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THE AUTHORITY TO FORM DOUBLE TAXATION
AGREEMENTS: CHALLENGES OF DEMOCRATIC
LEGITIMACY, SOVEREIGNTY, AND INTERNATIONAL
INFLUENCE FROM GERMAN PERSPECTIVE

Chia-Hao Hsu



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Abstract

This paper analyzes how Germany's Double Taxation Agreements (DTAs) create tensions between international tax norms and national sovereignty. It argues that while these agreements are vital for cross-border economics, they lead to a "democratic deficit" and a "sovereignty paradox".

Despite formal parliamentary approval, the Bundestag's substantive role in DTA negotiations is diluted by the influence of international bodies like the OECD and EU. This results in parliamentary endorsement being more symbolic than truly shaping tax policy. The "sovereignty paradox" arises because Germany's formal power to amend DTAs is limited by political, economic, and legal constraints, and "soft law" from the OECD acts as a quasi-binding authority. EU membership further limits autonomy by requiring alignment with EU tax policy.

Judicial review by the German Federal Constitutional Court and the European Court of Justice offers limited practical safeguards, as both courts often show restraint in scrutinizing DTA content. This shifts policy-making power to less democratically accountable international institutions.

To counter these issues, the paper proposes institutional reforms based on constitutional loyalty (Verfassungstreue) and constitutional organ loyalty (Verfassungsorgantreue). Key recommendations include strengthening parliamentary mandates, institutionalizing consultations, enhancing public engagement, strategic participation in EU and OECD tax discussions, and safeguarding Germany's constitutional identity. These aim to balance international integration with democratic governance, ultimately enhancing Germany's credibility and the legitimacy of its role in global tax governance.



Introduction

In the increasingly globalized economy, Double Taxation Agreements (DTAs) have become essential instruments for regulating cross-border taxation, avoiding tax evasion, and fostering economic cooperation. As global tax frameworks evolve, the negotiation and implementation of DTAs expose fundamental tensions between international obligations and national sovereignty. These tensions are especially pronounced within the European Union (EU), where member states like Germany must reconcile their constitutional order with the supranational structures of EU law and influential international frameworks such as the OECD Model Tax Convention.

In Germany, the authority to conclude international treaties, including DTAs, resides with the Federal Government, represented by the Federal Ministry of Finance, and is exercised pursuant to Article 59(2) of the German Basic Law. This constitutional structure reflects the principle of democratic legitimacy through institutional delegation, whereby executive actions in foreign affairs remain normatively bound to parliamentary approval.

However, the practical reality of DTA negotiations reveals a growing imbalance between formal constitutional processes and the substantive influence exerted by international organizations. German treaty negotiators increasingly rely on standardized texts issued by the OECD and influenced by European Commission recommendations, limiting Germany's room for maneuver and diluting the Bundestag's substantive role in shaping tax policy. This development raises normative concerns regarding the erosion of parliamentary sovereignty in tax matters, which are traditionally regarded as a core domain of self-determination.

Beyond the question of democratic legitimacy, these dynamics highlight a deeper structural sovereignty dilemma: Can Germany meaningfully exercise fiscal sovereignty within the constraints of an international legal and political system that increasingly standardizes tax policy? Germany's obligations under international and EU law create normative expectations that often render domestic debate symbolic or reactive, rather than proactive and sovereign.

From a functional perspective (*Funktionsgerechtigkeit*), there is a rational justification for delegating complex international tax negotiations to the executive. Technical expertise, diplomatic skill, and institutional knowledge all favor the Federal Ministry of

Finance's leadership in treaty-making. However, functional competence does not absolve the democratic system of the need for legitimacy, especially amid the rise of right-wing populist parties in Germany. Such movements often frame international tax obligations as undemocratic impositions, potentially undermining public trust in both domestic institutions and international commitments.

Legal remedies against this democratic attenuation remain limited. Although the Federal Constitutional Court may review DTAs for compatibility with the Basic Law, its jurisprudence is restrained where international agreements coincide with binding obligations under EU law. Similarly, the European Court of Justice (ECJ) consistently affirms the primacy of EU norms, restricting Germany's ability to deviate from shared tax norms, even where domestic political opposition is strong.

This paper explores these challenges through the lens of Germany's constitutional structure, the doctrine of democratic legitimacy, and the evolving nature of international tax law. It argues that Germany must navigate a careful path between maintaining credibility in international tax cooperation and preserving the democratic legitimacy of its fiscal policy-making processes. The paper ultimately proposes institutional reforms aimed at enhancing parliamentary oversight, increasing transparency in DTA negotiations, and safeguarding Germany's constitutional identity in the face of expanding international legal commitments.



The Constitutional Framework of Treaty-Making in Germany

Constitutional Basis: Art. 59 II S.1 GG and Legislative Approval

The competence to conclude international treaties in Germany derives from Article 59 (2) sentence 1 of the Basic Law (Grundgesetz, Art. 59 II S. 1 GG)¹, which provides that the political relations of the Federation or relating to subjects of federal legislation require the consent or participation of the Bundestag in the form of a federal statute². This constitutional provision embeds the principle of democratic legitimacy in the treaty-making process by subjecting international agreements with domestic legal effect to parliamentary scrutiny and formal consent.

In legal practice, this principle is supplemented by specific legislative provisions such as Section 2 (1) of the German Fiscal Code (Abgabenordnung, § 2 I AO)³. According to the rule, international tax treaties concluded pursuant to Article 59 (2) sentence 1 of the Basic Law take precedence over domestic tax legislation, provided they have become directly applicable within the national legal order. This illustrates how, beyond the formal involvement of the Bundestag, international agreements can override ordinary legislation, underscoring both their legal authority and the significance of ensuring democratic accountability in their negotiation and conclusion.

In addition, due to Section 2 (2) of the German Fiscal Code, the Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) could even release regulations about DTAs to ensure equality of tax treatment and to avoid double taxation or double non-taxation. This subsection authorizes the BMF, with the consent of the Bundesrat, to issue ordinances for the implementation of arrangements reached by way of consultation. These

1 Article 59 of the German Basic Law:

(2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply, mutatis mutandis.

2 Drüen in Tipke/Kruse, AO/FGO, Otto Schmidt, 05/2022, § 2 AO Rz. 28; Lehner in Kirchhof/Birk/Lehner, Steuern im Verfassungsstaat, C.H. Beck, 1996, S. 97.

3 Section 2 of the Fiscal Code of Germany:

(1) Agreements on taxation concluded with other countries within the meaning of Article 59(2), first sentence of the Basic Law, shall take precedence over tax legislation insofar as they have become directly applicable domestic law.

“arrangements reached by way of consultation” refer to mutual agreements between the competent authorities of the contracting states to a DTA, aiming to determine the details of the agreement’s implementation, especially to resolve difficulties or include specific entities and institutions within the scope of public service-related provisions of the DTA. This provision highlights the executive branch’s role in the practical application and interpretation of DTAs, allowing for flexibility and responsiveness to specific cases or evolving circumstances, while still requiring oversight through the Bundesrat’s consent.

In the context of DTAs, this constitutional framework entails that although treaty negotiations are conducted by the BMF, the Bundestag must approve the finalized agreements through a formal statute. This structure embodies a deliberate balance between executive efficiency in international negotiations and parliamentary sovereignty over substantive legal commitments. It also reflects the broader German constitutional principle that “taxation requires parliamentary consent” (Parlamentsvorbehalt)⁴, protecting the Bundestag’s prerogative to oversee the imposition and regulation of taxes.

Funktionslehre (Functional Theory) and the Role of the Executive

The German constitutional order also incorporates the Funktionslehre⁵, or functional theory of governmental competence, which complements the formal constitutional framework by emphasizing the practical division of labor between governmental branches. According to this doctrine, the executive, specifically specialized ministries, is functionally suited to handle technical and diplomatic negotiations, particularly in complex fields such as international tax law.

The German constitutional order also reflects the principle of Funktionslehre, a functional theory of governmental competence that complements the formal constitutional allocation of powers⁶. This approach emphasizes the institutional logic of differentiated state functions. According to this theory, executive branch, particularly specialized ministries, is functionally suited to handle technical and diplomatic negotiations, particularly in complex fields such as international tax law.

This functional allocation ensures efficiency, expertise, and consistency in international negotiations. The BMF possesses institutional knowledge, specialized expertise, and access to advisory bodies including tax authorities and academic consultants, is structurally

4 Valta/Stendel, Dynamik des Völkervertragsrechts und Treaty Override – Perspektiven des offenen Verfassungsstaats, StuW 2019, S. 353.

5 Zimmer, Funktion - Kompetenz – Legitimation, Gewaltenteilung in der Ordnung des Grundgesetzes (GG) - Staatsfunktionen als gegliederte Wirk- und Verantwortungsbereiche - Zu einer verfassungsgemäßen Funktions- und Interpretationslehre (Habi), Schriften zum Öffentlichen Recht Bd 365, Duncker und Humblot, 1979, S. 60 ff.

6 Würtenberger, Staatsrechtliche Probleme politischer Planung (Habi), Schriften zum öffentlichen Recht Bd 360, Duncker und Humblot, 1979, S. 223ff.

equipped to represent Germany in treaty-making processes⁷. In contrast, the Bundestag lacks the institutional capacity to participate meaningfully in the detailed, article-by-article drafting of DTAs. Legislative involvement is therefore procedural and supervisory rather than substantive⁸.

Nevertheless, functional efficiency on the part of the executive cannot obscure the constitutional imperative of democratic oversight, particularly in domains as politically and legally sensitive as taxation. While functional competence justifies executive leadership in treaty negotiations, it does not override the requirement of parliamentary consent as the essential act of democratic legitimation.

The Principle of Chains of Legitimacy (Legitimationsketten)

Closely related to this institutional balance is the principle of chains of legitimacy (Legitimationsketten)⁹, a foundational concept in German constitutional theory. It requires that all exercises of public authority, whether by legislative, executive, or judicial bodies, be traceable to the sovereign people through a continuous chain of democratic delegation. This principle ensures that even international actions by the executive remain accountable to the electorate, albeit indirectly.

In the context of DTAs, the Bundestag's approval of international tax treaties serves as the constitutional mechanism linking the executive's external treaty-making authority to the sovereign will of the German people. This formal involvement is intended to uphold democratic legitimacy in fiscal matters. However, as international negotiations increasingly rely on standardized instruments, such as the OECD Model Convention and templates issued by EU institutions, the Bundestag's role is often reduced to a binary (yes-or-no) assent, rather than meaningful participation in shaping the substantive content of tax agreements.

This erosion of parliamentary influence is even more pronounced in the implementation of the global minimum tax regime. Responding to the OECD's Pillar Two initiative and the corresponding EU directive, Germany's Mindeststeuergesetz incorporates significant

7 The BMF's specialized departments (e.g., Tax Department, especially the division for international tax law) are indeed equipped with a high level of technical expertise and experience in tax treaty negotiations. They maintain continuous engagement with their counterparts in other countries and within international organizations like the OECD. This concentration of expertise is a practical necessity for dealing with the intricate details of modern tax treaties. See also: Stendel, *Expertennetzwerke treffen auf Parlamentarismus und Partizipation: Gewaltenteilung und Demokratie als Herausforderungen des internationalen Steuerrechts*, *StuW* 2025, S. 112.

8 While the Bundestag has committees (e.g., Finance Committee) that deal with tax matters, their role is primarily legislative and supervisory after a treaty has been negotiated. They typically do not possess the same depth of technical specialization or the continuous involvement in ongoing negotiations that the executive branch does. This is a common feature of parliamentary systems where foreign policy and treaty negotiations are primarily executive functions.

9 Böckenförde, *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht*, Suhrkamp, 1991, S. 299.

portions of supranational regulatory texts directly into national law¹⁰. As a consequence, legislative discretion is substantially curtailed and the Bundestag's oversight capacity is effectively neutralized. What remains is a formal ratification process that lacks meaningful deliberation, raising structural concerns regarding the preservation of parliamentary sovereignty in the field of taxation.

The transformation from active legislative participation to passive ratification raises fundamental concerns regarding the erosion of democratic legitimacy. Given that the power to tax constitutes one of the core manifestations of popular sovereignty, both historically and constitutionally, the marginalization of parliamentary involvement in shaping substantive tax norms undermines a central tenet of democratic self-government.

Interaction with EU Competences (Article 4(3) TEU)

Germany's membership in the European Union adds a further dimension to the constitutional framework, introducing supranational legal obligations and political coordination requirements. Pursuant to Article 4(3) of the TEU¹¹, the principle of sincere cooperation (loyalty principle) obliges member states to support the Union's objectives and to abstain from measures that could jeopardize the attainment of common goals. In the field of taxation, this principle has given rise to considerable political and normative pressure to align national treaty practice with overarching EU tax policy. In particular, member states are expected to harmonize their DTAs with initiatives aimed at curbing tax avoidance, enhancing fiscal transparency, and implementing the OECD's Base Erosion and Profit Shifting (BEPS) framework.

Although primary competence over corporate and personal taxation remains with the member states, and the European Union lacks direct legislative authority over the conclusion of national DTAs, Germany is nonetheless subject to increasing normative pressure to align its treaty practice with Union-wide tax policy objectives. Instruments such as the Anti-Tax Avoidance Directive (ATAD), while formally limited to domestic law, exert indirect influence by establishing standards that de facto constrain the content and structure of bilateral tax agreements, thereby reinforcing convergence with common EU tax norms.

While Germany formally retains sovereignty over the negotiation and conclusion of DTAs, this competence is exercised within a multilayered legal and political framework. Domestically, it is bound by constitutional chains of democratic legitimacy; at the supranational level, it is constrained by the duty of sincere cooperation under EU law.

¹⁰ such critic s.: Beinert, Steuerertüchtigungsprogramme: Stand und Perspektiven der europäischen Steuerertüchtigungsprogramme (BEFIT, FASTER pp.), ISR 2024, S. 143.

¹¹ Article 4 of the Treaty on European Union:

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

Together, these constraints contribute to a progressive narrowing of parliamentary discretion, thereby intensifying concerns over democratic legitimacy in the conduct of international tax treaty policy.



Democratic Legitimacy and Parliamentary Oversight

The Bundestag's Role in DTA Approval

Democratic legitimacy in treaty-making is fundamentally linked to parliamentary participation. In Germany, the Bundestag's approval of DTAs fulfills the constitutional requirement that the power to tax derives from the people, exercised through their elected representatives. This reflects the classical constitutional maxim "No taxation without representation."

However, in practice, the Bundestag's role in approving DTAs is often formalistic. The legislative process typically involves ratifying a treaty already negotiated and signed by the BMF¹². While the Bundestag has the theoretical power to reject or amend treaty approval laws, such actions are extremely rare due to the political risks of disrupting Germany's international obligations and diplomatic relationships. As a result, parliamentary deliberations on DTAs tend to be narrowly technical and procedurally constrained, with minimal engagement in broader fiscal policy discourse, even where far-reaching tax implications are involved.

Challenges from OECD and EU Templates: The Democratic Deficit

One of the primary factors contributing to the erosion of democratic influence is the prevalence of international standardization. German treaty negotiators routinely rely on the OECD Model Tax Convention, often supplemented by recommendations issued by the European Commission. These templates are designed to promote consistency, fairness, and predictability in international taxation. While these goals are laudable, their widespread use leads to the "pre-cooking" of treaty content before it ever reaches the Bundestag.

Consequently, parliamentary approval increasingly assumes the character of a formal endorsement rather than substantive participation. The Bundestag's role is effectively confined to ratifying agreements whose core content has already been shaped by international consensus. This procedural marginalization contributes to what has been

¹² In practice, most of all the DTAs are ratified in the exact version negotiated by the Federal Ministry of Finance.

described as a democratic deficit¹³ in international economic governance, a deficit that is particularly problematic in the domain of taxation, where the normative claim to democratic oversight is traditionally at its strongest.

In addition, preference for international templates constrains Germany's ability to tailor tax treaties to reflect domestic social or economic policy priorities. This normative rigidity further diminishes the scope for substantive parliamentary engagement, as key policy choices are effectively predetermined by external frameworks rather than deliberated within the national legislative process.

Reduced Space for Political Debate and Public Participation

The procedural marginalization of the Bundestag also entails a broader deficit in public debate. Tax policy has traditionally functioned not only as an instrument of economic governance but also as a central domain of democratic discourse concerning distributive justice and social solidarity. However, the closed and technocratic nature of DTA negotiations, which are typically concluded prior to legislative involvement, leaves little room for civil society participation or critical public scrutiny. Thus, fundamental questions of fiscal justice are often insulated from meaningful democratic engagement.

The lack of public participation is especially problematic in light of the distributional implications of international tax agreements. DTAs influence the allocation of taxing rights, the regulation of cross-border capital flows, and the fiscal treatment of multinational enterprises, all of which have tangible socioeconomic consequences for German citizen. However, the highly technical nature of treaty texts and the procedural opacity of negotiations render public engagement extremely difficult, reinforcing the perception of technocratic governance at the expense of democratic accountability.

Populist Critique: AfD and Other Right-Wing Positions on Tax Sovereignty

The growing populist critique of international governance in Germany exacerbates these tensions. Right-wing parties such as the Alternative für Deutschland (AfD) increasingly frame international economic cooperation, including DTAs, as manifestations of elite dominance and external encroachment upon national decision-making. The perceived loss of control over taxation resonates with voters who are skeptical of globalization, EU integration, and multilateralism more broadly.

The danger is not merely rhetorical. If public trust in the legitimacy of Germany's international commitments continues to erode, there is a realistic possibility of parliamentary resistance to future DTA ratifications, particularly where such agreements

13 Deutscher Bundestag Drucksache 14/9200, S. 446.

are politically framed as unilateral concessions to foreign interests or supranational institutions. Moreover, persistent populist opposition risks undermining the longstanding political consensus supporting Germany's engagement in international tax cooperation, thereby weakening both the internal coherence of fiscal governance and Germany's credibility as a multilateral negotiating partner.

Although populist critiques of international tax cooperation are often reductionist or strategically motivated, they nonetheless expose a structural vulnerability in the existing framework of democratic oversight. The lack of meaningful parliamentary participation creates a political vacuum that can easily be filled by anti-globalization rhetoric.



Sovereignty in the Context of International Tax Norms

Conceptualizing Sovereignty in Taxation

Tax sovereignty, classically understood as the exclusive prerogative of the state to determine and levy taxes within its jurisdiction, is closely tied to the constitutional principle of democratic self-determination¹⁴. In the German context, this is institutionalized through the Bundestag's legislative competence over fiscal matters. Yet, in practice, the growing influence of supranational legal frameworks and the dynamics of economic globalization have led to a progressive erosion of this sovereign prerogative. This development raises the question of whether formal legislative competence alone suffices to safeguard democratic legitimacy when substantive policy choices are increasingly determined by external actors.

Modern international tax law operates through a dense web of bilateral treaties, multilateral initiatives, and soft-law frameworks, particularly those developed by the OECD and endorsed by the EU Commission. Although Germany, in formal constitutional terms, retains the competence to reject or modify these international standards, the substantial economic and diplomatic repercussions associated with such divergence render this discretion largely theoretical. As a result, these frameworks function as de facto constraints on national tax sovereignty, reducing the Bundestag's effective scope for independent fiscal policymaking.

The central issue, therefore, is whether these constraints represent a conscious and constitutionally legitimate cession of sovereignty or an externally driven erosion of domestic legislative autonomy.

OECD Influence: Soft Law, Hard Effect

The impact of the OECD Model Tax Convention on Germany's practice of concluding DTAs demonstrates how soft-law instruments, despite lacking formal binding effect, can produce a substantive curtailment of sovereign discretion¹⁵. Although not legally binding *per se*, the Model operates as an international interpretative standard, its commentaries

14 BVerfG, Urteil vom 6. Dezember 2022 – 2 BvR 547/21, Rn. 121.

15 Schön, International Tax Coordination for a Second-Best World (Part I), World Tax Journal 1, 2009, S. 67.

and updates acquiring quasi-binding authority in practice, not least because German administrative bodies and courts have progressively internalized these materials into their interpretative framework¹⁶.

Germany's active participation in the OECD's BEPS framework vividly illustrates how international tax governance mechanisms can, in practice, dictate essential elements of national fiscal policy. Rejecting OECD standards would not only damage Germany's reputation as a cooperative international actor but could also lead to tax disputes, retaliatory measures, or double taxation conflicts, harming German businesses and investors abroad.

Thus, the influence of OECD standards renders increasingly ambiguous the boundary between sovereign consent and normative coercion, raising critical questions about the sustainability of democratic fiscal self-determination in an international legal order shaped by multilateral standardization.

EU Influence on Tax Sovereignty

Germany's membership in the European Union introduces an additional layer of complexity to the exercise of national tax sovereignty. Although the EU treaties leave primary competence over direct taxation to the member states, this autonomy is increasingly constrained by the practical effects of EU law, particularly through the interpretation of the four fundamental freedoms enshrined in the Treaty on the Functioning of the European Union (TFEU)¹⁷.

The ECJ has played a central role in limiting member state discretion in taxation, especially in cases where national tax rules or bilateral DTAs are found to interfere with the free movement of capital, establishment, or services¹⁸. Where such conflicts arise, national measures including treaty provisions, must be adapted to comply with EU primary law¹⁹. Furthermore, EU secondary legislation, such as the Anti-Tax Avoidance Directive

¹⁶ Franz, in: Doppelbesteuerung, Loseblatt-Kommentar, C.H. Beck, 2024, Einführung zu Art. 3 OECD-MA, Rn. 4.

¹⁷ See, for example, Article 2 TFEU and Article 4 TFEU regarding shared competence, although direct taxation remains largely a national competence subject to EU law constraints.

¹⁸ A prominent example is *Schumacker* (Case C-279/93), which established the principle of non-discrimination for non-residents. Other key cases include *Marks & Spencer* (Case C-446/03) on freedom of establishment and *Cadbury Schweppes* (Case C-196/04) on controlled foreign company rules.

¹⁹ This principle is derived from the supremacy of EU law, as established in cases like *Costa v. ENEL* (Case 6/64). National courts are obliged to set aside national law conflicting with EU law.

(ATAD) or the Interest and Royalties Directive (IRD), imposes mandatory standards on member states that can override conflicting national or treaty-based provisions²⁰.

This dynamic creates a structural asymmetry: while Germany retains formal sovereignty in the negotiation and conclusion of DTAs, the substantive content of these treaties must conform to the evolving framework of EU law. The result is that Germany's discretion in shaping its international tax relationships is limited not only by international soft law (such as the OECD Model) but also by the binding force of EU legal norms.

In this sense, Germany's tax sovereignty operates within a multi-level legal order, where national preferences are filtered through the twin constraints of international cooperation and supranational legal obligations.

Sovereignty and Democratic Representation

The interaction between international obligations and domestic constitutional law reveals a structural paradox: although Germany retains formal sovereign authority over taxation, the Bundestag's legislative discretion is increasingly circumscribed by external normative frameworks. This divergence between nominal sovereignty and effective policy autonomy gives rise to a democratic deficit. The Bundestag's limited role in shaping the substantive content of DTAs weakens the representative link between electorate and fiscal governance, thereby undermining the constitutional principle of democratic legitimation.

This democratic deficit is particularly problematic in the current political climate, marked by increasing public skepticism toward international institutions. Political actors, including parties such as the AfD, have instrumentalized perceived erosions of sovereignty to advance narratives of fiscal subordination to external, non-democratic actors²¹. Although such claims frequently overstate the actual legal constraints involved, they nonetheless reflect a legitimate societal concern regarding the democratic transparency and accountability of international economic governance.

Sovereignty as a Negotiable Concept

Finally, it is important to recognize that sovereignty is no longer an absolute concept in the context of international tax law. Germany, like other advanced economies, has opted for shared sovereignty in exchange for predictability, stability, and fairness in the

20 For ATAD, see Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market. For IRD, see Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

21 The AfD's platform consistently criticizes the European Union and other international agreements, advocating for a return of national sovereignty, particularly in fiscal matters. See, for instance, AfD's party programs for European and federal elections, which often call for Germany's withdrawal from the Eurozone and a fundamental re-evaluation of EU competencies. For analysis on their rhetoric, refer to: Martinez: Explainer-Turning back the clock: Germany's AfD and the economy, Reuters, 01.02.2024, <https://www.reuters.com/world/europe/turning-back-clock-germanys-afd-economy-2024-02-01/> (17.07.2025).

international tax system. However, this choice must be accompanied by mechanisms that maintain democratic accountability. Otherwise, formal sovereignty risks becoming symbolic, disconnected from the substantive democratic processes it is supposed to protect.

This chapter thus argues that Germany faces a dual challenge: defending its formal sovereign prerogatives in international tax negotiations while simultaneously reforming domestic processes to reintroduce meaningful democratic participation in treaty-making. Only by doing so can Germany uphold both its international credibility and its constitutional commitment to popular sovereignty.

It must finally be acknowledged that sovereignty, in the context of international tax law, no longer operates as an absolute or unitary concept. Like other advanced economies, Germany has accepted forms of shared sovereignty in return for legal certainty, stability, and fairness within the international tax order. Yet this delegation of fiscal autonomy requires corresponding institutional safeguards to preserve democratic accountability. Absent such mechanisms, the concept of sovereignty risks devolving into a merely formal construct, increasingly detached from the substantive democratic processes that confer legitimacy upon it.

Conclusion

The preceding discussion has highlighted a fundamental tension between Germany's formal retention of tax sovereignty and the practical limitations imposed by international legal frameworks, particularly those developed by the OECD. While sovereignty remains intact at the level of constitutional form, its substantive expression is increasingly conditioned by external normative structures, raising unresolved questions regarding democratic legitimacy and constitutional integrity.

The following chapters will explore these challenges in greater depth. Chapter 5 will examine whether judicial review, both constitutional and supranational, offers an effective safeguard for parliamentary sovereignty in the face of international tax obligations. Chapter 6 will turn to the political dimension, assessing how enhanced parliamentary involvement and institutional reforms might restore the democratic legitimacy of Germany's international tax commitments.



Legal Challenges and Judicial Review

Despite the judicial review powers held by both the German Federal Constitutional Court and the ECJ over DTAs, in practice, the review by both is subject to significant limitations. This situation exacerbates the democratic deficit in international tax governance and poses a challenge to parliamentary sovereignty.

Constitutional Review of Double Taxation Agreements

The primary grounds for potential constitutional challenges to DTAs lie in possible infringements of fundamental rights (Grundrechte), most notably the right to property (Art. 14 GG) and the principle of equality (Art. 3 GG). For instance, a DTA that appears to confer unjustified advantages or disadvantages on taxpayers based solely on their nationality or residence may give rise to constitutional complaints (Verfassungsbeschwerde).

As Germany's international tax obligations grow in complexity and normative scope, the likelihood of tensions between DTAs and constitutional principles correspondingly increases. Pursuant to Article 59(2) of the German Basic Law, DTAs, once ratified by the Bundestag, acquire the status of formal statutes (Gesetze im formellen Sinn) and are therefore fully subject to judicial review by the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG).

Nonetheless, the prospects for successful constitutional challenges to DTAs remain limited. The Federal Constitutional Court has traditionally exercised judicial restraint in matters involving foreign affairs and international treaty obligations²², underscoring the Bundestag's discretion in reconciling domestic constitutional norms with Germany's international responsibilities. This position reflects the doctrine of limited justiciability in foreign policy matters, pursuant to which courts defer to the political branches in the conduct of external relations, particularly where treaty-making implicates complex assessments of diplomatic and strategic interests.

²² BVerfG, Beschluss vom 14. Oktober 2004 - 2 BvR 1481/04, Rn.60; BVerfG, Urteil vom 30. Juni 2009 - 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09, Rn. 301.

Conflict with EU Law and the Role of the ECJ

While German DTAs generally withstand domestic constitutional review, they are more susceptible to challenge under European Union law. DTAs must be conformed to reach the requirements of EU primary law. In particular, such agreements are subject to scrutiny for potential infringements of the fundamental freedoms guaranteed by the Treaty on the TFEU, including the freedom of establishment, the free movement of capital, services, and goods. Accordingly, the legal validity of DTAs may be compromised where their provisions are found to restrict cross-border economic activity in ways that cannot be justified under the Court's proportionality framework.

It is important to emphasize that, within the German legal order, European Union law enjoys primacy over national law, including the German Basic Law, insofar as the areas of EU competence are concerned. In this context, the ECJ does not examine whether EU legal acts comply with the German constitution. Rather, it is assumed that EU law, by virtue of its supranational character and the principle of primacy, takes precedence over conflicting national provisions²³. Therefore, the ECJ doesn't declare that European Union law must be interpreted or applied in accordance with the German Basic Law. Any tensions between EU obligations and the German constitutional order are addressed primarily through political dialogue or, where necessary, through constitutional review by the German Federal Constitutional Court, not through judicial adjustment of EU law by the ECJ itself²⁴.

As a consequence, Germany's discretion in the field of treaty-making is structurally constrained by its obligations as a member state of the European Union. However, this does not imply that the content of DTAs is subject to comprehensive judicial review by either the German Federal Constitutional Court or the ECJ. In practice, both courts exercise significant restraint with regard to the scrutiny of DTAs. The Federal Constitutional Court generally refrains from examining the substantive provisions of international treaties such as DTAs, focusing instead on the procedural requirements for their conclusion. Similarly, while DTAs may be indirectly affected by the requirements of European Union law, the ECJ does not engage in direct review of the agreements themselves. The concrete content of DTAs often escapes detailed constitutional or supranational judicial scrutiny, even though these agreements may significantly shape the fiscal obligations of taxpayers.

23 This is a fundamental aspect of the EU legal order. The ECJ's role is to ensure the uniform interpretation and application of EU law (Article 19 TEU). It does not assess the compatibility of EU law with the national constitutions of member states.

24 The relationship is a cornerstone of the constitutional dialogue between the German Federal Constitutional Court and the ECJ. The BVerfG, while generally acknowledging the primacy of EU law, reserves the right to review EU acts against the "identity" of the German Basic Law or in cases of *ultra vires* acts (acts exceeding EU competence). Recently, some cases illustrate the BVerfG's role in safeguarding constitutional identity and ultra vires control, rather than the ECJ interpreting EU law in light of national constitutions, such as BVerfG, Urteil vom 05.05.2020 – 2 BvR 859/15 u.a., Rn. 279.

The Role of the OECD and Judicial Interpretation

Although the OECD Model Tax Convention and its Commentaries do not constitute binding international law, they are regularly accorded significant interpretive weight by German courts, including the Federal Fiscal Court (Bundesfinanzhof)²⁵. This jurisprudential practice reflects a functional orientation toward interpretive harmonization in international tax law and serves to mitigate the risk of legal divergence or treaty conflict. As such, the OECD materials operate as a form of “soft law” whose persuasive authority effectively shapes the application and understanding of DTAs within the German legal order.

As a consequence, Germany’s discretion in the field of treaty-making is structurally constrained by its obligations as a member state of the European Union. However, this does not imply that the content of Double Taxation Agreements (DTAs) is subject to comprehensive judicial review by either the German Federal Constitutional Court or the ECJ. In practice, both courts exercise significant restraint with regard to the scrutiny of DTAs. The Federal Constitutional Court generally refrains from examining the substantive provisions of international treaties such as DTAs, focusing instead on the procedural requirements for their conclusion. Similarly, while DTAs may be indirectly affected by the requirements of European Union law, the ECJ does not engage in direct review of the agreements themselves. The concrete content of DTAs often escapes detailed constitutional or supranational judicial scrutiny, even though these agreements may significantly shape the fiscal obligations of taxpayers.

Procedural Obstacles to Judicial Enforcement

The increasing reliance on OECD Commentaries in the judicial interpretation of DTAs raises significant constitutional concerns. To date, the Federal Constitutional Court has not conclusively determined whether such reliance is compatible with the constitutional principles of legal certainty (Rechtssicherheit) and the legislative reservation in matters of taxation (Gesetzesvorbehalt, Art. 20 III GG). This gives rise to a potential normative tension: if OECD Commentaries evolve over time and deviate from the original understanding prevailing at the moment of ratification, it remains unclear whether German courts may constitutionally defer to such post hoc interpretations without undermining the foreseeability and legality of tax obligations under domestic law. This issue also creates legal uncertainty for taxpayers, as courts adopting OECD interpretations published after a treaty’s conclusion could potentially violate their legitimate expectations (Vertrauensschutz).

25 BFH: Verdeckte Gewinnausschüttung - Sperrwirkung von Art. 6 Abs. 1 DBA-Niederlande 1959 (Art. 9 Abs. 1 OECD-MustAbk) gegenüber Sonderbedingungen bei beherrschenden Gesellschaftern, BB 2013, 360; Sperrwirkung von Art. 6 Abs. 1 DBA-Niederlande 1959 (Art. 9 Abs. 1 OECD-MA) gegenüber Sonderbedingungen bei beherrschenden Gesellschaftern – Gewinnabgrenzung, ISR 2013, 55.

Further, the Federal Constitutional Court exercises considerable restraint in invalidating statutes that implement international agreements, mindful of the potential foreign policy consequences of such decisions. This judicial deference reflects a broader constitutional practice of respecting the executive's prerogatives in external relations. Consequently, while judicial review formally remains available, it often functions more as a theoretical safeguard than as an effective check on the executive's treaty-making authority in practice.

Structural Supremacy of International Norms

These developments reveal a de facto primacy of international tax norms, especially those emanating from the OECD and the European Union, over Germany's domestic legislative autonomy. While formal sovereignty is preserved in constitutional doctrine, the Bundestag's substantive policy-making capacity is significantly constrained by the combined effects of soft law instruments, binding EU directives, and judicial restraint. These dynamics underscore the tension between constitutional theory and political reality in the governance of international taxation.

This increasing divergence between formal legislative authority and substantive normative influence poses significant political and constitutional challenges. It reduces the transparency of tax norm creation and reallocates critical policy-making power to international institutions that operate beyond the reach of direct democratic accountability.

Implications for Democratic Legitimacy

The limited efficacy of judicial review in safeguarding German parliamentary sovereignty highlights a broader legitimacy deficit within international tax governance. In the absence of robust institutional mechanisms to contest or renegotiate externally imposed tax obligations, both the electorate and their representatives risk growing alienation from the fiscal policies that govern them. This democratic disengagement creates fertile ground for populist mobilization around sovereignty concerns, thereby jeopardizing Germany's international standing and undermining the coherence of its constitutional order.

Ultimately, this chapter suggests that judicial review alone cannot compensate for structural imbalances in international tax law. Instead, enhanced parliamentary involvement, procedural transparency, and active political engagement at the EU and OECD levels are required to restore both legal and democratic legitimacy to Germany's international tax commitments.

Overall, the judicial review of DTAs by both the German Federal Constitutional Court and the ECJ exhibits significant limitations, making it more difficult to effectively remedy the inherent democratic deficit in international tax norms and thereby undermining the democratic legitimacy of Germany's fiscal policy.



Functional Arguments vs. Parliamentary Sovereignty

The Functional Competence of the Executive

Proponents of concentrated executive authority in treaty-making frequently justify limited parliamentary involvement in DTAs by appealing to considerations of functional efficiency. The negotiation of tax treaties entails a high degree of technical complexity, encompassing specialized domains such as international tax law, transfer pricing, permanent establishment rules, anti-avoidance measures, and dispute resolution procedures. The BMF possesses the requisite institutional expertise, procedural continuity, and access to specialized advisory bodies, enabling it to effectively represent Germany's interests in bilateral and multilateral negotiations.

In contrast, the Bundestag lacks the specialized committees and technical expertise necessary for substantive engagement in complex treaty negotiations. Furthermore, tax treaties frequently implicate sensitive diplomatic considerations that demand confidentiality and swift responsiveness, conditions that are inherently incompatible with the deliberative and comparatively slow pace of parliamentary procedures²⁶. From this standpoint, functional specialization provides a compelling justification for the executive's predominant role in negotiating DTAs.

Parliamentary Oversight as a Constitutional Imperative

Despite the functional advantages of executive leadership, there remains a constitutional imperative to uphold parliamentary sovereignty in taxation. The German Basic Law enshrines the Bundestag's exclusive authority to determine tax policy, underscoring the principle of democratic legitimacy. The chains of legitimacy require that executive actions must ultimately be traceable to parliamentary authority, especially in matters involving taxation, which have direct implications for citizens' financial obligations.

Functional competence cannot supplant this foundational constitutional principle. While the Bundestag may lack specialized technical expertise, its representative legitimacy guarantees that the political will of the electorate informs decisions regarding Germany's

²⁶ See: Goldsmith/Posner, *The Limits of International Law*, Oxford University Press, 2005, S. 99-100.

participation in international tax coordination. The Bundestag, therefore, should not be reduced to a mere rubber stamp for executive-negotiated agreements. The core challenge lies not in substituting parliamentary authority with executive efficiency, but rather in devising institutional arrangements that harmonize technical proficiency with democratic control.

The Risk of Political Gridlock

A principal objection to enhancing parliamentary participation concerns the risk of political deadlock²⁷. Should the Bundestag assume a more substantive role during negotiation or systematically withhold consent to DTAs, it could introduce considerable uncertainty into Germany's international tax relations. Since businesses depend on the stability and predictability of treaty frameworks for cross-border planning, recurrent legislative interventions or treaty rejections may undermine Germany's credibility and complicate its diplomatic and economic ties with key treaty partners²⁸.

Moreover, persistent parliamentary resistance to DTAs may provoke constitutional crises, including conflicts over budgetary prerogatives or even motions of no confidence (Vertrauensfrage)²⁹ directed at the executive. Such dynamics underscore the inherent tension between the imperatives of efficient foreign policy-making and the demands of democratic governance. Nonetheless, circumventing democratic contention by curtailing parliamentary participation cannot constitute a sustainable or legitimate solution in the long term.

The Imperative of Constitutional Loyalty (Verfassungstreue) and Constitutional Organ Loyalty (Verfassungsorgantreue)

These potential conflicts and risks of deadlock underscore the fundamental importance of constitutional loyalty (Verfassungstreue) among all state organs. The principle of constitutional loyalty is a foundational, unwritten principle of German constitutional law. It requires all state organs to act in a manner that upholds the

27 The fear is that the detailed and often politically charged nature of parliamentary debate could slow down or even derail sensitive international agreements. See: Harriott, *The Dilemmas of Democracy and Foreign Policy*, *Journal of Peace Research*, Vol. 30, No. 2, 05.1993, S. 223.

28 The stability and predictability of the international tax framework are crucial for multinational enterprises. Frequent changes or uncertainties in DTA application can lead to increased compliance costs, double taxation, and disincentives for foreign investment. This pragmatic argument for executive efficiency weighs heavily in debates about treaty-making.

29 The term "Vertrauensfrage" refers either to a formal vote of confidence initiated by the Chancellor under Art. 68 I GG, or to a vote of no confidence introduced by parliamentary groups pursuant to Art. 67 I GG. Persistent parliamentary obstruction of government policy, including in treaty ratification, can indeed lead to severe political friction and potentially constitutional confrontations between the legislative and executive branches, as the executive might argue that its ability to govern effectively is being undermined.

constitution, even in the exercise of their distinct powers. It fosters a spirit of cooperative federalism and institutional respect³⁰. In Germany, the concept, particularly its extension into constitutional organ loyalty (Verfassungsorganantreue)³¹, dictates that all constitutional bodies (the executive, the legislature, and the judiciary) must act in good faith to uphold the Basic Law and cooperate towards its realization, particularly in areas touching upon fundamental constitutional principles like parliamentary tax sovereignty and democratic legitimacy. This reciprocal duty, grounded in the protection of the constitutional order (Verfassungsschutz)³², demands that each branch acknowledges and respects the legitimate functions of the others. By operating under a shared commitment to constitutional fidelity, the risk of democratic paralysis or institutional disaster, arising from a purely adversarial understanding of power separation, can be significantly mitigated, paving the way for constructive solutions.

Toward a Balanced Institutional Approach

A balanced solution lies in designing institutional mechanisms that enhance parliamentary oversight without undermining the executive's functional competence. Several models are available:

Pre-Negotiation Mandates: The Bundestag could issue general or specific negotiation mandates to the BMF before treaty talks commence, ensuring that democratic preferences shape the negotiation agenda.

Ex-Ante Consultations: Formalizing consultative procedures between parliamentary committees and ministry negotiators during the negotiation process would allow for early input without publicizing confidential details.

Post-Negotiation Hearings: Enhanced post-negotiation hearings before ratification would provide a structured forum for debate on the broader policy implications of DTAs, increasing transparency and public accountability.

These mechanisms could mitigate the democratic deficit without imposing paralyzing procedural burdens on the executive branch.

Democratic Legitimacy as the Foundation of Effective Tax Policy

Obviously, effective international tax policy demands a careful balance between technical expertise and democratic legitimacy. Overemphasizing functional competence at the expense of parliamentary sovereignty risks producing policies deficient in

30 Battis in Sachs: Grundgesetz Kommentar, 10. Aufl., C.H. Beck, 2024, Art. 33 GG, Rn. 34.

31 Poscher in Herdegen/Masing/Poscher/Gärditz: VerfassungsR-HdB/Poscher 1. Aufl., C.H. Beck, 2021, § 3, Rn. 125.

32 Gunter in: Dietrich/Eiffler, Handbuch des Rechts der Nachrichtendienste, Boorberg, 2017, S. 578.

societal consensus, particularly in politically sensitive domains such as taxation, where considerations of equity, fairness, and distributive justice are fundamental.

Absent strengthened parliamentary engagement, Germany risks exacerbating the politicization of tax policy through populist backlash, as citizens increasingly perceive a disjunction between international obligations and domestic democratic oversight. Conversely, a proactive and well-informed legislature can function as a stabilizing institution, bolstering the legitimacy of Germany's international tax policy and enhancing its resilience against populist challenges.



Conclusion and Policy Recommendations

This paper has explored the structural tensions between Germany's constitutional framework and the growing influence of international tax norms, particularly from the OECD and the European Union. While DTAs are crucial for preventing tax evasion and fostering cross-border economic cooperation, they also challenge democratic legitimacy and national sovereignty. The functional advantages of executive-led negotiations don't erase the democratic deficit caused by limited parliamentary influence and the significant role of international organizations in shaping domestic tax policy.

Germany's constitutional framework prioritizes parliamentary democracy, granting the Bundestag exclusive authority over taxation. However, the increasing reliance on international templates like the OECD Model Convention and mandatory EU directives restricts the Bundestag's effective legislative power, even with formal ratification processes in place. This erosion of meaningful parliamentary participation in shaping DTAs threatens the legitimacy of Germany's tax policy in the eyes of its citizens.

Furthermore, judicial review mechanisms, while available, offer limited practical ways to protect parliamentary sovereignty. German courts are often restrained in foreign affairs, and the ECJ tends to prioritize EU integration over national autonomy. This creates a sovereignty paradox for Germany: while it formally retains the power to reject or amend DTAs, political, economic, and legal constraints make that power largely symbolic.

Given these challenges, institutional practices need to be rebalanced to protect democratic legitimacy without harming Germany's position in the international tax order. The following policy recommendations aim to achieve this, grounded in the fundamental principles of constitutional loyalty, constitutional organ loyalty and the collective duty of constitutional protection:

1. Strengthening Parliamentary Mandates: The Bundestag should consider developing formal negotiation mandates for international tax treaties. By providing broad policy parameters before negotiations begin, parliament can ensure that the executive negotiates within democratically sanctioned frameworks, enhancing accountability without impairing diplomatic flexibility. This approach reflects a mutual constitutional loyalty, where the executive respects parliamentary prerogative from the outset.

2. Institutionalizing Ex-Ante Consultation: Structured consultative mechanisms between the Bundestag's finance committees and the BMF should be established, particularly for treaties with major economic or distributive consequences. Confidential briefings, guided by parliamentary privilege, could maintain secrecy while providing necessary democratic oversight.

3. Enhancing Public Engagement: Increasing transparency regarding the objectives and potential implications of DTAs is essential for restoring public trust in Germany's tax policy. Public hearings or white papers explaining the rationale for treaty provisions could bridge the gap between technical expertise and democratic participation.

4. Strategic Engagement at the EU and OECD Levels: Germany must proactively shape international tax norms, particularly within OECD working groups and EU tax committees, to align supranational standards with German constitutional principles. Passive adoption of externally driven norms increases the risk of domestic political backlash.

5. Safeguarding Constitutional Identity: Finally, Germany should emphasize the constitutional identity doctrine in its interactions with EU law, reaffirming that certain core democratic principles, including fiscal sovereignty, cannot be fully delegated without jeopardizing the legitimacy of the democratic state.

These recommendations reflect a pragmatic balance between the realities of international economic integration and the imperatives of democratic governance. Failure to address these tensions risks not only legal incoherence but also political destabilization, particularly in a context of rising populist skepticism toward supranational institutions. Conversely, strengthening domestic democratic processes surrounding tax treaty-making can enhance Germany's credibility as an international actor and reinforce the legitimacy of its participation in the evolving architecture of global tax governance.

Germany's experience in this regard may serve as a model, or even a warning, for other EU member states grappling with similar dilemmas of sovereignty, legitimacy, and global responsibility. The challenges Germany faces in the realm of DTAs are not unique to its context but offer valuable lessons or warnings for other EU member states.

Future research could further explore several aspects: Firstly, comparative studies could analyze the differing strategies, legislative models, and judicial practices adopted by other EU member states in addressing the democratic legitimacy of DTAs, and evaluate their effectiveness. Secondly, given the continuous evolution of international tax law, particularly new initiatives under the OECD and EU frameworks, research could focus on how these developments continue to impact national tax sovereignty and democratic oversight mechanisms. Finally, exploring the potential role of non-governmental organizations (NGOs) and civil society in enhancing DTA negotiation transparency and public participation might offer new perspectives on bridging the democratic deficit.