International Tax Law: New Challenges to and from Constitutional and Legal Pluralism

Editor: **Joachim Englisch**

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International Tax Law: New Challenges to and from Constitutional and Legal Pluralism

Why this book?
This book is the result of the 9th GREIT Conference on constitutional and legal pluralism in the field of international taxation. It analyses in which respect, and to what extent, national, international or supranational provisions of international tax law are subject to constitutional requirements of a different legal pedigree.

The book focuses on aspects that have not yet received much attention in legal research and thus goes beyond the now well-established fundamental freedom scrutiny of tax systems of the EEA Member States. In addition to consequences for taxpayers and courts, it covers tax policy implications. In that context, the much discussed initiatives by the OECD and the European Union on harmful tax planning and tax competition receive particular attention.

The book is divided into nine chapters treating different aspects of the abovementioned issues. The framework is set by a first chapter on the theoretical foundations and fundamental implications of the concept of pluralism. The following chapters focus on the principles of territoriality, on non-discriminaton standards, and on the fundamental freedoms. Aspects of cooperation and coordination in international tax law are discussed thereafter. Finally, an in-depth analysis of different aspects of tax competition, as well as of different concepts for the prevention of aggressive tax planning, is offered.

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Preface

This book is a collection of academic papers that were presented and discussed at the 9th annual conference of the Group for Research on European and International Taxation (GREIT). The conference was held at the Law Faculty of the University of Münster, Germany, on 18 and 19 September 2014. During two days of intense scholarly debate, different aspects of constitutional and legal pluralism in the field of international taxation were analysed; the framework for the discussion was set by a keynote on the theoretical foundations and fundamental implications of the concept of pluralism. Several contributions explored in which respect, and to what extent, national, international or supranational provisions of international tax law are subject to constitutional requirements of a different legal pedigree. As is the hallmark of GREIT research, much of the analysis was pioneering work and certainly went beyond the now well-established fundamental freedom scrutiny of tax systems of the EEA Member States. In a similar fashion, recent phenomena of legal pluralism were scrutinized; in this context, the papers focused on parallel tax regimes at different layers of legislation and governance. During debate, the need for legal reconciliation and institutional coordination became palpable. At the time of the conference, the OECD BEPS project was already in full swing, which also heavily influenced the deliberations of participants. Finally, possible developments of a *Europe à deux vitesses,* also in the field of international taxation, were outlined.

I am thankful to my friends and colleagues Ana Paula Dourado, Cécile Brokelind, Pasquale Pistone and Dennis Weber, who initiated the GREIT project and who entrusted me with hosting the 2014 conference. I am furthermore grateful for all others who have contributed to the academic success of this conference and to the publication of this book, as speakers, authors and panel chairs and members. I also wish to warmly thank Hanna Datzer for her invaluable support and the perfect organization of the conference, as well as for assisting me in my role as editor of this book. She and the entire team of my Institute for Tax Law were fully dedicated to making the 9th GREIT event a lasting contribution to tax law research, and to providing all attendees with many enjoyable moments also beyond the academic debate.

I gratefully acknowledge the generous support of the conference and the publication of this book by our sponsors, the Deutsche Forschungsgesellschaft (DFG), PwC and IBFD.

My final thanks goes to the Publishing Department of IBFD, and to Ms Jane Kerr in particular, for her continued optimism and relentless insistence on getting this book published.

Joachim Englisch
Münster, January 2016

Chapter 8

International Tax Coordination through the BEPS Project and the Exercise of Tax Sovereignty in the European Union

Pasquale Pistone

8.1. Introduction

After several decades of stability of fundamental conceptual tax categories, the BEPS project has activated an unprecedented evolution in the history of international taxation, with a view to achieving high levels of international tax coordination and countering base erosion and profit shifting.

On 5 October 2015, the OECD presented the final BEPS package, which was discussed at the meeting of the G20 finance ministers in Lima (Peru) on 8 October 2015 and formally approved at the summit of the G20 leaders held in Antalya (Turkey) on 15-16 November 2015. Despite this remarkable display of endorsement, the actual impact of the BEPS project on international tax coordination is still difficult to determine, and uncertainty may increase in connection with the implementation of the BEPS project over the next few years, depending on how it is ultimately implemented around the world. It thus appears to be the right time to set forth some reflections on the challenges and opportunities offered by the BEPS project through the filter of EU law, emphasizing the many points of convergence as well as the potential points of tension between the two agendas.

This chapter focuses on how the competitiveness of tax systems will have to be reshaped in the global context and places the emphasis on the perspective of EU law. This raises a two-pronged set of issues, namely (i) how the BEPS project affects EU law aspects concerning the exercise of taxing powers by Member States and (ii) the extent to which EU law allows for the implementation of BEPS project recommendations inside the European Union. The author supports the view that a stronger fight against base erosion and profit shifting does not per se constitute a problem from the perspective of EU law, but is rather an occasion to achieve an effective exercise of taxing sovereignties within the framework of transparent competition among states. Within such a framework, to the extent that states have reached an agreement as to strengthening their reaction to phenomena of base erosion and profit shifting

in a coordinated way, they should be allowed to shift from countering tax avoidance to countering aggressive tax planning, as well.

The author supports the notion that EU Member States may legitimately go beyond the fight against abusive tax practices in order to stop the exploitation of cross-border tax disparities. However, the author submits that the compatibility with EU law has not been satisfactorily addressed within the framework of the BEPS project. This chapter will present various technical reasons to support this conclusion, despite the fact that several documents of the BEPS project analyse the issues of compatibility with EU law.

There is, possibly, a structural problem that prevents a satisfactory assessment of such issues. In the presence of the exclusive jurisdiction of the Court of Justice of the European Union to interpret the compatibility of national law,[1] neither the OECD, nor EU Member States nor the EU Commission are in a position to make assertions on the compatibility with EU law with exact certainty and binding effects. Attempts to provide for mechanical application of measures that are aimed at countering base erosion and profit shifting, are structurally at odds with the need of EU law to achieve a proportionate reaction to such phenomena.

The author concedes that the BEPS project has narrowed the situations in which such problems may arise, such as, for instance, in respect of the application of limitation-on-benefits clauses to companies quoted on a stock exchange.[2] However, the BEPS project raises problems of compatibility with EU law that should be interpreted in light of their technical issues and with a view to achieving suggestions that can address them satisfactorily. This chapter will set forth some solutions, taking into account the potential implications that may arise at the global level also for non-EU Member States. The analysis focuses on the issues and their solutions, without taking into account the possible instruments that can be used for the implementation of the BEPS project.[3]

1. For EU law purposes, national law includes domestic and treaty law of the EU Member States.
2. In particular, the BEPS Action 6 Final Report acknowledges that, as a general rule, because the shares of publicly-traded companies and of some entities are generally widely held, these companies and entities are unlikely to be established for treaty shopping purposes. OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Action 6: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 5 Oct. 2015), sec. A, para. 11, International Organizations' Documentation IBFD.
3. The analysis of issues concerning their implementation through supranational tax law of the European Union, as suggested by the EU Commission on 28 January 2016, is

Based on such a perspective, the emphasis will be on principles and procedures that are relied on to identify and reduce harmful tax practices. This objective presupposes a conceptual and terminological introduction on harmful tax practices, aggressive tax planning and abusive practices.

The institutional development that underlies the BEPS project will also be addressed with regard to the shift towards coordinated tax multilateralism and global supranational tax law.[4]

After outlining the main features of transparent tax competition and those of the prohibition of abusive practices and aggressive tax planning, the core part of this chapter will focus on the relation between the BEPS project and EU law. In particular, selected issues from the BEPS project will be grouped into two main categories based on their impact on EU tax law. The first category includes measures that enhance European tax integration without giving rise to insurmountable issues – thus having an essentially positive impact. The second category includes measures that present some significant issues of compatibility with EU law.

8.2. Tax disparities and the consolidation of new conceptual categories: Abusive practices and aggressive tax planning

The BEPS project marks a radical change in the boundaries of tax competition. States have traditionally reacted to abusive tax practices, but are currently showing a firm commitment to counter all tax advantages obtained across borders more generally when their sovereignty is being eroded, or profits are shifted to a different jurisdiction. For this purpose, states are agreeing to coordinate the exercise of their tax jurisdiction in order to effectively counter aggressive tax planning.

Both abusive practices and aggressive planning can give rise to forms of unacceptable tax competition, but are essentially two different phenomena

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the object of a different study, on which *see* P. Pistone, *BEPS, Capital Export Neutrality and the Risk of Hidden Tax Protectionism. Selected Remarks from an EU Perspective*, in *Base Erosion and Profit Shifting (BEPS) - Impact for international tax policy* (R. Danon ed., Schulthess 2016), ch. 12.

4. On the shift from bilateralism to multilateralism in international taxation, *see also* P. Pistone, *Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law*, 6 World Tax J. 1 (2015), at 3, Journals IBFD.

which the BEPS project sometimes bundles together in a way that may cause some legal uncertainty for the purposes of this chapter. The relation between abusive practices and aggressive tax planning essentially corresponds to that between tax avoidance and the exploitation of tax disparities to the advantage of taxpayers.

Tax disparities arise from the exercise in parallel of two jurisdictions, neither of which takes precedence over the other. Disparities can create advantages or disadvantages for taxpayers across borders. Only in the case of tax systems shaped in a way so as to systematically produce favourable effects for taxpayers across borders, has the Court of Justice of the European Union concluded that such disparities could be addressed at the level of interpretation, namely within the framework of the prohibition of State aid.[5] In all other cases, including all disparities giving rise to disadvantages for taxpayers that are active across borders, the Court has always concluded that an essentially uncoordinated framework for the exercise of taxing powers in cross-border situations, in fact, prevented the possibility of addressing such issues at the level of interpretation.[6] Accordingly, the Court has rejected the notion that juridical double taxation arising in cross-border situations could be declared incompatible with fundamental freedoms.[7]

The BEPS project is evidence that states are willing to coordinate the exercise of their taxing powers in order to *counter taxpayer exploitation of disparities* (for purposes of eroding the tax base). For this reason the author suggests that the Court of Justice of the European Union could now contemplate reconsidering its case law on disparities – at least in some cases. In particular, the commitment for coordinating the exercise of taxing jurisdictions within the framework of the BEPS project should allow determining what jurisdiction should prevail in some of the cases that give rise to juridical double taxation. Likewise, the solutions adopted within the framework of the BEPS project for coordinating the exercise of tax jurisdiction should allow the Court to approach some of the tax disparities that create advantages for taxpayers in a way that does not correspond to value creation.

5. ES: ECJ, 15 Nov. 2011, Case C-106/09_P, *European Commission and Kingdom of Spain v. Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, (2011) ECR I-11113, ECJ Case Law IBFD.
6. This matter is therefore to be addressed at the level of positive integration.
7. BE: ECJ, 14 Nov. 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres v. Belgische Staat*, (2006) ECR I-10967, ECJ Case Law IBFD; BE: ECJ, 16 July 2009, Case C-128/08, *Jacques Damseaux v. État Belge*, (2009) ECR I-06823, ECJ Case Law IBFD.

This outcome can also be used to approach the problems arising in connection with so-called double dipping. Double (or multiple) dipping refers, in essence, to double (or multiple) deductions in respect of single payments, or the combination of (one or more) deduction(s) with non-taxation. They are a recurrent example of inconsistencies arising in connection with cross-border disparities and the different reasoning followed by tax jurisdictions. Because of its position on disparities, the Court of Justice of the European Union has only marginally acknowledged the principle of "one payment, one deduction" in cross-border situations, admitting that the need to prevent or counter double dipping could be bundled together with other grounds for justifying a restriction on fundamental freedoms.[8]

However, in the presence of tax coordination, the author believes that, going forward, the Court should consider the need to counter double dipping as a stand-alone justification, also considering that some specific measures are being taken by the BEPS project in respect of circumstances such as Action 2 (on hybrid instruments and entities) and Action 5 (on harmful tax competition). This intervention would be even more well-grounded, considering that the reaction of the BEPS project is not limited solely to abusive tax practices, but also to aggressive tax planning.

In light of the above, one can argue that abusive practices entail a friction between form and substance for tax purposes, while aggressive tax planning disrupts the consistency in tax treatment, opening up unintended advantages across borders that would not be accessible within a single taxing jurisdiction.[9]

The conceptual difference does matter, as anti-abuse (i.e. anti-avoidance) measures are structurally unfit to target cross-border tax advantages not connected with a friction between the form and substance of a given transaction or scheme. After all, had general anti-abuse rules (GAARs), specific anti-abuse rules (SAARs) or targeted anti-abuse rules (TAARs) been able to curb aggressive tax planning, base erosion and profit shifting by multinational enterprises (MNEs) would not have reached the very serious dimensions

8. E.g. UK: ECJ, 13 Dec. 2005, Case C-446/03, *Marks & Spencer plc v. Halsey (Her Majesty's Inspector of Taxes)*, (2005) ECR I-10837, para. 47, ECJ Case Law IBFD.

9. In this regard, it may possible to see some links between such an understanding of aggressive tax planning and the pursuit of "international tax arbitrage", a concept on which US scholarship has been focusing – to the extent of making it a term of art. *See* R. Avi-Yonah, *Tax Competition, Tax Arbitrage and the International Tax Regime*, 61 Bull. Intl. Taxn. 4 (2007), at 130, Journals IBFD.

that were among the reasons that spurred the OECD and G20 to react to them.

The difference also matters in light of EU developments in this area, as EU law sets strict requirements for justifying the reaction to abusive practices in respect of fundamental freedoms, but – until now – has applied a different approach to disparities.

When it comes to the emergence and consolidation of the concept of aggressive tax planning in the aftermath of the BEPS project, a parallel can be drawn with the evolution of the concept of "harmful tax competition". Tax competition per se was never considered "harmful" until after the mid-1990s. The defining moments in this regard were the release of the 1997 EU Code of Conduct[10] and of the 1998 OECD Report on Harmful Tax Competition.[11]

In light of the more recent developments brought by the BEPS project, one can argue that harmful tax practices and abusive practices are two different forms of the same problem: the erosion of the integrity of the tax base and, as such, it appears reasonable to target them jointly; at the same time, the fundamental distinction developed above needs to be borne in mind in order to avoid undue overlaps on the conceptual plane, which in turn may translate also on the policy plane.

8.3. European tax law and BEPS: Convergences in light of the shift towards multilateralism in international taxation

8.3.1. An overview

When carrying out an analytical survey of the impact of the BEPS project on EU law, it is important to frame the analysis into a broader context that also includes global tax transparency. In this regard, it is noteworthy that the political mandate of the OECD and G20 achieved in only a couple of years levels of tax coordination which EU Member States had failed to reach over several decades. Such developments are particularly significant and contribute to removing cross-border tax obstacles within the European Union and

10. Code of Conduct for Business Taxation, set out in the conclusions of the Council of Economics and Finance Ministers (ECOFIN) of 1 Dec. 1997 (98/C2/01).
11. OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD 1998).

in relations with third countries. However, EU Member States are obliged to interpret their commitments under the BEPS project in line with their obligations stemming from the supranational law of the European Union.

Several efforts were made to address the problems of the compatibility of the BEPS project with EU law. The active involvement of the European Commission in the working groups has also been particularly critical in this regard. However, the view of the Commission does not prevent the Court of Justice of the European Union, which is the single judicial body interpreting EU law, from ascertaining a conflict with supranational law of the European Union. Furthermore, the complexity of this scenario is increased by the dynamic nature of the legal order of the European Union and its gradual evolution towards its ultimate goals of integration.

The author perceives a potential for grey areas, in which the compatibility of the outcome of the BEPS project with EU law is not entirely clear. Some issues can be addressed at the level of interpretation, by having EU Member States apply a reconciliatory interpretation with the object and purpose of EU law.[12] However, this technique does not resolve all issues, and especially the structural attempt of the BEPS project to mechanically apply its solutions in order to prevent problems from occurring. Such an approach is likely to be at odds with the core values of EU law, which require a substance analysis in order to single out genuine practices in compliance with the principle of proportionality. The author submits that the potential for grey areas concerning the relations with EU law could generate additional elements of legal uncertainty, potentially giving rise to harmful repercussions for business and undermining the success of the entire BEPS project.

8.3.2. The pivotal role of transparency

As far as tax transparency is concerned, EU Member States have long rejected the idea of allowing full transparency in respect of certain types of income (such as in respect of the taxation of savings) which they now accept, even going so far as to shift towards a more generalized acceptance of automatic exchange of information, in a context in which non-EU Member States as well comply with such a standard.

12. On the risks of an exceedingly liberal use of reconciliatory interpretation, *see* R. Szudoczky, *The Influence of Primary Law on the Interpretation of Secondary Law in the Field of EU Citizenship and Direct Taxation: Whatever Works…*, in *Traditional and Alternative Routes to European Tax Integration* (D. Weber ed., IBFD Publications 2010), at 193, Online Books IBFD.

This development may have additional repercussions on the tax case law of the Court of Justice of the European Union. For a long time, the Court had drawn a clear demarcation in tax matters between intra-EU, cross-border situations (which were covered by the EU tax directive on mutual assistance) and all other cases. The justification commonly known as "effectiveness of fiscal supervision" was conceived by the Court to apply in respect of relations with third countries, allowing EU Member States to restrict fundamental freedoms whenever tax authorities could not ascertain the relevant facts in cross-border situations due to the absence of a measure equivalent to the EU directive.[13] The justification was gradually softened by the Court in situations where an exchange of information provision is contained in the applicable tax treaty.[14] However, this still reveals a structural deficiency due to the absence of an autonomous right of standing for non-EU countries before the Court.

An example can help to more precisely outline the potential repercussions of this development. Assume that an EU Member State requests a non-EU Member State to supply tax information in a cross-border situation. In one scenario, the requested non-EU Member State supplies that information, but the EU Member State finds it difficult to use such information, for instance because it is based on categories that differ from those that are commonly used in the EU Member State. Unless the EU Member State succeeds in properly clarifying such information, one cannot exclude that such state will conclude that it has not received the information required. This could open the door to invoking the justification based on effective fiscal supervision, which it might be able to defend also before the Court of Justice against the taxpayer. In an intra-EU context (i.e. involving also an EU requested state), any statement by the EU requesting state could be countered by opposite evidence not only of the taxpayer, but also of the EU requested state. Third countries, in this example involved as requested countries, may not do the same. One therefore cannot exclude that the Court will accept the justification invoked by the requesting EU Member State, the tax authorities of which have, in fact, not obtained the information needed to exercise their "fiscal supervision". Several variations of this example can show how more

13. For a reconstruction of the drivers underlying the development of the case law of the Court of Justice, *see* M. Lang, *The Legal and Political Context of CJEU Case Law on Mutual Assistance*, 52 Eur. Taxn. 5 (2012), at 199, Journals IBFD.
14. AT: ECJ, 10 Feb. 2011, Joined Cases C-436/08 & C-437/08, *Haribo and Österreichische Salinen*, (2011) I-00305, ECJ Case Law IBFD.

complex issues can arise, such as when the requesting state makes a request that the requested state regards as a so-called fishing expedition.[15]

The context of global tax transparency and the genuine commitment of a large number of countries around the world – the effective compliance of which with global standards has, in many cases, already been peer-reviewed[16] – is, in the author's opinion, sufficient evidence of the existence of similar standards to those that have led the Court of Justice of the European Union to reject the justification based on the need to carry out "effective fiscal supervision" within the EU internal market. Therefore, especially in cases where tax authorities have a legal basis for obtaining information upon request – and, a fortiori, in the presence of automatic exchange of information – the Court is unlikely to undertake a case-by-case analysis of the effectiveness in the exchange of information in relations with third countries.

This enhanced framework of transparency will also have a more specific impact on the measures concerning country-by-country reporting and the effective analysis of the functions performed by group companies, which the author believes can also play a significant role in respect of the application of CFC legislation.

8.3.3. A reconsideration of the modes of exercise of tax sovereignty

The overall impact of the BEPS project on European tax law must be measured by considering the aggressive exercise of taxing sovereignty.

Prior to the start of the BEPS project, some states (including some EU Member States) had inconsistently exercised their taxing jurisdiction within the framework of unfair tax competition. The goal of such policies may

15. In this regard, the OECD has incorporated in the Commentary on the Model Tax Convention, a general definition (originally already developed in the 2006 OECD Manual on Information Exchange, an implementation guide directed at tax officials) of "fishing expedition". Under this definition, the term refers to requests for information that are unlikely to be relevant for the tax affairs of a given taxpayer. *See OECD Model Tax Convention on Income and on Capital: Commentary on Article 26* para. 5. The latest version of the Commentary also expanded the list examples of various hypotheses of requests that may or may not constitute a fishing expedition. *See OECD Model: Commentary on Article 26* para. 8.

16. As of October 2015, 32 jurisdictions have undergone a Phase 1 peer review and 86 have undergone both a Phase 1 and Phase 2 peer review. *See* http://www.oecd.org/tax/transparency/GFratings.pdf.

have been to stretch the taxing jurisdiction – even to the point of endorsing business models capable of eroding the tax jurisdiction of other countries. The lack of consistency could be perceived insofar as tax systems, on the one hand, included measures enhancing the exploitation of cross-border tax disparities (thus attracting internationally mobile capital under the dome of a tax jurisdiction)[17] and, on the other hand, developed measures aimed at protecting the jurisdiction against the erosion of their taxing sovereignty by other countries.[18] The scope of the repercussions of such policies remains to be defined at present, but leaked information has shown that some EU Member States have systematically endorsed base erosion practices. Such phenomena are being addressed within the framework of the hard law prohibition of State aid and the soft law commitment to counter harmful tax practices.

The BEPS project has dramatically shifted away from such dynamics, bringing the exercise of taxing sovereignties in line with some global, desirable goals of alignment between taxing rights and value creation within the framework of coordination that achieves transparent tax competition. The serious commitment of an unprecedented number of tax jurisdictions to comply with the standards of the BEPS project and tax transparency, is likely to produce an impact also within the legal system of the European Union. Although it is difficult to predict the actual implications until the Court of Justice of the European Union has the opportunity to rule on them, scholars may put together relevant elements and outline the framework within which such recognition is likely to take place.

Already in the past, the Court of Justice of the European Union has acknowledged the importance of the OECD Model Tax Convention and the activities of tax coordination developed within such framework, which reflected internationally accepted tax practice and which – in some cases – the Court has even considered articulating "international tax law".[19] On this basis, it

17. Within the borders of the European Union, this tendency may take the form of "smart tax competition". *See* P. Pistone, *Smart Tax Competition and the Geographical Boundaries of Taxing Jurisdictions: Countering Selective Advantages Amidst Disparities*, 40 Intertax 2 (2012), at 85.

18. This tendency can, for instance, be acknowledged on the grounds of a survey of the case law of the Court of Justice dealing with cross-border interest deductibility regimes. For a survey, *see* e.g. R. Monteiro & M. Korts, *Tax Treatment of Interest for Corporations*, in *Tax Treatment of Interest for Corporations* (O. Marres & D. Weber eds., IBFD Publications 2013), at 215 et seq., Online Books IBFD.

19. DE: ECJ, 14 Feb. 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker*, (1995) I-00225, para. 32, ECJ Case Law IBFD; FR: ECJ, 12 May 1998, Case C-336/96, *Gilly v. Directeur des services fiscaux du Bas-Rhin*, (1998) I-02793, para. 31, ECJ Case Law IBFD; NL: ECJ, 12 Dec. 2002, Case C-385/00, *F.W.L. de Groot v. Staatssecretaris van*

is reasonable to expect that the Court will recognize a similar value in the BEPS project and all tax treaties and domestic law implementing its standards in cross-border situations.

8.3.4. BEPS and the reconsideration of the system of legal sources of international tax law

The ability of the BEPS project to generate internationally accepted tax practices has stronger potential than in the past, as there are clear signs of tax coordination arising in connection with the project. Therefore, it is essential to focus on its legal value from the perspective of EU law.

At present, there are no indicators that the BEPS project and legal measures implementing it constitute some forms of international customary law in tax matters.[20] One can expect that one of its two elements, i.e. *diuturnitas*, will be met at some point in the future. However, the development of tax coordination surrounding the BEPS project will continue to lack the other element required for the establishment of international customary law, i.e. the *opinio iuris ac necessitatis*. Compliance with the standards of the BEPS project is, in fact, making effective progress due to the support of some states, which perceive the unsustainability of unregulated tax competition

Financiën, (2002) I-11819, para. 98, ECJ Case Law IBFD; NL: ECJ, 23 Feb. 2006, Case C-513/03, *Heirs of M.E.A. van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, (2006) I-01957, para. 48, ECJ Case Law IBFD; SE: ECJ, 21 Nov. 2002, Case C-436/00, *X and Y v. Riksskatteverket*, (2002) I-10829, para. 54, ECJ Case Law IBFD; DE: ECJ, 12 June 2003, Case C-234/01, *Arnoud Gerritse v. Finanzamt Neukölln-Nord*, (2003) ECR I-05933, para. 45, ECJ Case Law IBFD; DE: ECJ, 6 July 2006, Case C-346/04, *Robert Hans Conijn v. Finanzamt Hamburg-Nord*, (2006) I-06137, para. 17, ECJ Case Law IBFD; NL: ECJ, 7 Sept. 2006, Case C-470/04, *N. v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, (2006) I-07409, para. 45, ECJ Case Law IBFD; UK: ECJ, 13 Mar. 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, para. 49, ECJ Case Law IBFD; DE: ECJ, 15 May 2008, Case C-414/06, *Lidl Belgium GmbH & Co. KG v. Finanzamt Heilbronn*, para. 22, ECJ Case Law IBFD; BE: ECJ, 21 Jan. 2010, Case C-311/08, *Société de Gestion Industrielle SA (SGI) v. Belgian State*, paras. 70-71, ECJ Case Law IBFD.

20. Whether the pre-BEPS project set of international rules governing international taxation constitute a display of international customary law has been the subject of scholarly debate. A conclusion in the affirmative has been asserted by a relevant portion of US scholarship under the somewhat different category of the emergence of an "international tax regime". R.S. Avi-Yonah, *International Tax as International Law: An Analysis of the International Tax Regime* (Cambridge University Press 2007) (in particular, its Introduction). On the other hand, there have been attempts to describe the current situation based on a revisitation of the very theory of international customary law. B.D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010).

at the global level, and the – voluntary or necessitated – endorsement of some other states that feel the global political pressure in connection with the scandals of MNEs paying little or no taxes. Such scandals would have simply not occurred without the shelter of some tax jurisdictions.

Accordingly, states do not comply with the standards of the BEPS project because they feel that such rules correspond to law or are obligatory, but rather because they have accepted the global vision that global tax problems must be addressed with effective global answers. The success of the shift towards global tax coordination in line with value creation therefore essentially depends on how much such states are willing to endorse the BEPS project and implement it worldwide.

The group of countries involved in the establishment of the standards of the BEPS project acts under the political mandate of the G20, but lacks a proper legitimacy in terms of international law and has a further democratic deficit, as countries generally presenting technical positions through their tax authorities without the actual involvement of the countries' legislative bodies. Certainly, this is one of the facets of multilateralism where the positions of one or more given countries do not equally participate in the final outcome.[21] Notably, the OECD has succeeded in involving a large number of countries in this project, allowing for a broad participation in the establishment of the standards of the BEPS project, and also including the input of representatives from civil society. However, this may not entirely resolve all doubts considering that some topics are only marginally brought into the picture and some countries are only marginally involved. Examples of this include the protection of taxpayer rights[22] and the impact of base erosion and profit shifting on developing countries – especially the least developed ones.[23] Even greater doubts arise in respect of the establishment of the standards of global tax transparency, which were designed by a smaller group of countries and then imposed on the rest of the world. Also in this case, the predominance of tax authorities at both the time of the establishment

21. *See* I.J. Mosquera Valderrama, *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, 7 World Tax J. 3 (2015), Journals IBFD.
22. The author believes that stronger powers of tax authorities require a corresponding strengthening of the protection of taxpayer rights. *See further* P. Baker & P. Pistone, *IFA Cahiers 2015 – Volume 100B. The Practical Protection of Taxpayers' Rights*, General Report (IBFD Publications 2015), Online Books IBFD.
23. Developing countries, in particular the least developed ones, have maintained a marginal role in the establishment of the BEPS standards. Their involvement in the most recent phases of the OECD Task Force on Tax and Development does not structurally change the pattern, which may be even more severely questioned in terms of legitimacy of the imposition of the BEPS standards on such countries.

and the time of their implementation has significantly constricted the rights of taxpayers,[24] and the marginal relevance of developing countries has not prevented conditions that can be very financially burdensome for those countries in connection with cross-border flows of information.[25]

Yet, this form of soft tax coordination is effective and – to the extent that it will receive the endorsement of the majority of states – it will soon turn into a global standard and approximate the exercise of taxing powers around the world. From such a perspective, it will also have a significant influence on EU law.

In particular, the BEPS project will strengthen the reaction of EU law to aggressive tax planning, by confirming that internationally accepted tax practice no longer tolerates aggressive tax planning and abusive practices across borders. This may have some major implications to the extent that the Court of Justice of the European Union acknowledges that the BEPS project is, in fact, bringing about an unprecedented level of international tax coordination. The author sees some significant, specific implications in respect of the approach to disparities and double dipping which have repeatedly been the subject of statements by the Court and which are essentially two sides of the same coin.

8.3.5. Consolidation of multilateral coordination and the emergence of "jusnaturalism" in tax law

The above outlined trends could also be understood, in more theoretical terms, as the emergence of a critical stance on the "legal positivism" which seems to have conditioned the development of tax law by encouraging the erection of fences around national systems and has prevented the emergence of worldwide standards in this area. The current momentum with the promotion of the BEPS agenda signals a shift from internationally accepted

24. Some countries have abolished some rights of taxpayers (such as those that were applicable prior to cross-border exchange of tax information) in order to comply with the global standards on tax transparency at the time of peer review by teams composed of tax authorities of other countries. *See further* Baker & Pistone, *supra* n. 22, sec. 9.

25. Despite the asymmetry in flows of tax information from developing countries to developed countries and the extreme complexity of the information to be exchanged, the principle of reciprocity requires that the cost connected with the supply of cross-border tax information is borne by the supplying state – in fact creating an enormous burden for developing countries, which generally request little information and often do not have the required infrastructure to gather the information that developed countries may request from them.

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