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Global Governance, Global Standards and Democracy in Taxes[1]

ANA PAULA DOURADO*

1. Tax Good Governance on the Global Policy Agenda, in the EU and in Portugal

Since the financial crisis of 2008, the G20, the OECD and the European Union have been joining efforts in increasing tax transparency, identifying the extent to which profit shifting to low tax jurisdictions is being carried out by multinational companies and combating base erosion and the decrease of corporate income tax revenues by those companies[2]. Enhancing administrative cooperation and developing tax good governance, interacting with tax havens and tackling aggressive tax planning are part of supra-national concrete recommendations and actions.

* Professora Associada da Faculdade de Direito da Universidade de Lisboa.
Membro da Direção da Associação Europeia de Professores de Direito Fiscal (EATLP) e da Plataforma da União Europeia para a Boa Governação Fiscal; Consultora do FMI.

[1] This chapter is inspired in a previous chapter I wrote: "Tax Mobility in the European Union: Present and Future Trends", in *Movement of Persons and Tax Mobility*, ed. Ana Paula Dourado, IBFD, 2013, pp. 3-26. The arguments in the present chapter can be found in more detail in the aforementioned "Tax Mobility in the European Union: Present and Future Trends". A follow-up of these ideas are to be found in Ana Paula Dourado, "No Taxation without Representation in the EU: Democracy, Patriotism and Taxes", *Principles of Law: Function, Status and Impact in EU Tax Law*, ed. Cécile Brokelind, IBFD, 2013, pp. 205-233.

[2] In 2020, the G20 asked the OECD to analyse the topic of base erosion and profit shifting by multinationals, and to report about the progress of the work for their February 2013 meeting: as a response, the OECD (2013) issued the Report *Action Plan on Base Erosion and Profit Shifting*. The EU Reacted: *Communication from the Commission to the European Parliament and the Council, An Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion,* (187637/12) Brussels (6.12.2012), COM (2012) 722 Final; *Commission Recommendation of 6.12.2012*, Brussels (6.12.2012), C(2012) 88006 final; *Conclusions of the European Council* , Brussels (22.5.2013), EUCO 75/13, pp.6-8; ECOFIN, *Conclusions on Tax Evasion*, Brussels (14 May 2013), 9549/13, FISC 94.

In respect of tax transparency and combating tax evasion and aggressive tax planning, opinion makers are focused on showing the lack of fairness and equity as a disruptive effect provoked by the global economy. However, states should also worry about the inefficient allocation of resources created by such aggressive tax planning, namely in respect of domestic corporations that have no access to the same planning possibilities[3].

The aim to increase tax transparency and to decrease tax evasion and aggressive tax planning does not imply international tax harmonization[4] or an EU harmonization of the tax base and rates (even less of tax subjects), but tax coordination is necessary[5]. In this context, allocation of taxing rights between source and residence is being revisited by OECD[6] .

It is common knowledge that mainstream media have transnational impact and act as global opinion makers, determining to a great extent the political agendas in taxes[7/8]. In 2012, some news in the media increased the public perception that governments lose corporate tax revenue because of tax planning by multinationals – these are accused of dodging taxes worldwide by breaking domestic and international rules on the taxation of cross-border profits[9].

This is now called Base Erosion and Profit Shifting (BEPS). BEPS behaviour consists in increasing segregation between the location where actual business activities and investment take place and the location where profits are reported for tax purposes, the shifting of risks and intangibles, and the artificial splitting of ownership of assets between legal entities within a group, transactions

[3] *The OECD Report Action Plan..., supra* n. 2, p. 8.

[4] See the discussion on the OECD Report *Harmful Tax Competition: an Emerging Global Issue* (1998) and the reactions to it; and A.P. Dourado, *Exchange of Information and Validity of Global Standards in Tax Law: Abstractionism and Expressionism or Where the Truth Lies*, EUI WP 11 (2013), pp.1-18.

[5] Cf. for tax evasion cases: N. Johannesen, *Taxing Hidden Wealth – Lessons for Policy Making*, 25 EUI Working Papers RSCAS (2012), pp. 5 et seq..

[6] A.P. Dourado, *Is it Acte Clair? General Report on the Role Played by CILFIT in Direct Taxation,* The Acte Clair in Direct Tax Law (*A.P. Dourado & R.P. Borges eds*., IBFD, 2008, pp. 28-31; F. Vanistendael, *The ECJ at Cross-Roads: Balancing Tax Sovereignty against the Imperatives of the Internal Market,* European Taxation (2006) p. 413 et seq.

[7] As *The OECD Report Action Plan...., supra* n. 2, calls them in Chapter I: "There is a growing perception that governments lose substantial corporate tax revenue because of planning aimed at shifting profits in ways that erode the taxable base to locations where they are subject to a more favourable treatment. Recent news stories such as Bloomberg's "The Great Corporate Tax Dodge", the New York Times' "But Nobody Pays That", the Times' "Secrets of Tax Avoiders" and the Guardian's "Tax Gap" are only some examples of the increased attention mainstream media has been paying to corporate affairs".

[8] See the criticism to the short-term political agendas in Jürgen Habermas, *Ach, Europa*, *Kleine politische Schriften XI*, Suhrkamp Verlag, Frankfurt-am-Main (2008), pp. 96-108.

[9] *The OECD Report Action Plan..., supra* n. 2, p. 13.

between such entities that would rarely take place between independent entities[10]. Evidence indicates that BEPS behaviour is widespread in a world where global value chains and fragmentation of production are dominant features[11].

As a reaction to the aforementioned news in the media and a response to a G20 mandate, the OECD presented a Report "Addressing BEPS" announcing several actions. These actions are currently being enacted and suggest measures to deal with BEPS- it is acknowledged that current international standards did not accompany the changes in global business practices, especially in the areas of intangibles and the digital economy[12].

In turn, the recent corporate income tax reform in Portugal (which entered in force in 2014) has been enacted in counter trend to the BEPS developments. The rules that are currently being recommended by the OECD BEPS actions will sooner or later weaken the core purpose of the aforementioned Portuguese reform, namely to increase competitiveness (and aggressive competition?).

2. Revenue Interests and Globalization

Globalization (i.e., especially free movement of capital) has led to an increasing division between high and low tax jurisdictions. Nominal tax rates have decreased drastically since the eighties, even if tax transparency has increased (although the latter did not lead to a fall in the corporate tax burden, because tax base was often broadened)[13]. In spite of globalization the interests protected are still the national interests and this is also true for the EU, since corporate taxes are national taxes and there is tax competition among Member States.

The current international trend moves towards more fairness and transparency in the tax treatment of foreign direct investment, it complies with the constitutional principles of rule-of-law states and illustrates the necessity to revisit international tax law rules.

When discussing tax mobility and the anti-BEPS agenda we may not forget that EU/EEA taxpayers are entitled to the fundamental freedoms under the TFEU/EEAA provisions (they grant rights to the aforementioned taxpayers)

[10] *The OECD Report Action Plan..., supra* n. 2, p. 6 and Chapter 2 (15 -21).

[11] *The OECD Report Action Plan..., supra* n. 2, Chapter 2.

[12] *The OECD Report Action Plan..., supra* n. 2, p. 7; Roberto Moro Visconti, *Exclusive Patents and Trademarks and Subsequent Uneasy Transaction Comparability: Some Transfer Pricing Implications,* 40 Intertax 3 (2012), pp. 212-220.

[13] Statutory corporate income tax rates in OECD member countries dropped on average 7.2 percentage points between 200 and 2001 (32.6% to 25.4%) – rates have been reduced in 31 countries Tax rates have decrease: *The OECD Report "Action Plan...", supra* n. 2, pp. 15-16.

and according to which there can be non-discriminatory treatment based on source or residence.

In most of the direct tax cross-border situations taking place within the EU/EEA territories a resident and a non-resident are considered to be in comparable positions[14]. To the extent that a tax discrimination by a EU/EEA Member State occurs (as a rule implying a less favourable treatment of the cross-border situation in comparison to a domestic situation), the national interest (loss of tax revenue) cannot, in principle, be validly invoked before the TFEU/EEAA: the loss of national tax revenue cannot justify a discriminatory treatment[15].

In contrast, with regard to the difference between resident and non-resident taxpayers (or residence and source) Article 24 of the OECD MC, although providing for non-discriminatory treatment, still relies to a major extent on the difference between source and residence.

3. Tax Mobility and EU Law

The existing mobility in Europe results to a great extent from the efforts of the European Court of Justice (ECJ) to overcome the constraints raised by the legislative decision-making process. This is especially true for tax matters where the unanimity rule is still valid under the Treaty on the Functioning of the European Union (TFEU).

[14] Exceptions occur in the field of tax rates, comparability under personal income tax (the rule is that a resident is not comparable to a non-resident, unless most of the income is earned in the State of source – the so-called virtual residence) and comparison of treatment granted by a Member State to residents of different States (horizontal comparability): See, in this book, Frans Vanistendael, *EU at the Crossroads in 2011: EMU and/or Internal Market?* pp.

[15] S. Van Thiel, *Justifications in Community Law for Income Tax Restrictions on Free Movement: Acte Clair Rules that can be Readily Applied by National Courts,* The Acte Clair in Direct Tax Law... *supra* n. 6, pp.87-93. See among many others, the following ECJ cases: 16 July 1998, Case C-264/96 (Imperial Chemical Industries plc [ICI] v K. Hall Colmer [Her Majesty's Inspector of Taxes]); 21 September 1999, Case C-307/97 (Compagnie de Saint-Gobain v Finanzamt Aachen-Innenstadt); ECJ 8 March 2001, Cases C-397/98 and C-410/98 Metallgesellschaft Ltd a.o. v Commissioners of Inland Revenue, H.M. Attorney General); 6 June 2000, Case C-35/98, Staatssecretaris van Financiën v Verkooijen ; 7 September 2004, Case C-319/02 (Petri Mikael Manninen); 12 September 2006, Case C-196/04 (Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue); However, the justification of "allocation of taxing rights", related to cross-border losses and exit taxes, is not substantially diferent from a "loss of revenue" argument (or a protectionist argument), because it relies on the traditional international tax law concept. See M. Poulsen, *Freedom of Establishment and the Balanced Allocation of Taxing Rights,* 40 Intertax 3 (2012), pp. 203-204: the author contends that the ECJ is "prepared to accept an allocation of tax jurisdiction based on the traditional international tax interpretation" (p.203).

The European Commission tries to put forward proposals for tax harmonization[16], aimed at achieving a deeper level of integration in the European Union, and the Council, represented by national interests, relies on tax competition to assure those national interests, which can range from discriminatory taxes justified on the basis of the need to collect tax revenue to the reduction of the corporate income tax burden[17].

Notwithstanding the differences between EU law and international law, it is also true that tax mobility as a policy goal has not yet been achieved in the EU. The inconsistencies in the EU integration process weaken the EU position in the world: in the current state of affairs, EU law is hardly to be recommended as a standard either in respect of tax mobility, or as an international or regional standard regarding an anti-BEPS reaction and tax competition[18].

Apart from a few directives on specifically identified constraints to the internal market (economic double taxation, restructuring of companies, mutual assistance, double taxation of interest and royalties between associated companies), tax competition in the EU is the rule and non-discrimination of cross-border situations is the limit.

In the absence of a regular legislator on direct tax issues, the ECJ has assumed a prominent role in the protection of taxpayers' fundamental freedoms and has been focusing on the tax restrictions to those fundamental freedoms[19]. On the basis of the non-discrimination principle of EU nationals (and third-country nationals in the case of free movement of capital), which is included in the treaty provisions governing the fundamental freedoms (in the TFEU and in the EEAA), the ECJ has rightly managed to address the obstacles deriving from a direct tax legislation that does not discriminate against non-nationals, but instead against non-residents (inbound situations) and foreign sources of income (outbound situations), independently of their nationality[20].

[16] See the case of the *Proposal for a Council Directive on a Common Corporate Consolidated Tax Base* (CCCTB), COM (2011) Final 2011/0058 (CNS); *Proposal for a Council Directive* 2008/0215 (CNS) *Amending Directive 2003/48/EC on Taxation of Savings Income in the form of Interest Payments*.

[17] P. Pistone, *Smart Tax Competition and the Geographical Boundaries of Taxing Jurisdictions: Countering Selective Advantages Amidst Disparities,* 40 Intertax 2 (2012), pp. 85-91.

[18] On the validity of international standards: A.P. Dourado, *Exchange of Information and Validity*...supra n. 4, pp. 13 et seq.

[19] See the list of cases in K. Van Raad (ed.), *Materials on International & EU Tax Law,* International Tax Center Leiden 2 (2013).

[20] This has become clearer since the Maastricht Treaty: *Inter alia*, A.P. Dourado, *Lições de Direito Fiscal Europeu,* Coimbra editora, Coimbra (2010), ch. 3.

It is undeniable that the interpretation of the fundamental freedoms provisions in the TFEU and the EEAA by the European Court of Justice has very much contributed to reducing the tax rules discriminating against inbound and outbound investment and other cross-border income. It is also true that although these tax rules were firmly grounded on the distinction of taxation between residents and non-residents, Member States are still competent to rely on residence and source to design their tax codes.

However, because, according to the reasoning of the ECJ, residents and non--residents are in principle comparable[21] and a different treatment will imply discrimination incompatible with the TFEU, source and residence as connecting elements have in reality become obsolete in the European Union to a great extent, even if they are kept in written law that is in force. When comparing non-residents to residents, and EU/EEA cross-border situations to domestic ones, the ECJ is protecting tax mobility and therefore building up the internal market.

4. The ECJ Self-restraint

Nevertheless, the ECJ does not always consider non-residents comparable to residents and in that case, it still accepts the international tax law distinction. For example, in personal income taxes, residents are not, in principle, comparable to non-residents (*Schumacker* line of reasoning). This position can also be justified in the perspective of economic allegiance, under the current international rules on allocation of taxing rights (the state of residence is the state with which his personal and economic relations are closer – the centre of vital interests) and by the ability-to-pay principle: because the state of residence taxes worldwide income and progressively, it has the whole picture of the taxpayer's accrued income and is in the ideal position to distribute the tax burden among the resident taxpayers, applying parameters of equality.

The Court also traces a distinction between object-related costs (where the comparability of residents and non-residents is valid) and personal-related costs (where residents and non-residents are not comparable), but the frontier in this case is blurred and the distinction leads to complexity and not to clarification[22].

There is a difference between creation and interpretation of law, and the ECJ has set up its own limits[23].

[21] Except in the personal income tax cases (but see the criticism to this position in B. Terra, P. Wattel, supra n. **Erro! Marcador não definido.**, pp. 979-985).

[22] See the Vera Mattner case: *supra* n. Erro! Marcador não definido..

[23] See F. Vanistendael, *supra* n. 14.

5. Universal Tax Law Standards and Protecting Loss of National Tax Revenue

The European Union instances considered together have not managed yet to find a balanced approach to the role of national taxes in the (still to be achieved) internal market. In contrast to national principles of Administrative Law that have been incorporated or even upgraded as EU constitutional principles[24], constitutional principles of tax law have been regarded as irrelevant.

That is the case of the principle of practicability. This principle could ground a valid justification for the traditional withholding taxes on gross income of non-residents, in the case of cross-border services, instead of forcing the withholding agent to deduct the "inextricably related costs"; the principle of practicability would also justify a preference for the unilateral approach in the case of outbound dividends, instead of the internal market approach. It is virtually impossible for a withholding agent to gather the relevant information and skills on the tax rules of the residence country and to decide on that basis whether it should withhold or not withhold taxes on dividends.

But that is also the case of the principle of ability to pay that is challenged by aggressive tax planning and abuse. There has not been a consistent policy that considers together, as it should, the fundamental freedoms, sound finances in Member States, ability to pay, control of loss of revenue and allocation of taxing rights.

In many relevant cases involving groups of companies, national anti-abuse rules (anti-BEPS rules) have been tackled as exceptions to the fundamental freedoms (they are justifications to restrictions) and only considered to be proportionate if they are not designed as irrebuttable presumptions. The cross-border losses and expenses cases have been object of a different line of reasoning (the mere risk of abuse is a valid justification, together with the aforementioned risk of jeopardizing the allocation of taxing rights). But the ECJ does not explain why it follows a different reasoning in the two groups of cases (it does not handle them as a different group of cases). Thus, the precedence rule is valid to all subsequent tax cases.

6. Imperfect Tax Mobility, BEPS and Tax Competition

Tax mobility is far from having been achieved in the EU, and the European Court of Justice cannot replace the legislator in achieving this goal. The ECJ has been

[24] This is due to the fact that the Administrative Principles are related to the EU Governance: See A.von Bogdandy *Gegenstand, Grundlagen und Grundbegriffen,* Europäisches Verfassungsrecht, Theoretische und dogmatische Grundzuge (von Bogdandy & J. Bast, eds.) Heidelberg, Springer (2010), pp. 15-50; in the same book: C. Möllers, *Verfassunggebende Gewalt – Verfassung- Konstitutionalisierung,* pp. 268-269; Wyatt & Dashwood's *European Union Law*, London, Sweet & Maxwell (2006), chapter 7.

either accused of protecting the taxpayer without paying due attention to the risk of tax avoidance and loss of national revenue, or, recently, of protecting the revenue interests[25]. The problem does not lie in the interpretation of the law, but in the insufficient policy action and harmonization of direct taxes[26].

The fact that mobility has not yet been achieved within the EU and the EEA and therefore creates obstacles to the setting up of an internal market stimulates BEPS behaviour – they would not exist within the EU if corporate taxation was completely neutral (whether harmonized or not), or if a CCCTB directive with formulary apportionment would be in force, even if other abusive behaviour would occur[27]; imperfect mobility also leads to tax competition between EU Member States (as well as between the EEA Member States).

The features of BEPS behaviour and tax competition in the aforementioned regional areas do not differ substantially from the situation towards the rest of the world and in the rest of the world. This can be demonstrated by the anti-abuse rules in the national corporate tax codes, in the Parent-Subsidiary Directive and in the Merger Directive, and by the public outcomes of the transfer pricing forum, such as the Code of Conduct on the Arbitration Convention and the recommendation to Member States to conclude advanced pricing agreements (APAs)[28]: none of them are different from the rules used in respect of non-EU cross-border situations, although EU hard and soft law instruments aim at multilateral instead of bilateral solutions.

7. BEPS, the EU and the OECD

Because the EU has its own governance, its own agenda and primary law obligations to achieve mobility, as well as its own cases of tax abuse, it could decide to address the above-mentioned BEPS behaviour autonomously. It could respond by harmonizing regimes, or enacting codes of conduct anticipating the OECD work.

The past decades show us that the Council and also the European Commission do not normally anticipate solutions to cross-border problems when these

[25] E.C.C.M. Kemmeren, *Recovery of Income Taxes: ECJ Tends to Allow Member States more Leeway,* 22 EC Tax Review 1 (2013), pp. 2-8.

[26] See e.g. alternative reform options on cross-border taxation of portfolio dividends: C. Spengel, L. Evers, *The Cross-border Taxation of Dividens in the Case of Individual Portfolio Investors: Issues and Possible Solutions,* EC Tax Review 1 (2012) at pp. 17-32.

[27] See W. Hellerstein in this book: *Formulary Apportionment in the EU and the US: A Comparative Perspective on the Sharing Mechanism of the Proposed Common Consolidated Corporate Tax Base.*

[28] A. C. M. Zaidan, *The External Tax Treaty Making Powers of the Member States: Defining Limits and Obligations under the Current European Legal Order* 41 Intertax 5 (2013), pp. 274-293

are being addressed by the OECD. There is no "technical" advantage for the EU to tackle those topics on its own, before solid progress has been made at the OECD level: the issues that have to be addressed in respect of BEPS are primarily global problems that have to be tackled by global answers.

But it could still be counter-argued that any potential EU law out-of-the-box solutions to mobility and its responses to transnational problems could bring external political recognition to the EU. Those solutions could be recommended to groups of other third countries, as inspiring examples of supra-national law – best practices – to the rest of the world. An inspiring example to the rest of the world can, to a certain extent, be granted by the new mutual assistance directive which moves towards automatic exchange of information: taken together with the Savings Directive, the EU shows ambition in this area and has been at the forefront of the tax transparency movement: however, also in respect of tax transparency, there has been an EU/OECD hand-in-hand progress[29].

Moreover, in the current stage of EU integration and mobility, and while/as long as the CCCTB proposed directive is not approved, BEPS behaviour is not yet to be dealt with within the EU substantially differently from the manner in which it is being addressed in the OECD Report. This does not hinder the EU from taking the forefront in implementing some of the OECD recommendations, as has happened in respect of mutual assistance.

9. International Reaction to BEPS

Taking into account the current situation as described in the OECD "Addressing BEPS" Report – increased mobility in its international meaning – and assuming that the widespread aggressive tax planning is a fact, it is herein contended that tax rules on allocation of taxing rights should, whenever possible, be improved instead of being radically changed.

This is the case of transfer pricing rules as compared to a world corporate consolidated tax base (CCTB) where allocation of revenues is implemented by formulary apportionment. In order to work perfectly, the latter system recommends harmonization of tax bases, a common currency and trust between national tax administrations. The greater the number of states involved, the more

[29] See K. Spies, *Influence of International Mutual Assistance on EU Tax Law,* 40 Intertax 10 (2012) pp. 518-530There are, however, serious problems in EU Member States, not caused by EU Law, concerning taxpayers rights and related to the use in some Member States of information illicitly obtained and to other taxpayers' fundamental rights: A. Dourado, *Exchange of Information and Validity..., supra* n. 4, pp. 17 et seq.; A. Rust , *Data Protection as a Fundamental Right* (Rust A.& Fort E.eds.), Exchange of Information and Bank Secrecy, (2012) pp. 180-181.

difficult it is to implement a common CCTB[30]. Even in the European Union, a CCCTB will be difficult to implement without a federal budget, where the corporate income tax revenue would be at least partially an EU tax[31] because Member States (mainly the tax administrations and governments) react suspiciously to different rules on allocation of taxing rights (not to mention other existing obstacles) and the possibility of revenue decrease[32].

Thus, an anti-BEPS agenda aiming to set out international standards and acknowledging the interests of and difficulties faced by emerging and developing countries must have very specific targets and must be realistic enough. Such standards need to be implemented quickly, and any radical alteration of the allocation of taxing rights rules will lead discussions to a halt.

Both the League of Nations and the OECD Models are a post-war product, a result of new world orders. Full tax reforms at the national level, as opposed to partial tax reforms, also occur after a radical change in the constitutional order or in times of serious economic and social crisis[33]. In contrast, in times of peace and stable international relations, it will be hardly possible to enact a new tax treaty model introducing a different balance to the current rules on allocation of taxing rights.

Actions have to be coordinated, but they will have to simultaneously respect national sovereignties. Joint audits, improvement of anti-abuse rules and corporate responsibility are examples of measures to be taken that are mentioned in the OECD Report and will not imply a limitation of national sovereignty.

A response to the current BEPS behaviour corresponding to an out-of-the--box thinking implies an alternative tax, such as a destination-based corporate tax. This will have to be first tested at national level, and if corporate taxation is effectively replaced in one OECD jurisdiction, it will take long before this is duly reflected in international coordination.

[30] The same is true for the constitution of a political union: J. Habermas, *Um Ensaio sobre a Constituição da Europa,* Lisboa, Edições 70 (2012) (Essay zur Verfassung Europas, Suhrkamp, 2011) pp. 61-114.

[31] See the proposal by M. P. Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice*, RSCAS PP (2012/11).

[32] See the results achieved by: R. Koch, A. Oestreicher, D. Vorndamme & S. Hohls, *Possible Effects of a Common Consolidated Corporate Tax Base on EU Tax Budget,* in this book.

[33] See the Portuguese proposal for a corporate income tax reform: T. C. Neves, *Opening Pandora's Box: Ten International Dimensions of the Portuguese Corporate Tax Reform*, Tax Notes International, Special Reports (September 23, 2013).

10. Fair Distribution of Tax Burdens, Allocation of Taxing Rights and Harmful Tax Competition

It can be safely concluded that, if the policy debate is targeted at decreasing tax evasion and aggressive tax planning, the fair distribution of the tax burden is still to be determined according to national parameters – i.e. in each jurisdiction, at the state level – , which implies that the meaning of equality among taxpayers is to be defined, as usual, by national law, in compliance with constitutional principles. Tax equality can then pursue either capital export or capital import neutrality or none of them.

And in fact, the allocation of taxing rights among jurisdictions is not questioned in the current agenda, unless there is harmful tax competition. If the latter occurs, states are encouraged by the OECD to take anti-abuse measures[34].

In the EU, this implies, so far, the prohibition of existing State Aid[35]. However, because harmful tax competition is characterized by the ring-fencing of the regime[36] (broadly corresponding to selectivity in the EU), it does not avoid a race to the bottom that covers domestic companies investing abroad: national tax measures fostering conduit companies does not fall, per se, in the definition of harmful tax competition, as long as there is no ring fence and no discrimination.

All this means that the anti-BEPS agenda aims at protecting the national fiscal interest (i.e. at collecting national tax revenue). There is, however, strong awareness that this interest cannot be achieved without global governance. Global tax governance is a condition to address BEPS and to assure tax mobility (they are two faces of the same coin), since unilateral measures will either prove to be inefficient to tackle abuse or to provoke double taxation and other tax obstacles, economic distortions and inefficiencies.

11. Global Tax Governance and EU Tax Governance

Global tax governance is to be achieved by concerted action towards enactment of international standards and subsequent transposition in legally binding instruments (i.e., hard law). In the European Union, the European Commission has enacted two recommendations on 6 December 2012 in order to address BEPS that do not differ substantially from the broad suggestions in the OECD Report. They include a model of a GAAR that converges with the ECJ case law on artificial arrangements, and that is to be adopted by all EU Member States.

[34] *The OECD Report Action Plan... supra* n. 2, Chapter 5.

[35] R. Luja *(Re)shaping Fiscal State Aid: Selected Recent Cases and Their Impact* 40 Intertax 2 (2012), pp. 120 -131.

[36] *The OECD Report Action Plan... supra* n. 2, p. 29.

The EC recommendations constitute soft law[37] but may have binding effects if adopted by the Member States. In that case, the ECJ will be competent to interpret whether the recommendations, as enacted under national law, comply with the TFEU (for example, with the fundamental freedoms) and contribute to a uniform interpretation of the recommendations in the EU Member States[38].

In the International Public Law frame, the exchange of information standard has been granted legal value by means of conclusion of TIEAs and renegotiation of exchange of information provisions in tax treaties, implementation of peer reviews to assess whether the standard has been effectively implemented, and to some extent, also the US FATCA measures[39]. Moreover, both the OECD approach to BEPS, as well as the transfer pricing forum in the EU, seem to be willing to keep the arm's length principle, and to look for solutions based on substance versus form approaches, adapting it to today's global business environment.

The fact that the reaction to BEPS must be granted globally can have two implications for the EU influence on global tax governance. It can be argued that global governance and global answers do not eliminate multi-decision levels and, consequently, the EU will still have to tackle BEPS, whether working in parallel to the G20/OECD response or after what the right answers are having been clarified, for a global dimension.

That would be the best way for the EU to fulfil its own policies constitutionally required (the creation of the internal market) and to comply with its constitutional principles (the non-discrimination principle). One way of addressing BEPS in the EU would be to approve the CCCTB proposal of directive. The G20 worries and the OECD Report could reinforce the need to abandon the arm's length principle within the EU.

In a more critical approach to the inefficient EU decision-making process, a global reaction to BEPS, led by the G20 and the OECD would mean that tax mobility in the EU is not, after all, a constitutional right (derived from a principle), requiring a specific answer (an EU answer) but merely a policy goal. If that is the case, tax mobility within the EU can be compatible with global standards and national answers to abuse of that mobility.

[37] D. Sarmiento, *The Function of EU Soft Law,* Traditional and Alternative Routes to European Tax Integration, D. Weber (ed.), Amsterdam, IBFD (2010), pp. 53-65.

[38] Cf. the ECJ 13 December 1989, Case C-322/88 (Salvatore Grimaldi v Fonds des maladies professionnelles).

[39] A. G. Soriano, *Toward an Automatic but Asymmetric Exchange of Information: the US Foreign Account Tax Compliance Act (FATCA) AS Inflection Point,* 40 Intertax 10 (2012), pp. 540-555.

In other words, the global recommendations to address BEPS could be freely adopted by each EU Member State, according to its own policy targets (to be more or less competitive) and revenue interests (anti-abuse rules targeted at cross-border situations would be admissible as long as they are proportionate).

This would also mean that the degree of integration within the EU – the internal market and the fundamental freedoms – is still far from assuring tax mobility to the EU nationals, that the goal of achieving tax mobility within the EU can be postponed *sine die* and that the Member States are still competent to address tax mobility. Both view-points and related arguments are valid to a certain extent, and are not the end of the story.

12. The Deficit of EU Tax Governance and the Increasing Tax Competition: The Need for a Fiscal Union

The fact that tax harmonization in direct taxes is so difficult to achieve (because of the unanimity rule which is effectively used by the Council to divide itself) seems to lead Member States to an increasing tax competition, of which the patent box regimes introduced by some Member States are an example[40], and where the adoption of participation exemption regimes by some of them follows the world-wide trend[41]. This tax competition, taking place not only worldwide but also within the EU, foments BEPS behaviour.

Participation exemption regimes, if not only directed at active business abroad and if not accompanied by harsh CFC and switch-over clauses, is attractive to the set up of conduit companies in the EU, and to the laundering of exempted income in non-cooperative jurisdictions[42]. Tax competition in Europe does not contribute to tax mobility, either, but, on the contrary, leads to the introduction of unilateral obstacles by the Member States that are negatively affected by those policies.

Finally, it can even be argued that the international standard on exchange of information, the US FATCA and the general move to tax transparency (including identification of beneficial owners of income) can contribute to increased

[40] See the case of Netherlands: M. Boterman and B. Van Der Gulik, *Netherlands,* The Taxation of Foreign Passive Income for Groups of Companies, 98a Cahiers de Droit Fiscal International (2013) pp. 502-503, 515.

[41] See the examples of France, Nicolas Jacquot, Cahiers... *supra* n .40, pp. 321 et seq.; and of the Netherlands, M. Boterman and B. Van Der Gulik, Cahiers..., *supra* n. 40, pp. 505-506; and the comments on the proposal to introduce a participation exemption regime in Portugal: A. P. Dourado, *A Dupla Não Tributação, a Competitividade e o que Queremos Ser e Parecer,* Jornal de Negócios (28 August 2013); and T. C. Neves, *Opening Pandora's Box...*, *supra* n. 33, at 3.3.

[42] M. Dahlberg, B. Wiman, *General Report,, Cahiers... supra* n. 40, pp. 20-22.

global tax competition[43]. In fact, low tax jurisdictions that were based on bank secrecy and lack of transparency in general may well cease to be attractive. In a (ideal) world of transparency, territorial tax systems or participation exemption systems will continue to increase and without proper global tax governance (and without EU tax governance) the entire world, including the EU Member States, will engage in tax competition.

Thus, it is herein contended that the EU also has to react to BEPS behaviour, even if accompanying the progress achieved by the OECD and by means of soft law. An EU wide-GAAR, elimination of patent-box regimes and the list of actions already identified in the OECD Report must be implemented within the EU: implementation of joint audits, joint risk assessment of MNEs, improved risk management, enhanced relationship, spontaneous exchange of information, good corporate citizens, country-by-country reporting, elimination of mismatches between different tax systems.

As a result of the financial crisis in late 2008 and the euro crisis in 2010, but especially in the context of the G20 and the OECD initiatives, the EU policy focus related to the movement of persons in the context of tax mobility has switched from the necessity of creating an internal market with no obstacles to that movement, to the necessity of fighting cross-border tax evasion and aggressive tax planning. If we believe that good tax governance is not a mere slogan, we have to be aware that political agendas in the EU Member States are increasingly targeted at short-term goals linked to the electoral cycles[44]. For good and bad reasons, the latter pressure does not exist in respect of the EU agenda itself. The good reasons are linked to the role of a supranational entity that focuses on supra-national interests and therefore is presumably more aware of the common interests in the Union. This role is played by the European Commission, but not by the Council. There are at least three bad reasons for the absence of electoral pressure within the EU: they lie in the fact that political agendas ought to be determined by the public interest but that that interest does not necessarily coincide with the opinion makers' viewpoints (e.g. the mainstream media); in the democratic deficit in Europe; and in a deep alienation of the European citizens from the EU decision makers[45].

[43] D. Dharmapala , J.R. Hines Jr., *Which Countries become Tax Havens*, 93 Journal of Public Economics (2009), at 1058; D. Dharmapala, *What Problems and Opportunities are Created by Tax Havens* 24 Oxford Review of Economic Policy (2008), at 661.
A. P. Dourado, *supra* n. 4.

[44] See the criticism in J. Habermas, *Ach, Europa*....pp. 102-104.

[45] Cf. J. Habermas, *Ach, Europa....supra* n.*7.*

13. The Current EU Tax Policy Agenda and Tax Justice and Tax Efficiency

It is fair enough to recognize, that, after all, the EU tax policy agenda (finally) reflects the good old national economic and fiscal law debate about tax justice and tax efficiency. Whereas mobility within the EU is necessary for (efficient) economic growth and the increase of public revenue (if there is no tax abuse or evasion), a determined reaction to BEPS and any other cross-border tax abuse and evasion has to be taken. In fact, equality among taxpayers has to be guaranteed so that paying taxes is perceived as a public obligation. However, the aforementioned classic goals of justice and efficiency and the related principles of tax law will not be enforceable in the EU in the absence of political integration and of EU taxes[46]. They have to be part of the globally sound finances. Alternatively, tax competition among Member States, BEPS behaviour and subsequent unilateral reactions will increase.

This chapter aimed at showing the inconsistencies and tensions regarding tax mobility in the European Union. The above mentioned insufficient policy action and harmonization of direct taxes can only be solved with more Europe: a fiscal and political union, both of which require direct democratic legitimacy of the EU decision-making powers and a federal budget (in order to comply with the no taxation without representation)[47].

[46] A joint fiscal policy is also a condition for the EMU: See J. Luque, M. Morelli and J. Tavares, *A Volatility-based Theory of Fiscal Union Formation*, EUI WP 21 (2012), pp. 1-41; see e.g. Idem, p. 28: "Either all or part of the countries move towards fiscal union; or the Euro might colapse and at least some countries will have to revert to autarky"

[47] J. Habermas, criticizing the current decision-making rules, for not granting enough democratic legitimacy to the European Union decisions (or "output"): S*upra* n. 45. Habermas cross refers to S. Oeter and the concept of Executive Federalism as an insufficient one: S. Oeter, *Föderalismus und Demokratie*, Europaïsches Verfassungsrecht..., *supra* n. 24, p. 103.