

## KEYNOTE SPEECH

### FAIRNESS VERSUS LEGALITY IN INTERNATIONAL TAXATION – DENTONS GLOBAL TAX CONFERENCE Nov. 21 2019

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*For information on GLOBTAXGOV and for publications (output) in the project see <https://globtaxgov.weblog.leidenuniv.nl/>*

When preparing this speech, I started looking for all documents where the word fairness was being addressed in scientific articles and policy papers from international organizations and countries. I wanted to know how the concept of fairness has evolved and also the problems with certainty and legality.

However, after more than 40 presentations in more than 25 countries in the last 22 months. I decided to tell my story, and how during my work I have been confronted with fairness and legality. The work done is part of the European Research Council Grant for the project GLOBTAXGOV (Feb 2018-Jan 2023) that investigates international tax law making in the OECD and the EU, and builds a new model of global tax governance. This is a Starting Grant based only on “independent and scientific academic research. Following my research, I would like to present some of the main issues to consider in international tax law making by the OECD and the EU.

### **My journey**

Since 2009, even before the ERC GLOBTAXGOV Project, I have been working on analyzing the OECD and EU tax initiatives first on exchange of information on request, then, on automatic exchange of information (AEOI), then on the Base Erosion Profit Shifting BEPS Project and now on taxation of highly digitalized business.

These initiatives have been introduced by the OECD and followed to some extent by the European Union (EU), in several instruments either soft law (Minimum Standards) or treaties that countries can sign and ratify (Tax Information Exchange Agreements, Multilateral Convention on Mutual Administrative Assistance in Tax

Matters and Multilateral Instrument to implement BEPS). Countries have been also invited to implement these initiatives for instance by participating in the Global Transparency Forum or as a BEPS Associate in the BEPS Inclusive Framework.

At EU level, these changes have taken place through amendments in the EU Directive on Administrative Cooperation and the Tax Avoidance Package including the introduction of the Anti-Tax Avoidance Directive. So there is a regulatory framework that the OECD and the EU have developed to introduce these initiatives, and this framework aims to encourage developed and developing countries to adopt these initiatives.

However, the reason to have these initiatives is different creating also shortcomings in the way that the taxpayers 'rights to transparency in terms of reliability, clarity and simplicity are being dealt with and therefore having an influence on legality and legal certainty. I will address this in 3 topics being exchange of information, aggressive tax planning and BEPS and taxation of highly digitalized business

#### **a) Exchange of information**

In principle was a discussion about countries, and how countries could effectively exchange information? There was an urgent need by tax authorities for more access to taxpayer's information. The exchange of information made possible to repeal bank secrecy, to ensure that tax havens and low tax jurisdictions exchanged information and also that tax administrations could have access to information from other countries with less requirements for foreseeable relevance or reciprocity.

In order to have access to this information, countries concluded bilateral and multilateral agreements to exchange information on request and thereafter introduced the automatic exchange of financial accounting information (i.e. Common Reporting Standard) following the introduction of the US FATCA.

However, this era of transparency did not bring more safeguards for taxpayers to prevent the leak of tax information and to prevent that the information is used for other purposes than the ones that the information has been requested. Therefore, some questions raised at that time which are still valid today: what happens to my data once the information has been exchanged with other country? Is there a monitoring process for access to my data? are there safeguards to protect the use of data for other purposes? Is my data used for profiling? Does the use of my data represent a risk for my personal life and business?

More exchange of information calls for more safeguards, but unfortunately, this has not been the case, which is also demonstrated by the recent data breach in Bulgaria and the fact that Switzerland decided to cancel the AEOI with Bulgaria.

The only way to address these shortcomings is to have more safeguards that provides for privacy, confidentiality, reciprocity, accuracy (data controller to carry out regular checks of the quality of personal data). These safeguards are necessary in order to ensure that exchange of data is also complying with the rule of law and the principles of confidentiality, secrecy and privacy available in the Constitution or Income Tax Law of the countries exchanging the information.

### **b) Aggressive tax planning and BEPS**

Thereafter, the discussion was about fair share by multinationals mainly due to call by NGOs and public on the aggressive tax planning structures by multinationals. The fair share discussion created several responses from countries, for instance by introducing anti-avoidance measures (specific or general) in their domestic legislation or renegotiation of tax treaties (e.g. in the Netherlands there was (and still is taking place) a renegotiation of tax treaties concluded by the Netherlands with several African countries).

Furthermore, the OECD with the political mandate of the G20 introduced the BEPS Project which contains 4 Minimum Standards including Action 6 to tackle treaty abuse, 10 best practices and 1 Multilateral Instrument. However, during the discussions of the BEPS Project, one issue that should have been carefully addressed by the OECD and the G20 was the definition of aggressive tax planning, and the difference between acceptable and unacceptable tax avoidance, treaty abuse, and treaty shopping. Some definitions were given only after the BEPS Actions were already introduced.

In an article that I published in 2018 in *Intertax*<sup>1</sup>, I argued (with other authors) “that OECD and nongovernmental organizations (NGOs) have referred to ‘aggressive tax planning’ ATP, a phrase without a legal definition, to introduce the concept of ‘fair share of taxes’ when considering tax structures employed by multinational enterprises (in the main) and perhaps expanding the consensus of ‘unacceptable tax avoidance’. The OECD has stated that tax avoidance is ‘a term that is difficult to define but which is generally used to describe the arrangement of a taxpayer’s affairs

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<sup>1</sup> MOSQUERA VALDERRAMA, I.J., MAZZ, A., SCHOUERI, L.E., QUINONEZ N., WEST C., PISTONE, P & ZIMMER F. (2018), Tools Used by Countries to Counteract Aggressive Tax Planning in Light of Transparency, *Intertax* 46(2): 140-155

that is intended to reduce his tax liability and that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow”.

In the same article, we explained that “unlike the OECD, the European Union has defined aggressive tax planning in the European Commission Recommendation of 6 December 2012 on ATP C (2012) 8806 Final (the ‘2012 Recommendation’). The European Commission stated in the 2012 Recommendation that ‘aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability’. However, this definition has been only provided by the EU in a non-binding (recommendation) instrument, therefore EU countries are not required to introduce this definition into their domestic law. Certainly, non-EU countries (third countries) are not bound by this EU definition.

The 2016 Tax Avoidance Package, including the Anti-Avoidance Directive (ATAD 1), made reference to the 2012 Recommendation definition of ATP, but fell short of endorsing it. The Tax Avoidance package provides for ‘concrete measures to prevent aggressive tax planning, to boost transparency and create a level playing field for all business in the EU’. Neither the text of ATAD 1 (for EU countries) nor the text of ATAD 2 (for third (non-EU) countries) contain a definition of ATP”.

Another issue that raises uncertainty, is the implementation of BEPS Action 6 dealing with treaty abuse. Some observations based on our work on GLOBTAXGOV are the differences among countries regarding the choices made in the Multilateral Instrument (PPT, and LOB simplified or detailed, or no PPT but conduit financing arrangements which is the case of the US, and choice or not for discretionary relief ).

The use of multilateral instrument has also created uncertainty. Since some countries choose for multilateral for some of their treaties, but for some specific treaties, it will be dealt through bilateral negotiations. Other countries choose to have all (or most) of their tax treaties as covered tax agreements. Some countries have decided to wait and see, what countries ratify, before ratifying the multilateral instrument. These choices result in a complex menu of options that also reduce the certainty for the taxpayer, and also for tax advisors and tax administrations.

When presenting BEPS Action 6, the tax administration will normally take a very short time to address BEPS Actions 6 whereas scholars and tax advisors can give presentation for 1 hour each due to the difficulties of implementing the BEPS Action

6. Some issues addressed by scholars and tax advisors related to the wording of the PPT for instance reasonable to conclude, facts and circumstances, entitlement to treaty benefits, and the interaction with GAARs. Only with these topics, it is possible to spend at least one afternoon, or like one University here in Amsterdam, one day to discuss these issues in detail. So the questions is everything as simple and easy to enforce as the tax administration is presenting it, or it is more complicated?

Other questions that would need to be addressed in detail are how is the interaction between PPT and other treaty provisions? and between PPT and domestic GAARs (fraus legis, substance over form). When dealing with the PPT is the PPT an umbrella clause so even if the LOB test is successful, the PPT will still entitle the tax administration to deny the tax treaty benefits? And how does the PPT interact with the domestic GAARs?

For instance in the Netherlands, there is the fraus legis that provides for the essential motive to enter into the transaction is to avoid Dutch taxation whereas the PPT provides for one of the reasons is to have a treaty benefit, and the EU has the 'EU GAAR' that provides for a "genuine economic or artificial test" which does not exist in the PPT. the question is how the national judge will apply PPT with these differences in approach? Cases will come, so we need to have the answers, but I am afraid that we will not be on time.

The EU has chosen to introduce some of the BEPS Actions in the EU Anti-Tax Avoidance Directive (ATAD), however, this choice also represents a change in direction from the EU. Before the Directives were to prevent double taxation e.g. interest/royalty directive, however with ATAD, the EU has chosen to introduce detailed legislation in a Directive, which by using the Directive means then, that there is a also a great probability that countries implement the Directive differently. Since EU Direct taxation is only on unanimity, and the instrument is a Directive, and not regulation, countries are not obliged to copy and past the rules, but to provide the minimum as required by the Directive. Therefore, countries can provide more requirements, and it is only upon an infringement procedure or a case law before the Court of Justice of the European Union that some certainty (if any) can be achieved.

### **c) Taxation of highly digitalized business**

I have argued in a blogpost published on Nov. 19 2019<sup>2</sup> at blog GLOBTAXGOV, that with the discussion of Pillar 1 to address the taxation of highly digitalized business and Pillar 2 to introduce the GLoBE (Global Anti-base erosion) Proposal, the BEPS Inclusive Framework has taken another role mainly as a forum of discussion and decision making on the content of Pillars 1 and 2. However, due to the difficulties to reach a consensus, the OECD Secretariat has recently (October 2019) introduced its own proposal (i.e. Unified Approach) in order to seek consensus by OECD, G20 and non-OECD, non-G20 countries on taxation of highly digitalized business (Pillar 1). In addition, in November 2019, the OECD released a consultation document to seek input on the technical issues of the GLoBE Proposal (Pillar 2).

I am concerned based on my own experience of the fast pace of these reforms, and that countries and tax administrations do not have enough resources to attend the meetings in Paris and to follow up all developments. In addition, the number of responses to the public consultations for instance to Pillar 1 require also time to read these responses, and in some cases high tax technical knowledge to understand the content for instance of the consultation document of Pillar 2. The question is how to allocate resources efficiently? There is no time to read everything and to comment on everything especially with the OECD timeline to give the input and the short time between the publication of the responses and the public consultation meeting. Therefore, choices need to be made and this is not only for academics, but also for business, tax advisors and government officials.

There is no certainty on how these developments are taking place, there is also no clarity on whether consensus of the countries from the members of the BEPS Inclusive Framework for Pillar 1 and Pillar 2 will be reached. From the OECD documents and discussions in public panels there is clearly a need to reach consensus and to show results to the G20 by 2020 since there are already unilateral measures in digital taxation. However, this consensus should not be rushed since the discussions should be sustainable and feasible and it should provide long term consensus that benefit not only developed but also developing countries, for taxpayers, tax advisors, and business in general.

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<sup>2</sup> <https://globtaxgov weblog.leidenuniv.nl/2019/11/19/about-the-beps-inclusive-framework-and-the-role-of-the-oecd/>