

The International Tax Policy of BEPS

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A NEW MODEL OF GLOBAL GOVERNANCE IN INTERNATIONAL TAX LAW MAKING



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Topics

**OECD and EU
developments**

**Selected issues
BEPS**

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1. OECD and EU Developments

OECD

- ❑ 2013: BEPS Project and BEPS 4 Minimum Standards
- ❑ 2019: Public Consultation
 - Revised profit allocation and nexus rules in the digital economy
 - Global anti-base erosion proposal

EU

- ❑ Anti-Tax Avoidance Directives (1 and 2)
- ❑ Directive on Administrative Cooperation (DAC 1 to 6)
- ❑ Directive on Tax Dispute Resolution Mechanisms
- ❑ ECOFIN Council: 2008 Standard of Good Governance: Transparency, exchange of information, fair tax competition. In 2018 BEPS 4 Actions

2. Selected issues BEPS

- BEPS 44 Group decided the content of the BEPS Actions. Turkey member of the G20, thus BEPS 44
- Extended to non-OECD; non-G20 Countries: BEPS Inclusive Framework for BEPS 4 Minimum Standards (Actions 5,6,13 and 14). Currently 129 members.
- Multilateral Instrument (MLI) to implement BEPS Related Measures. Signed by 87 jurisdictions (currently ratified by 25)
- **TURKEY**
 - Member BEPS Inclusive Framework
 - Signatory (MLI) no yet ratified. Some reservations

2.1. Implementation BEPS

- ❑ Why countries are adopting BEPS? Political decision?
- ❑ How the implementation of BEPS minimum standards will take place?
- ❑ How the implementation of BEPS will contribute to achieve the SDGs?
- ❑ What issues of international taxation, beyond BEPS, should be addressed to fulfill developing countries' need to achieve the 2030 Agenda for Sustainable Development?

2.2. Implementation BEPS: Turkey

- ❑ Legal system in Turkey is a cross between Swiss, German, Italian, French and Roman laws, a covert Islamic law and local customary law, as well as more recently, European law and American law (Örücü, E (2006) 'A Synthetic and Hyphenated Legal System: The Turkish Experience' (1) *The Journal of Comparative Law*, 27)

- ❑ Does the implementation of BEPS creates tax competition? If there are differences in the implementation of BEPS, the result could be tax competition among countries.
 - legalistic approach to the implementation of BEPS vs.
 - approach based in consensus, open norms and discretionary application.

2.2. Implementation BEPS: Turkey

How is Turkey implementing BEPS?

- ❑ Minimum standards 5, 6, 13 and 14

MLI applicable to all 86 DTT

- ❑ MLI: Notification: Some provisions regarding permanent establishment (art. 12 commissionaire arrangements, art. 13 specific activity exemptions); art. 9(4) capital gains
- ❑ MLI: Reservations: art. 4 dual resident entities; art. 5 methods for elimination of double taxation; specific anti-abuse rules: art. 8 dividend transfer transactions, art. 9(1) capital gains; art. 10 p.e. located in third jurisdictions; art. 11 savings clause; art. 14 splitting up of contracts;
- ❑ Nothing on art. 3 transparent entities; or on mandatory binding arbitration

2.2. Implementation BEPS: Turkey

Example: Art. 7 Treaty abuse in Turkey

- BEPS Peer Review Action 6: Turkey choice PPT. However, notification existing provision: DTT Kazakhstan; Lebanon, Malta, Senegal (no yet in force).
- How tax administration will interpret the principal purpose test and the preamble (double non-taxation; with optional provision: economic relationships)? And what is the relationship between domestic anti-avoidance rules and PPT? Tax disputes? Uncertainty?
- Turkey applies PPT but it does not apply art. 7(4) discretionary relief.

2.3. Implementation BEPS: EU

- Article 6: ATAD 1 effective 1 January 2019.
 - Main purpose or one of the main purposes
 - Valid commercial reasons reflecting economic reality
 - Other differences EU abuse and PPT see 2018 IFA EU Report GAARs and other rules.
- BEPS Action 6 Principal Purpose Test
 - One of the principal purposes is a tax purpose
 - Even if valid commercial reasons, if tax also an important reason, then, PPT will apply

EU Commission Recommendation 2017/136: Member States to align the CJEU case law as regards the abuse of law so that treaty benefits are also granted if the respective arrangement or transaction “***reflects a genuine economic activity***” (p.2).

2.3. Implementation BEPS: EU

EU approach vs. domestic GAARs: Danish Beneficial Ownership Cases (C-115/16, C-118/16, C-119/16, C-299/16 and C-116/16 and C-117/16): ATAD 1, Parent and Subsidiary and, Interest and Royalties Directives

AG Kokott (main points to take in this interaction)

- Member States cannot rely on article 1(2) of the Directive (P&S) if it has not been transposed. However, the EU general principle to prevent abuse still applicable and to be interpreted and applied in accordance to EU law
- National rules to prevent abuse to be interpreted in conformity with EU Law (which is now codified in art. 6 ATAD 1 which provides for an “economic viewpoint approach”)
- Use of OECD for interpretation
 - Art. 29 2017 OECD Model and its commentary cannot have a direct effect on the interpretation of an EU Directive (and thus, on the interpretation of national law in conformity with EU Law).
 - Concept of beneficial owner to be interpreted under EU law autonomously and independently of the 1977 OECD Commentaries on art. 11.

2.3. Implementation BEPS: EU

CJEU

- General principle of EU law that EU law cannot be relied on for abusive or fraudulent taxpayers, can be directly applied by the national authorities and courts. Objective element purpose of the rule and subjective: intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it.

Para. 127. A group of companies may be regarded as being an artificial arrangement where it is not set up for reasons that reflect **economic reality**, its structure is purely one of form and its **principal objective or one of the principal objectives** is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law (CJEU C-115/118/119/299)

2.4.BEPS:Standard of Good Tax Governance

- ECOFIN Council: Since 2018: Transparency, exchange of information, fair tax competition and BEPS 4 Minimum Standards
- **EU**
 - Transparency, exchange of information, BEPS 4 Actions: OECD-G20
 - Fair Tax Competition: Developed by the EU
- **THIRD (NON-EU) COUNTRIES**
 - Standard pre-condition: EU development aid' strategic and economic partnership and free trade agreements. Also used for list of non-cooperative jurisdictions.
 - Flexibility to the EU Commission to negotiate the content of the standard that can result in competition among countries.

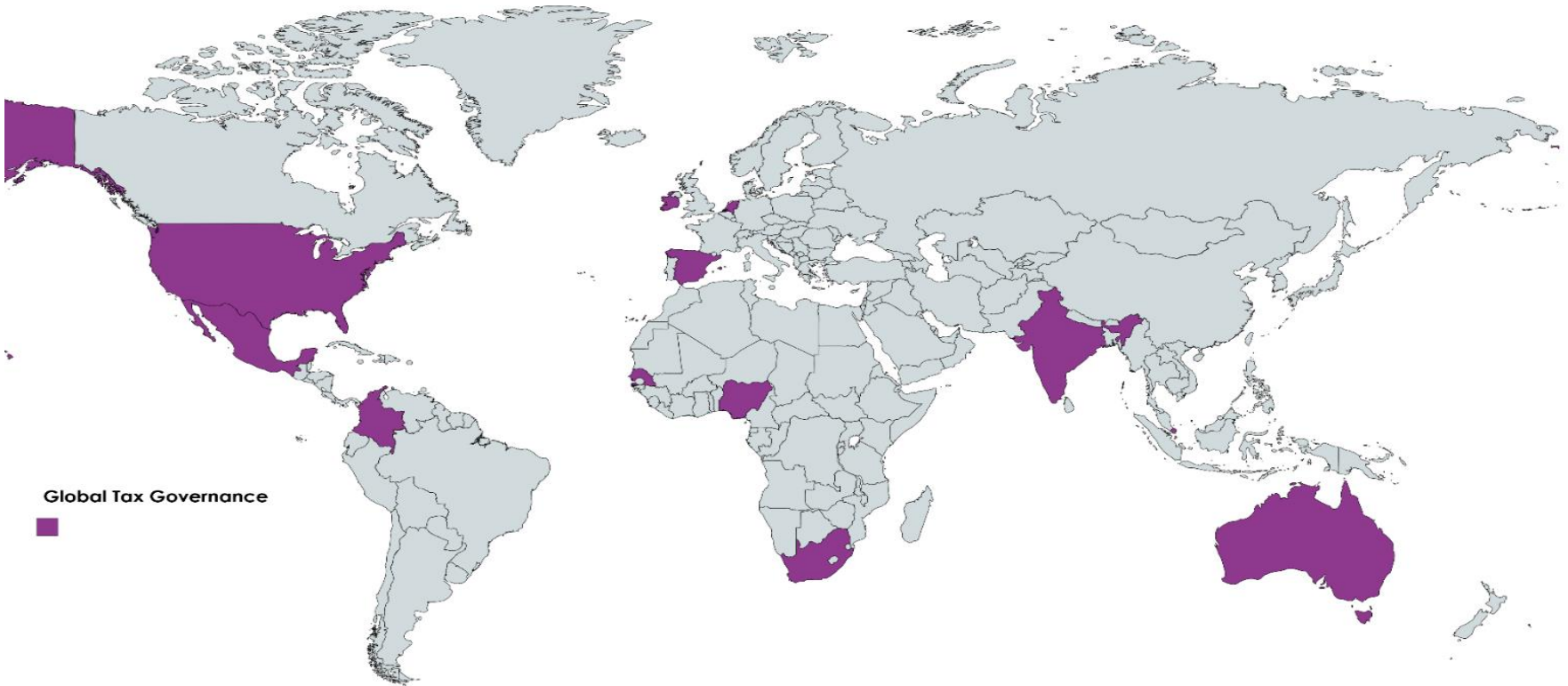
2.4.BEPS:Standard of Good Tax Governance

- Criteria for the establishment of the EU list of non-cooperative jurisdictions for tax purposes: Transparency, Fair Taxation, Implementation of anti-BEPS measures
- Initial criterion: for the jurisdiction **to commit by the end of 2017**, to the agreed OECD anti-BEPS minimum standards and their consistent implementation.
- Future criterion (to be applicable once the reviews by the Inclusive Framework of the agreed minimum standards are completed) for the jurisdiction **to receive a positive assessment** for the effective implementation of the agreed OECD anti-BEPS minimum standards.

3.Global Tax Governance: Research Objectives

1. To investigate the transplant of the 4 minimum standards
2. To investigate the conditions under which the OECD can set standards in the current model of global tax governance
3. To investigate the legitimacy of the EU initiatives with respect to EU and third (non-EU) countries (*Mosquera, Standard of Good Tax Governance, Intertax, Vol. 47(5) 2019*)

3.Global Tax Governance: Scope



3. Global Tax Governance

Countries

1. Why is the country adopting BEPS? Focus Minimum Standards and some reference to best practices
2. How is the country adopting BEPS?
 - Historical development of the BEPS rules in the country
 - Are the rules going further than BEPS? Due to EU? Political change of image?
3. Are BEPS rules the same? Or have they changed upon transplantation?
 - The mismatch between the BEPS and the current tax rules of the selected countries (e.g. arbitration, defensible position of the taxpayer)
4. Problems that these countries have in implementing BEPS and the solutions: Share experiences and best practices

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