

The EU and International Tax Law: Base Erosion and Profit Shifting (BEPS) and Beyond

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1. Challenges international taxation

Challenges: To find the income, to tax it, to enforce the tax and to make companies to comply with tax.

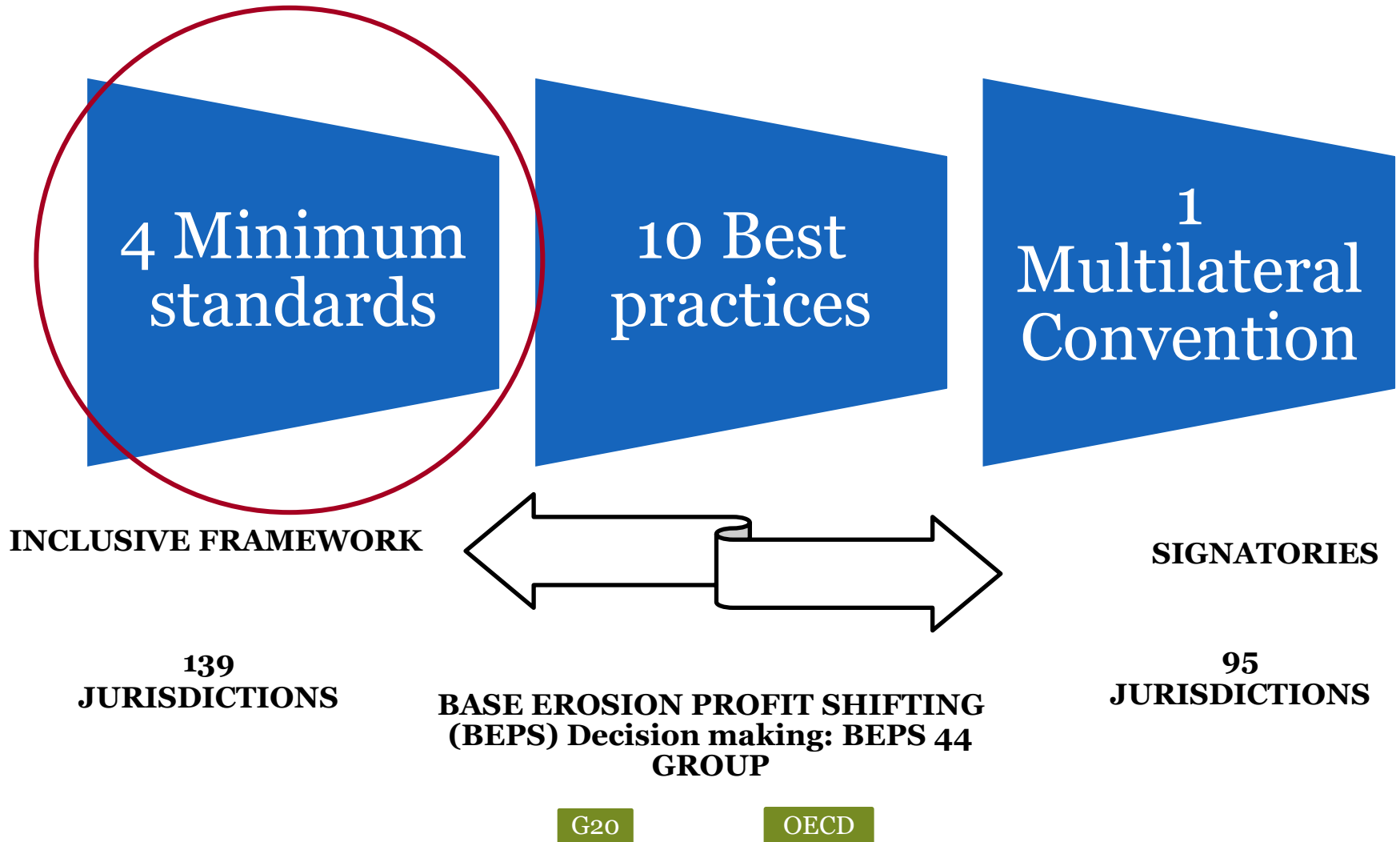
- Complexity of the transactions resulting in double non-taxation or low taxation. *BEPS Project*
- Lack of information exchange between tax administrations. *CRS, FATCA, EU Directive for Administrative Cooperation*
- *Harmful tax competition* including use of tax havens. *EU Code of Conduct and BEPS Project*
- Raise revenue: Recovery of the economy after COVID19. *COM Business Taxation for the 2021 Century*
https://ec.europa.eu/taxation_customs/events/online-tax-event_en
- <https://youtu.be/OqeqxEeTMoc>

EU Unanimity in direct taxation (income and corporate taxation)

1. Current instruments/proposals

1. League of Nations, OECD and UN Models. Failure to have a multilateral instrument. (developed vs. developing countries). Some OECD projects e.g. Transfer Pricing Guidelines, 1998 Report on Harmful Tax Competition. Some EU projects: Code of Conduct for Business Taxation, and EU Directives.
2. Financial crisis: Need for revenue, and to tackle tax evasion and bank secrecy. Exchange of Information: On request and then automatic (financial account information). Global Transparency Forum
3. BEPS tackle base erosion and profit shifting by multinationals (see next slide)
 - EU also following these developments.
4. BEPS Taxation of Highly digitalized business and remaining BEPS issues
 - Pillar 1 –3 proposals and 9th October proposal Unified Approach OECD Secretariat – Allocation of taxing rights: Nexus (where) and allocation (how)
 - Pillar 2- introduction of a minimum income tax – consequences for tax incentives.
 - EU proposal for a Digital Levy

1. TAX GOVERNANCE – OECD and G20



1. TAX GOVERNANCE: EU AND THIRD COUNTRIES

Anti-Tax Avoidance Directives



State Aid Investigations



Fair Tax Competition



2. Role EU

EU role in the formation of international law – proactive co-shaping of the international legal order alongside other actors (*Kochenov and Amtenbrink, 2013*)

In taxation

- Standard: Improve international tax cooperation and facilitate the collection of legitimate tax revenues. To promote fair taxation: central to the EU's social and economic model and its sustainability.
<https://youtu.be/pvUSiMbrIAo>
- EU as a major political and economic player internationally: To support BEPS (smooth and timely implementation) in the single market and internationally See <https://youtu.be/TGaZPkcno9o>
- The EU needs a robust, efficient and fair business tax framework that supports the post-COVID-19 recovery, removes obstacles to cross-border investment and creates an environment conducive to fair and sustainable growth. See <https://youtu.be/JfoEXJJILSc>

3. EU and standard of good governance in tax matters

Standard can be introduced in:

- For third (non-EU countries) strategic partnership agreement: Legally binding framework for cooperation
- For third (non-EU countries) a coordinated tax clause that should be included in free trade agreements that the EU concludes with third countries
- For third (non-EU countries) relevant agreements, without prejudice to their respective competences. Thus trade and strategic partnership but also other areas (aid, cooperation)

3.1. Import/Export EU standards

- Reasons: (i) authority; (ii) prestige and imposition; (iii) chance and necessity (iv) expected efficacy of law and (v) political, economical and reputational incentives (*Mosquera 2007*)

Examples

- Environmental and labour standards
- 1995 Data Protection Directive
- Sometimes standards are not developed by EU, but international standards (agreed, before entering into force, before binding form, only adopted by few countries) (*Scott 2014*)

Standard of good governance is an import or export of EU norms?

Legal status of the standards?

3.2. Import/Export EU standards

Import of norms: Transparency and exchange of information: International standards used developed by The G20-OECD and then, used by the EU in international agreements. After import, the standard is exported throughout the agreements. Also BEPS.

Export of norms: Fair tax Competition. Standard developed by the EU, and later on by the OECD

3.3. Legal status standards

Transparency and exchange of information

Binding

- Multilateral Convention on Mutual Administrative Assistance (141 countries/jurisdictions)
- MCAA CRS - Automatic Exchange of Information (109 countries/jurisdictions)

Consequences

- The international standards introduced in the agreement become binding standards.
- However, mismatches between the countries adopting the standards and countries required to implement the standards (if not yet adopted)

3.4. Legal status standards

4 BEPS Minimum Standards

Non- Binding

- Participants BEPS Inclusive Framework 137 countries/jurisdictions

Consequences

- The international standards introduced in the agreement become binding standards.
- However, mismatches between the countries adopting the standards and countries required to implement the standards (if not yet adopted)

3.5. Legal status standards

Fair tax competition

- Fair tax competition, fair taxation, harmful tax regimes, state aid (selected tax competition)
- Unclear and vague standard with different meanings: fair, unfair, harmful. Applicable in a subjective way

Non- Binding

- 1997 Code of conduct (political agreement/ peer pressure between Member States). Now also applicable to third (non-EU) countries. Comm. July 2020 reform and modernization.

Consequences

- List of non-cooperative jurisdictions: Member States and Code of Conduct group. Applicable also to EU countries? Legitimacy issues?
- Selected tax competition results in indirect protectionism (*Dourado 2016*)

3.6. EU Standard in Agreements

➤ **EU- Canada 2016** Strategic Partnership Agreement

- **Title II** The EU and **Canada** commit to upholding democratic principles and human rights, to advancing democracy, including free and fair elections, and the importance of the rule of law for effective democratic governance.

Other agreements

EU- Japan April 2018 Strategic partnership agreement

- A legally binding pact covering not only political dialogue and policy cooperation, but also cooperation on regional and global challenges
- Also linked to Economic Partnership agreement (trade).

EU- Philippines 2018 Partnership and Cooperation Agreement. Linked to (under negotiation Trade Agreement)

EU-South Korea 2010 Framework Agreement

- Also signed trade and investment agreement and framework participation agreement

EU Standard in Agreements 2009: South Korea

Article 12 Taxation

- With a view to strengthening and developing economic activities while taking into account the need to develop an appropriate regulatory framework, the Parties recognise and commit themselves to implement in the tax area the principles of **transparency, exchange of information and fair tax competition**. To that effect, in accordance with their respective competences, the Parties will improve international cooperation in the tax area, facilitate the collection of legitimate tax revenues, and develop measures for the effective implementation of the above mentioned principles.

EU Standard in Agreements 2016: Canada

Article 11

Cooperation on Taxation

With a view to strengthening and developing their economic cooperation, the Parties adhere to and apply **the principles of good governance in the tax area, i.e., transparency, exchange of information and avoidance of harmful tax practices** in the frameworks of the OECD Forum on harmful tax practices and the Union Code of Conduct on business taxation, as applicable. The Parties shall endeavour to work together to promote and improve the implementation of these principles internationally.

EU Standard in Agreements 2018: Japan

Article 19

Taxation

With a view to promoting good governance in tax matters, the Parties shall endeavour to enhance cooperation in line with internationally established tax standards, in particular by encouraging third countries to enhance **transparency, ensure exchange of information and eliminate harmful tax practices.**

EU Standard in Agreements 2018: Philippines

Article 12

Good Governance in the Tax Area

- With a view to strengthening and developing economic activities while taking into account the need to develop an appropriate regulatory framework, the Parties recognise and will implement the principles of **good governance in the tax area**. To that effect, and in accordance with their respective competences, the Parties will improve international cooperation in the tax area, facilitate the collection of legitimate tax revenues, and develop measures for the effective implementation of the abovementioned principles.
- The Parties agree that the implementation of these principles takes place notably within the framework of existing or future bilateral tax agreements between the Philippines and Member States.

EU Standard in Agreements

EU- China 2020 Strategic Agenda for Cooperation

- Commit to reach an agreement on the adoption of the Global Standard on **Automatic Exchange of Information** being developed by the OECD together with G20 countries in the area of taxation.

EU- Colombia and Peru. 2010 Free Trade Agreement

Art. 155(5) Effective and Transparent regulation

- The Parties also take note of the "Ten Key Principles for Information Sharing" promulgated by the Finance Ministers of the G7 Nations and the Agreement **on Exchange of Information** on Tax Matters of the Organisation on Economic Cooperation and Development's (hereinafter referred to as "OECD") and the Statement on Transparency and exchange of information for tax purposes of the G20.

4. EU DST and third (developing) countries

EU Proposal for Directive 2018

3% DST on gross revenue – EU users and threshold EUR 750 million

2021 EU Digital Levy see https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12836-A-fair-&-competitive-digital-economy-digital-levy_en

Roadmap, public consultation (with feedback), adoption by the Commission second quarter of 2021.

See <https://youtu.be/dCRBGc8qO88>

See <https://youtu.be/JBBx4qTJ6ec>

4. EU DST and third (developing) countries

Unilateral approaches

- Digital Service Tax in EU countries and outside the EU
- Withholding tax
- Significant economic presence
- US Minimum Tax (now with G7)

Multilateral approaches

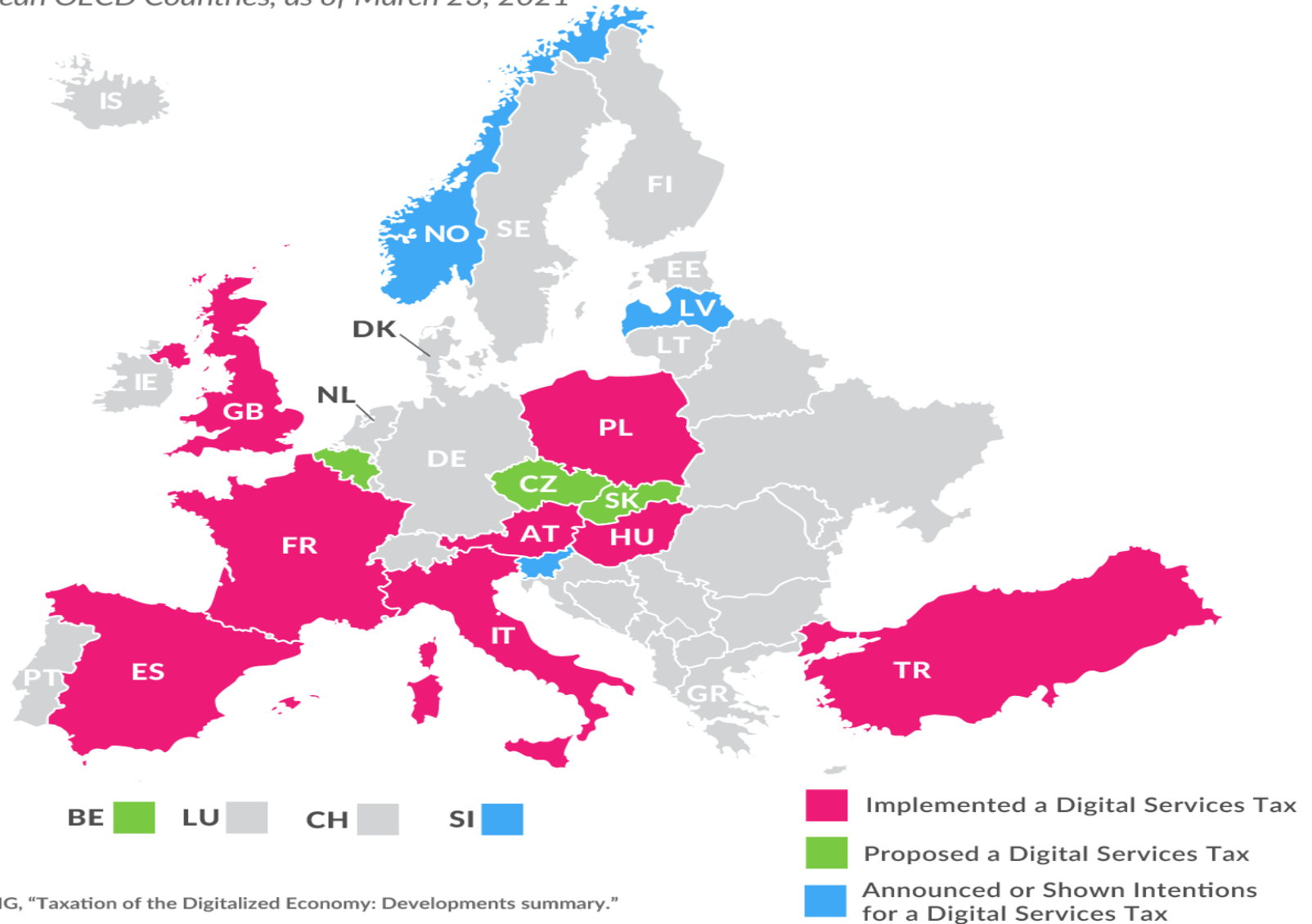
- OECD Pillar 1
- UN art. 12B withholding tax

EU approach

One digital levy

Digital Services Taxes in Europe

Announced, Proposed, and Implemented Digital Services Taxes (DSTs) in European OECD Countries, as of March 23, 2021



Source: KPMG, "Taxation of the Digitalized Economy: Developments summary."

4. EU DST and third (developing) countries

EU Digital levy

EU Commission: Shaping Europe's Digital Future and Fair Taxation

A proposal compatible with the OECD

- A corporate income tax top-up to be applied to all companies conducting certain digital activities in the EU
- A tax on revenues created by certain digital activities conducted in the EU
- A tax on digital transactions conducted business-to-business (B2B) in the EU

To keep in mind

Scope and definition of digital activities or companies subject to digital levy

Relation with the EU and MsT obligations including DTC and also WTO compliant

Fairness considerations: SMEs, digital companies with a dominant/weak position

What is different from the EU 2018 Directive?

A proposal as an add-on to any OECD Pillar 1 framework

Some reading

See hyperlinks in the slides. See also

MOSQUERA VALDERRAMA, I.J. [A new wind change in direct taxation. 20 Challenges for the EU in 2020's. Special Issue German Law Journal.](#)

MOSQUERA VALDERRAMA, I.J. [The EU standard of good governance in tax matters for third \(non-EU\) countries. Intertax \(blinded-peer review\)](#)

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