sciendo

Financial Internet Quarterly 2022, vol. 18 / no. 4, p. 23-34

10.2478/fiqf-2022-0025

Financial Internet Quarterly

CHALLENGES IN TRANSFER PRICING: A CONCEPT OF SAFE HARBOURS FOR FINANCIAL TRANSACTIONS

Michal Ištok[1], Veronika Solilová[2], Karel Brychta[3]

Abstract

The OECD project against BEPS has brought and initiated many changes – among others, in the OECD Transfer Pricing Guidelines. To react and respond to changes in the current business environment, a new chapter for transfer pricing in financial transactions has also been introduced (namely chapter X). This step can be considered beneficial. However, meeting all the requirements for setting a transfer price for financial transactions seems to remain a very demanding and expensive task. Furthermore, the OECD Transfer Pricing Guidelines have been of a general nature rather than providing responses to all potential problems and circumstances – they provide fundamental ideas and principles. Thus, the potential to apply a simplified procedure for setting a transfer price (even for financial transactions) can be viewed as desirable, both for taxpayers and tax authorities. The aim of the paper is linked to this idea – to present the results of a comparative study dealing with the rules for safe harbours for financial transactions (namely loans) as established worldwide, providing a summary of existing concepts and systematized criteria for a safe harbour to be considered.

JEL classification: H25, K34

Keywords: comparative study, financial transaction, loan, safe harbour, transfer pricing

Received: 19.09.2022 Accepted: 14.11.2022

Cite this:

Ištok M., Solilová V., Brychta K. (2022) Challenges in transfer pricing: a concept of safe harbours for financial transactions. Financial Internet Quarterly 18 (4), pp. 23-34.

[1]Michal Ištok, Brno University of Technology, Faculty of Business and Management; Matej Bel University in Banská Bystrica, Czech Republic, e-mail: michal.istok@umb.sk, ORCID: https://orcid.org/0000-0003-2562-754X.

[2]Veronika Solilová, Brno University of Technology, Faculty of Business and Management; Mendel University in Brno, Czech Republic, e-mail: veronika.solilova@mendelu.cz, ORCID: https://orcid.org/0000-0002-9122-539X.

[3]Karel Brychta, Brno University of Technology, Faculty of Business and Management, Czech Republic, e-mail: Karel.Brychta@vut.cz, ORCID: https://orcid.org/0000-0002-9184-1598.

Introduction

The transfer pricing [TP] issue can be considered one of the key tax issues in the last few decades, which can be demonstrated by the increasing amount of expert literature dealing with this phenomenon (for a summary of literature, see for instance Brychta, Poreisz & Sulik, 2020; Kumar et al., 2021). The attention paid to this topic has been boosted, doubtlessly, by the globally effective OECD project against Base Erosion and Profit Shifting [BEPS] (OECD, 2013a; 2016) and changes in the standards this project has actually brought about (OECD, 2019, 2022). At the same time, there is a change in the understanding of TP and its importance in company management as such; that is, there is a movement from the sole comprehension of TP as a measure for tax avoidance to its comprehension as a tool for reducing costs, as well as for enhancing process efficiency and rationalizing intra-company transactions (Kumar et al., 2021; Roges & Oats, 2022). Recent studies explicitly confirm a reduction in tax-motivated profit shifting due to strict tax regulations (Chen et al., 2021), which can be understood to be one of the practical impacts of the OECD project against BEPS. But critics still remain, regarding the complexity/intricacy of the standards that have to be met to fully follow the Arm´s Length Principle [ALP], as established in the essential and globally accepted standards embodied in the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter referred to as the OECD Transfer Pricing Guidelines; OECD, 2022). This can be a serious problem, especially for SMEs, which provokes reasonable efforts to find simplified solutions – the establishment of safe harbours is one of them (Solilová et al., 2019). A safe harbour as such can be applied, "(…) for low-risk transactions which relieves taxpayers of certain obligations which would otherwise be required under that country´s transfer pricing rules" (Mills, 2019, p. 1077), while application of the full scope of TP rules is connected, among other aspects, with the absence of reliable data and necessary adjustments of those available (see Steens et al., 2022). The complexity/intricacy of the standards (arising also partly due of their general nature) brings uncertainty for both taxpayers and tax administrators. Thus, it is only logical that some more suitable standards (in the sense of being conceptually simpler) are considered, evaluated, and, if found to be suitable/acceptable, applied. Mills (2019) presents the following extant alternatives:

1) the "sixth method" (a method other than that explicitly established by the OECD),
2) global formulary apportionment,
3) safe harbours,
4) advanced pricing agreements.

The "sixth method", safe harbours, and advanced pricing agreements are all tools/measures embodied in the OECD Transfer Pricing Guidelines (OECD, 2022). The concept of safe harbours is not a new one; nevertheless, its acceptance/suitability from the perspective of evaluation by the OECD has changed – in 2013 there was a significant revision of the chapter on safe harbours (OECD, 2013b). In subsequent analysis, the OECD dealt with a deeper analysis of this measure (OECD, 2017). The OECD (2018) observed the following:

1) competition regimes face challenges to ensure, at the same time, that enforcement decisions are correct and that the mechanisms to arrive at such correct decisions are not too costly: presumptions and safe harbours play a valuable role in balancing these two goals,
2) competition regimes deploy a number of presumptions and safe harbours that seek to ensure that competition law is administrable: safe harbours facilitate compliance with the law and make enforcement more predictable and efficient,
3) jurisdictions around the world have extensive experience in the application of presumptions and safe harbours.

It seems that even the most significant globally-accepted international standards creator (the OECD, or, to be more precise, some of its representatives) considers the concept of safe harbours suitable despite there being some attributes/aspects that can be considered to be in conflict with the "general" rules of TP (for more details, see OECD, 2022, item E.4 (Concerns over safe harbours)). The OECD standards (OECD, 2022), which previously covered more or less classical transfers of goods and services, have recently undergone significant content changes following the action plans against BEPS and the aim of becoming more relevant to the current business environment. In the updated OECD standards, extra attention has been paid to the issues of tangible property and financial transactions. This represents a new Chapter X in the OECD Transfer Pricing Guidelines (OECD, 2022).

The idea behind this paper is to link the concept of a safe harbour with financial transactions and to point out conditions that should be met when creating a safe harbour for financial transactions. In this respect, the authors investigated existing legal regulation covering standards for safe harbours using comparative law as a source of inspiration (in the broader context, see for instance Reimann & Zimmermann, 2008) and selected OECD standards/recommendations regarding financial transactions. 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 research regarding existing legal regulations gov-

erning safe harbours for a selected type of transaction. In a subsequent part, the authors discuss their conclusions based on a synthesis of the existing legal regulation and OECD standards/recommendations, OECD standards governing financial transactions, and existing practice. The final part contains a summary of the paper.

Aim and methodology

The aim of the paper is, on the basis of the synthesis of existing safe harbour rules for loans, to provide a summary of existing concepts and to present a taxonomy of the criteria as deduced for the establishment of a safe harbour for loans. The paper thus contributes to existing comparative analyses of transfer pricing rules and is a point of departure for further research into guidelines that may be applicable when setting up a safe harbour. The stated aim is fully in line with the need to identify similarities and differences across TP rules and regulations in order for them to be (re) configured and improved to promote accountability, ethics, and transparency (for more details see Kumar et al., 2021) and to be congruent with the idea of simplifying existing complicated rules (for a critical view on the complexity of TP rules, see for instance Brychta et al., 2020). The main tasks addressed in this paper are:

1) to present existing practice regarding the concepts of transfer pricing safe harbours for loans;
2) to present a taxonomy of the criteria deduced for the establishment of a safe harbour for loans while using both the standards as established in domestic law and the OECD for safe harbours and financial transactions (OECD, 2022).

The study, which is of an exploratory nature, is based on qualitative research aimed at existing legal regulations of safe harbours for loans (as presented in the IBFD database, 2021) along with the analysis and synthesis of OECD standards (OECD, 2022). On the basis of the synthesis of the results obtained, the authors identify the key criteria for establishing safe harbours for loans along with existing problems and challenges. The results of the study presented in this paper can thus be understood as a foundation for further analysis and research.

Results

During their qualitative analysis, the authors identified 12 countries worldwide that have introduced a safe harbour for financial transactions, specifically for setting the interest rate for granted loans. There are also 15 countries that do not explicitly employ the general concept of the safe harbour but offer significant simplification of the rules which can be adopted by taxpayers. The countries that have established safe harbours are as follows: Australia, Cyprus, Ghana, India, Korea, Poland, Russia, Serbia, Singapore, Slovenia, Switzerland, and the United States. Only three of these are EU members. In the context of safe harbour rules for financial transactions, the professional literature sometimes refers to the case of Brazil. In 2013, the Brazilian Law 12,715 and the Ordinance of the Ministry of Finance 427/13 implemented the obligation to follow the established rules – specifically, the spread margins for loans granted by foreign related parties (a maximum spread margin of 3.5% for debtors and a minimum spread margin of 2.5% for the purpose of a revenue recognition) (Dias Musa et al., 2021). Considering the rule as implemented by OECD Transfer Pricing Guidelines that reads as follows: "A safe harbour substitutes simpler obligations for those under the general transfer pricing regime" and "… provided that safe harbour is elective …" (OECD, 2022, items 4.102 and 4.115), the Brazilian concept therefore should not thus be considered to represent a safe harbour.

Safe harbours in Europe

Six safe harbour regimes have been introduced in Europe. The concept in Cyprus refers to a 2% after-tax return on assets (Kyriacos & Costas, 2021). A similar simplified regime (a minimum return of 2% after tax on assets) can be adopted by an intermediary-financing company bearing limited risks in Luxembourg (Rasch, 2021).

Taxpayers in Poland are able to use safe harbour provisions for spread margins provided that the following conditions are met:

1) the debtor does not provide any additional fees other than interest (including commission or bonus),
2) the loan has been granted for a maximum period of five years,
3) the amount of the principal is not higher than 20 mil. PLN or its equivalent denominated in another currency,
4) the lender does not have a registered seat or place of management in a country enabling harmful tax competition (Aleksandrowicz, 2021; Orbitax, 2022).

The following table contains the safe harbour rates applicable for loans granted before and from the year 2022.

Table 1: Polish safe harbour rules

Currency	Before 2022	From 2022
PLN	WIBOR PLN 3M + 2%	WIBOR PLN 3M + max. 2.8% debtor, min. 2% creditor
USD	LIBOR USD 3M + 2%	SOFR 3M + max. 2.8% debtor, min. 2% creditor
EUR	EURIBOR EUR 3M + 2%	EURIBOR 3M + max. 2.8% debtor, min. 2% creditor
CHF	LIBOR CHF 3M + 2%	SARON 3M + max. 2.8% debtor, min. 2% creditor
GBP	LIBOR GBP 3M + 2%	SONIA 3M + max. 2.8% debtor, min. 2% creditor

Source: Aleksandrowicz, 2021; Orbitax 2022.

The interest rate consists of the risk-free interest rate and the provided margin depending on the currency of the loan. As can be seen from Table 1 above, since 2022, two changes have taken place. There is an amendment of the risk-free interest rate for the US dollar, Swiss franc, and British pound. Since 2022, two different (maximum and minimum) margins have been set, these separately for debtors and for creditors, whereas previously the same margin was set for both parties. Safe harbour interest rates are amended on an annual basis and are published by the Decree of the Minister of Finance (Aleksandrowicz, 2021; Orbitax 2022).

In Russia, the safe harbour regime is enshrined under Art. 269 (1) of the Russian Tax Code. The safe harbour rules provide acceptable ranges (minimum and maximum) for loans denominated in selected currencies. For 2021, the key rate was set at 4.5% by the Russian Central Bank (Kivenko & Artamonov, 2021).

Table 2: Russian safe harbour rules

Currency	Minimum	Maximum
RUB – domestic transactions	75% of the key rate (0% for years 2020 and 2021)	125% of the key rate (180% for years 2020 and 2021)
RUB – cross-border transactions	75% of the key rate	125% (180% of the key rate for years 2020 and 2021)
EUR	EURIBOR + 4% (0% for years 2020	EURIBOR + 7%
YUAN	SHIBOR + 4% (0% for years 2020 and	SHIBOR + 7%
GBP	LIBOR + 4% (0% for years 2020 and	LIBOR + 7%
CHF	CHF LIBOR + 2% (0% for years 2020 and 2021)	CHF LIBOR + 5%
JPY	JPY LIBOR + 2% (0% for years 2020	JPY LIBOR + 5%
USD and other currencies	USD LIBOR + 4% (0 for years 2020 and 2021)	USD LIBOR + 7%

Source: Kivenko & Artamonov, 2021.

The taxpayers were allowed to adopt the decreased interest rates for the period from 1.1.2020-31.12.2021. Most of the Russian companies set their interest rates to be compliant with the provided safe harbour range (Kivenko & Artamonov, 2021).

Slovenian safe harbour rules are also based on a build-up model. The interest rate consists of two parts – a variable part and an addition to the variable part. The interest rate is calculated as: variable part (risk-free rate depending on the currency of the loan) + mark-up according to the maturity of the loan (for loans with a maturity of over 1 year) + mark-up according to the debtor´s credit rating. Similar to Poland, the risk-free interest rates have changed since 2022, e.g. for the US dollar (from LIBOR-USD to SOFR-USD), Japanese yen (from LIBOR-JPY to TONAR-JPY), British pound (from LIBOR-GBP to SONIA-GBP), and Swiss franc (from LIBOR-CHF to SARON-CHF). The tax-recognized interest rates are amended on an annual basis (Pate, 2021). The Slovenian Income Tax Act contains paragraphs on the use of credit ratings. Previously, there was reference primarily to Standard & Poor´s methodology. In 2021, the Rules on Amendments to the Rules on Recognized Interest Rates were published. The amendment brought also a conversion table (as Annex) for different credit ratings, as used and assigned by various credit rating agencies (Kovačič, 2021).

The Serbian Ministry of Finance publishes annual interest rates applicable for relevant periods (separately for banks and providers of financial leasing services and separately for other legal entities). The interest rate depends on the currency of the loan and its maturity (KPMG, 2021). The following table contains an overview of tax-recognized interest rates for other legal entities valid for 2021.

Table 3: Serbian safe harbour rules

Currency	Short-term loans	Long-term loans
RSD	3.69%	3.90%
EUR	2.32%	2.83%
CHF	6.86%	-
USD	1.57%	4.01%

Source: KPMG, 2021.

The Serbian Ministry of Finance in 2020 published interest rates also for:

1) short-term loans (4.71%) and long-term loans in RSD (5.55%),
2) short-term loans in EUR and for dinar loans indexed in EUR (2.64%),
3) long-term loans in EUR and for dinar loans indexed in EUR (2.87%),
4) long-term loans in USD (4.05%) and dinar loans indexed in CHF (4.83%),
5) long-term (7.52%) and short-term (7.84%) dinar loans indexed in CHF (7.52%) (Regfollower, 2020).

Switzerland offers probably the most sophisticated and comprehensive safe harbour regime. Every year, the interest rate circular (e.g. Circular Letter 189 of 28 January 2021 and the renewed Circular Letter of 27 and 28 January 2022) provides taxpayers with a list of minimum and maximum interest rates for loans granted and received. The interest rates vary depending on the type of loan and currency (Ernst & Young, 2021). The following tables contain the safe harbour interest rates for loans denominated in Swiss francs and other selected currencies.

Table 4: Swiss safe harbour rules (denominated in CHF)

Granted loans (minimum 2021)	Received loans (maximum 2021)
The actual interest incurred + margin 0.5% (on loans up to CHF 10 mil.) or margin 0.25% (on loans exceeding CHF 10 mil.) – in the case of re-financing with debt.	Trade and production (operating loans): max. 3% for loans up to CHF 1 mil., and 1% for loans exceeding CHF 1 mil. Swiss holding or asset administration companies: 2.5% for loans up to CHF 1 mil. and 0.75% for loans exceeding CHF 1 mil.
	Real estate loans: max. 1.5% (industry and trade) and 1% (housing and agriculture) for loans up to 2/3 of the value of property and 2.25% for the rest.
	Building land, villas and holiday homes and factory properties up to 70% of the market value – 1.75% for housing and agriculture and 2.25% for industry and commerce.

Source: Stocker, 2021.

The Circular letter publishes safe harbour interest rates also for loans financed with equity (e.g. 0.25% for period 2021 and 2022) and contains guidelines for interest rate setting for loans denominated in foreign currencies. If the safe harbour interest rates for foreign currencies are lower compared to rates for Swiss francs, then CHF safe harbour interest rates apply. Table 5 contains the safe harbour interest rates for selected currencies, which are the minimum rates for granted loans and maximum acceptable rates for received loans. In the case of re-financing loans, the margin must be a minimum of 0.5% above the underlying third-party interest rate.

Table 5: Swiss safe harbour rules (foreign currencies)

Country	Currency	2021	2022
EU	EUR	0.25%	0.50%
Czech Republic	CZK	1.50%	3.00%
Great Britain	GBP	1.00%	1.25%
China	CNY	3.75%	3.75%
Poland	PLN	1.50%	1.50%
Russia	RUB	6.50%	8.00%

Source: Stocker, 2021; Louca, 2022.

Safe harbours throughout the world

In 2019 the Australian Taxation Office updated the guidance on low-level inbound loans and unified the interest rates for inbound and outbound loans. The Practical Compliance Guideline 2017/2 is updated on an annual basis to offer the maximum interest rates for small related-party inbound and outbound loans (e.g. 1.79% for year 2021, 2.33% for year 2020 and 3.76% for year 2019). Safe harbour interest rates only apply to loans; they cannot be applied to other financial arrangements, e.g. to guarantee fees. Requirements are set for taxpayers to be entitled to the application of safe harbour rates:

1) a maximum combined cross-border loan balance of AUD 50 mil. for the Australian economic group during the whole financial year,
2) the loan is provided in Australian dollars and the associated interest is paid in the Australian dollar as well,
3) the taxpayer has not suffered sustained losses,
4) there are no restructurings during the year,
5) the taxpayer assesses the compliance with transfer pricing rules (Butler et al., 2021).

The Practical Compliance Guideline provides taxpayers with a procedure on how to assess the transfer pricing risks related to financial transactions, ranging from the green zone (low risk) to the red zone (very high risk). Taxpayers with a red zone grade are not able to apply for the Advance Pricing Agreements programme (Butler et al., 2021).

Taxpayers in Singapore can apply the safe harbour regime for their related-party loans not exceeding the amount of SGD 15 million (for domestic transactions). The Inland Revenue Authority of Singapore publishes the safe harbour margins to be applied over an appropriate base reference rate (e.g. 2% for 2020 and 2.75% for 2021) (See & Ying Lee, 2021).

The Ghanaian income tax act allows a resident entity, which is not a financial institution and in which 50% or more of the ownership or control is held by an exempt person alone or together with an associate, to deduct the interest paid provided that the debt ratio does not exceed 3:1 at any time during a base period (Ali-Nakyea, 2021).

The first concept of safe harbours for loans in India was introduced in 2009. New safe harbour regulations are applicable from 2017 and take into account the currency of the granted loan and CRISIL-based credit rating of the borrower. In the case of loans denominated in the Indian rupee, the basic interest rate should not be less than the one-year marginal cost at the lending rate of the State Bank of India. For loans denominated in foreign currencies, the basic interest rate should not be less than a 6-month LIBOR. The margin spread then depends on the credit rating of the borrower. The following table contains the safe harbour regime valid for the financial year 2019-2020 (Butani, 2021).

Table: 6 Indian safe harbour rules for 2021

Credit rating	Spreads for loans in INR	Spreads for loans in foreign currencies
AAA to A	175 bp	150 bp
BBB-, BBB or BBB+	325 bp	300 bp
BB to B	475 bp	450 bp
C to D	625 bp	600 bp
Credit rating not available and the amount of the loan advanced is lower or equal to INR 1 billion as on 31 March of the relevant previous years	425 bp	400 bp

Source: Butani, 2021.

Safe harbour rules cannot be applied to transactions with "low-tax countries" (where the corporate income tax rate is lower than 15%) (Butani, 2021).

Korea established a safe harbour for cross-border intercompany loans in 2017 (the amendment of International Tax Coordination Law – Presidential Decree). The interest rate depends on whether the loan is granted or received. In the case that the Korean resident lends funds to a foreign related party, the applicable interest rate reflects the bank overdraft rate as prescribed by the International Tax Coordination Law – Presidential Decree (e.g. 4.6% for year 2021). In the case of borrowing, the interest rate is calculated as the 12-month LIBOR of the currency of the loan, the issue as of the last day of the preceding fiscal year, plus a margin of 1.5% (Nam et al., 2021).

Taxpayers in the United States can opt for the safe harbour regime by applying the federal rate. The safe harbour rates are built on the interest rates of federal government securities and are published monthly by the Internal Revenue Service for loans with the maturity of:

1) the federal short-term rate (less than 3 years),
2) the federal mid-term rate (more than 3 years but less than 9 years),
3) the federal long-term rate (more than 9 years).

The taxpayer is eligible to apply for the safe harbour rate provided that the loan is denominated in US dollars and the lender does not operate as a financial institution. The safe harbour rate is not less than 100% and not more than 130% of the applicable federal rate (Ritter, 2021).

As already mentioned, there are also about 15 countries offering simplified procedures to calculate the interest rate. These regimes are not directly anchored in legislation as safe harbour regimes; rather, they represent simplified procedures for the calculation of interest rates which are accepted by the tax authorities (e.g. New Zealand or South Africa). New Zealand offers the opportunity to taxpayers (borrowers) with small loans (less than NZD 10 million) and cross-borders transactions to calculate the interest rate as follows: basic interest rate for small loans (or other similar instruments) plus a margin of 3.75%. The income tax act also contains provisions for the determination of an applicable credit rating for the borrower and, in some ways, there are deviations from the OECD chapter X (Prescott-Haar et al., 2021). According to South African rules, when the interest rate for loans denominated in the South African rand does not exceed the weighted average for the South African prime rate plus a margin of 2%, then this interest rate is considered to reflect the Arm's Length Principle. If the loan is denominated in a foreign currency, the weighted average of the relevant inter-bank rate is used as the prime rate (Horak, 2021).

Discussion

OECD standards (OECD, 2022) deal with the issue of safe harbours in Chapter IV titled Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes, describing it as a measure potentially incompatible with the ALP (OECD, 2022, item 4.96) and having ing a potential to open tax planning opportunities to taxpayers (OECD, 2022, item 4.122 et seq.). There are, on the other hand, stated benefits as follows (OECD, 2022):

1) compliance relief (items 4.106 – 4.107),
2) certainty (item 4.108),
3) administrative simplicity (item 4.109).

Following the requirements as established by the OECD (2022, Chapter X in connection with Chapter I Section D.1 and other related aspects) one can observe that loans alone (or, rather, intra-group loans) seem to be most suitable for establishing a safe harbour when certain conditions are met. Other types of financial transactions (cash-pooling; hedging, and the provision of financial guarantees and captive insurance) seem to be too complex – though, in fact, this can also be true for some cases of provided intra-group loans (or more precisely, loans provided among associated persons).

On the basis of their research into current practice, the authors of this paper identified several basic aspects/attributes that exist and that should be considered and evaluated:

1) the regime of the safe harbour (elective vs non-elective),
2) the type of safe harbour (unilateral, bilateral, and multirateral),
3) the type/category/purpose of the loan provided,
4) the position of the taxpayer in the transaction,
5) the frequency of updates of the rules and the way in which the rules are published,
6) the conditions/limitations for the application of a safe harbour,
7) the conception of the interest rate (there are several – very different – ways the interest rate can be established/set),
8) the currency in which the loan is provided.

A summary of the findings and conclusions regarding the above-specified aspects, excluding the last three from the list, are specified in Table 7 below.

Table 7: Aspects/attributes connected with safe harbours for loans

Aspect	Existing concepts	Commentary and evaluation according to OECD Transfer Pricing Guidelines (OECD, 2022)
Regime of the safe harbour	Obligatory	This regime is contrary to the standards of the OECD. This would be acceptable only for cases when the law sets a 0% interest rate, which can be considered to be *stricto sensu* a specific safe harbour.
	Elective	This option is in line with the OECD standards.
Type/category/purpose of the safe harbour provided	Period for which the loan was provided	There is a need to reflect this relevant aspect in the level of the interest rate. The question is whether a safe harbour remains acceptable for medium- and long-term loans while fixed interest rate are applicable.
	Underlying asset for which the loan is granted	A relevant attribute which, however, significantly complicates the situation for the architect of the safe harbour rules/standards. One can assume that the rules reflecting these specifics will not be broadly acceptable in other countries due to existing specifics in the area of production, the situation in the real estate market, etc.
Position of the taxpayer in the transaction	Debtor vs. creditor	This aspect seems to be worthy of consideration; however, it imposes higher demands on the architect of the rules/standards, when relevant statistical data should be followed to provide reasonable differences between the interest rates as set for the debtor and creditor. A measure serving for the protection of public finances – to ensure a maximum interest rate on the part of the debtor and a minimal interest rate on the part of the creditor.
Frequency of the updates of the rules/standards	Regular vs. ad hoc updates	Considering the current situation in the financial market, regular updates on at least an annual basis seem to be necessary/suitable. To apply updates more often would undermine the essential conditions of safe harbours and would be connected with high costs on the part of taxpayers and tax authorities.

Source: Own elaboration based on the results of the research.

The authors of the paper are of the opinion that safe harbours should be established as elective ones (as stated in the OECD standards) in order for taxpayers to have the possibility to choose to apply "standard" provisions for TP. This possibility then eliminates the risk of double international taxation when the rules on safe harbours are not accepted by a tax authority in the other contracting country. In addition, there may be other facts (circumstances) that make it more suitable for a taxpayer to use the standard procedure instead of the simplified one. A standard (not simplified procedure) will reflect relevant specifics of the transaction influencing the transfer price. Using a safe harbour regime does not provide such an opportunity. Considering the other aspects specified in Table 7, it would be suitable to set different interest rates reflecting the position of the taxpayer in the transactions, i.e., whether he/she is a creditor or a debtor. Regarding the source of law in which the rules are published, the concept of publishing in sub-law legal regulations seems to be sufficient, since this makes updates easier and faster compared to a rigid act defining procedures. However, this depends on the type of legal system and existing practice. A 0% interest rate (or the situations/transactions for which TP rules are not applied) should be, however, set directly in relevant acts (when such situations/transactions are supposed to be permanently exempt; see for instance Czech Income Tax, 1992, Sec. 23 paragraph 7).

Table 8 summarizes selected limits/conditions that should/could create a barrier for the application of a safe harbour regime for loans. The last table (Table 9) specifies concepts potentially applicable for the setting of interest rates for loans.

Table 8: Limits/conditions for the application of safe harbours for loans

Category	Particular aspect	Commentary and evaluation according to OECD Transfer Pricing Guidelines (OECD, 2022)
Amount of the loan provided	Setting a maximal limit up to which a safe harbour regime can be applied	This could be considered one of the essential key aspects. To set a correct financial limit for safe harbours (as well as the amount of other attributes) can be a tricky issue since there is always a risk of the creation of a certain form of discrimination.
Associated attributes	Existence of other aspects connected with the loan creates an obstacle for the application of safe harbour regime	Growing complexity of the transactions (for instance, the existence of a guarantee, fees connected with the loans) creates a wider divergence from ALP, which makes the application of a safe harbour regime less acceptable.
Economic situation/ indicators	Existence of the accumulated loss. Negative equity	These situations should, as a rule, create an obstacle for the application of a safe harbour regime due to the existence of an undesirable (more risky) economic situation – for these situations it is probable that the subject would not be provided the loan by an independent entity.
Relation to subject seated in non-cooperating countries	A transaction connected with a subject seated in a tax heaven or a country with a preferential/ harmful tax regime	This aspect is in line with the ideas and principles of the OECD project against BEPS and connected standards (OECD, 2013a, 2016). This is connected with a need to place these countries in an exhaustive list – such a list can be even variable in time (for instance see European Council, 2022).

Source: Own elaboration based on the results of the research.

Table 9: Potential concepts for setting the interest rate for loans in safe harbours

Aspect	Existing concepts	Commentary and evaluation according to OECD
Conception of the interest rate	0%	It represents as an acceptable exemption from all of the general transfer pricing rules (OECD, 2022, item 4.102).
	One interest rate related to an economic indicator	A very problematic issue from the perspective of the choice of the correct (suitable/broadly acceptable) indicator. A problematic issue also from the perspective of the acceptance of the rule for other countries (problems connected with different accounting rules, etc.) – a particular indicator is not internationally transferable.
	Establishing one key interest rate	Connected with a need for updates for a particular year – the final interest rate is established as a multiple of the key/basic interest rate.
	Built-up model composed of: A risk-free interest rate a set margin	This concept is in harmony with the ideas/standards as established by the OECD standards for setting the interest rate.
	Interest rate based on the credit rating of the party of the transaction	In line with the ideas/standards behind OECD standards. Problematic if the guidelines for setting the credit rating are not provided in an official way: different methods will be applied on the part of taxpayers.

Reflection of the currency in which the loan is provided	Without reflection of the currency	The amount of the loan is calculated on the basis of conversion to the domestic currency.
	With reflection of the currency in which the loan is provided/granted	This concept seems to be more suitable, also in respect of the possibility of using publicly available data and getting closer to the OECD standards. The question is then which risk-free interest rate should be followed – it seems that, in practice, interest rates from the world stock-exchanges have (not surprisingly) been broadly accepted.

Source: Own elaboration based on the results of the research.

Overall, it seems that the most suitable concept with respect to setting the interest rate – while considering the level of accuracy and simplification – is a built-up model along with the reflection of the currency in which the loan is provided.

Conclusions

Generally speaking, one can conclude that the existence of safe harbours/preferential regimes for financial transactions is a minor concept adopted globally in domestic law. The safe harbour is, without any doubt, a concept which brings desirable simplifications for taxpayers and even for tax authorities. However, there are many problems connected with identifying the proper way to establish the rules. In addition, there is a significant obstacle to the broader acceptance of safe harbours – the risk of double taxation in international transactions (for some aspects, see item E.4.2 (Risk of double taxation, double non-taxation, and mutual agreement concerns) of the OECD Transfer Pricing Guidelines (OECD, 2022). The question is also of what are the acceptable levels of the personal scope (the 'who') and the subject scope (which types of transaction) in order not to create discrimination between transactions and/or subjects. Speaking of existing concepts of safe harbours for setting interest rates, one can observe variation in the rules established for this area. The paper presents a summary of existing concepts along with a taxonomy of the criteria for the establishment of a safe harbour for loans in order to provide a basis for follow-up research and to serve as a starting point for de lege ferenda considerations. One must admit that there are a number of problematic issues in the context of appropriate safe harbour settings. One of them is the lack of appropriate and available data that would allow the rules to be set in such a way that they fulfil their purpose (providing an administrative simplification) while not being detrimental to public finances.

Acknowledgements

The Authors are thankful for the support provided by the Technology Agency of the Czech Republic; the paper is one of the results of the project TL05000328 "Setting the market price for financial transactions while using the arm´s length principle". The Authors are also thankful for the support provided by the Brno University of Technology (project FP-S-7935 "Trends of Selected Attributes in the Financial Management of Companies").

References

Aleksandrowicz, M. (2021). Poland - Transfer Pricing Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed 17.05.2021).

Ali-Nakyea, A. (2021). Ghana - Transfer Pricing, Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 30.09.2021).

Brychta, K., Poreisz, V., Sulik-Górecka, A. & Ištok, M. (2020). Transfer Pricing in V4 Countries. Brno: VUTIUM. Retrieved from https://dspace.vutbr.cz/handle/11012/188101 (Accessed 14.09.2021).

Butani, N. (2021). India – Transfer Pricing, Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 03.03.2021).

Butler, M., Vu, C. & Wang, L. (2021). Australia - Transfer Pricing Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 14.09.2021).

Chen, X., Cheng, Q., Chow, T., & Liu, Y. (2021). Corporate in-house Tax Departments. Contemporary Accounting Research 38(1), 443-482. Retrieved from https://doi.org/10.1111/1911-3846.12637 (Accessed 14.09.2021).

Czech Income Tax Act (1992). Act No. 586/1992 Coll., on Income Taxes, as amended. https://www.zakonyprolidi.cz/cs/1992-586 (Accessed: 15.05.2022).

Dias Musa, S, Machado, C. & Camargo, L. F. (2021). Brazil - Transfer Pricing Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 17.02.2021).

Ernst & Young (2021). New 2021 SFTA Safe-harbour Interest Rates for Advances and IC Loans. Retrieved from https://www.newrealityblog.com/2021/02/15/new-2021-sfta-safe-harbor-interest-rates-for-advances-and-ic-loans/ (Accessed: 14.03.2021).

European Council (2022). EU List of Non-cooperative Jurisdictions for Tax Purposes. Retrieved from https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/ (Accessed: 20.05.2022).

Horak, W. (2021). South Africa – Transfer Pricing, Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 25.03.2021).

IBFD (2021). Tax Research Platform. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 17.05.2021).

Kivenko, E. & Artamonov, A. (2021). Russia - Transfer Pricing Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 18.05.2021).

Kovačič, M. (2021). Tax Alert August (Slovenia). Retrieved from https://www.ey.com/en_si/ey-slovenia-tax-alerts/tax-alert-august-2021 (Accessed: 14.04.2022).

KPMG (2021). Serbia: Arm´s Length Interest Rates for 2021. Retrieved from https://home.kpmg/us/en/home/insights/2021/03/tnf-serbia-arms-length-interest-rates-for-2021.html (Accessed: 4.05.2022).

Kumar, S., Pandey, N., Lim, W.M., Chatterjee, A.N. & Pandey, N. (2021). What Do We Know About Transfer Pricing? Insights from Bibliometric analysis. Journal of Business Research 134 (3), 275–287. doi: https://doi.org/10.1016/j.jbusres.2021.05.041.

Kyriacos, S. & Costas, M. (2021). Cyprus - Transfer Pricing Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 23.09.2021).

Louca, M. (2022). Switzerland Publishes Updated Safe Harbour Interest Rates for 2022. Retrieved from https://www.pwc.ch/en/insights/tax/switzerland-publishes-updated-safe-harbour-interest-rates-for-2022.html (Accessed: 02.06.2022).

Mills, T. (2019). Fully Armed: Is the Application of the Arm's Length Principle the Best Method to Address Transfer Mispricing in the Mining Industry in Developing Countries? The Extractive Industries and Society, 6(4), 1075–1078. doi: https://doi.org/10.1016/j.exis.2019.07.011.

Nam, T., Lee, S. & Cho, B. (2021). Korea (Rep.) – Transfer Pricing, Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 7.06.2021).

OECD (2013a). Addressing Base Erosion and Profit Shifting. doi: https://doi.org/10.1787/9789264192744-en. (Accessed 15.03.2022).

OECD (2013b). Revised Section E on Safe Harbours in Chapter IV of the Transfer Pricing Guidelines. Retrieved from https://www.oecd.org/ctp/transfer-pricing/Revised-Section-E-Safe-Harbours-TP-Guidelines.pdf (Accessed: 15.03.2022).

OECD (2016). BEPS Project Explanatory Statement: 2015 Final Reports, OECD/G20 Base Erosion and Profit Shifting Project. doi: https://doi.org/10.1787/9789264263437-en. (Accessed: 15.03.2022).

OECD (2017). Safe Harbours and Legal Presumptions in Competition Law. Background Note by the Secretariat. Retrieved from https://one.oecd.org/document/DAF/COMP(2017)9/en/pdf (Accessed: 20.06.2022).

OECD (2017). Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017. Retrieved from https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm (Accessed: 13.03.2022).

OECD (2018). Executive Summary of the Roundtable on Safe Harbours and Legal Presumptions in Competition Law. Annex to the Summary Record of the 128th Meeting of the Competition Committee held on 5-6 December 2017. Retrieved from https://one.oecd.org/document/DAF/COMP/M(2017)2/ANN1/FINAL/en/pdf (Accessed: 20.06.2022).

OECD (2019). Model Tax Convention on Income and on Capital 2017 (Full Version). doi: https://doi.org/10.1787/g2g972ee-en (Accessed: 15.03.2022).

OECD (2022). OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022. doi: https://doi.org/10.1787/0e655865-en (Accessed: 15.03.2022).

Orbitax (2022). Poland Publishes Notice on Base Interest Rates and Margins for Related Party Debt Safe Harbour Simplification in 2022. Retrieved from https://www.orbitax.com/news/archive.php/Poland-Publishes-Notice-on-Bas-48655 (Accessed: 10.04.2022).

Pate, B. (2021). Slovenia - Transfer Pricing Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 11.03.2021).

Prescott-Haar, L., Day, S. & Blackburn, J. (2021). New Zealand – Transfer Pricing, Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 04.05.2021).

Rasch, M. (2021) Luxembourg - Transfer Pricing, Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 31.03.2021).

Regfollower (2020). Serbia: Minister of Finance Publishes Safe Harbour Interest Rates for 2020. Retrieved from https://regfollower.com/serbia-ministry-of-finance-publishes-safe-harbor-interest-rates-for-2020/ (Accessed: 15.05.2022).

Reimann, M & Zimmermann, R. (Eds.) (2008). The Oxford Handbook of Comparative Law. Oxford: Oxford University Press.

Ritter, B. (2021). United States – Transfer Pricing, Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 21.09.2021).

Rogers, H. & Oats, L. (2022). Transfer Pricing: Changing Views in Changing Times. Accounting Forum, 46(1), 83–107. doi: https://doi.org/10.1080/01559982.2021.1926778.

See, J. & Ying Lee, S. (2021). Singapore – Transfer Pricing Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 1.04.2021).

Solilová, V., Nerudová, D. & Litzman, M. (2019). Application of the CCCTB and Safe Harbours to European SMEs: Can the Decrease in Compliance Costs Support better SME Performance? Ekonomický Časopis (Journal of Economics) 67(6), 587–606.

Steens, B., Roques, T., Gonnet, S., Beuselinck, C. & Petutschnig, M. (2022). Transfer Pricing Comparables: Preferring a Close Neighbor over a Far-away Peer? Journal of International Accounting, Auditing and Taxation 47(2), 1–18. https://doi.org/10.1016/j.intaccaudtax.2022.100471.

Stocker, R. (2021). Switzerland - Transfer Pricing Country Tax Guides. The International Bureau of Fiscal Documentation https://www.ibfd.org/ (Accessed: 21.09.2021).

Tax Code of the Russian Federation of 31 July 1998, as amended. Retrieved from https://www.nalog.gov.ru/eng/tax_legislation/tax_code_of_russia/ (Accessed: 11.11.2022).