

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

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1. International taxation?

- Tax Sovereignty
- No international law of taxation
- No international organization
- Advisory organs on tax policies
 - OECD
 - UN Committee of Fiscal Affairs
- Political organs: G7, G8, G20, G77 and G24
- EU Supranational (Regional) Organization

International taxation focus on income tax and deals with cross-border situations (2 countries)



FATCA
CRS



BEPS



IOs/G20/EU and civil society: International Taxation

Aims

- OECD/G20/EU: Global fair, sustainable and modern tax systems.
- Civil society: Solidarity; Fairness: Fair share by MNEs
<https://www.taxjustice.net/2018/03/08/video-discussion-on-tax-revenue-losses-apples-tax-avoidance-and-state-aid/>

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.
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– EU also following these developments.
4. BEPS Taxation of Highly digitalized business
 1. Pillar 1 –3 proposals and later proposal Unified Approach OECD Secretariat – Allocation of taxing rights: Nexus (where) and allocation (how).
 2. Pillar 2- introduction of a minimum income tax (15%)– consequences for tax incentives).

Statement on a Two-Pillar Solution approved by 137 jurisdictions (drafting rules in process)

2. Global Tax Governance

Definition:

it “consists of the **set of institutions governing issues of taxation that involve cross-border transactions or have other international implications.** This definition implies that global tax governance need not, but could, involve **a full or partial shift of the power to tax,** that is, the right to impose taxes on citizens, **to the international level.** Currently, the right to tax is firmly tied to the nation-state. While global tax governance circumscribes and shapes a nation’s power to tax in various ways, it exclusively consists of institutions governing the interaction among national tax systems”

Thomas Rixen, Peter Dietsch ‘Global Tax Governance: What is Wrong with It and How to Fix It’ (2011).

3. TAX GOVERNANCE: EU AND THIRD COUNTRIES

Anti-Tax Avoidance Directives



State Aid Investigations



Fair Tax Competition



3. TAX GOVERNANCE: EU AND THIRD COUNTRIES

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. EU as a major political and economic player internationally:
- To support BEPS (smooth and timely implementation) in the single market and internationally

4. EU Standard of good governance in tax matters

“The Parties recognise and commit themselves to implement the principles of good governance in the tax area, including the global standards on transparency and exchange of information, fair taxation, and the minimum standards against Base Erosion and Profit Shifting (BEPS). The Parties will promote good governance in tax matters, improve international cooperation in the tax area and facilitate the collection of legitimate tax revenues”.

Council of the European Union, Council Conclusions on the ‘EU Standard Provision on Good Governance in Tax Matters for Agreements with Third Countries, FISC 180, ECOFIN 364 (26 Apr. 2018), <http://data.consilium.europa.eu/doc/document/ST-8344-2018-INIT/en/pdf>

4. EU Standard of good governance in tax matters

- **2008: Transparency, exchange of information and fair tax competition**
 - 2012: Harmful tax and list of non-cooperative jurisdictions
 - 2016: Anti-tax avoidance package: Harmful tax, anti-Base Erosion and Profit Shifting (BEPS) measures and fair economic activity (tax rate/not artificial)
 - 2017: List of non-cooperative jurisdictions for tax purposes
- **2018: Transparency, exchange of information, fair taxation and BEPS 4 Minimum Standards**

4. EU Standard of good governance in tax matters

*The Commission has since tabled the **updated clause in all relevant new and ongoing negotiations, several of which are in the process of being successfully concluded.***

The Commission will continue to insist on the inclusion of the tax good governance clause in all relevant future negotiations on international agreements.

In the event that a third country refuses to accept the clause, or insists on changing it to the extent that it no longer serves the intended purpose, the Commission and Member States must consider the appropriate response. Such countries could be scrutinised under the EU listing exercise.

4. EU Standard of good governance in tax matters

*Another important way in which the EU promotes fairness in tax matters is through a **tax good governance clause in relevant international agreements with third countries**. The European Parliament considers the tax good governance clause to be one of the “core instruments of EU external policy” (TAXE 3 report, 26/03/2019) and has repeatedly called for it to be systematically included in any relevant EU agreements with third countries and regions.*

*In the 2016 External Strategy, the Commission suggested **updating and strengthening the standard good governance clause, to align it with the latest international norms**. Member States endorsed a new text in May 2018 and confirmed that such wording should be included in all relevant international agreements.*

4. EU Standard of good governance in tax matters

- 2020 Tax Good Governance in the EU and beyond

Tax good governance is the foundation on which fair taxation is built. Broadly, tax good governance encompasses tax transparency, fair tax competition, the absence of harmful tax measures and the application of internationally agreed standards.

4. 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)

EUTAXGOV Jean Monnet Chair

The EUTAXGOV Chair will address the EU Standard of Tax Good Governance.

The objectives of this Chair are (i) to enhance knowledge and understanding of the use of this Standard by students and to (ii) to raise awareness and to create a dialogue of the use of this Standard between academia, civil society, governments, and policy makers at EU level and at domestic (country) level including third (non-EU) countries.

5. 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. “Frequently, the EU engages in the practice of territorial extension with a view to enforcing internationally agreed standards of conduct (international standards)”. Even before entering into force, or in a form that it is not binding, or even if only adopted by few countries (*Extraterritoriality and Territorial Extension in EU Law Joanne Scott 2014 at 112*)

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

Legal status of the standards?

5. 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

- Mosquera Valderrama, I.J. [The EU standard of good governance in tax matters for third \(non-EU\) countries.](#) Intertax, 2019.
- Mosquera Valderrama, I.J. [Critical Review of the ATAD Implementation: Foreword: The Implementation of the ATAD in the EU: The Same but not the Same.](#) Intertax, 2021.

6. Legal status standards

Transparency and exchange of information

Binding

- Multilateral Convention on Mutual Administrative Assistance (144 jurisdictions)
- MCAA CRS -Automatic Exchange of Information (115 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)

6. Legal status standards

4 BEPS Minimum Standards

Non- Binding

- Participants BEPS Inclusive Framework 141 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)

6. 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*)

7. 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.

EU Standard in Agreements

EU-ACP

June 2018 EU Negotiating Directives

Strategic priorities

- The Agreement will include provisions to support legislation and initiatives addressing all forms of corruption, introduce more transparency and accountability over public funding and in the delivery of public services, improve revenue collection, tackle tax evasion and avoidance, money laundering and illicit financial flows and meet **global tax governance standards**. In this regard, particular attention will be given to the proper use of financial external assistance.

April 2020, the ACP Group of States became an international organisation: the Organisation of African, Caribbean and Pacific States (OACPS).

EU Standard in Agreements

EU-ACP

The EU and OACPS chief negotiators concluded their negotiations on 15 April 2021. [Negotiated agreement](#)

Art. 12 Good Governance

*6. The Parties recognise and commit themselves to implement the principles of **good governance in the tax area**, including the global standards on transparency and exchange of information, fair taxation and the minimum standards against Base Erosion and Profit Shifting (BEPS). They shall promote good governance in tax matters, improve international cooperation in the tax area and facilitate the collection of tax revenues. They shall cooperate to enhance capacity to comply with these principles and standards and reap the benefits of a thriving rulesbased financial sector. They agree to engage in timely partnership dialogue at bilateral and international levels on tax matters.*

EU Standard in Agreements

EU-ACP

Art. 72 Financial Governance

3. The Parties shall combat tax fraud, tax evasion, tax avoidance and illicit financial flows and shall strengthen asset recovery. They shall work towards ensuring the efficiency, effectiveness, certainty, transparency and ***fairness of tax systems***.
4. The Parties shall take concrete measures, including by enacting legislation, and shall strengthen relevant institutions and mechanisms to implement the principles of ***good governance in the tax area***.

Visit us at

- **Leiden University, Institute of Tax Law and Economics**
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