

The Standard of EU Tax Good Governance

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Governance in Tax Matters

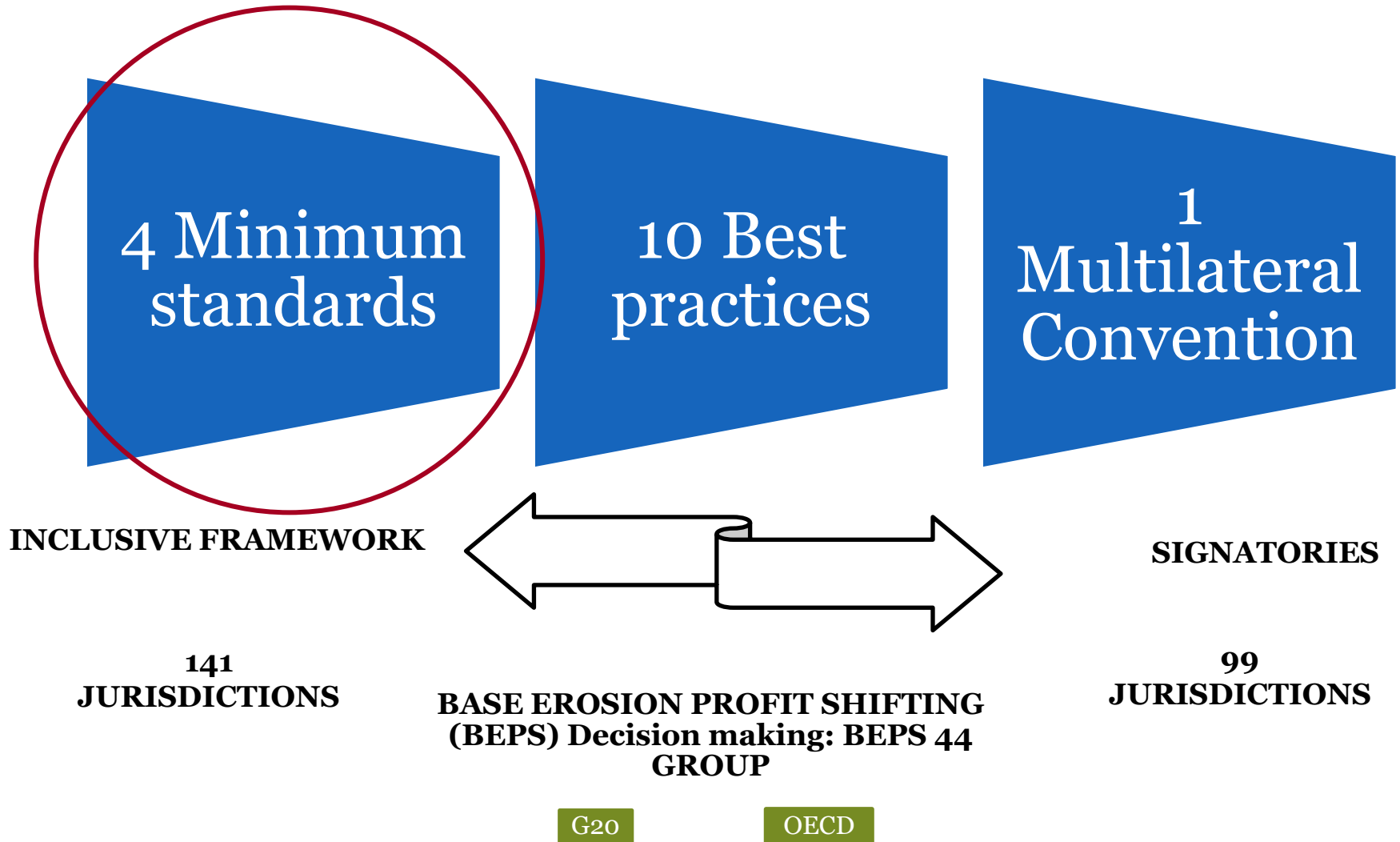


ERC GLOBTAXGOV

Research question

Under what conditions can the OECD-G20 and the EU models of global tax governance be feasible and legitimate for both developed and developing countries?

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

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.

3. 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>

3. 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**

3. 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.

3. 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.*

3. 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.

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. “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?

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

- 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.

3.3. 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)

3.4. 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)

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-Canada SPA

EU- Canada (signed) 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.

- **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.

See also https://www.international.gc.ca/world-monde/international_relations-relations_internationales/spa-aps.aspx?lang=eng

3.6. EU-Canada CETA

➤ Article 28.7 Taxation CETA

7.(a) Where an investor submits a request for consultations pursuant to Article 8.19 (Consultations) claiming that a taxation measure breaches an obligation under Sections C (Non-discriminatory treatment) or D (Investment protection) of Chapter Eight (Investment), ***the respondent may refer the matter for consultation and joint determination by the Parties*** as to whether:

- (i) the measure is a taxation measure; 216
- (ii) the measure, if it is found to be a taxation measure, breaches an obligation under Sections C (Non-discriminatory Treatment) or D (Investment Protection) of Chapter Eight (Investment); or
- (iii) there is an inconsistency between the obligations in this Agreement that are alleged to have been breached and those of a tax convention.

(b) A referral pursuant to subparagraph (a) cannot be made later than the date the Tribunal fixes for the respondent to submit its counter-memorial.

Where the respondent makes such a referral the time periods or proceedings specified in Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) shall be suspended. If within 180 days from the referral the Parties do not agree to consider the issue, or fail to make a joint determination, the suspension of the time periods or proceedings shall no longer apply and the investor may proceed with its claim.

(c) A joint determination by the Parties pursuant to subparagraph (a) shall be binding on the Tribunal.

(d) Each Party shall ensure that its delegation for the consultations to be conducted pursuant to subparagraph (a) shall include persons with relevant expertise on the issues covered by this Article, including representatives from the relevant tax authorities of each Party. For Canada, this means officials from the Department of Finance

3.6. EU-Canada CETA

➤ Joint Interpretative Instrument Investment protection

“CETA requires a real economic link with the economies of Canada or the European Union in order for a firm to benefit from the agreement and prevents “shell” or “mail box” companies established in Canada or the European Union by investors of other countries from bringing claims against Canada or the European Union and its Member States. The European Union and Canada are committed to review regularly the content of the obligation ***to provide fair and equitable treatment, to ensure that it reflects their intentions (including as stated in this Declaration) and that it will not be interpreted in a broader manner than they intended***”.

However, Proposal Unshell Directive if applicable to third non (EU countries) may result in a broader interpretation. See <https://globtaxgov.weblog.leidenuniv.nl/2022/05/19/is-the-unshell-directive-proposal-really-necessary/>

EU Standard in Agreements 2010: 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-South Korea 2010 Framework Agreement

- Also signed trade and investment agreement and framework participation agreement

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- 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 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- Philippines 2018 Partnership and Cooperation Agreement. Linked to (under negotiation Trade Agreement based on the 2007 ASEAN Negotiation Directives)

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. 32. Public Finance and Financial Governance

3. The Parties shall take measures to combat illicit financial flows, tax fraud and tax evasion, and reduce opportunities for tax avoidance, including through bilateral and multilateral consultations. The Parties shall apply the ***principles of good governance in the tax area*** in, inter alia, enacting legislation, developing comprehensive policies, adopting concrete measures and strengthening relevant institutions and mechanisms.

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***.

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