988, Art. 5, para. 2). Nonetheless, considering

that the application of DTTs is prioritized in the face of domestic law even in Brazil, this means that, when interpreting DTTs, the Brazilian concept of associated persons is restricted to the terms of the treaty and, complementarily, to the provisions contained in the OECD standards (Schoueri, 2013a).

Who should bear the burden of proof regarding the existence of an association between persons should also be investigated in further research, since this has been of vital importance for the application of ALP in situations when a conflict between the statement of a taxpayer and the conclusion of a tax authority regarding the existence of an association arises. Our presumption based on our preliminary research is that this burden is borne by tax authorities. This is a logical conclu-

sion, according to the principle of legal certainty and the rule of law, as a duty to prove the non-existence of an association cannot be imposed on a taxpayer.

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REFERENCES

- Al-Rawashded, B.H. (2020). Mutual Agreement Procedure, Double Taxation Treaties and Protection of Taxpayers' Rights in the BRICS Countries. *Lawyer Quaterly*, 10(3), 260-278.
- Barbosa, M.R. & Santos, J.V.G. (2020). Brazil. In: *The Transfer Pricing Law Review*. Law Business Research, 25-35.
- Barreto, P.A. & Takano, C.A. (2014). Tributação do resultado das coligadas e controladas no exterior, em face da Lei nº 12.973/14. In: Rocha, V. O. (ed.). *Grandes questões atuais do direito tributário*, 18th Vol., São Paulo Dialética.
- Brazilian Act No. 11,727 (2008). Act No. 11.727, 23 June 2008, as amended. Retrieved from: http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2008/lei/l11727.htm (Accessed: 26.06.2022).
- Brazilian Act No. 11,795 (2008). Act No. 11.795, of October 8, 2008, on consortium, as amended.
- Brazilian Act No. 9,278 (1996). Act No. 9,278, 10 May 1996, as amended. Retrieved from: http://www.planalto.gov.br/ccivil_03/leis/l9278.htm (Accessed: 26.06.2022).
- Brazilian Act No. 9,430 (1996). Act No. 9,430, 27 December 1996, as amended. Retrieved from: http://www.planalto.gov.br/ccivil_03/leis/l9430.htm (Accessed: 26.06.2022).
- Brazilian Act on Joint Stock Companies (1976). Act No. 6,404, 15 December 1976, as amended. Retrieved from: https://conteudo.cvm.gov.br/export/sites/cvm/subportal_ingles/menu/investors/anexos/Law-6.404-ing.pdf (Accessed: 26.06.2022).
- Brazilian Civil Code (2002). Act No. 10,406, 10 January 2002, as amended. Retrieved from: http://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm (Accessed: 26.06.2022).
- Brazilian Constitution (1988). Constitution of the Federative Republic of Brazil, 5 October 1988, as amended. Retrieved from: <https://www.refworld.org/docid/4c4820bf2.html> (Accessed: 26.06.2022).
- Brazilian National Tax Code (1966). Act No. 5,172, 25 October 1966, as amended. Retrieved from: http://www.planalto.gov.br/ccivil_03/leis/l5172compilado.htm (Accessed: 26.06.2022).
- Brazilian Normative Instruction RFB No. 1,037 (2010). Brazilian Normative Instruction RFB No. 1,037, 4 June 2010, as amended. Retrieved from: <http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=16002#:~:text=IN%20RFB%20n%C2%BA%201037%2F2010&text=Relaciona%20pa%C3%ADses%20ou%20depend%C3%AAs%20com%20tributa%C3%A7%C3%A3o%20favorecida%20e%20regimes%20fiscais%20privilegiados> (Accessed: 26.06.2022).

- Brazilian Normative Instruction RFB No. 1,312 (2012). Normative Instruction RFB No. 1,312, 28 December 2012, as amended. Retrieved from: <http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=39257> (Accessed: 26.06.2022).
- Constitution of the Czech Republic (1993). Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic, as amended. Retrieved from: <https://www.zakonyprolidi.cz/cs/1993-1> (Accessed: 26.06.2022).
- Czech Act on Business Corporations (2012). Act No. 90/2012 Coll., on Business Corporations, as amended. Retrieved from: <https://www.zakonyprolidi.cz/cs/2012-90> (Accessed: 26.06.2022).
- Czech Civil Code (2012). Act No 89/2012 Coll., Civil Code, as amended. Retrieved from: <https://www.zakonyprolidi.cz/cs/2012-89> (Accessed: 26.06.2022).
- Czech Income Tax Act (1992)> Act No. 586/1992 Coll., Income Tax Act, as amended. Retrieved from: <https://www.zakonyprolidi.cz/cs/2012-89> (Accessed: 26.06.2022).
- Czech Supreme Administrative Court: Judgement of 27 January 2011 File No. 7 Afs 74/2010. Retrieved from: www.nssoud.cz (Accessed: 01.01.2022).
- Develva, F., Scornos, D., Van den Berghen, J. & Van Braband, P. (2015). LOB Clauses and EU-Law Compatibility: A Debate Revived by BEPS? *EC Tax Review*, 24(1), 132 - 143. doi: 10.54648/ecta2015014.
- Devereux, M.P. & Keuschnigg, C. (2009). The Distorting Arm's Length Principle in International Transfer Pricing. Working Papers 0910, Oxford University Centre for Business Taxation.
- Edge, S. & Robertson, D. (Eds) (2020). *The Transfer Pricing Law Review* (4th ed). London: Law Business Research.
- European Commission (2022). Joint transfer pricing forum. Member States' Transfer Pricing Profiles. Retrieved from https://ec.europa.eu/taxation_customs/joint-transfer-pricing-forum_en (Accessed: 26.06.2022).
- Gealfow, J. A. (2018). Case Law and its Binding Effect in the System of Formal Sources of Law. *Journal of the University of Latvia. Law*, (11), 38-61.
- Guvenen F., Mataloni, F. J. Jr., Rassier, D. G., Ruhl, K. J. (2022). Offshore Profit Shifting and Aggregate Measurement: Balance of Payments, Foreign Investment, Productivity and the Labor Share. *American Economic Review* 112(6), 1848-1884.
- Hájek, J. (2018). Do Czech companies influences tax base using intercompany transactions? [Ovlivňují české společnosti základ daně transakcemi se zahraničními spřízněnými osobami?] *Politická Ekonomie*, 66(3), 330-343. doi: <https://doi.org/10.18267/j.polek.1191>.
- Holtzman, Y., Nagel, P. (2014). An introduction to transfer pricing. *Journal of Management Development*, 33(1), 57-61. doi: <https://doi.org/10.1108/JMD-11-2013-0139>.
- Kumar, S. & Pandey, N. (2021). What do we know about transfer pricing? Insights from bibliometric analysis. *Journal of Business Research*, 134, 275-287. doi: <https://doi.org/10.1016/j.jbusres.2021.05.041>.
- Lang, M. (2020). *Introduction to the Law of Double Taxation Conventions*. Vienna: Linde.
- Latvian Act on Taxes and Fees (1995). Latvian Law "On Taxes and Fees", *Latvijas Vestnesis*, Vol.26 (1995), as amended. Retrieved from <https://likumi.lv/ta/en/en/id/33946-on-taxes-and-fees> (Accessed: 26.06.2022).
- Latvian Declaration on the Restoration of Independence of the Republic of Latvia (1990). The Supreme Council of the Latvian Soviet Socialist Republic on the Restoration of Independence of the Republic of Latvia. *Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs*, Vol. 20, 1990. Retrivede from <https://likumi.lv/ta/en/en/id/75539-on-the-restoration-of-independence-of-the-republic-of-latvia> (Accessed: 26.06.2022).

- Latvian Enterprise Income Tax Act (1995). Latvian Act on Enterprise Income Tax, Latvijas Vestnesis, Vol. 156 (2017), as amended. Retrieved from: <https://likumi.lv/ta/en/en/id/292700-enterprise-income-tax-law> (Accessed: 26.06.2022).
- Latvian State Revenue Service (2019). Methodological Material: Transfer Price Documentation. Retrieved from: https://www.vid.gov.lv/sites/default/files/27122019_transfertcenas._informativais_materials.pdf (Accessed: 22.06.2022).
- Ministry of Finance of the Czech Republic (2022). List of the Agreements for the elimination of double taxation with respect to taxes on income or with respect to taxes on income and on capital in force as of 13 June 2022. Retrieved from: <https://www.mfcr.cz/cs/legislativa/dvoji-zdaneni/prehled-platnych-smluv> (Accessed: 26.06.2022).
- Mosquera Valderrama, I.J. (2020). BEPS Principal Purpose Test and Customary International Law. *Leiden Journal of International Law*, 33(2), 745-766. doi: <https://doi.org/10.1017/S0922156520000278>.
- Nikolaou, P. (2021). Mandatory Binding Arbitration: Avoiding Stalemates Over the Tax Chessboard. *Intertax*, 49(12), 974-985. doi: <https://doi.org/10.54648/taxi2021099>.
- OECD (2013). *Addressing Base Erosion and Profit Shifting*. Paris: OECD Publishing. Retrieved from: www.oecd.org. (Accessed: 25.05.2022).
- OECD (2019). *Model Tax Convention on Income and on Capital (Full Version)*. Paris: OECD Publishing. Retrieved from: www.oecd.org (Accessed: 25.05.2022).
- OECD (2022a). *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*. Paris: OECD Publishing. Retrieved from www.oecd.org (Accessed: 25.05.2022).
- OECD (2022b). *Transfer Pricing Country Profiles*. Retrieved from: <https://www.oecd.org/tax/transfer-pricing/transfer-pricing-country-profiles.htm> (Accessed: 25.05.2022).
- OECD, Receita Federal do Brasil (2019). *Transfer Pricing in Brazil: Towards Convergence with the OECD Standard*. Paris: OECD Publishing. Retrieved from www.oecd.org (Accessed: 26.06.2022).
- Receita Federal do Brasil (2021). *Acordos para evitar a dupla tributação e prevenir a evasão fiscal*. Retrieved from: <https://www.gov.br/receitafederal/pt-br/acao-a-informacao/legislacao/acordos-internacionais/acordos-para-evitar-a-dupla-tributacao/acordos-para-evitar-a-dupla-tributacao> (Accessed: 26.06.2022).
- Schoueri, LE (2013a). *Preços de transferência no direito tributário*, São Paulo, Dialética.
- Schoueri, L.E. (2013b). *O Princípio Arm's Length em um Panorama Internacional*. In: Schoueri, L. E. (ed), *Tributos e preços de transferência*, Dialética, São Paulo, 208-227.
- White, J. (2020). *OECD Looks Beyond the Arm's Length Principle*. Retrieved from: <https://www.internationaltaxreview.com/article/b1fydc48yqvvcz/oecd-looks-beyond-the-arms-length-principle> (Accessed: 5.03.2020).
- Xavier, A. (2014). *A Lei nº 12.973, de 13 de maio de 2014, em matéria de lucros no exterior: objetivos e características essenciais*. In: Rocha, V.O. (ed.), *Grandes questões atuais do direito tributário*, Vol. 18, São Paulo, Dialética.

Attachment 1: Detailed comparison of the definitions of “associated persons” provided by domestic and international law

Entity	Definition of associated persons
OECD	<p>An enterprise that participates directly or indirectly in the management, control or capital of a foreign enterprise.</p> <p>The same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State.</p> <p>Note: this criterion was modified (extended) to cover even solely domestic relations. An enterprise/the same persons that participate directly or indirectly in two different enterprises.</p>
Latvia	<p>Persons associated through Capital:</p> <ol style="list-style-type: none"> (1) parent and subsidiary commercial companies or co-operative societies; (2) when the share of the holding of one commercial company or co-operative society in another company is between 20 and 50%; (3) when more than 50% of the value of the equity capital or shares of two or more commercial companies or co-operative societies is held, or a decisive influence is ensured in these two or more commercial companies or co-operative societies under a contract or otherwise (by majority vote) by the same person and the kin of this person to the third degree or the spouse of this person, or the affines of this person to the second degree; (4) a natural person (or the kin of this person to the third degree or the spouse of this person, or the affines of this person to the second degree) who directly or indirectly holds more than 50% of the value of the equity capital or shares of a commercial company or of the value of co-operative shares of a co-operative society, or a natural person (or the kin of this person to the third degree or the spouse of this person, or the affines of this person to the second degree) to whom decisive influence has been ensured in a commercial company or co-operative society under a contract or otherwise; <p>Persons associated through management:</p> <ol style="list-style-type: none"> (1) the person(s) who have a majority of votes on the boards of directors of the commercial companies or co-operative societies; (2) a natural person (or the kin of this person to the third degree, or the spouse of this person, or the affines of this person to the second degree) that holds more than 50% of the value of the equity capital or shares in two or more commercial companies or co-operative societies; (3) the same person or the same persons have a majority of votes on the boards (executive bodies) in the commercial company or co-operative society; <p>Persons associated otherwise:</p> <ol style="list-style-type: none"> (1) persons who, in addition to a contract for a specific transaction in any form, have entered into an agreement (public or not) providing for any additional remuneration not laid down in the contract or who engage in other forms of coordinated activities with a view to reducing their taxes; <p>Exceptions:</p> <ol style="list-style-type: none"> (1) capital companies which are linked by capital shares or stocks that are directly owned by the State or local government; (2) when there are more than 10 persons that hold more than 50% of the value of the equity capital or shares of the commercial company or co-operative society in each of these companies or have a decisive influence in these companies ensured under a contract or otherwise.

Entity	Definition of associated persons
Czech Republic	<p>Persons associated through capital (directly): If one person directly holds a share in the capital or voting rights of another person, or if one person directly holds a share in the capital or voting rights of several persons, or if, simultaneously, this share constitutes at least 25% of the registered capital or 25% of the voting rights of such persons, then all such persons are persons directly mutually associated through capital.</p> <p>Persons associated through capital (indirectly): If one person indirectly participates in the capital or voting rights of another person or if one person directly or indirectly participates in the capital or voting rights of several persons, or if, simultaneously, this share constitutes at least 25% of the registered capital or 25% of the voting rights of such persons, then all such persons are persons mutually associated through capital.</p> <p>Persons associated otherwise: (1) the situation in which one person participates in the management or control of another person; (2) if identical persons or close persons participate in the management or control of other persons, then such other persons are persons otherwise mutually associated. Persons otherwise associated shall not be deemed to be persons if one person is a member of the supervisory boards of two persons. Participation in a control committee or similar control body and carrying out control for a reward is not considered participation in the control; (3) controlling and controlled persons and also persons controlled by the same controlling person;</p> <p>Close persons: (1) persons that have created a legal relationship predominantly for the purpose of reducing a tax base or increasing a tax loss.</p>
Brazil	<p>Persons associated through Control: (1) residents or persons domiciled abroad characterized as (1.a) parent companies, controlling or affiliated, according to their equity interest or the sum of their equity interest and a Brazilian company's equity interest in a third company; or (1.b) an exclusive agent, distributor or concessionaire for the trading of goods, services or rights, or in relation to which a legal person domiciled in Brazil who enjoys such exclusivity. (2) a person domiciled abroad who shares administrative control with a legal person domiciled in Brazil.</p> <p>Persons associated through Capital: (1) a person domiciled abroad which (1.a) shares corporate control with a legal person domiciled in Brazil; or (1.b) keeps, alongside the same shareholder of a legal person domiciled in Brazil, at least 10% of its capital stock.</p> <p>Persons associated through Management: (1) a parent company and its subsidiaries, affiliates, or branches, when domiciled abroad.</p> <p>Persons associated otherwise: (1) a person domiciled abroad who is related up to the 3rd degree, married to, or lives in a marital-type arrangement with the directors or with the societal partner or controlling shareholder in the Brazilian legal person. (2) a legal person domiciled in Brazil that carries out operations through an intermediary person not characterized as linked, which, in turn, operates with another, abroad, characterized as linked to the Brazilian legal person. (3) a resident or person domiciled abroad that is associated with the legal person domiciled in Brazil in the form of a consortium or condominium. (4) a resident or person domiciled abroad which promotes transactions subject to preferential tax regimes.</p>

Source: Own elaboration based on: OECD Model Convention (2019); Brazilian Normative Instruction RFB No. 1,312 (2012), Brazilian Act No. 9,430, of December 27, 1996 (1996), Brazilian Act on Joint Stock Companies (1976), Brazilian Civil Code (2002), Brazilian Act No. 9,278, of May 10, 1996 (1996), Brazilian Normative Instruction RFB No. 1,037, of June 4, 2010 (2010), Brazilian Act No. 11,795, of October 8, 2008 and Brazilian Act No. 11,727, of June 23, 2008 (2008); Czech Income Tax Act (1992), Czech Act on Business Corporations (2012) and Czech Civil Code (2012); Latvian Act On Tax and Duties (1995) and Latvian Corporate Income Tax Law (2017).

Attachment 2: Scope of the acts covering the term “associated persons”.

Country	Act/legal regulations	Category	Note
Brazil	Brazilian Normative Instruction RBF No. 1,312 (2012): Article 2, items III, V, VI, IX and X, §§ 1 and 4 Brazilian Act No. 9,430 (1996): Art. 23, items II, V and VI	Persons associated through control	The characterization as "Parent Company" and "Affiliate" is regulated by Article 243, §§ 1 and 2 of Brazilian Act on Joint Stock Companies (1976) Definition of consortium: art. 2 of the Brazilian Act No. 11,795 (2008)
	Brazilian Normative Instruction RBF No. 1,312 (2012): Article 2, items V and VII, §§ 1 and 2, Brazilian Act No. 9,430 (1996): Art. 23, item IV.	Persons associated through capital	Definition of condominium: Book III, Title III, Chapters VI and VII, of the Brazilian Civil Code (2002). Definition of marital nature: Brazilian Act No. 9,278 (1996).
	Brazilian Normative Instruction RBF No. 1,312 (2012): Article 2, items I, II and IV. Brazilian Act No. 9,430 (1996): Art. 23, item I, II and III.	Persons associated through management	Definition of preferential tax regimes: Art. 22 of the Brazilian Act No. 11,727 (2008) and Art. 1 of the Brazilian Normative Instruction RFB No. 1,037 (2010).
	Brazilian Normative Instruction RBF No. 1,312 (2012): Article 2, item VIII, §§ 3 and 5. Brazilian Act No. 9,430 (1996): Art. 24-A.	Persons associated through other criteria	
Czech Republic	Czech Income Tax Act (1993): Sec. 23 para. 7.	Persons associated through capital, management and control	Some terms are specified thanks to quite extensive case-law of the administrative courts.
	Czech Act on Business Corporations (2012): Sec. 71 et seq.	Definition of business groups; influence; controlling and controlled entities; etc.)	
	Czech Civil Code (2012): Sec. 22.	Close persons	
Latvia	Latvian Act On Tax and Fees (1995): Section 1, Point 18); Latvian Act on Enterprise Income Tax (1995): Section 4, Paragraph 10	Associated persons	N/I

Source: Own elaboration based on the sources specified in the table.