Pillar 2 and the Standard of EU Tax Good Governance

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EU TAX GOV

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Topics

ERC Project GLOBTAXGOV

EU JEAN Monnet Chair EUTAXGOV

EU Standard of Good Governance in Tax Matters

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)

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 (model rules and administrative guidance already published)

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).

1. TAX GOVERNANCE: EU AND THIRD COUNTRIES

Anti-Tax Avoidance Directives

State Aid Investigations

Fair Tax Competition

Changes in EU Direct Taxation

Instruments

- Directives to prevent Double Taxation: Merger, Interest and Royalties, Parent and Subsidiary
- Directive to prevent tax avoidance and to enhance exchange of information: Anti-Tax Avoidance Directives, and Directive on Administrative Cooperation
- Fair and Effective Taxation: Unshell Directive (Combined ATAD-DAC) and Pillar 2 Directive

- Political Commitment: Unanimity, Role of Hungary and Poland, and Enhanced Cooperation as last resource.

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
- 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.

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.

EU and 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

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)

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.

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.*

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.*

EU Standard of good governance in tax matters

- **Pillar 2 in the EU Standard of good governance in Tax Matters?**
- Approved in December 2022: The profit of the large multinational and domestic groups or companies with a combined annual turnover of at least €750 million will be taxed at a minimum rate of 15%.
- The directive has to be transposed into member states' national law by the end of 2023.
- This will still result in the ***EU being a front-runner in applying the G20/OECD global agreement*** on Pillar 2.

EU Standard of good governance in tax matters

Questions legitimacy, inclusiveness, fairness on Pillar 2

- Political agreement 137 of 141 tax jurisdictions
- Regional Organizations (ATAF, CARICOM, developing countries) Global fair deal?
- UN Resolution approved GA- UN cooperation or instrument for international tax cooperation

IF PILLAR 2 IN THE EU STANDARD, then.

Use of the black list of non-cooperative jurisdictions to raise pressure to comply with international tax standards. Until now transparency, exchange of information, fair taxation, BEPS. And now also countries to adopt Pillar 2 and the 15% Global Minimum Tax Rate? Fairness, threshold high-necessary, legitimacy?

EU Standard of good governance in tax matters

- Summary discussions Pillar 2 at EU Platform for Tax Good Governance (8 December 2021).
- Discussion Members of the Platform:

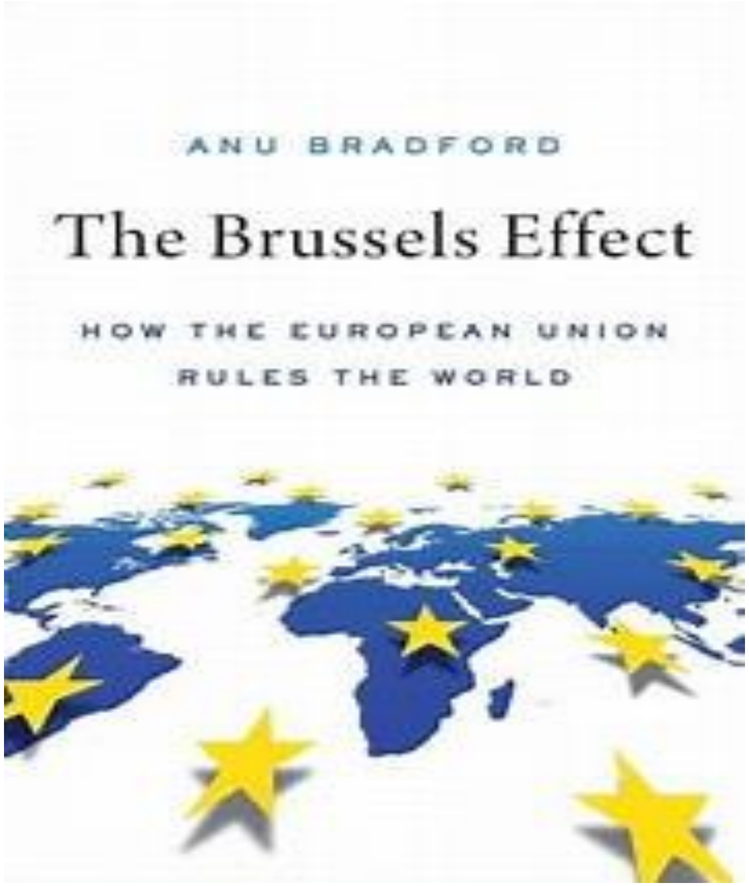
  "It was enquired what are the implications of the Inclusive Framework agreement vis-à-vis countries that expressed their dissent such as Kenya, Nigeria, Pakistan and Sri Lanka. It is difficult to understand whether the Inclusive Framework works on the basis of consensus among its members or not.

  International fora such as the United Nations proved that you can reach remarkable goals if you follow processes that are more transparent and more inclusive than the one undertaken by the OECD". (at 3)

EU Standard of good governance in tax matters

- Summary discussions Pillar 2 at EU Platform for Tax Good Governance (cont.)
- Chair reply: It is true that not every State actively approved these rules but the Inclusive Framework operates by consensus and not by unanimity. Technically speaking, this serves as a common framework to adopt unilateral measures. In terms of the agreement's implementation, EU Member States will be legally bound by the Pillar 2 Directive whilst non-EU Member States will not be legally bound to implement the global agreement as this is not an international convention (unlike Pillar 1). At 4.
- ***But if still included in the EU Standard? and the consequence is the blacklisting? Are countries still free to implement or not?***

The Brussels Effect: EU influences international law



'without resorting to international institutions or seeking other nations' cooperation, the EU is able to promulgate regulations that become entrenched in the legal frameworks of developed and developing markets alike, leading to the "Europeanization" of important aspects of global commerce'.

A. Bradford, Exporting Standards: The Externalization of the EU's Regulatory Power via Markets, 42 Int'l Rev. L. & Econ. 158 (2015)

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?

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.

See Mosquera The EU standard of good governance in tax matters for third (non-EU) countries. Intertax

Legal status standards

Transparency and exchange of information

Binding

- Multilateral Convention on Mutual Administrative Assistance
- MCAA CRS -Automatic Exchange of Information

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)

Legal status standards

4 BEPS Minimum Standards

Non- Binding

- Participants BEPS Inclusive Framework 142 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)
- In addition, a multilateral instrument to amend bilateral tax treaties, it contains 2 of the BEPS 4 Minimum Standard. Binding only if covered agreement (match by other country). Some opt-it or opt-out provisions

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*)

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***.

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