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Tax Treaty Policy on Article 9 of the OECD Model Scrutinized

The authors, in this article, consider the history, context and purpose of article 9 of the OECD Model and analyse the position of the Czech and Austrian Ministries of Finance with regard to the application of article 9 of the Austria-Czech Republic Income and Capital Tax Treaty (2006).

1. The Austria-Czech Republic Income and Capital Tax Treaty (2006)[1]

The treaty negotiations[2] between Austria and the Czech Republic in respect of a new tax treaty[3] started in 1999.[4] Following the clarification of certain open issues in 2005, the Austria-Czech Rep. Income and Capital Tax Treaty was signed on 8 June 2006. The tax treaty was effective from 1 January 2008[5] and replaced the former Austria-Czechoslovakia Income and Capital Tax Treaty (1978).[6] The treaty partners also concluded a protocol, which is an integral part of the tax treaty.[7] On 9 March 2012, an amending protocol to the tax treaty was signed, which entered into force on 26 November 2012.[8]

The tax treaty generally follows the OECD Model (2003),[9] which was the current OECD Model when it was signed.[10] However, some provisions of the tax treaty differ from the OECD Model (2003).[11] For instance, by implementing the concept of a service permanent establishment (PE)[12] in article 5, the PE definition has been widened. In addition, article 11 does not permit source taxation of interest.[13] A further deviation from the OECD Model is article 9. As in the former Austria-Czechoslovakia Income and Capital Tax Treaty (1978), the Austria-Czech Rep. Income and Capital Tax Treaty (2006) does not contain article 9(2) of the OECD Model (2003), which states that:

> Where a Contracting State includes in the profits of an enterprise of that State – and taxes accordingly – profits on which an enter-

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1. *Convention Between the Czech Republic and the Republic of Austria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital* (8 June 2006), Treaties IBFD [hereinafter: *Austria-Czech Rep. Income and Capital Tax Treaty* (2006)] and BGBl III 2007/39; 2007/31 Sb.m.s.
2. M. Lang, *Überlegungen zur österreichischen DBA-Politik*, 22 SWI 3, p. 108 et seq. (2012) and H. Jirousek, *Anmerkungen zur DBA-Politik Österreichs: eine Replik*, 22 SWI 4, p. 157 et seq. (2012).
3. The *Austria-Czech Rep. Income and Capital Tax Treaty* (2006) and protocol were drafted and signed in English, but both contracting states also published the tax treaty and protocol in their national languages.
4. 1566 *der Beilagen* XXII. GP – *Staatsvertrag-Materialien*, S. 1 and H. Jirousek, *Doppelbesteuerungsabkommen Österreich-Tschechien* XX 60 ÖStZ 14, p. 337 (2007).
5. Art. 27(1) *Austria-Czech Rep. Income and Capital Tax Treaty* (2006).
6. *Convention Between the Republic of Austria and the Czechoslovak Socialist Republic for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital* [unofficial translation] (12 Feb. 1978), Treaties IBFD [hereinafter: *Austria-Czech. Income and Capital Tax Treaty* (1978)] and BGBl 1979/34; 1979/48 Sb, which is still in force between Austria and the Slovak Republic.
7. The Austrian Chamber of Public Accounts and Tax Advisors opposes the conclusion of further provisions by way of a protocol. Constitutional concerns have been raised regarding the amendment of a tax treaty by way of a protocol. In this respect, *see* the evaluation of the *Austria-Czech Rep. Income and Capital Tax Treaty* (2006) by the Austrian Chamber of Public Accounts and Tax Advisors, point 13.
8. *Czech Republic; Austria – Protocol to treaty between Czech Republic and Austria signed* (9 Mar. 2012), News IBFD. For critical remarks regarding the conclusion of protocols, *see supra* n. 7. The protocol deals with article 25 of the *Austria-Czech Rep. Income and Capital Tax Treaty* (2006) (Exchange of information). At the time of the writing of this article, it was not yet in force but had been ratified by the respective parliaments.
9. *OECD Model Tax Convention on Income and on Capital* (28 Jan. 2003), Models IBFD.
10. The *OECD Model* (2003) and the *OECD Model Tax Convention on Income and on Capital: Commentaries* (28 Jan. 2003), Models IBFD, which were available when the tax treaty was signed, should be used in interpreting the *Austria-Czech Rep. Income and Capital Tax Treaty* (2006). Strong objections have been raised to referring to OECD Commentaries, when interpreting tax treaties, that were drafted after the tax treaty was concluded (*see* M. Lang, *Die Bedeutung des Kommentars und des Musterabkommens der OECD für die Auslegung von Doppelbesteuerungsabkommen*, in *Aktuelle Entwicklungen im Internationalen Steuerrecht* p. 30 et seq. (W. Gassner, M. Lang & E. Lechner eds., Linde 1994); *Later Commentaries of the OECD-Committee on Fiscal Affairs, Not to Affect the Interpretation of Previously Concluded Treaties*, 25 Intertax 1, p. 7 (1997) and *supra* n. 2, at p. 122).
11. For an overview and analysis of the *Austria-Czech Rep. Income and Capital Tax Treaty* (2006) and its deviations from the *OECD Model* (2003), *see* Jirousek, *supra* n. 4; S. Dommes, *Jüngste DBA-Entwicklungen in Österreich*, 18 SWI 8, p. 350 (2008); K. Krapinger-Jandl, *Änderungen des Doppelbesteuerungsabkommen zwischen Österreich und der Schweiz bzw Österreich und der Tschechischen Republik und aktuelle Erkenntnisse zur Anwendung der bereits bestehenden Doppelbesteuerungsabkommen*, 47 FJ 9, p. 311 (2008); and A.Baumann, M. Gatterer & N. Schmidt, *Double Taxation Treaty Austria/Czech Republic*, in *Double Tax Treaties in CEE/SEE* p. 63 (C.P. Schindler, A. Baumann & B. Twardosz eds., LexisNexis-Verl. ARD Orac 2011). It should be noted that A. Baumann, M. Gatterer & N. Schmidt compare the *Austria-Czech Rep. Income and Capital Tax Treaty* (2006) with the *OECD Model Tax Convention on Income and on Capital* (17 July 2008), Models IBFD, which was not available when the tax treaty was negotiated and signed.
12. One of the major deviations from the *OECD Model* (2003) is the implementation of the concept of a service PE (*see* D. Nerudová & M. Steindl, *The interpretation of the Service PE in the DTT between Austria and Czech Republic* (forthcoming). For details of Austrian tax policy on art. 5, *see* S. Bendlinger, *Austria*, in *IFA Cahiers de Droit Fiscal International, Is there a Permanent Establishment?* vol. 94a, sec. 10 (2009), Online Books IBFD and D.W.Blum, *Unternehmensgewinne in den österreichischen DBA (Art 5, 6, 7, 8 und 9 OECD-MA)*, in *Die österreichische DBA-Politik – Das "österreichische Musterabkommen* (M. Lang, J. Schuch & C. Staringer, Linde, forthcoming). For details of the Czech tax policy on the PE concept *see* L. Fialková & L. Vorlicková, *Czech Republic*, in *IFA*, *supra* and D. Nerudová & L. Moravec, *Czech Republic, The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* p. 331 et seq. (M. Lang, P. Pistone, J.Schuch & C. Staringer eds., Cambridge U. Press 2012).
13. *See* Lang, *supra* n. 2, at p. 116 for an analysis of the Austrian tax policy on the taxing rights of the source state.

> prise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.

As the provision in respect of corresponding adjustments was not included in the Austria-Czech Rep. Income and Capital Tax Treaty (2006), it must be considered whether or not there is ambiguity in regard to the application of article 9 of the tax treaty.

2. Interpretation of Article 9 of the OECD Model

2.1. Background to article 9

2.1.1. Article 9(1)

The first League of Nations Draft Model Tax Treaty (1927) dealt with the taxation of business taxation in article 5.[14] This was intended to prevent double taxation of business income by allocating the taxing right between the contracting states according to the PE concept. In several jurisdictions, subsidiaries were considered to be PEs of their parent company for tax purposes. This accorded with the branch theory (*Filialtheorie*) as established in Germany.[15] It is assumed that this approach had an effect on article 5.[16] In fact, associated enterprises were treated as a PE under the League of Nations Draft (1927)[17] and, therefore, there was no need for a provision similar to article 9(1) of the OECD Model.[18] Such a provision was not required until article 5 was modified to exclude affiliated companies from the PE definition at the General Meeting held in Geneva in 1928, where numerous new states participated.[19] Due to the diversity of the tax systems of the participants of the General Meeting, the previous draft was not considered to be readily adaptable.[20] As the majority of the states favoured the treatment of associated enterprises as separate entities, associated enterprises were excluded from the PE concept.[21] In the League of Nations Draft Model Tax Treaty (1928), associated enterprises were treated as separate entities for tax purposes. There was no provision relating to the allocation of business income between the associated enterprises; multinationals (MNEs) were, therefore, at risk of being subject to double taxation.[22] Consequently, it became necessary to include a provision on the transactional allocation of income between associated enterprises. According to the US economist, Thomas S. Adams, the problem of allocation of business income is more complex and the existence of international business income is one of the prime causes of double taxation.[23] A detailed study setting out rules on the allocation income was needed and, therefore, the US lawyer, Mitchell B. Carroll, was appointed to carry out this research.[24] An investigation into the practice of taxation of business income in 35 jurisdictions demonstrated that most countries used the separate accounting method in considering associated enterprises as separate entities for tax purposes. Consequently, the Carroll Report (1933)[25] recommended that the primary rule for the allocation of business income should be the separate accounting method.[26] This was the first time Carroll referred to the arm's length principle.[27] The Carroll Report also formed the basis of the League of Nations Draft Model Tax Treaty (1933), which referred to the arm's length principle in article 3 regarding PEs and included the arm's length principle for associated enterprises in article 5. The genesis of article 5 of the League of Nations Draft Model Tax Treaty (1933) can be traced back to article IV of the France-United States Tax Treaty (1932), which was negotiated in 1930. Article IV was based on US national tax law.[28] It was, however, the League of Nations Draft Model Tax Treaty (1933) that gave the arm's length principle a sound basis in international taxation. The subsequent League of Nations Draft Model Tax Treaty (1935) embodied the arm's length principle in respect of associated enterprises in article 6 in the same way as the League of Nations Draft (1933). This article remained unchanged as article VII in both the Mexico Draft Model Tax Treaty (1943) and the London Draft Model Tax Treaty (1946).[29] The Mexican Draft (1943), which became the basis for the UN Model, and the London Draft (1946), which was the predecessor to the OECD Draft (1963),[30] included business income allocation rules that were almost identical in substance to article 9(1) of the OECD Model.[31] In the period 1958 to 1961, the Organisation for European Economic Co-operation (OEEC)[32] published reports containing proposals for 25 articles in respect of a new model, which included article XV on business profits and article XVI on associated enterprises. Article XVI was drafted according to the London Draft (1946) and was finally included as article

14. J. Wittendorf, *Transfer Pricing and the Arm's Length Principle in International Tax Law* p. 87 (Kluwer L. Intl. 2010).
15. Id., at p. 87 with further references.
16. Id., at p. 87 et seq.
17. K. Vogel, *Klaus Vogel on Double Taxation Conventions* 3rd ed., Art 9 MN 9 (Kluwer L. Intl. 1997).
18. Wittendorf, *supra* n. 14 and Vogel, *supra* n. 17.
19. Vogel, *supra* n. 17.
20. M.B. Carroll, *League of Nations Prevention of International Double Taxation and Fiscal Evasion Two Decades of Progress under the League of Nations* p. 21 (League of Nations 1939) and Wittendorf, *supra* n. 14, at p. 88.
21. Carroll, *supra* n. 20, at p. 21 et seq. and Wittendorf, *supra* n. 14, at p. 88.
22. Wittendorf, *supra* n. 14, at p. 88.
23. Id., at p. 89 with further references.
24. Id.
25. M.B. Carroll, *Taxation of Foreign and National Enterprises*, *Methods of Allocating Taxable Income* vol. IV (League of Nations 1933).
26. The separate accounting method was set out in article 3 of the *League of Nations Draft* (1933).
27. The arm's length principle was used as an allocation norm in US legislation. *See* US: Revenue Act 1928, sec. 45, as referred to in the US national report to the League of Nations in 1932. In regard to international tax law, the arm's length principle was implemented into the *France-US Tax Treaty* (1932). *See* J. *Wittendorf*, *supra* n. 14, at pp. 32 and 90 for further references.
28. Wittendorf, *supra* n. 14, at p. 76. Sec. 45 of the Revenue Act of 1928, which was the predecessor to sec. 482.
29. Vogel, *supra* n. 17.
30. *OECD Draft Tax Convention on Income and on Capital* (30 July 1963), Models IBFD.
31. Vogel, *supra* n. 17 and Wittendorf, *supra* n. 14, at p. 96.
32. In 1961, the OEEC was transformed into the OECD and was expanded to encompass the Western European countries, Canada and the United States.

9(1) of the OECD Draft (1963). The wording of article 9(1) of the OECD Model has remained unchanged since then. Accordingly, the historical background to article 9(1) of the OECD Model clearly suggests that it is a treaty provision[33] relating to business income between associated enterprises the purpose of which is to prevent the contracting states from applying national tax law that conflicts with the arm's length principle, thereby resulting in economic double taxation.[34] In other words, domestic rules that provide for profit adjustments between associated companies must be in accordance with the arm's length principle to prevent economic double taxation.[35] However, as with any other treaty provision, article 9 of the OECD Model does not give rise to a tax liability.[36] Article 9(1) of the OECD Model can, therefore, be considered to be the mechanism by which economic double taxation is prevented in transfer pricing cases.

2.1.2. Article 9(2)

A statement regarding corresponding adjustments was first made in the Protocol to the London Draft (1946).[37] The statement only related to the transactional allocation of business income between head offices and PEs. However, no statements or provisions regarding corresponding adjustments in respect of associated enterprises were made.[38] The United States appeared to be the first to want to deal with the problem of economic double taxation due to the lack of corresponding adjustments for associated enterprises. Accordingly, in 1963, the United States approached the OECD Fiscal Committee so as to establish appropriate solutions for the consistent allocation of income.[39] The United States dealt with this issue unilaterally and granted US parent companies an indirect foreign tax credit in respect of foreign taxed income.[40] However, this taxation policy was no longer acceptable due to increasing globalization.[41] Consequently, the United States was the driver in reaching international consensus regarding the need for rules on corresponding adjustments. It considered the OECD to be the key to the resolution of economic double taxation in transfer pricing cases.[42] Accordingly, Working Party 7 was re-established to deal with the question of whether or not and, if so, in what situations a corresponding adjustment should be made. In this respect, it was questioned whether or not economic double taxation is covered by a tax treaty.[43] According to Working Party 7, article 9 of the OECD Draft (1963) "serves a useful purpose as a statement of what Contracting Parties to Double Taxation Conventions have in mind".[44] From this statement, it may be concluded that the contracting states even intended to cover economic double taxation arising as a result of adjustments envisaged in article 9(1) of the OECD Model. Consequently, it is assumed that the contracting states had to make a corresponding adjustment, even without the inclusion of a separate provision for this. However, the United States initiated a targeted campaign with the intention of creating an international consensus relating to rules on corresponding adjustments.[45] Accordingly, the second report of Working Party 7[46] resulted in a recommendation that the OECD Model provide for a corresponding adjustment to be made in all cases where profits had to be reallocated to one contracting state and where that state and the other contracting state agreed that the reallocation was fair. As the Committee agreed with the recommendation, article 9(2) was added to the OECD Model (1977).[47, 48] Against this background, however, it may be assumed that article 9(2) of the OECD Model is crucial with regard to the obligation to make a corresponding adjustment and, therefore, to prevent legally arising economic double taxation. In light of the amendment to the Commentary on Article 9 of the OECD Model (1992),[49] such reasoning can, however, be disproved. In addition, according to the OECD, not only does the wording of article 9(2) of the OECD Model clarify that it is the spirit of the OECD Model to have economic double taxation due to transfer pricing covered but also:[50]

33. M. Lang, *Introduction to the Law of Double Taxation Conventions* MN 467 (Linde Verlag 2010), wherein he states that article 9 of the *OECD Model* "is not an allocation rule but has a special role. Although this rule as has a confining effect similar to that of allocation rules, it addresses cases of economic double taxation: …".
34. In this sense, *see* Working Party No. 7 of the Fiscal Committee, *Apportionment of Profits of Permanent Establishments and Associated Enterprises*, FC7WP 7(67) 2, "… This will minimize disputes, limit the burden on the competent authorities, promote uniform treatment of taxpayers, establish equitable allocation of tax revenues between Member countries and minimize cases of double taxation …". According to Wittendorf, *supra* n. 14, at p. 147, history suggests that the purpose is to prevent double taxation. Article 9(1) of the *OECD Model* does not cover all forms of economic double taxation of business profits, for example, economic double taxation arising due to qualification conflicts (partnerships and expenses) are not subsumed under article 9 of the *OECD Model*.
35. Lang, *supra* n. 33, at MN 467.
36. Id., at MN 468.
37. *See* art. VI(1)(b) of the Protocol to the *London Draft* (1946).
38. Wittendorf, *supra* n. 14, at p. 95.
39. *Draft report of the Fiscal Committee to the Council FC (63) 4: Letter from the United States Delegation to the Chairman of the Fiscal Committee May 8 1963*, TFD/FC/158.
40. *See* Wittendorf, *supra* n. 14, at p. 37 with reference to sec. 482 of the Regulations.
41. For the United States, this was an unbearable situation, as described by Stanley S. Surrey, Assistant Secretary of the US Treasury for Tax Policy. *See* Wittendorf, *supra* n. 14, at p. 37.
42. Wittendorf, *supra* n. 14, at p. 38.
43. Report by Working No. 7 of the Fiscal Committee, FC/WP7 (70) (1), *Apportionment of profits*, 7 c.
44. Id., 7 d.
45. Wittendorf, *supra* n. 14, at p. 39 with further references.
46. Report by Working No. 7 of the Fiscal Committee, FC/WP7(70) (2), *Corresponding adjustments*.
47. OECD Model Tax Convention on Income and on Capital (11 Apr. 1977), Models IBFD.
48. Report by Working No. 7 of the Fiscal Committee, FC/WP7(70) (2), *Corresponding adjustments*.
49. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 25* para. 10 and *Commentary on Article 9* para. 3 (1 Sept. 1992), Models IBFD. According to paragraph 3 of the *OECD Model: Commentary on Article 9(1)* the OECD Report on Transfer Pricing and Multinational Enterprises represent internationally agreed principles and provides valid guidelines on the application of the arm's length principle that underlies the article.
50. Para. 10 of the *OECD Model: Commentary on Article 25* (1992) and A. Lahodny-Karner, *Verrechnungspreise und Gegenberichtigung*, in *Aktuelle Entwicklungen im Internationalen Steuerrecht* p. 96 (W. Gassner, M. Lang & E. Lechner eds., Linde 1994). In 1992, five OECD member countries reserved the right not to include OECD Model Tax Convention on Income and on Capital art. 9(2) (1 Sept. 1992), Models IBFD. *See* paragraph 16 of the *OECD Model: Commentary on Article 9* (1992), where the reservations were made by Belgium, Finland, Norway, Portugal and Switzerland.

the mere fact that Contracting States inserted in the convention the text of Article 9, as limited to paragraph 1 – which usually only confirms broadly similar rules existing in domestic laws – indicates that the intention was to have economic double taxation covered by the Convention.

2.1.3. OECD reports on article 9

In 1979, the OECD published its first transfer pricing report, entitled "Report of the OECD Committee on Fiscal Affairs on Transfer Pricing and Multinational Enterprises",[51] which dealt with the taxation of MNEs, including transfer pricing. The Commentary on the OECD Model (1992) referred to this report and clarified that it is also a means of interpreting article 9 of the OECD Model.[52] This report was supplemented and followed by further reports dealing with transfer pricing. In this regard, it should be noted that, according to the OECD report entitled "Transfer Pricing, Corresponding Adjustments and the Mutual Agreement Procedure"[53] corresponding adjustments are mandatory, unless the enterprise manipulated its transfer price for the purpose of gaining a tax advantage. Finally, in 1995, the OECD published the "Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" (the "OECD Transfer Pricing Guidelines (1997)"),[54] which set out more detailed guidelines regarding the application of the arm's length principle. In the 1997 to 2010 period, the OECD Transfer Pricing Guidelines (1997) were frequently revised.[55] As with the Commentaries on the OECD Models, the OECD Transfer Pricing Guidelines (1997) are not legally binding under international tax law, but they are considered to be a valuable means of interpretation[56] to the extent that they were available when a tax treaty was signed.[57] In this respect, the Commentaries on the OECD Model and the various OECD reports up to 2005 provide guidance on the interpretation of the Austria-Czech Rep. Income and Capital Tax Treaty (2006). The further revised OECD "Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations",[58] issued in 2010, can, therefore, not be taken into account when interpreting article 9 of this tax treaty.

2.2. Purpose and context of article 9 of the OECD Model

Article 9(1) of the OECD Model is concerned with the taxation of business profits[59] derived from transactions between associated enterprises that are covered by the taxing right of the two residence states under article 7(1) of the OECD Model.[60] The arm's length principle is also inherent in article 7(2). While article 7 focuses on dealings, article 9 addresses business profits from the perspective of transactions between related enterprises. The objective of article 9 is to ensure that transactions between associated enterprises comply with the arm's length principle, which means that these transactions must be treated as if they had been carried out between two wholly independent enterprises.[61] Like every other treaty provision, article 9(1) does not create a tax liability,[62] but restricts the taxing rights in regard to transactions between related enterprises. It is domestic law that provides the legal basis for the income adjustment. Article 9(1) ensures that the domestic rules for income adjustments comply with the arm's length principle. Most states also apply domestic rules that are analogous to the arm's length principle.[63] It can, therefore, be assumed that by including article 9(1), the contracting states wish to eliminate economic double taxation in transfer pricing cases.[64] Given this background, the primary purpose of article 9(1) is to ensure that the domestic rules comply with the arm's length principle in respect of transactions regarding business income between associated enterprises with the objective of mitigating economic double taxation. Article 9(1) permits the contracting states to adjust profits in line with the arm's length principle, which can be undertaken by imputing income or reducing expenses according to the provisions of national tax law.[65] A (primary) adjustment is not conditional on the other contracting state agreeing with the adjustment. However, the state that made the primary adjustment bears the responsibility[66] of justifying the adjustment, both in

51. OECD, *Report of the OECD Committee on Fiscal Affairs on Transfer Pricing and Multinational Enterprises* (OECD 1979), International Organizations' Documentation IBFD.
52. Para. 3 *OECD Model: Commentary on Article 9* (1992).
53. OECD, *Transfer Pricing, Corresponding Adjustments and the Mutual Agreement Procedure, in Transfer Pricing and Multinational Enterprises, Three Taxation Issues* MN 70 (OECD 1984).
54. OECD, *Transfer Pricing Guidelines for multinational enterprises and tax administrations* (OECD 1997) (the "OECD *Transfer Pricing Guidelines* (1997)").
55. The *OECD Transfer Pricing Guidelines* (1997) *supra* n. 54, state in chap. IV, sec. C, para. 4.35: *Corresponding adjustments and the mutual agreement procedure. Articles 9 and 25 of the OECD Model Tax Convention* state that corresponding adjustments *are not mandatory* – tax administrations are not required to reach agreement under the mutual agreement procedure. Furthermore, under the *OECD Model: Commentary on Article 9(2)*, a tax administration *should make a corresponding adjustment only* insofar as it considers the primary adjustment to be justified both in principle and in amount. The non-mandatory nature of corresponding adjustments is necessary in order to preserve the fiscal sovereignty of each OECD member country. This is expressed in paragraph 6 of the *OECD Model: Commentary on Article 9* (1992), which provides that an adjustment is not automatically to be made in State B. State B is committed to making an adjustment of the profits of the affiliated company only if it considers that the adjustment made in State A is justified both in principle and as regards the amount.
56. *Vienna Convention on the Law of Treaties* art. 31 (23 May 1969), Treaties IBFD.
57. M. Lang, *Die Bedeutung des Kommentars und des Musterabkommens der OECD für die Auslegung von Doppelbesteuerungsabkommen*, in Gassner, Lang & Lechner eds., *supra* n. 10; Intertax, *supra* n. 10, at p. 7; and *supra* n. 2, at p. 122.
58. OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2010), International Organizations' Documentation IBFD.
59. All categories of income that qualify as business profits under art. 7(1) of the *OECD Model*.
60. Wittendorf, *supra* n. 14, at pp. 177-183.
61. Lang, *supra* n. 33, at Introduction, MN 467.
62. Lang, *supra* n. 33, at Introduction, MN 467 et seq. and Lahodny-Karner, *supra* n. 50, at p. 95.
63. Lahodny-Karner, *supra* n. 50, at p. 96.
64. Id.
65. Wittendorf, *supra* n. 14, at p. 240. If the transfer price is below the arm's length price, income and/or expenses may be imputed. If the transfer price exceeds the arm's length price, income and/or expenses may be reduced.
66. However, article 9(1) of the *OECD Model* does not contain any formal rules regarding the burden of proof (for details, *see* paragraph 4 of the *OECD Model: Commentary on Article 9* (2010).

principle and with regard to the amount meeting the arm's length principle.[67]

Article 9(2) of the OECD Model also provides taxpayers with an adjustment that complies with the arm's length principle. Such an adjustment is referred to as a "corresponding or matching adjustment". However, the corresponding adjustment is not made automatically, as, in light of the purpose of article 9, article 9(2) only provides for the possibility of re-examining transfer prices and, depending on the outcome of this exercise, consequently determining a new transfer price in the form of a corresponding adjustment. It appears, therefore, that a contracting state is only committed to making a (corresponding) adjustment if it considers that the transaction does not meet the arm's length test, in other words, where the contracting state considers that its "own" transfer price is not at arm's length. Accordingly, the Commentary on Article 9 of the OECD Model (2005)[68] and the OECD Transfer Pricing Guidelines (1997)[69] also refer to the "non mandatory nature of corresponding adjustments" given the fiscal sovereignty of each OECD member country. The other contracting state is, therefore, not required to make a corresponding adjustment if it considers that the transaction has been carried out at arm's length. However, where there is a dispute regarding the consistency of profit adjustments and the resulting economic double taxation, the wording of article 9(2) suggests dealing with corresponding adjustment requests under the mutual agreement procedure in article 25 of the OECD Model. The OECD Transfer Pricing Guidelines (1997)[70] also recommend initiating a mutual agreement procedure under article 25 to determine corresponding adjustments, notwithstanding the inclusion of article 9(2) in a tax treaty.

3. The Practical Application of Article 9 of the Austria-Czech Republic Income and Capital Tax Treaty (2006)

3.1. The Czech Ministry of Finance

In 1995, during the procedure that was undertaken for it to become an OECD member country, the Czech Republic[71] made a reservation regarding article 9(2) of the OECD Mode1, which asserted its right not to include paragraph 2 into its tax treaties, but to be prepared to accept this paragraph with the addition of a third paragraph that limits the potential corresponding adjustment to bona fide cases. The reservation was entered into in 1997 and included in the OECD Model (1998).[72] According to Mr Tůma, the former negotiator for all of the tax treaties concluded by the Czech Republic, the objective of this reservation is to create a regime under which associated enterprises that, for tax evasion purposes, applied a price other than the arm's length price are required to bear the consequences of their actions, including possible international double taxation.[73] The reservation was not withdrawn by the Czech Republic during the last revision of the OECD Model (2010)[74] and is also reflected in the Czech treaty network, as 54%[75] of the tax treaties that it has concluded do not contain article 9(2) of the OECD Model. A further 30%[76] of Czech tax treaties contain article 9(2), but include article 9(3) limiting the potential corresponding adjustment to bona fide cases as stated in the Czech reservation on article 9(2). Only 16%[77] of Czech tax treaties are completely in line with article 9, but only three[78] of these were signed after making the reservation regarding article 9(2). Accordingly, Czech treaty policy broadly complies with its reservation on article 9(2).

The Austria-Czech Republic Income and Capital Tax Treaty (2006) falls within the 54% of Czech tax treaties that lack a provision for a corresponding adjustment. In this respect, Mr Zíka, head of the international tax relations division of the Czech Ministry of Finance, has explicitly stated that the Czech tax authorities are not required to make a corresponding adjustment.[79] This line of reasoning was based on the fact that the tax treaty does not contain article 9(2) of the OECD Model. On the one hand, taking into account the Czech reservation on article 9(2), the argument of the Czech Ministry of Finance appears to be reasonable. A corresponding adjustment does not have to be made automatically. If the Austrian tax authorities adjust transfer prices during a tax audit and, therefore, set arm's length prices, the Czech tax authorities do not have to make a corresponding adjustment and are not required to follow the approach of the Austrian tax authorities. However, such a primary adjustment could also be a reason for the Czech tax authorities to determine whether or not the transfer prices are at arm's length.

On the other hand, the stance of the Czech Ministry of Finance is questionable in the light of the spirit of the tax treaty, i.e. the elimination of double taxation. The mere fact that the treaty partners inserted article 9(1) of the OECD Model into the tax treaty indicates that they want

67. For details, *see* OECD *Transfer Pricing Guidelines* (1997), *supra* n. 54, at paragraphs 4.1-4.77 regarding the "Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes".
68. For details, *see OECD Model Tax Convention on Income and on Capital: Commentary on Article 9(2)*, paragraph 6 (2005), Models IBFD.
69. For details, *see OECD Transfer Pricing Guidelines* (1997), *supra* n. 54, at paragraph 4.35.
70. For details, *see OECD Transfer Pricing Guidelines* (1997), *supra* n. 54, at paragraph 4.33 with further references.
71. Statement of the government of the Czech Republic on becoming an OECD member country (15 Nov. 1995), available at www.mzv.cz/file/188235/vstupni_prohlaseni_cesky.doc. The Czech Republic became an OECD member country on 21 December 1995. Further references are included in the Statement of the Czech Ministry of Finance No. 251/15 082/96, available at www.ucetni-portal.cz/sdeleni-mf-ke-vstupu-cr-do-oecd-ve-vztahu-k-danim-primym-109-x.html.
72. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 9* para. 16 (1 June 1998), Models IBFD. Hungary, similar to the Czech Republic, entered a reservation on article 9 in 1997.
73. *See* J. Tůma, *The Czech Republic and OECD in the tax area*, 3 Finanční daňový a účetní bulletin, (1996).
74. Currently, on the basis of the *OECD Model* (2010), only five OECD member countries, i.e. the Czech Republic, Hungary, Germany, Italy and Slovenia, reserve the right not to insert article 9(2). Australia has a general reservation regarding article 9. The United States has also made an observation on article 9 with regard to thin capitalization.
75. Czech Ministry of Finance, *Review of concluded tax treaties*, available at www.mfcr.cz/cps/rde/xchg/mfcr/xsl/prehled_smluv_3762.html.
76. Id.
77. Id.
78. Namely, the Czech tax treaties with Korea (Dem. People's Rep.), Kuwait and Norway.
79. V. Zíka, *New tax convention between Czech Republic and Austria*, 13 Poradce (2006).

to prevent economic double taxation.[80] Economic double taxation does not arise, provided that both contracting states apply their domestic rules in accordance with the arm's length principle and share a common understanding of this principle. To the extent that the Czech tax authorities agree that the primary adjustment is justified both in principle and with regard to the amount,[81] they are confirming that the transfer price was not originally determined according to the arm's length principle. Despite the absence of article 9(2), the Czech tax authorities are required to make such corresponding adjustments in bona fide cases in light of article 9(1). By including article 9(1) in the tax treaty, the contracting states have made a commitment to follow the arm's length principle and thus avoid economic double taxation.

The purpose of article 9(1) of the OECD Model is also taken into account regarding the obligation to consider a request for a corresponding adjustment under the mutual agreement procedure (MAP) set out in article 25 of the OECD Model. The possibility of entering into a MAP under article 25 is evident from the wording of article 9(2), provided that a tax treaty contains a clause of this type. However, entering into a MAP under a tax treaty is not an obvious step if the tax treaty does not include a provision similar to article 9(2). This is usually the case in regard to tax treaties that were concluded by the Czech Republic before 1977, as well as the Austria-Czech Republic Income and Capital Tax Treaty (2006). In light of this interpretation of article 9, it can, therefore, be concluded that there is an obligation to consider a request for a corresponding adjustment under article 25[82] and, therefore, also under article 24 of the Austria-Czech Republic Income and Capital Tax Treaty (2006). The historical development[83] and the context of article 9 also indicate that there is an obligation to consider a request for a corresponding adjustment. In addition, the Commentary on Article 9 of the OECD Model (2003)[84] and the OECD Transfer Pricing Guidelines (1997)[85] suggest the use of a MAP in respect of disputes regarding the content of the arm's length principle. However, there is no time limit in which to reach an agreement to resolve a case under article 24 of the Austria-Czech Republic Income and Capital Tax Treaty (2006), as is proposed in article 25(5). In addition, the opening and the enforcement of a MAP under article 24 of the Austria-Czech Republic Income and Capital Tax Treaty (2006) appears, particularly in regard to the Czech tax authorities, to be very problematic in respect of time limit issues (*see* subsequently).[86] Accordingly, the procedure is open ended. It may, therefore, potentially result in effective deadlock.[87]

The enforcement of article 9 of the OECD Model does not appear to be easy in the Czech Republic, particularly with regard to time limit issues. According to the Commentary on Article 9 of the OECD Model (2003),[88] contracting states are free to include time limits in their tax treaties.[89] Some OECD member countries take the position that the commitment to make an appropriate adjustment should be open ended.[90] However, according to the OECD Commentary on Article 9 (2003), some OECD member countries take the opposite view.[91] Under Czech tax legislation, article 148 of the Tax Code No. 280/2009 Coll., as amended, provisions are included concerning the time limit.[92] According to the Czech tax authorities, an obstacle to making a corresponding adjustment is the expiry of the time limit under national legislation. In the literature, this practice of the Czech tax authorities is considered as giving unjustified preference to national legislation,[93] as the non-performance of international treaty law in connection with article 27 of the Vienna Convention on the Law of Treaties (1969).[94] According to Lang (2007), a domestic legislator is, in practice, limited in determining

80. Para. 10 *OECD Model: Commentary on Article 25* (2003). *See also* Lahodny-Karner, *supra* n. 50, at pp. 95 et seq. and 111.
81. Para. 6 *OECD Model: Commentary on Article 9(2)* (2003).
82. For details, *see* paras. 9 and 10 of the *OECD Model: Commentary on Article 25* (2003). This is also in line with the majority view in the tax literature. In this regard, for further references, *see* Vogel, *supra* n. 17, at Art 9, MN 74.
83. Working Party No. 7 of the Fiscal Committee, *Apportionment of Profits Corresponding Adjustment*, FC/WP 7(70) 2.
84. Para. 11 *OECD Model: Commentary on Article 9* (2003).
85. *OECD Transfer Pricing Guidelines* (1997), *supra* n. 54, at para. 4.33.
86. *See* V. Sojka, *International taxation of income*, p. 224 (Wolters Kluwer 2008) and V. Solilová & D. Nerudová, *Mutual agreement under Commentary on Art. 25 of the OECD-MC and Czech tax policy 2010*, Daně a právo v praxi 5/6 (2010). In addition, according to information provided by the Czech General Financial Directorate, as of 2 March 2012, the Czech Republic has opened only one MAP under art. 25 of the *OECD Model* compared to seven cases under the EU Arbitration Convention (1990): Convention 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, EU Law IBFD and Abl, No. L 225, p. 10 (20 Aug.1990), regarding transfer pricing matters. According to the OECD, between 2006 and 2010, the Czech Republic opened 34 MAPs under article 25 of the *OECD Model*.
87. The possibility to resolve this effective deadlock by way of a MAP under art. 25(5) of the *OECD Model* was researched by Solilová & Nerudová, *supra* n. 86.
88. Para. 10 *OECD Model: Commentary on Article 9* (2003).
89. *The Convention Between Malta and the Czech Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital* art. 9(3) (21 June 1996), Treaties IBFD contains a time limit for making a corresponding adjustment, which states that: "A Contracting State shall not change the profits of an enterprise in the circumstances referred to in paragraph 2 after the expiry of the time limits provided in its national laws". In addition to this, the Czech tax treaties with Canada, Egypt, Finland, the Philippines, Spain and Switzerland contain time limit provisions regarding a primary adjustment. The time limit provision is either set out in article 9(3), article 24 or article 25 relating to the mutual agreement procedure.
90. *See OECD Transfer Pricing Guidelines* (1997), *supra* n. 54, at paras. 4.43-4.51 and also para. 10 *OECD Model: Commentary on Article 9(2)* (2003).
91. *See OECD Transfer Pricing Guidelines* (1997), *supra* n. 54, at paras. 4.43-4.51 and also para. 10 *OECD Model: Commentary on Article 9* (2003).
92. CZ: Tax Code No. 280/2009 Coll., article 148. states that tax may not be assessed or additionally assessed after expiry of the three-year time limit. However, the time limit for raising a tax assessment shall be extended by one year under the conditions set out in art. 148(2) Tax Code, but shall end, at the latest, upon the expiry of ten years.
93. D. Nerudová & L. Moravec, *The Czech Republic*, in *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* p. 338 (M. Lang et al. eds., Cambridge U. Press 2012).
94. *See* Sojka, *supra* n. 86, at p. 205. *See also* V. Šnek et al., *Procesní aplikace úpravy základu daně podle čl. 9 odst. 2 vzorové smlouvy OECD o zamezení dvojího zdaněn*, No. 76/31.08.05, available at www.ucetni-portal.cz/procesni-aplikace-upravy-zakladu-dane-podle-cl-9-odst-2-vzorove-smlouvy-oecd-o-zamezeni-dvojiho-zdanen-264-v.html.

the procedural conditions for fulfilling treaty obligations.[95] Such procedural conditions must be in line with both the principle of equivalence and effectiveness.[96] In this respect, it should be noted that, currently, the Czech Ministry of Finance is working on a decree that should determine the procedural aspects of a corresponding adjustment.

3.2. The Austrian Ministry of Finance

In contrast to Czech treaty policy, the Austrian Model,[97] "which is the starting point on bilateral treaty negotiations for the Austrian delegation"[98] includes the provision regarding a corresponding adjustment in article 9(2) of the OECD Model. However, according to Loukota (1995), the former head of the Austrian treaty negotiating team, Austria does not insist on the inclusion of this provision in a tax treaty.[99] In the view of the Austrian Ministry of Finance, article 9(2) of the OECD Model merely clarifies the obligation to make corresponding adjustments in circumstances where a primary adjustment is made.[100] Similar to Lahodny-Karner (1994),[101] the Austrian Ministry of Finance has adopted the stance that the insertion of article 9(1), together with the requirement to mitigate international double taxation, expresses an obligation to make corresponding adjustments. If a tax treaty does not include article 9(2), the Austrian Ministry of Finance would only make a corresponding adjustment in "bona fide cases".[102] It is, however, unclear as to what the legal basis is for the limitation to bona fide cases. Together with the treaty policy of the negotiating partner, as appears to be the case with the Czech Republic,[103] this could be another reason why numerous Austrian tax treaties do not contain, in contrast to both the Austrian Model and the OECD Model, a provision for corresponding adjustments.[104]

The express answering service (EAS) provides non-legally binding replies by the Ministry of Finance in response to questions from taxpayers.[105] EAS 2380[106] considers the different interpretations and, therefore, the application of article 9 of the OECD Model by the two contracting states can be highlighted.[107] In EAS 2380, arm's length interest was paid by a Czech corporation to its Austrian shareholder. Double taxation arose, as the Czech Republic did not grant a deduction for the interest paid at arm's length to the Austrian shareholder. According to the Austrian Ministry of Finance, the non-deductibility of the arm's length interest paid constitutes an infringement of the principles of article 9.[108] In such a situation, a MAP is recommended to clarify the content of the tax treaty, to resolve the conflict[109] and, therefore, to mitigate double taxation.[110] In this regard, it should be noted that the Austrian Chamber of Public Accounts and Tax Advisors[111] insisted on the insertion of a MAP provision in the Austria-Czech Republic Income and Capital Tax Treaty (2006). Nevertheless, during an on-going international procedure, a taxpayer has to deal with double taxation. As the Austrian Ministry of Finance is aware of this fact, they are willing to grant temporary tax relief under section 48 of the Federal Fiscal Code (*Bundesabgabenordnung*, BAO) during an on-going procedure.[112] The temporary tax relief is only granted to enterprises whose taxable profits have been increased by the Austrian tax authorities through the application of the arm's length principle to transactions involving an associated enterprise in another tax jurisdiction. A further criterion for the temporary tax relief is that there is no apparent abuse of law.[113] The legal notifications that set out the tax relief only apply for a limited time period to ensure that the taxpayers involved still have an incentive to reach international consensus quickly.[114] The Austrian Ministry of Finance, therefore, protects taxpayers during the ongoing procedure from paying taxes

95. M. Lang, *The Procedural Conditions for the Implementation of Tax Treaty Obligations Under Domestic Law*, 35 Intertax 3, pp. 147 & 150 (2007).
96. Id., Lang, at p. 149 et seq.
97. *See*, for example, the *Austrian Model Convention on Income and on Capital* (2001), which also included this provision. *See* H. Loukota, *Die aktuelle österreichische DBA-Politik*, 48 ÖStZ 13, p. 252 (1995).
98. Lang, *supra* n. 2, at p. 108.
99. Loukota, *supra* n. 97.
100. *Austrian Transfer Pricing Guidelines* (2010) (the "VPR 2010"), Rz 5 state that: "*Art. 9 ist so auszulegen, dass sich daraus für die Vertragsstaaten eines DBA nicht nur die Berechtigung ergibt, fremdverhaltenswidrig ermittelte Gewinne eines verbundenen Unternehmens auf das fremdübliche Maß zu erhöhen, sondern dass daraus für den anderen DBA-Partnerstaat die Verpflichtung resultiert, eine korrespondierende Gegenberichtigung vorzunehmen. Art. 9 Abs. 2 OECD-MA wird auf österreichischer Seite eine bloß klarstellende Funktion zugemessen*." *See* Dommes, *supra* n. 11 and A. Philipp, H. Lokouta & H. Jirousek, *Internationales Steuerrecht* Band 1, 31, Z 9, Rz 57 (Manz 2010).
101. Lahody-Karner, *supra* n. 50, at pp. 95 et seq., 111 and 126.
102. Loukota, *supra* n. 97 and VPR 2010, *supra* n. 100, at Rz 6.
103. Blum, *supra* n. 12.
104. *See*, in more detail, Blum, *supra* n. 12.
105. The Division for International Taxation of the Austrian Federal Ministry of Finance deals with the express answering service (EAS). As early as 1991, the Division for International Tax Affairs in the Federal Ministry of Finance (Division IV/4) started a special service relating to inquiries from Austrian taxpayers regarding international tax issues. The replies given by the Division for International Tax Affairs, which became known as the EAS, are greatly appreciated by taxpayers and reflect the general position of the Federal Ministry of Finance in relation to international tax matters. The replies are published in German for the general public and some have also been discussed in international publications regarding tax treaty matters. The number of inquiries and answers has increased to more than 2,800. Since 2006, the EAS have been made accessible to the general public (in German only) in the Federal Ministry of Finance's Legal and Technical Information Database "FINDOK", available at http://english.bmf.gv.at/tax/doubletaxationagreements/expressanswerserviceeas/_start.htm?q=eas. With regard to the development and relevance of EAS, *see* H. Loukota, *supra* n. 97, at p. 254; *EAS-Anfragebeantwortungen: EAS-Nr. 1000 wurde erreicht*, 7 SWI 3, p. 94 et seq. (1997); and M. Lang, *Die Bedeutung von EAS-Rechtsauskünften des BMF*, 8 SWI 10, p. 460 (1998).
106. Austrian Ministry of Finance, EAS 2380 (11 Nov. 2003).
107. EAS 2380 concerns art. 9 of the *Austria-Czech Income and Capital Tax Treaty* (1978), but, as this tax treaty also does not include a provision regarding corresponding adjustments, the problems arising due to the different approaches in interpreting art. 9(2) of the *OECD Model* arise in regard to this tax treaty as well.
108. Austrian Ministry of Finance, EAS 2380 (11 Nov. 2003). In this respect, it should be noted that not all forms of economic double taxation are covered by art. 9 of the *OECD Model*. *See* Lahodny-Karner, *supra* n. 50, at p. 97 with further references.
109. H. Jirousek, *Steuerrechtliche Konfliktsituationen bei internationalen Wirtschaftsbeziehungen und ihre Lösungsmöglichkeiten*, 2 RdW 4, p. 118 (1984).
110. Austrian Ministry of Finance, EAS 2380 (11 Nov. 2003) and Baumann, Gatterer & Schmidt, *supra* n. 11, at p. 65.
111. *See* the evaluation of the *Austria-Czech Rep. Income and Capital Tax Treaty* (2006) by the Austrian Chamber of Public Accounts and Tax Advisors, point 11.
112. VPR 2010, *supra* n. 100, at Rz 359 and Philipp, Lokouta & Jirousek, *supra* n. 100, at Band 1, Z 9, Rz 70.
113. VPR 2010, *supra* n. 100, at Rz 359.
114. *See* Philipp, Lokouta & Jirousek, *supra* n. 100, at Band 1, Z 9, Rz 70.

twice, provided that the taxpayers cooperate with the procedure.[115]

4. Conclusions and Recommendations

Article 9 of the Austria-Czech Republic Income and Capital Tax Treaty (2006), which does not include a provision regarding corresponding adjustments, reflects the bilateral policy decision taken by both the Austrian and the Czech Ministries of Finance. The non-inclusion of the provision for corresponding adjustments in this tax treaty results from differing interpretations of article 9 of the OECD Model. Article 9 of the tax treaty can, therefore, be considered to be an example of an ambiguous application of a tax treaty. According to the Austrian Ministry of Finance, article 9(2) of the OECD Model is only of a declarative nature. By including article 9(1) of the OECD Model, the contracting states intend to comply with the arm's length principle and, therefore, to mitigate economic double taxation. In contrast to Austria, it appears that the Czech Ministry of Finance has adopted the position that corresponding adjustments should be made, provided that the tax treaty includes a provision similar to article 9(2) of the OECD Model.[116] In practice, the differing interpretations adopted by the Ministries of Finance result in legal uncertainty and instances of double taxation. However, by inserting article 9(1) of the OECD Model, both contracting states must apply their domestic rules in accordance with the arm's length principle to prevent economic double taxation.

There are possible solutions that either deal with or prevent conflicts that may arise due to the different interpretations of article 9 of the OECD Model. However, it must be noted that all these solutions have advantages and disadvantages. With regard to legal certainty, a MAP, as set out in article 24 of the Austria-Czech Republic Income and Capital Tax Treaty (2006), is the minimum standard of legal certainty. As the treaty partners do not have to reach an agreement under the MAP, the process may be prolonged and burdensome and may not, ultimately, provide a solution to the conflict. From the taxpayer's perspective, this is very unsatisfactory. The arbitration procedure under the EU Arbitration Convention appears to be a sound alternative to the MAP in resolving tax disputes. A major advantage of the EU Arbitration Convention (90/436) is that an Advisory Commission must decide on how double taxation should be eliminated if agreement cannot be reached by the competent authorities within two years of submitting the case.[117] The opinion of the Advisory Commission must be delivered not more than six months after the date on which the matter is referred to it.[118] Following that, the competent authorities shall take a decision that will eliminate the double taxation within six months of the date on which the advisory commission delivered its opinion. Moreover, if they fail to reach a mutual agreement, they shall be obliged to act in accordance with the opinion delivered.[119]

In contrast to the MAP, the arbitration procedure in the EU Arbitration Convention (90/436)[120] contains a time limit for reaching a mutual agreement. For instance, in Austria, the taxpayer's request for an agreement procedure can be based simultaneously on the relevant tax treaty and on the EU Arbitration Convention.[121] However, with regard to the possibility of initiating a procedure under the EU Arbitration Convention, the European Court of Justice (ECJ) confirmed in *SGI* (Case C-311/08) that an "additional administrative and financial burden is imposed on the company which has submitted its case to such a procedure".[122] This is also true for the MAP. In Austria, the taxpayer may also request temporary tax relief under section 48 of the BAO,[123] which is granted during the procedure.

From a tax planning perspective, the conflicts and transfer pricing issues that may arise as a result of the different interpretations of article 9 of the OECD Model could be prevented by a unilateral Advance Pricing Agreement (APA). In this respect, taxpayers may make use of the Austrian advance ruling regime implemented in section 118 of the BAO.[124] In Austria, an advance ruling is not free of charge; the maximum amount that can be charged is EUR 20,000. An advance ruling enables a taxpayer to determine, in advance, the implications in respect of setting the arm's length price, but the "correct arm's length price" cannot be set by the Austrian Ministry of Finance. Nevertheless, (primary) profit adjustments during tax audits can be avoided, provided that the facts and circumstances underlying the ruling are the same. An advance ruling is legally binding in Austria. If, however, the Czech tax authorities make a primary adjustment during a tax audit, the Austrian tax authorities cannot make an adjustment because of the legally binding advance ruling, under which the Austrian tax authorities and the taxpayers have agreed on an arm's length price. A disadvantage of the advance ruling can be seen in the restriction against testing the arm's length price again and, therefore, in making an adjustment. In the Czech Republic, a taxpayer can obtain a

115. Philipp, Lokouta & Jirousek, *supra* n. 100, at Band 1, Z 9, Rz 70.
116. The primary adjustment must also be justified both in principle and with regard to the amount if a corresponding adjustment is to be made.
117. Art. 7(1) EU Arbitration Convention (90/436).
118. Id., art. 11(1).
119. Id., art. 12(1).
120. As article 9(1) of the *Austria-Czech Rep. Income and Capital Tax Treaty* (2006) complies with article 9(1) of the *OECD Model*, no conflict between the MAP as recommended in the tax treaty and the EU Arbitration Convention (90/436), as described in A. Kempf & F.Gelsdorf, *Die EU-Schiedsverfahrenskonvention im Konkurrenzverhältnis zu Doppelbesteuerungsabkommen*, 21 IStR 9, p. 329 et seq. (2012), arises.
121. VPR 2010, *supra* n. 100, at Rz 367.
122. BE: ECJ, 21 Jan. 2010, Case C-311/08, *Société de Gestion Industrielle SA (SGI) v. Belgian State*, para. 54 et seq., ECJ Case Law IBFD.
123. For details, *see* H. Mayer & E. Nagelstutz, *Mechanismen zur Lösung von zwischenstaatlichen Verrechnungspreiskonflikten - Verständigungs- und Schiedsverfahren*, in *Handbuch Verrechnungspreise* p. 495 et seq. (S. Bernegger, F. Rosenberger & H. Zöchling eds., Linde 2009) and R. Macho, *Gegenberichtigung bei Verrechnungspreiskorrekturen*, in Bernegger, Rosenberger & Zöchling eds., *supra* n. 123, at p. 515 et seq.
124. T. Ehrke-Rabel & C. Ritz, *Verbindliche "Rulings" im Steuerrecht*, 28 RdW 10, p. 659 (2010); T. Ehrke-Rabel, *Verbindliche Auskünfte in Österreich*, GES 5, p. 231 (2010); B.U. Koran, *Rechtsverbindliche Auskünfte - Advance Ruling - der Auskunftsbescheid gemäß § 118 BAO*, 85 SWK 26, S. 803 (2010) and *Advance Ruling – Finanzämter geben verbindliche Rechtsauskünfte*, 5 CFOaktuell 3, p. 113 (2011); M. Paar, *Der Auskunftsbescheid gemäß § 118 BAO*, ZfV 6, p. 925 (2010); and C. Ritz & B.U. Koran, *Advance Ruling*, SWK-Spezial (Linde 2011).

"binding consideration"[125] regarding the agreed price used in related-party transactions in respect of the competent Czech authorities. However, the taxpayer must consider the disadvantages of this alternative.[126] For instance, the binding consideration costs CZK 10,000, the taxpayer cannot appeal the decision of the Czech tax authorities, which is effective for a maximum of three years from the date on which it entered into force, and, following the expiry of the binding consideration, a new request for a further binding consideration must be made. In addition, both the Austrian advance ruling regime and a binding consideration in the Czech Republic do not provide comprehensive benefits, such as a full-fledged APA under the OECD Transfer Pricing Guidelines.[127] From a tax planning perspective, as well as regarding legal certainty, a bilateral APA[128] as a legally binding agreement between both contracting states is highly recommended. A bilateral APA is, therefore, a useful tool to mitigate instances of double taxation in advance that may arise due to ambiguity regarding how article 9 applies.

125. For details, *see* the binding consideration under section 38nc of Act No. 586/1992 Coll. regarding income taxes (ITA). The Czech Ministry of Finance has also issued Decree "D-333 Communication by the Ministry of Finance in respect of article 38nc of the ITA – binding consideration over the transfer pricing policy used in related party transactions". According to the Czech tax authorities (for details, *see* "The annual Report of the Czech tax administration", available at http://cds.mfcr.cz/cps/rde/xchg/SID-3EA9846C-8075B368/cds/xsl/325.htmlhttp://cds.mfcr.cz/cps/rde/xchg/SID-3EA9846C-8075B368/cds/xsl/325.html), 78 cases have been registered in the Czech Republic and the number of bilateral requests for binding consideration has increased since the provision entered into force.
126. For details, *see* V. Solilova, *Řešení Sporu v oblasti převodních cen - část 1*, in *Finanční řízení a controlling v praxi* No. 3 (Kluwer 2012).
127. *See* F. Francírek, *Cena převodních cen*, available at http://kvf.vse.cz/storage/1180451061_sb_francirek.pdf.
128. For details regarding the legal basis of and negotiation of a bilateral APA in Austria, *see* S. Dommes, G. Gahleitner & G. Steiner, *APA-Verfahren in Österreich: Rechtlicher Rahmen und erster Erfahrungsbericht*, 19 SWI 2, p. 56 (2009); Ritz & Koran, *supra* n. 124, at S 7; and A. Friedrich, H. Kuschill & G. Steiner, *Ruling und APAs – Chancen und Risiken für die Steuerpolitik*, in *Einkommensteuer-Körperschaftsteuer-Steuerpolitik, Gedenkschrift für Peter Quantschnigg* p. 109 (Bundesministerium für Finanzen (BMF) and Johannes-Kepler-Universität Linz (JKU Linz eds., 2010).

