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International Governance through Soft Law: The Case of the OECD Transfer Pricing Guidelines

Alberto Vega

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Universität Bremen
Sonderforschungsbereich 597 / Collaborative Research Center 597
Staatlichkeit im Wandel / Transformations of the State
Postfach 33 04 40
D - 28334 Bremen
Tel.:+ 49 421 218-56644
Fax:+ 49 421 218-56633
Homepage: http://www.staatlichkeit.uni-bremen.de

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International Governance through Soft Law: The Case of the OECD Transfer Pricing Guidelines

ABSTRACT

Soft law plays an important role in the regulation of international tax matters. This paper focuses on the case of the OECD Transfer Pricing Guidelines and analyses the relationship between this non-binding instrument and the formal sources of law. From the perspective of international law, the OECD Guidelines are mainly connected to double tax treaties, but they may also influence customary norms and the general principles of law. From the point of view of domestic legal systems, references to the OECD Guidelines can be found in the tax legislation of some countries and, especially, in the interpretative circulars of the Tax Administrations. Furthermore, in some states the courts have also taken the OECD Guidelines into account in their judgements, which shows that they are almost treated as hard law. However, this practical relevance of the Guidelines does not seem to be in accordance with the process in which they were made in the OECD, which could be more open to the different stakeholders and more transparent.

Keywords: soft law, transfer pricing, international taxation, OECD, international governance, recommendations, guidelines.

CONTENTS

International Governance through Soft Law: The Case of the OECD Transfer Pricing Guidelines

1. INTRODUCTION[1]

Soft law plays an important role in the international governance of many issues. For instance, the literature has highlighted the relevance of soft law for the international protection of the environment (Dupuy 1991) and the regulation of the global financial system (Brummer 2011). However, despite some exceptions (Vogel 2005; Christians 2007), the study of the role of soft law in the area of international taxation has not received the attention that it deserves according to the influence that non-binding instruments have in this field. In this sense, it should be noted that most of the work of the OECD on international taxation takes place through soft law, such as the model convention for the prevention of double taxation, its corresponding commentaries, the transfer pricing guidelines and the standards for effective exchange of information on tax matters. Even though international taxation is usually seen as a rather technical field, the distribution of tax revenues among states remains a political issue which, as Rixen (2008a) has noted, should attract the interest not only of tax experts but also of political scientists. Moreover, this area exemplifies many aspects of the connection between hard and soft law which have been studied by international law scholars such as Baxter (1980), Boyle (1999) and Schreuer (1977).

The main aim of this paper is to examine the relation between soft law and the formal sources of law, focusing on the particular case of the OECD Transfer Pricing Guidelines. These Guidelines are not legally binding, but given the nature of the transfer pricing problem, they have become a focal point and are very influential not only from the perspective of international law, but also directly on the national legal systems of many countries. Moreover, the way these Guidelines were drafted in the context of the

1 Universitat Pompeu Fabra (Barcelona), Department of Law. E-mail: alberto.vega@upf.edu. A preliminary version of this paper was presented at the conference “Politics beyond the State: Transformations of the State between De- and Repoliticization”, organized by the Collaborative Research Center 597 “Transformations of the State”, University of Bremen (27 to 29 May 2010). I am grateful to the participants of the conference and two anonymous referees for their perceptive comments. Financial support by the Spanish Ministry of Economy and Competitiveness and the European Social Fund is acknowledged (grant BES-2008-003252). This work was partially prepared during a research visit to the Max Planck Institute for Tax Law and Public Finance (Munich) and is part of the activities of the Research Group on Tax Law (2009-SGR-886), financed by the Government of Catalonia.

OECD will also be analysed to see if it is in accordance with the practical relevance that they exert.

In order to study the previous aspects, the paper is organized according to the following structure. To begin with, the main characteristics of the transfer pricing problem are introduced. After that, the notion of soft law is presented and the example of the OECD Transfer Pricing Guidelines is analysed, paying particular attention to their historical evolution and elaboration process. Next, the influence that these Guidelines have had on the formal sources of law is studied, both from the perspective of international law and the domestic legal systems of several countries.

2. THE TRANSFER PRICING PROBLEM AND ITS POSSIBLE SOLUTIONS

The transfer pricing problem is not only about taxation, but it is one of its most important dimensions. As is well known, multinational enterprises play a major role in today’s economy. These multinationals are made up of different units located around the world which trade with each other. Since these subunits are not independent, but a part of the whole multinational, one of the problems that arises is that of determining the price that has to be charged for the goods and services that are exchanged among those units.

Multinational enterprises may take different aspects into account when deciding these prices. For instance, they may want to minimize the exchange risks associated with the different currencies with which they operate. They may also use transfer pricing as a way of overcoming the restrictions on cash transfers (such as profit repatriations) that some countries impose, or to help foreign subsidiaries to compete during the initial years after being set up (Abdallah 1989, 14-22).

However, the most important factor that is usually taken into account is taxation, including not only income taxes but also tariffs. If a country charges high import duties, a multinational will have an incentive to charge low transfer prices to its subsidiaries in that country to reduce the value of imports and the corresponding tariffs. Similarly, differences in corporate tax rates may be very important and thus, multinationals may fix transfer prices so that most profits are allocated in the jurisdictions with lower tax rates. The importance of this factor has been clearly shown by the economic literature on this topic. For instance, Bartelsman and Beetsma (2003, 2246) present evidence that transfer pricing is used to shift profits in response to differences in corporate tax rates and according to their estimations this influence is very important. In particular, at the margin more than 65% of the additional revenue resulting from a unilateral tax increase is lost because of income shifting. Thus, what could be seen as an “opportunity” for multinational companies is a serious problem for the tax revenues of the states.

With respect to the solutions to the transfer pricing problem, it is possible to distinguish two main alternatives. One possibility is to follow the arm's length principle, which is the option recommended by the OECD. According to this principle, the prices charged between related parties should be equivalent to those that would have been charged between independent parties in the same circumstances. However, in many cases the application of this principle will be difficult since it may not be possible to find a comparable market transaction. Indeed, as Coase (1937, 390) pointed out, "the main reason why it is profitable to establish a firm would seem that there is a cost of using the price mechanism". Consequently, if the existence of firms is justified by the purpose of avoiding the transaction costs of market exchanges, establishing a comparable market price will be impossible in many cases.

Another alternative which has received the support of some scholars is unitary taxation, also known as formulary apportionment. If this system is followed, the first step would be to calculate the worldwide profit of the multinational enterprise. After that, the taxable income would be distributed among the different countries where it operates according to a given formula that would take several aspects into account, such as the sales or the number of employees that correspond to each jurisdiction. This system has some advantages. For instance, if we accept that in the case of multinationals it is not possible to determine one "true" source of income, then the purpose of income allocation should be to distribute the corresponding taxes among the states with a legitimate claim to them in the most equitable way. This seems easier if a formula that reflects a conception of equity is used (Hellerstein 2005, 108). Moreover, from a practical point of view, it seems that formulary apportionment would be easier to administer and less resources would have to be invested in documenting all transactions and in litigation (Avi-Yonah and Clausing 2007, 14-16).

However, the implementation of formulary apportionment has some associated difficulties. For example, it may not be easy to reach a consensus on the definition of the taxable base or on the weight of the apportionment factors of the formula (Hellerstein 2005, 110). As Cockfield (2004, 122-123) pointed out, formulary taxation "is unacceptable on tax sovereignty grounds principally because it would bind participants to formulas and tax rules set at the supranational level". Moreover, in comparison to the arm's length standard, formulary apportionment may be too inflexible. In other words, the ways of applying the arm's length principle have continuously evolved to take into account changing economic circumstances and business practices (Neighbour and Owens 2002, 956). Therefore, its adoption, especially by the OECD, seems very unlikely.[2]

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[2] Consequently, Avi-Yonah (2009), who is in favour of formulary apportionment, has suggested the possibility of using this method at least in the context of the arm's length standard to allocate the residual profit in the profit

Summing up, both the arm’s length principle and formulary apportionment have advantages and disadvantages and therefore it is difficult to say if one alternative is in general better than the other. However, once the countries agree on the convenience of avoiding tax evasion through transfer pricing, all parties are better off if they follow the same strategy, independently of the one which is chosen. The classical example of such a strategic interaction is choosing which side of the road to drive on, as what really matters is that all drivers choose the same side of the road, no matter which. Therefore, interactions in transfer pricing should not be modelled as a prisoner’s dilemma but rather, as a coordination game (Radaelli 1998, 18). Despite this, the initial situation in which the countries have to decide whether to cooperate or not may be seen as a prisoner’s dilemma with distributional conflict, especially if we take into account that small countries may prefer not to cooperate and become tax havens (Dehejia and Genschel 1999, 411).[3]

Focusing on those countries which agree to cooperate, the transfer pricing problem can be modelled as a coordination game in which the consequences of the different alternatives are not the same for all. For instance, formulary apportionment could be especially attractive for developing countries, since these states usually lack the necessary administrative resources to enforce the complex regulations implementing the arm’s length principle. As Mutén (1992, 7) points out, “transfer pricing is a difficult subject for any tax administration, and in developing countries, the tax administrations rarely find themselves able to give the matter the attention needed to counter the findings of more resourceful administrations in industrial countries”. Moreover, many developing countries may fear that measures trying to enhance the enforcement of tax provisions could be seen as a hostile act which could have a negative impact on the attraction of foreign direct investment (Lall 1993, 218). Further, another particular difficulty for the application of the arm’s length standard in developing countries is that usually there is not enough case-law which could guide taxpayers, especially considering their political instability and their weak rule of law (Baistrocchi 2006, 954). As a result, it is not surprising that Casanegra de Jantscher and Mansfield (1993, 38) find that the arm’s length principle has proved difficult to apply in Latin America.

Nevertheless, it is also clear that the interest of developing countries for the formulary apportionment solution will depend on the particular factors of the formula. In this sense, several authors even consider that the most common criteria which could be

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split method.

3 In fact, many of the countries which currently do not regulate transfer pricing issues, such as Andorra, Anguilla and the Cayman Islands (KPMG 2011, 27-28), have traditionally been perceived as tax havens. This aspect has also been observed by Borkowski (1997, 332) and Calderón (2007, 5).

taken into account would be especially beneficial for developed countries. For instance, if tax revenues are distributed according to the value of the capital assets that a multinational enterprise has in each state, industrialized countries would receive most of the income since their plants usually have more expensive equipment (Mutén 1992, 7; Casanegra de Jantscher and Mansfield 1993, 38).[4]

Therefore, if we accept that a certain system could be more beneficial for a certain group of countries (although all of them would prefer to follow the same strategy rather than different ones) the transfer pricing problem could be modelled, as Radaelli explains, as a “battle of the sexes game”, that is, “in transfer pricing actors want to use a common standard, although they cannot agree on the standard to be employed” (Radaelli 1998, 5-6). Furthermore, the different ways in which these alternatives can be implemented can also favour, to a greater or lesser extent, certain kinds of countries. In the coming sections we will see that facing such a type of strategic game has important implications on the influence that soft law may exert on the behaviour of states.

3. THE OECD TRANSFER PRICING GUIDELINES: AN EXAMPLE OF GOVERNANCE THROUGH SOFT LAW

This section presents the OECD Transfer Pricing Guidelines as an example of soft law. To begin with, the concept of soft law, which is frequently controversial, will be introduced, as well as some of the main advantages and disadvantages which are normally associated with the use of non-binding instruments. The last parts of this section will focus on the way the OECD works in relation to tax matters and on the characteristics of the OECD Transfer Pricing Guidelines as soft law.

3.1. The notion of soft law

The use of soft law instruments is becoming increasingly common in the context of global governance or, in other words, with respect to those matters that require a regulation that goes beyond the limits of a certain state. This can also be observed with respect to tax matters. As Ring (2010, 4) notes: “Despite the formal, hard law power of the state over tax policy, international organisations influence the actual design of international tax policy and tax rules in a variety of ways, up to and including the creation or exercise of “soft law” power”.

The notion of soft law is frequently used in this context but not always with the same meaning. Basically, it is possible to distinguish three main approaches. The most com-

[4] However, Horner (2001) considers that the sales element in the formula could favour developing countries. Therefore, this author criticizes the fact that this method never had a chance at the OECD.

mon, which is the one that this paper will follow, identifies soft law with legally non-binding instruments which, nonetheless, are created with the intention of having an impact on the behaviour of states. Alternatively, the expression “soft law” may be used to refer to those instruments, even if legally binding, which are excessively vague or imprecise, or to those which lack formal enforcement mechanisms.

The first conception focuses on the non-binding character of soft law, by contrast to the classical sources of international law, which are summed up in Art. 38(1) of the Statute of the International Court of Justice (ICJ): international conventions, international customary norms and the general principles of law recognized by civilized nations.[5] In general, the previous list of sources is considered to be complete or exhaustive, but in the opinion of authors such as Schreuer (1977, 112), Art. 38(1) cannot limit the freedom of states to create international law by other means. Indeed, some even consider that new sources of law may have already arisen and thus, Art. 38(1) would be outdated.[6]

With respect to the recommendations provided by international organisations, which play an important role in the field of international taxation, their legal status will depend on the constituent treaty of each institution. However, in some cases, as Klabbers (2002, 197) points out, the constituent treaties may not be clear on the types and nature of the acts to be adopted and sometimes new instruments, which may be difficult to fit into the existing categories, are introduced.

Given the fact that not all the recommendations that are issued by international organisations have exactly the same characteristics, the definitions that have been proposed are relatively wide. For instance, Virally (1956, 94) defines them as an invitation to behave in a certain way, but without specifying the legal consequences that they may have. The reason is that the previous author considers that defining them as non-binding instruments would be insufficient, since they can produce many different effects depending on the specific regulation of each international organisation.[7] In particular, with respect to the recommendations aimed at member states, although formally they do not impose any legal obligation, in the view of Virally they may have legal consequences depending on the powers which have been delegated to the international organisation.[8]

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5 For an analysis of the classical sources of law, see Kennedy (1987).

6 For a review of these arguments, see Danilenko (1993).

7 In the words of Virally, “Le véritable problème ne se réduit pas à une simple alternative entre l’existence et l’absence d’une force obligatoire: c’est celui, plus vaste et plus difficile, de la signification juridique de l’invitation portée par la recommandation, des effets de droit qu’elle peut produire, à défaut même d’obligation directement et immédiatement créée” (Virally 1956, 69).

8 According to the opinion of this author, “Il est donc incontestable que l’exécution ou le refus d’exécution d’une

In relation to this approach, one important question is whether a legal obligation can be graduated or not. In other words, is it possible to consider that some agreements are more legally binding than others? This is a controversial aspect. Some authors consider that the idea of legal obligation can be seen as a continuum, ranging from the weakest form (the parties expressly declare that an agreement is not binding) to the strongest (a treaty is clearly binding) (Abbott, Keohane, Moravcsik, Slaughter and Snidal 2000, 404; Chinkin 1989, 865). In between, there may be instruments framed as "recommendations" or "guidelines" which are generally considered to be non-binding even though this is not explicitly stated. Similarly, in the opinion of Baxter (1980, 564) it would be "excessively simplistic to divide norms into those that are binding and those that are not", since even those which are not binding could have certain legal effects. Moreover, Goldmann (2008, 1877) finds that a relative concept of law allows a more precise assessment of the legal effects of a given instrument. In this sense, Duplessis (2007, 268) considers that as a result of a mechanical application of the binary code legal/illegal, international law may become disconnected from the real world and unable to guide the behaviour of international actors.

Conversely, other scholars believe that the distinction between binding and non-binding agreements is a binary one, which means that it is only possible to distinguish between norms and non-norms, but not between more or less binding norms. In the opinion of Weil (1983, 416), the variable normativity of international law should be seen as a pathological phenomenon. Similarly, Klabbers (1996, 182) concludes that the notion of soft law is redundant, since it is enough with the distinction between those agreements which are law and those which are not law at all.

Despite these controversies, what is clear, as we will see later in more detail, is that the recommendation of the OECD on the Transfer Pricing Guidelines is not legally binding, even though it has been issued with the intention of influencing the global regulation of this matter.

3.2. Advantages and risks of soft law

The use of non-binding agreements has been strongly criticized by several scholars, but there are also reasons that may justify their creation. Before dealing with the OECD Transfer Pricing Guidelines in detail, this section will briefly present the main advantages and disadvantages of soft law.

With respect to the advantages, it is clear that soft law helps to reach agreements that otherwise would not be possible. In the opinion of Dean and Kelly (2009, 601), it facili-

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recommandation n'est pas juridiquement indifférent. L'une et l'autre attitudes sont, au contraire, susceptibles de produire des effets de droit" (Virally 1956, 87).

tates the coexistence of different legal cultures, perspectives and values, laying the basis for cooperation among states. Moreover, it is more flexible than binding agreements, which enables the introduction of amendments. Thus, it would be possible to verify if the proposed agreement is useful and, if it works correctly, it could be the first step towards a binding treaty.

In addition, the costs related to soft law agreements are generally lower than those arising from the negotiation of binding instruments. The reason is that the consequences of violating them are usually not so severe and, therefore, states will not invest so many resources in the negotiation process (Abbott and Snidal 2000, 434). Similarly, the amount of time required to agree on a soft law instrument may be relatively smaller, due to the fact that the approval process is much simpler. Conversely, the ratification of binding instruments, which may require the intervention of national parliaments, depending on the constitutional regulations of each state, can produce important delays. Furthermore, non-binding agreements are less costly to states in terms of sovereignty than hard law (Abbott and Snidal 2000, 436). This is especially clear if hard law entails delegating authority to an international organisation, since states would lose the capacity to regulate certain issue areas independently. Therefore, in the view of Guzman (2005, 61), in certain cases the use of non-binding agreements could be optimal, so there is no a priori reason why they should be viewed as a less desirable form of cooperation.

With respect to the disadvantages, some authors have pointed out that soft law is a danger to the rule of law (Klabbers 1998, 391). The reason is that soft law may be created through mechanisms which do not fulfil all the requirements for the creation of hard law (such as transparency, public debate and democratic legitimacy) but, in spite of that, it may end up “hardening”, as will be shown later in more detail. As a result, Rose and Page (2001) consider that soft law could be seen as legislation through the back door, with the corresponding deficiencies in terms of public scrutiny and accountability. However, in the case of law created through the regular legislative procedures (“front door”, in the terminology of Rose and Page), both supporters and opponents can scrutinize the proposed legislation and express their arguments for and against.

3.3. The OECD and the creation of soft law in tax matters

The OECD is an international organisation with the capacity to provide binding norms (referred to as decisions in Art. 5(a) of the OECD Convention) to its member states. However, in practice the OECD produces almost only soft law, especially with respect to tax matters. According to the OECD database which contains all decisions, recommendations and other instruments in force, it can be observed that, in relation to taxation, at present there are 17 recommendations and one declaration (all of them non-binding) but only one convention with a protocol (binding) in force.[9] Thus, the work of the OECD in this field consists more in diffusing principles and policy solutions, which is known as governance through soft law (Rixen 2008a, 116; Marcussen 2004), rather than in establishing precise and binding regulations which would limit the sovereignty of the member states.

With respect to the (soft) law-making process on tax matters in the context of the OECD, the following aspects can be highlighted. To begin with, tax issues are dealt with by the Committee on Fiscal Affairs (CFA), which is made up of senior officials of the different OECD member governments as well as by observers of some non-members, such as Argentina, China, India, Russia and South Africa. Moreover, the CFA also consults with representatives from the business community, especially through the Business and Industry Advisory Committee to the OECD (BIAC). As a result, Christians (2010, 21) sees the CFA as a public/private network, but in the view of Rixen (2008b, 6) access by civil society interests is too limited and therefore the CFA can be better described as a transgovernmental expertocracy.

Further, the CFA receives the support from the Centre for Tax Policy and Administration (CTPA), which is a Directorate within the Secretariat and prepares technical work. Consequently, the staff of the CTPA are directly employed by the OECD according to their technical expertise, forming what Christians (2010, 18-19) calls an expert network of tax professionals. In this sense, Ring (2010, 30) considers that the professional staff of the OECD provide an example of the kind of organisational leadership that is independent of the states themselves.

Finally, the recommendations are taken by the Council, which comprises a representative of each member state, by mutual agreement of all members. However, if a country abstains from voting on a recommendation, it will be applicable to the countries which voted in favour but not to the abstaining ones. As Ault (2009, 763) stressed, the consensus principle is central and given that negotiators meet up periodically, a country may sacrifice its position in a particular case in order to have more support for a future issue of greater importance.

However, the way the OECD works has also several limitations. To begin with, membership to the OECD is limited to developed countries and, despite the recent efforts to foster cooperation with non-member states and with other international organisations, their influence in the OECD is still very limited. Moreover, Christians (2010, 33-34) considers that the law-making process of the OECD is excessively opaque and that the use of soft governance methods has generated uncertainty about the legal status of certain instruments. This could be due, for instance, to the fact that the OECD lacks

9 See the database of acts of the OECD (http://webnet.oecd.org/oecdacts/Default.aspx).

an official journal (Vogel 2005, 147). In this sense, Calderón (2007, 27) stressed the fact that the (soft) law-making process in the context of the OECD lacks the transparency, possibilities of public discussion and democratic control that would correspond to the activity of the national legislature. As Ramallo (2005, 16-17) has pointed out with respect to transfer pricing, an international organisation with limited legitimacy, the OECD, is replacing national parliaments.

3.4. The OECD Transfer Pricing Guidelines as soft law

In relation to the historical evolution of the international regulation of transfer pricing, the first model tax treaties prepared by the League of Nations already referred to the arm's length standard.[10] Later, the same principle was also introduced in Art. 9 of the 1963 OECD Draft Convention and, subsequently, in the current OECD Model Convention and in most tax treaties in force. However, the arm's length standard is very broad and before the introduction of the OECD Transfer Pricing Guidelines, the lack of administrative guidance in most countries was an obstacle for its application (Linde, 1977, 82).

The United States was the first country which dealt with this issue in detail and in 1968 the Department of the Treasury prepared precise regulations for certain types of inter-company transactions. As several authors have noted (see, for example, Avi-Yonah 2007; Eden *et al*. 2001; Langbein 1986; Picciotto 1992) the United States started an international campaign to promote international cooperation in this area and exerted a great influence in the discussions in the OECD during the seventies. Finally, the OECD issued in 1979 the report "Transfer Pricing and Multinational Enterprises", which reaffirmed the adoption of the arm's length principle and detailed the methods that were acceptable for determining transfer prices from the point of view of taxation. This report was included in a recommendation of the OECD Council of Ministers to the Governments of the Member Countries but, despite being adopted without reservations, it was not legally binding.

Some years before, in 1976, the OECD had already provided the more general Guidelines for Multinational Enterprises, which covered several issues such as employment and industrial relations, competition, financing and which also made a brief reference to taxation. In particular, it was stated that enterprises should refrain from making use of the particular facilities available to them, such as transfer pricing which does not conform to the arm's length standard, for modifying in ways contrary to na-

10 See, for instance, Art. 5 of the 1933 League of Nations draft Convention Adopted for the Allocation of Business Income between States for the Purposes of Taxation and Art. VI of the Protocol to the Mexico Draft of 1943 and the London Draft of 1946.

tional laws the tax base on which members of the group are assessed. These Guidelines for Multinational Enterprises were included as an appendix to the Declaration by the Governments of OECD Member countries of 21 June 1976 in which they jointly recommend to multinational enterprises their observance. Therefore, as Vogelaar (1980, 127-136) explains, the voluntary nature of the guidelines was never questioned as no government or body of the Organisation proposed legally binding rules. However, the previous author considers that these Guidelines have a political and social value and "are not devoid of legal significance" since their adoption by the governments of the most influential countries of the world accords them a legal authority (Vogelaar 1980, 135).

Over the next few years, the OECD continued the work in this field and published different reports focusing on particular aspects of transfer pricing, such as the mutual agreement procedure, transfer pricing in the banking sector and the allocation of central costs. It is also important to note that in 1992 a significant reform of the transfer pricing regulation was introduced in the United States, allowing profit methods and, consequently, going beyond the traditional approach.[11]

In 1995, the OECD published the new Transfer Pricing Guidelines. Although the basic principles remained the same, a reform was necessary to take into account technological developments as well as the differences which had arisen between the United States and other OECD countries. They have been later supplemented by several reports (for instance, on intangible property and services and on advance pricing agreements) and certain amendments have also been introduced in a continuous process of revision.[12] In their current version (OECD 2010) they are structured in seven chapters. The first one is the most important since it states the arm's length principle and provides guidance for its application, and the next two chapters present in detail the methods for computing transfer prices. The following chapters deal with administrative issues, such as the mechanisms for resolving transfer pricing disputes and documentation requirements. Finally, certain problematic aspects, such as issues related to intellectual property rights, are also dealt with in more detail.

With regard to the legal status of the OECD Transfer Pricing Guidelines, they were approved by the Committee on Fiscal Affairs on 27 June 1995 and are the object of the Recommendation of the OECD Council C(95)126/FINAL, of 13 July 1995. This recommendation is not legally binding since it is based on Art. 5(b) of the Convention on

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[11] For a detailed analysis of the evolution of transfer pricing regulations, see Rixen (2008a, 126-130).

[12] As Rixen (2008a, 190-191) explains, innovations take the form of incremental changes, subsuming the reforms in the traditional concepts which are generally accepted. The reason is that reaching a general agreement on a complete reform would be difficult and could lead to coordination deficiencies.

the OECD and therefore, the tax administrations of the OECD member states are simply encouraged to follow the Guidelines. However, authors such as Calderón (2007, 11) consider that a sort of “soft obligation” derives from the recommendations of the OECD, which means that “States must follow them, unless they have introduced reserves to these or when material reasons exist that prevent it (like singularities of the domestic law of such states)”. In fact, the current version of Recommendation C(95) 126/FINAL (whose last amendment took place through Recommendation C(2010)99, of 22 July 2010), instructs the Committee on Fiscal Affairs to monitor the implementation of the Transfer Pricing Guidelines, which shows that member states are clearly expected to comply with them. Moreover, the Committee is also instructed to encourage non-member states to follow the Guidelines.

4. From soft to hard law: the influence of the OECD Transfer Pricing Guidelines

Soft law may end up “hardening” in many different ways. In the next sections this possibility is illustrated with the example of the OECD Transfer Pricing Guidelines, both from an international and a domestic point of view. However, before analysing the particular mechanisms through which this influence takes place, it is important to note that, in general, the OECD Transfer Pricing Guidelines serve as a focal point and are followed even without relying on sanctions.

As McAdams (2000) explains, in the case of coordination games, the law provides a focal point around which individuals can coordinate their behaviour. In such a situation, the mere expectation that others will play the strategy associated with the focal point ends up being self-fulfilling. Moreover, McAdams (2000, 1672) considers that this expressive effect of law (an idea which can also be applied to soft law) is not only relevant with respect to pure coordination games but also in relation to games in which the players have some common interest as well as some conflicting interests. The result is that the international organisations which deal with coordination problems can exert a big influence even if their standards are not legally binding, precisely because of the self-enforcing nature of coordination equilibria (Abbott and Snidal 1998, 16). As Rixen (2008a, 20) explains, non-binding soft law may be enough to provide a solution for a distributive conflict in a coordination game. Therefore, even though the OECD Transfer Pricing Guidelines are not legally binding, they work as a focal point given their publicity and the reputation of the OECD.[13]

[13] Apart from the OECD Transfer Pricing Guidelines, model tax treaties also work as a focal point. Although they are an example of soft law, they are enough for reaching an international consensus because the double tax problem can also be modelled as a coordination game. For more details, see Rixen (2008a, 169-172).

Next, when commenting the relation between soft law and international law it will be possible to appreciate that the influence of soft law on state practice has, in turn, an important impact on the formation of customary norms of international law and general principles of law.

4.1. The influence of the OECD Transfer Pricing Guidelines on the formal sources of international law

The following paragraphs will briefly discuss the influence that soft law can have on the formal sources of international public law (treaties, customary norms and the general principles of law recognized by civilized nations), focusing on the particular case of the OECD Transfer Pricing Guidelines. As Schachter (1991, 301) pointed out, “the conclusion that non-binding agreements are not governed by international law does not however remove them entirely from having legal implications”.

To begin with, soft law may influence treaties in several ways. For instance, it may be a first step towards a binding agreement, which is particularly common in the field of human rights (Schachter 1991, 85). However, soft law works most frequently in a complementary way, especially as an interpretative tool of the treaties in force. With respect to the relevance of the OECD Transfer Pricing Guidelines for the interpretation of tax treaties, the following aspects should be noted.

First, in some cases the signatory states to a treaty may explicitly indicate in diplomatic notes or in a protocol to the treaty that it should be interpreted according to the Transfer Pricing Guidelines. In this sense, references to the Guidelines have been included, for instance, in the protocols to the treaties between Belgium and the United States (2006), Bulgaria and the United States (2007), and Iceland and the United States (2007). Moreover, in the case of the treaty between Japan and the United States of 2003, both countries agreed through diplomatic notes that the treaty should be interpreted according to the latest available version of the Guidelines, which is criticized by several authors for allowing an informal modification of the original meaning of the treaty (Calderón 2007, 14 and 19; Vogel 2005, 147). Furthermore, the recent treaty between Japan and the Netherlands of 2010, which is not yet in force, allows, in certain cases, to submit the differences arising from its application to arbitration and the complementary agreement which develops this possibility expressly states that issues related to the application of the arm’s length standard should be decided having regard to the Guidelines, as amended from time to time. Thus, the previous examples show that through these references, the Guidelines almost become a part of the treaties in force.

Second, even in the absence of specific references in the treaties or their protocols, the Transfer Pricing Guidelines are closely related to the Commentaries to the OECD and United Nations Model Tax Conventions, which identify the Guidelines with the internationally agreed principles for the application of the arm's length standard contained in the Models and, consequently, in almost all treaties in force. As a result, the Guidelines can be seen as a part of the Commentaries (Vettel 1996, 19; Calderón 2007, 11-13; Bullen 2011, 20-30). This has been particularly clear since 1992, when a new paragraph to the Commentaries to Art. 9 of the OECD Model Convention was introduced stating that the OECD Guidelines were valid for the application of the arm's length principle. Consequently, the OECD Transfer Pricing Guidelines can be seen as a part of the Commentary to the OECD Model Convention and this gives them an important relevance when interpreting the tax treaties in force which are based on the OECD Model. In fact, the Group of Experts of the United Nations has also recommended following the OECD Transfer Pricing Guidelines regarding the application of the arm's length principle established in Art. 9 of the UN Model Convention, clearly expanding the influence of the OECD Transfer Pricing Guidelines beyond the OECD member states (Calderón 2007, 14).

In this sense, even though the Commentaries to the OECD Model are not legally binding, Engelen (2008) considers that the OECD states which voted in favour of them may be obliged to follow them by virtue of the doctrines of estoppel and acquiescence. However, most authors, such as Ward (2008) and Pijl (2008), do not share this view, but, nonetheless, it is clear that even without the legal obligation to follow the Commentaries, in practice they are taken into account when interpreting the treaties in force.

Apart from treaties, soft law may influence international customary norms, which are constituted by two fundamental elements: state practice and the conviction that they reflect or amount to law (*opinio juris*). In this regard, Hillgenberg (1999, 514) considers that non-binding agreements cannot directly produce customary international law, but they can contribute to its creation as an emerging *opinio juris*. Similarly, in the view of Bothe (1980, 87), documents which are not legally binding as such may be used as proof of customary law.

In relation to the possibility that the use of the arm's length standard may have become a norm of customary international law, not all authors share the same opinion. In the view of Thomas (1996), this principle has become a general state practice and, moreover, the negative reaction of the international community to the application by some states of the United States of the formulary apportionment method to multinationals shows that the arm's length principle is generally seen as compulsory. Similarly, Avi-Yonah (2007) also sees this principle as a customary norm. However, even though the material requirement, that is, the presence of a general state practice, is widely accepted, the existence of *opinio juris* is most frequently denied. In general it is considered (see, for example, Lang 2004, 99) that no customary norm obliges states to eliminate double taxation and, therefore, as Lepard (1999) concludes, states are not obliged to use any particular method to prevent the double taxation of multinationals.

Another formal source of international law are the general principles of law recognized by civilized nations (Art. 38(1)(c) of the Statute of the ICJ). Although this source is highly controversial and its practical relevance is rather meagre (van Hoof 1983), the arm's length standard, as applied by the Transfer Pricing Guidelines, could qualify as one of these principles. On the one hand, if we follow the conception that these principles must be common to the domestic legal systems of a wide number of states (Sørensen 1946, 113) it is clear that the arm's length principle satisfies this condition. On the other hand, if we admit (such as Verdross 1968, 525-526) that the general principles may have an international origin and may focus on certain issue areas (such as human rights, the protection of the environment or taxation), the arm's length standard would also fit in this category. However, the OECD Transfer Pricing Guidelines as a whole cannot be considered a general principle of law given their level of detail and the different topics covered, but they are a basic tool for the application of the arm's length principle.

4.2. The influence of the OECD Transfer Pricing Guidelines on the domestic legal systems

Apart from the influence of soft law on the formal sources of international law, the OECD Transfer Pricing Guidelines may also have an impact from the domestic perspective. In this sense, the following pages will focus on the connection between soft law and legislation, circulars of the tax administration and case-law.

4.2.1. References in legislation

Several countries, such as Ireland, Mexico, Spain and the United Kingdom refer to the OECD Transfer Pricing Guidelines in their legislation, usually indicating that they should be taken into account for interpretative purposes. In Ireland, section 835D(2) of the *Taxes Consolidation Act 1997* states since 2010 in the following terms that the OECD Guidelines should be considered when computing transfer prices among related parties:

> *"For the purpose of computing profits or gains or losses chargeable to tax under Case I or II of Schedule D, this Part shall be construed to ensure, as far as practicable, consistency between—*
>
> *(a) the effect which is to be given to section 835C, and*
>
> *(b) the effect which, in accordance with the transfer pricing guidelines, would be given if double taxation relief arrangements incorporating Article 9(1) of the OECD Model Tax*

> *Convention applied to the computation of the profits or gains or losses, regardless of whether such double taxation relief arrangements actually apply,*
>
> *but this section shall not apply for the purposes of construing this Part to the extent that such application of the section would be contrary to the provisions of double taxation relief arrangements that apply to the computation of those profits or gains or losses.”*

Moreover, section 835D(1) indicates that the particular version of the Guidelines to be considered is the one of 2009, but section 835D(3) allows the Minister of Finance to update this reference if the OECD publishes new versions of the Guidelines.[14]

In the case of Mexico, Art. 215 of the Income Tax Act[15] establishes the arm’s length standard for the valuation of operations between related parties and explicitly states that this should be interpreted according to the OECD Transfer Pricing Guidelines of 1995 or to those which may substitute them as long as they are consistent with the Mexican legislation and the treaties signed by Mexico. In Spain, reference to the Guidelines is made in the preamble to *Ley 36/2006*,[16] which establishes that Spanish legislation on transfer pricing must be interpreted in the light of the OECD Transfer Pricing Guidelines (even though the content of preambles is not legally binding).

In the case of the United Kingdom, the *Taxation (International and Other Provisions) Act 2010*, in the version given by *Finance Act 2011*, indicates in Section 164(1) that when interpreting domestic legislation, preference should be given to the interpretation which prevents contradictions with the OECD Guidelines, which are defined as:

> *“(a) the version of the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations approved by the Organisation for Economic Co-operation and Development (OECD) on 22 July 2010, or*
>
> *(b) such other document approved and published by the OECD in place of that (or a later) version or in place of those Guidelines as is designated for the time being by order made by the Treasury, including, in either case, such material published by the OECD as part of (or by way of update or supplement to) the version or other document concerned as may be so designated” (Section 164(4)).*

In this sense, it is important to note that Section 58(2) of the *Finance Act 2011* clearly states that the reference to the version of 2010 of the Guidelines has effect, for corpora-

[14] Section 835D(3) includes the following habilitation: “The Minister of Finance may, for the purposes of this Part, by order designate any additional guidance referred to in paragraph (a)(iii) of the definition of “transfer pricing guidelines” in subsection (1) as being comprised in the transfer pricing guidelines”.

[15] *Ley del Impuesto sobre la Renta* (Official Journal of the Federation, 1 January 2002).

[16] *Ley 36/2006, de 29 de noviembre, de medidas para la prevención del fraude fiscal* (Official Journal of the State, 30 November 2006).

tion tax purposes, for accounting periods beginning on or after 1 April 2011, and for income tax purposes, for the tax year 2011-12 and subsequent tax years. Previously, reference was made to the version of the Guidelines existing in 1998. In comparison to other countries, the British legislation is precise when indicating the version of the OECD Guidelines to be considered, which increases legal certainty in this area.

Furthermore, other countries such as Hungary, Latvia, Norway, Peru and Romania have also included references to the OECD Transfer Pricing Guidelines in their transfer pricing legislation, usually indicating that they shall be taken into account for interpretation purposes (PricewaterhouseCoopers 2012). This implied delegation of competences from the national Parliaments to the OECD seems problematic from the perspective of the principle of legality in tax matters (Calderón 2007, 22). Moreover, it is important to note that in those countries where the application of the arm's length standard is not regulated in detail, the Guidelines may be used in practice to fill gaps of the legislation even though this would go beyond a simple interpretative assistance.

4.2.2. References in administrative circulars

Reference to the OECD Transfer Pricing Guidelines is most frequently made in circulars or other analogous documents issued by the Tax Administrations and which, in general, are only binding to them but not to taxpayers or the judiciary. However, most taxpayers will follow the views expressed in these circulars since otherwise they may risk audits and long litigation processes with the Tax Administrations.

In Australia, the taxation rulings of the Tax Administration state the intention to follow the Guidelines as close as possible[17] and this attention can also be observed in Belgium[18] and Canada.[19] Similarly, in Germany, some of the most relevant circulars of the Federal Ministry of Finance (*Verwaltungsvorschriften*) on issues related to transfer pricing include constant references to the OECD Transfer Pricing Guidelines.[20]

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17 Paragraph 1.5 of Taxation Ruling 98/11 states: “The ATO [Australian Taxation Office] will follow as closely as practicable the OECD publication 'Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations', 1995, OECD ('the 1995 OECD Report')”.

18 Some of the most relevant circulars in which this can be observed are the ones from 28 June 1999 (*Circulaire n° AAF/98-0003 dd. 28.06.1999*) and 14 November 2006 (*Circulaire n° Ci.RH.421/580.456 (AFER 40/2006) dd. 14.11.2006*).

19 One of the circulars of the Canada Revenue Agency where this is clearer is the *Income Tax Information Circular 87-2R*, of 27 September 1999.

20 See, *Schreiben betr. Grundsätze für die Prüfung der Einkunftsabgrenzung zwischen nahestehenden Personen mit grenzüberschreitenden Geschäftsbeziehungen in Bezug auf Ermittlungs- und Mitwirkungspflichten, Berichtigungen sowie auf Verständigungs- und EU-Schiedsverfahren (Verwaltungsgrundsätze-Verfahren), vom 12. April*

The case of New Zealand is significant since its Tax Administration issued its own guidelines on transfer pricing to guide its taxpayers,[21] but in a consistent way with the OECD Guidelines, that is, the tax authorities of New Zealand basically tried to present the OECD Guidelines in a more accessible way for their taxpayers. This practice was justified by the Tax Administration with the following arguments:

> *“There is, however, no valid reason why Inland Revenue should not follow the OECD guidelines entirely in administering New Zealand’s transfer pricing rules. The consensus established between OECD member countries means that the OECD guidelines will, for example, be the relevant guidelines to consider if a transfer pricing issue is raised under New Zealand’s double tax agreements. […] Consequently, New Zealand’s guidelines should be read as supplementing the OECD guidelines, rather than superseding them. […] By issuing guidelines with a practical focus, Inland Revenue hopes to explain transfer pricing in a way that is perhaps more accessible to taxpayers confronted by the issue than are the OECD guidelines” (paragraphs 6, 7 and 8).*

Another country where administrative guidance for the application of transfer pricing legislation is particularly important is the United Kingdom. The British Tax Administration (Her Majesty’s Revenue and Customs, HMRC) has published different types of non-binding instruments to guide taxpayers, such as Statements of Practice, Tax Bulletins and Guidance Manuals which frequently refer to the Guidelines. For instance, Statement of Practice SP 2/10 on Advance Pricing Agreements states:

> *“The centre-piece of the proposal will be a description of the method by which it is proposed to determine the transfer pricing issues in accordance with the arm’s length principle, and an analysis demonstrating how the application of that method satisfies the terms of the UK’s legislation, including the effect of any DTA, and is consistent with the OECD Transfer Pricing Guidelines” (paragraph 3 of Annex 1).*

In the same sense, other publications of the British Tax Administration have also stressed the relevance of the Guidelines, such as the *International Manual* issued by HMRC, which states:[22]

2005 and *Schreiben betr. Grundsätze für die Prüfung der Einkunftsabgrenzung zwischen nahe stehenden Personen in Fällen von grenzüberschreitenden Funktionsverlagerungen (Verwaltungsgrundsätze Funktionsverlagerung), vom 13. Oktober 2010.* However, despite the references to the OECD Guidelines, the German regulation of the taxation of *Funktionsverlagerungen* or „transfers of functions“ remains very particular.

[21] See, “Transfer Pricing Guidelines: A guide to the application of section GD 13 of New Zealand’s Income Tax Act 1994”, *Tax Information Bulletin*, vol. 12, no. 10 (Appendix), October 2000.

[22] This publication is available online: http://www.hmrc.gov.uk/manuals/intmanual/Index.htm.

> *“The Inland Revenue will be guided by the Guidelines in applying domestic transfer pricing legislation and in seeking to prevent double taxation under the terms of Double Taxation Conventions with OECD Member countries. The Inland Revenue encourages taxpayers to consult the Guidelines when evaluating whether their transfer pricing complies with the arm's length principle” (INTM463010).*
>
> *“The comments in this chapter are not intended to be a substitute for the OECD Transfer Pricing Guidelines. […] You should always refer to the Guidelines for further detail” (INTM463010).*

In the case of Switzerland, the tax authorities have issued several circulars indicating that they will follow the OECD Guidelines, such as the Circular of the Federal Tax Administration no. 4 of 19 March 2004, which points out the fact that that the Director of the Federal Tax Administration informed the cantonal administrations, by letter of 4 March 1997, that they should take into account the OECD Transfer Pricing Guidelines when dealing with the taxation of multinational enterprises.[23]

With respect to the influence of the OECD Guidelines in non-member States of the OECD, the *South African Revenue Service* published Practice Note no. 7, of 6 August 1999, developing the legislation on transfer pricing and stating clearly that it is based on the OECD Guidelines:

> *“Because of the international importance of the OECD Guidelines, this Practice Note is based on, inter alia, those guidelines. Although South Africa is not a member country of the OECD, the OECD Guidelines are acknowledged as an important, influential document that reflects unanimous agreement amongst the member countries, reached after an extensive process of consultation with industry and tax practitioners in many countries. The OECD Guidelines are also followed by many countries which are not OECD members and are therefore becoming a globally accepted standard” (paragraph 3.2.1).*

Moreover, the South African Tax Administration considers that taxpayers should follow the OECD Transfer Pricing Guidelines if they do not find specific guidance in the tax treaties entered into by South Africa, the legislation or the practice notes of the Administration (paragraph 3.2.3 of the cited Practice Note).

In other non-OECD countries, such as Namibia, the Tax Administration has also issued practice notes indicating the need to follow the OECD Transfer Pricing Guidelines. In particular, Tax Practice Note 2/2006, issued by the Director of the Namibian Tax

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[23] The circular states: “La présente Circulaire […] rappelle que le Directeur de l’Administration fédérale des contributions a, par lettre du 4 mars 1997, informé les administrations cantonales que lors de la taxation d’entreprises multinationales elles devaient tenir compte des Directives OCDE en matière de prix de transfert”.

Administration, even states that in case of conflict, the OECD Guidelines (in the latest available version) will prevail over the practice note.

Another significant aspect is that in some countries such as Austria, the Czech Republic, Italy and the Slovak Republic, the OECD Guidelines have been translated and published by the tax authorities.[24] In Austria, they were published in the Official Journal of the Austrian Tax Administration (*Amtsblatt der Österreichischen Finanzverwaltung, AÖFV*),[25] but the Austrian doctrine (Vettel 1996, 14-17) does not consider them to have a binding nature for taxpayers, but only that of informative circulars from the Ministry of Finance (*Erlässe*). In Italy, the OECD Guidelines of 1995 were translated by the Ministry of Finance and were published in 1997 by the Istituto Poligrafico e Zecca dello Stato.

Finally, in the United States, the existence of detailed regulations on transfer pricing has made circulars referring to the OECD Guidelines unnecessary. However, on certain occasions the Tax Administration has expressed its intention to follow the OECD, for instance in the framework of the mutual agreement procedure which is frequently used to solve transfer pricing cases involving the application of a tax treaty. In this sense, section 3.03 of the Procedures for Requesting Competent Authority Assistance Under Tax Treaties (Rev. Proc. 2006–54)[26] states:

> *“Applicable Standards in Allocation Cases. With respect to requests for competent authority assistance involving the allocation of income and deductions between a U.S. taxpayer and a related person, the U.S. competent authority and its counterpart in the treaty country will be bound by the arm’s length standard provided by the applicable provisions of the relevant treaty. The U.S. competent authority will also be guided by the arm’s length standard consistent with the regulations under section 482 of the Code and the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations as published from time to time by the Organisation for Economic Co-operation and Development. When negotiating mutual agreements on the allocation of income and deductions, the U.S. competent authority will take into account all of the facts and circumstances of the particular case and the purpose of the treaty, which is to avoid double taxation”.*

To sum up, it is possible to observe that tax administrations rely heavily on the OECD Transfer Pricing Guidelines in order to interpret the legislation and even fill its gaps. In the opinion of Calderón (2007, 23-24), the circulars should refer to a particular version of the Guidelines to avoid the problem of “dynamic interpretation”, since that would

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[24] The OECD has also published translations of the Guidelines into non official languages of the organization, such as German and Spanish.

[25] See AÖFV 1996/114, AÖFV 1997/122 and AÖFV 2000/171.

[26] *Internal Revenue Bulletin*, no. 2006-49 (4 December 2006).

increase legal certainty. However, if new versions of the OECD Guidelines are published and the tax administrations do not update their circulars, the situation could become confusing. In fact, from the experience of the countries which were previously analysed, it could be appreciated that normally reference is made to the OECD Guidelines in general, without further details, or specifying that the latest available version should be considered. Although in most countries the interpretative circulars issued by the Tax Administration are not a formal source of domestic law, in practice they are seen as very relevant by taxpayers and even by the courts. This is probably one of the mechanisms which more clearly contributes to the transformation of the OECD Guidelines into almost hard law.

4.2.3. References in case-law

In the case-law of the main courts of certain countries it is possible to observe the attention paid by the judges to the OECD Transfer Pricing Guidelines. In general, this phenomenon has been qualified by Rose and Page (2001, 19) as judicial “creep”, which “occurs when judges invoke soft laws, such as European Commission recommendations, to arrive at decisions that differ from what would be produced by applying hard laws”. When this happens, soft law becomes “hard pseudo law”: since it was not promulgated according to the regular process of legislative enactment it must be considered “pseudo law”, but as a result of being applied as if it were enacted normally, it has the same effects as hard law (Rose and Page 2001, 2). However, as we will see in this subsection, in the cases dealing with transfer pricing the courts rely on soft law mainly to interpret or complement hard law, especially when the OECD Transfer Pricing Guidelines regulate aspects which are not covered by domestic legislation.

To begin with, in Canada, the Federal Court of Appeal in the case *Smithkline Beecham Animal Health Inc. v. Canada*, of 31 May 2002 ([2002] F.C.A. 229) justified the use of the OECD Guidelines as an interpretative tool with the following arguments:

> *“It appears to be common ground that the OECD Guidelines inform or should inform the interpretation and application of subsection 69(2) of the Income Tax Act. The OECD Guidelines state the principles for determining international transfer prices and, where possible, the agreement among OECD members with respect to the practices to be followed” (paragraph 8).*

In Germany, the Federal Fiscal Court (*Bundesfinanzhof*) took the OECD Guidelines into account and cited them to reinforce its position in its judgement of 17 October 2001 (I R 103/00). Similarly, in Austria the Administrative Court (*Verwaltungsgerichtshof*) also referred to the OECD Guidelines in its judgement of 13 September 2006 (reference no. 2002/13/0190) to justify the method which was more adequate for the determination of transfer prices among related firms. In Italy, the judgement of the *Corte Suprema di Cassazione* of 13 October 2006 (no. 22023) also considered the 1995 Guidelines to confirm the initial position of the Court, even though the facts of the case took place before their publication.

Another country where the Courts have paid attention to the OECD Guidelines is Spain. For instance, the judgement of the Supreme Court (*Tribunal Supremo*) of 6 February 2008 (RJ 2008/1357) considers that the position of the Tax Administration was in accordance not only with the domestic legislation but also with the 1979 OECD Report on Transfer Pricing. Similarly, the *Audiencia Nacional* also referred to the OECD Guidelines to justify the use of certain methods to compute transfer prices under the arm's length standard, since they were more explicit than the Spanish legislation (judgements of 27 September 2007 (JUR 2007/306677) and 11 December 2008 (JUR 2009/3142)).

In Switzerland, the relevance of the Guidelines can be observed in the judgement of the Federal Administrative Court (*Bundesverwaltungsgericht* / *Tribunal administratif fédéral*) of 24 September 2009 (A-710/2007). In it, the court cited the Circular of the Federal Tax Administration no. 4 of 19 March 2004, which highlights the relevance of the OECD Guidelines for the Tax Administration and, consequently, referred to the position of the OECD when considering the methods which were acceptable to compute transfer prices.

Moreover, it is important to note that also the courts of non-OECD countries, such as Kenya, have taken the OECD Transfer Pricing Guidelines into account. In this sense, the High Court of Kenya established in the case *Unilever Kenya Limited v. the Commissioner of Income Tax*[27] that given the legal gaps existing in Kenya it would be necessary to follow the OECD Guidelines to solve the dispute. In particular, justice Visram used the following arguments:

> *“Now, these guidelines do not form the laws of the countries in question. They are simply “guidelines”, guiding the world of business, that is business enterprises and the taxing authorities of those countries in arriving at proper Transfer Pricing principles for the purposes of computation of income tax. […] And especially because of the absence of any such guidelines in Kenya, we must look elsewhere. […] I have no doubt in my mind that […] the relevant guidelines such as “Transfer Pricing” principles […] are not just here for relaxed reading. These have been evolved in other jurisdictions after considerable debates and taking into account appropriate factors to arrive at results that are equitable to all parties. […] It would be fool-hardy for any court to disregard internationally accepted principles of*

27 Judgement of 5 October 2005 (Income Tax Appeal no. 753 of 2003).

> *business as long as these do not conflict with our own law. To do otherwise would be highly short-sighted".*

However, in a few other countries the courts have expressly rejected following the OECD Guidelines or they mention them only in very exceptional cases. In particular, in Australia the Federal Court stated in the judgement *SNF (Australia) Pty Ltd v. Commissioner of Taxation* [2010] FCA 635, of 25 June 2010, that the OECD Guidelines were not legally binding and that it would deviate from them:

> *"Both the 1979 and the 1995 guidelines have a role in assisting the Court in considering the appropriate methodology and the way in which methodologies are to be applied. I refer to the 1995 guidelines as a convenient reference to the various methods that have been adopted or referred to in determining arm's length consideration. However, the 1995 guidelines do not dictate to the Court any one or more appropriate methods, and are just what they purport to be, guidelines. I treat them effectively as part of the submissions of Counsel as referring to a number of methods by which an arm's length consideration might be calculated.*
>
> *I have not relied upon any of the guidelines for the purposes of interpreting Div 13" (paragraphs 58 and 59).*

In other countries such as the United States and France, references to the OECD Guidelines in the case-law are almost non-existent. As an exception, it is possible to cite the dissenting opinion of Judge Noonan in the judgement of the *United States Court of Appeals, Ninth Circuit*, of 27 May 2009 in the case *Xilinx, Inc., and Consolidated Subsidiaries v. Commissioner of Internal Revenue* (no. 09-74246, 06-74269), even though the mention does not add substantial arguments. Similarly, references to the OECD Guidelines in the French case-law are also rare. One exception is the judgement of the *Cour de Cassation* (*Chambre Commerciale*), of 17 March 2009 (no. 08-14503), although the case does not deal with taxation but with competition law.

Despite the clear exception of the cited Australian judgement, in many cases it is possible to observe what Rose and Page (2001, 19-20) qualify as judicial "creep", since the OECD Guidelines, which are soft law, end up affecting taxpayers. In the opinion of the previous authors, several measures should be introduced to avoid this phenomenon, such as reminding judges that mere recommendations should not be treated as law, and modifying the existing norms to avoid the ambiguities which tend to favour situations of judicial "creep". In the case of transfer pricing, this means that national legislation should regulate, for instance, the methods which are considered to be admissible for the determination of arm's length prices. Otherwise it seems logical to expect that the courts will have to rely on the more detailed content of the OECD Guidelines to "interpret” the arm’s length standard mentioned in the legislation or, actually, to fill legal gaps.

4.2.4. Summary

The next table summarizes the main empirical findings of this section devoted to the influence of the OECD Transfer Pricing Guidelines on the domestic legal systems.

Table 1. Countries with references to the OECD Transfer Pricing Guidelines in their legislation, circulars of the Tax Administration and case-law.

<table>
<tr><td rowspan="5">Countries with references to the OECD Guidelines</td><td>With references in legislation</td><td colspan="2">Hungary, Latvia, Mexico, Norway, Peru, Romania, Spain and the United Kingdom.</td></tr>
<tr><td rowspan="3">With references in circulars and other publications of the Tax Administration</td><td>Frequent references</td><td>Australia, Belgium, Canada, Germany, Namibia, New Zealand, South Africa, Switzerland and the United Kingdom.</td></tr>
<tr><td>Translation and publication of the Guidelines by the Tax Authorities</td><td>Austria, Czech Republic, Italy and Slovak Republic.</td></tr>
<tr><td>References in particular cases</td><td>United States.</td></tr>
<tr><td>With references in case-law</td><td colspan="2">Canada, Germany, Italy, Kenya, Spain and Switzerland.
In very exceptional cases: United States and France.
References denying the relevance of the Guidelines: Australia.</td></tr>
</table>

In general, it is possible to appreciate that transfer pricing practices tend to converge in most countries around the OECD Guidelines. The connection between the Guidelines and the domestic legal systems takes place in different ways. In some cases, the legislation includes explicit references to the OECD Guidelines, usually stating that they should be taken into account when interpreting the domestic transfer pricing rules. However, references to the OECD Guidelines are most frequently contained in the circulars of the Tax Administration, which in general are only binding for the Administration itself but not for taxpayers or the courts, even though, in practice, references to the OECD Guidelines in the case-law are not strange especially in those countries whose domestic legislation is more imprecise.

This situation could be seen as an example of what Genschel and Zangl (2008) qualify as denationalization of political authority through an international organisation, in this case the OECD. Despite the fact that the power of the OECD remains incomplete, since it requires the collaboration of the states to implement its recommendations, in practice it is very difficult for a single country to introduce an alternative regulation. As Calderón (2007, 20) notes, the OECD Transfer Pricing Guidelines, “without totally losing their nature of soft law, have evolved, to a degree, into an instrument of hard law”.

5. CONCLUSIONS

This paper shows that in the case of transfer pricing, soft law can be as influential as hard law. In general, the transfer pricing problem can be seen as a coordination game, since once the countries agree on the need to regulate this issue to prevent tax evasion, a common regulation is always preferable, even though all the alternatives may not have the same distributive result. In this type of situation, soft law, such as the OECD Transfer Pricing Guidelines, becomes a focal point and exerts a clear influence on the formal sources of law.

From the perspective of international public law, the OECD Guidelines are frequently used as a complement, especially for interpretative purposes, to the double tax treaties in force. In general, the OECD Guidelines are seen as an extension of the Commentary published by the OECD on its Model tax convention. Moreover, in the particular case of certain tax treaties, the parties have even included explicit references to the OECD Guidelines in protocols (which are legally binding). Besides the influence on treaties, some authors have claimed that the arm's length standard, which is developed by the OECD Transfer Pricing Guidelines, may have become a customary norm of international law, even though for most legal scholars the requirements of customary norms are not completely met. However, the arm's length standard seems to qualify as a general principle of law recognized by civilized nations, which is one of the formal sources of law mentioned by Art. 38 of the Statute of the ICJ.

From the point of view of domestic legal systems, the legislation of several countries includes references to the OECD Transfer Pricing Guidelines, usually indicating the need to take them into account when interpreting the national norms. Moreover, the Tax Administrations refer very frequently to the OECD Guidelines in the circulars in which they present their interpretation of the national legislation. Although these circulars are generally not binding to taxpayers or the judiciary, in practice most taxpayers will follow them to avoid litigation with the Tax Administration. In fact, in many countries it is also possible to observe judicial decisions which take the OECD Transfer Pricing Guidelines into account, especially when they regulate a certain aspect with more detail than the domestic legislation.

The relevant influence of the OECD Transfer Pricing Guidelines, which in practice become a "source" of law, contrasts with the limitations of the process in which they were made within the context of the OECD. In particular, the participation of developing countries, which may have different interests in relation to transfer pricing issues, is limited since they are not OECD member states. Moreover, although the elaboration of tax rules could be seen as a rather technical activity for experts, in fact they are a central aspect of the political debate and, therefore, the transparency and public debate surrounding the work of the OECD on tax matters should be improved following the example of national legislatures. In this sense, a limitation of the current situation is the fact that the OECD does not have an official journal and most of its publications, such as the Transfer Pricing Guidelines, are not freely accessible to taxpayers.

However, the fact that soft law instruments may have some deficiencies does not necessarily mean that they should be replaced by traditional hard law, such as a multilateral treaty or a binding decision taken by the OECD. Since these limitations do not depend on the non-binding nature of the agreement but on the way the agreement is reached and made public, it would be enough with a reform of the law-making process in the OECD. Nevertheless, proposing concrete changes to the way the OECD works is a complex subject which should be the object of further research.

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BIOGRAPHICAL NOTE

Alberto Vega is research fellow at the Universitat Pompeu Fabra (Barcelona), Department of Law.

E-Mail: alberto.vega@upf.edu

Address: Universitat Pompeu Fabra, Department of Law, Roger de Llúria building (Ciutadella campus), Ramon Trias Fargas, 25-27, 08005 Barcelona, Spain.