

Kluwer International Tax Blog

The Contents of Intertax, Volume 52, Issue 03, 2024

Ana Paula Dourado (General Editor of Intertax) · Monday, March 18th, 2024

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Irma Mosquera Valderrama, Throughput Legitimacy of the Peer Review Process of the Four Beeps Minimum Standards: A Case Study

This article focuses on the Base Erosion Profit Shifting (BEPS) Project and more specifically on the peer review of the four BEPS minimum standards. The first part of this contribution introduces the analysis of this process in the context of a case study of seven countries participating in the BEPS Inclusive Framework: Cameroon, Congo, Costa Rica, Jamaica, Peru, Sri Lanka, and Viet Nam. Thereafter, this article will provide the analysis of the peer review process by using the concept of throughput legitimacy developed by Schmidt (in other areas than tax law) that includes accountability, transparency, inclusiveness and openness. Its use can contribute to enhancing the governance of the peer review process and increasing legitimacy at the same time and thereby strengthening countries' compliance with the four BEPS minimum standards. Its use can also facilitate helping countries that are part of the BEPS Inclusive Framework to build trust in the peer review process. In light of the findings of the case study, this article concludes that there are throughput legitimacy deficits and that these should be addressed by the OECD and countries participating in the BEPS Inclusive Framework. This article's preliminary findings can be used for further research by the OECD, regional organizations, scholars, civil society, and think tanks to improve countries' compliance with the four BEPS minimum standards.

Linda Sydänmaanlakka, Power and Expertise in Global Tax Governance

It is a rather broadly held misconception that the project on Base Erosion and Profit Shifting (BEPS) began in September 2013 when the G20 Leaders' endorsed the OECD's Action Plan on BEPS.¹ The general acceptance of this narrative is understandable and perhaps largely trivial. However, it does tell us something important about our tendency to focus on the foreground of issues – on the immediate and obvious. When public focus is narrowed down to notable events, such as the G20 Leaders' summits, the background work of tax experts fades out of focus. Often, the work of the expert is not even associated with the idea of public power and authority; it is reduced to something concerned with mere technicalities. Yet, it is the expert who outlines the agenda and prepares the discussion drafts and executive summaries that inform the (political) actor in the foreground of the issues that, based on objective expert knowledge, should somehow be addressed in one way or another. The more complex the issue, the less that the actor in the

foreground has the technical ability to assess the merits of the experts' proposition. Sometimes, owing to our desire to be confident in our ability to grasp difficult concepts, we may ultimately support the expert who makes the claim of superior knowledge over an issue we do not fully comprehend precisely as a result of our lack of understanding so as to deny or conceal this deficiency. Occasionally, such false confidence of the foreground actor in their ability to assess the propositions of the expert may result in a feedback loop in which the ideas of the expert appear to legitimize the power of the foreground actor, and this power subsequently appears to legitimize the expert's ideas.²

This article will discuss the role of experts and the everyday power they use in the realm of global tax governance. To date, such a discussion has largely escaped the agenda of legal academic discussion.³ Yet, the importance of the discussion on expert power in tax is paramount; unawareness over this constituent element of the current paradigm results in an inability to address what is known as the legitimacy deficit of global tax governance. This will continue to reproduce global power imbalance in favour of the privileged and at the expense of the disenfranchised. The development of international tax norms into a regime of global tax governance will serve as a framework for this discussion thereby rendering the role of experts working under the auspices of the League of Nations and, subsequently, the OECD at the centre of the focus.

Juliana Cubillos González & Frederik Heitmüller, Influence of Domestic Constituencies in the Implementation of International Tax Standards and Legitimacy of Global Tax Governance

The intensification of global governance activities in the area of international taxation has raised the question of the democratic legitimacy of the process since decisions in multilateral institutions are typically made by members of the executive alone and predominantly those from developed countries. There are opportunities to influence discussions at the global level for non-state actors, but the capacity to do so is unequally distributed.

Yet, the results of global standard-setting processes need to be implemented domestically which affords opportunities for a wider range of constituencies to influence the outcome, among them elected parliamentarians, businesses, and local civil society. On the one hand, this two-stage process mitigates the lack of inclusiveness in global governance; on the other hand, it may jeopardize the effectiveness of global standards in achieving harmonization.

In practice, opportunities for stakeholders to influence the implementation process and the interest to actually do so vary across countries. The purpose of this article is to chart this variation and discuss what it means for the global governance process. This is sourced from interviews on the implementation of the BEPS project's standards with different tax policy stakeholders in Australia, Colombia, India, Mexico, the Netherlands, Nigeria, Senegal and Spain. With this data it is identified which non-governmental constituencies exist in each country, what are their interest vis-à-vis different elements of the BEPS Project, and what means they have at their disposal to influence the implementation process.

The findings indicate variation across countries regarding the direction in which governmental and non-governmental stakeholders try to influence the outcomes as well as regarding their opportunities to effectively influence implementation processes. This entails that the level of implication of stakeholders will be context-dependent and so will be the answer to the question on whether the participation in the implementation process can 'compensate' for a lack of

participation in standard setting processes.

Nicolas Traut & Gustavo Weiss de Resende, *Anti-Avoidance Jurisprudence in Direct Taxation: The CJEU Between Politics and Certainty*

Over a span of several years, the Court of Justice of the European Union (CJEU) developed a framework for anti-abuse in the context of European law and particularly established criteria for justifying restrictions on the fundamental freedoms in the tax context. In tax cases on anti-avoidance that are more recent, however, the court has demonstrated a notable change in its stance towards this issue that represents a disruption in the consistent development of its jurisprudence on abuse. While the court covers the contradictions in its case law by passing an impression of continuity between disparate decisions, it is remarkable how recent rulings draw from Organisation for Economic Co-operation and Development (OECD) language. This reliance on concepts from a non-EU institution, however, leads to legitimacy concerns. The increasing importance of international organizations and public opinion – for example, in reaction to the Panama Papers – in shaping the international tax landscape is undeniable. While high-profile projects like Base Erosion and Profit Shifting (BEPS) and Global Anti-Base Erosion (GloBE) highlight international tax issues, they also exert political pressure on judicial bodies such as the CJEU which leads to less methodological decisions that will align the court with political interests. In this context, the CJEU's acting as a political player at the borderline of its competences is to be viewed critically, especially regarding the recent shift in its case law on abuse and tax avoidance that leads to concerns over legal certainty.

Stefanie Geringer, *A Change in the Law or A Guideline from the EU VAT Committee? Evaluating Soft Law Instruments for Clarifying EU VAT Law Through the Lens of Legitimacy*

In addition to amendments to the European Union (EU) value added tax (VAT) statutory law and the case law of the Court of Justice of the European Union (CJEU), various types of soft law have increasingly been used in recent years to elucidate the essence of EU VAT provisions. These include the guidelines issued by the EU VAT Committee which is a body explicitly enshrined in the EU VAT Directive. This article is aimed at discussing the significance of the EU VAT Committee guidelines from a legitimacy perspective. It will be demonstrated that they do not correspond to the ideals of inclusive governance that have long been advocated at the Union level and thus generally show deficits in input legitimacy. Some recent examples relating to the amended special scheme for small- and medium-sized enterprises (SMEs) will be utilized to argue that the EU VAT Committee guidelines can only be considered to have a certain level of output legitimacy. They can thus be useful as a legal opinion that national authorities and courts should take into account when interpreting and applying EU VAT law. However, they must therefore comply with the mandate of the EU legislature enshrined in Article 398 paragraph 4 of the EU VAT Directive.

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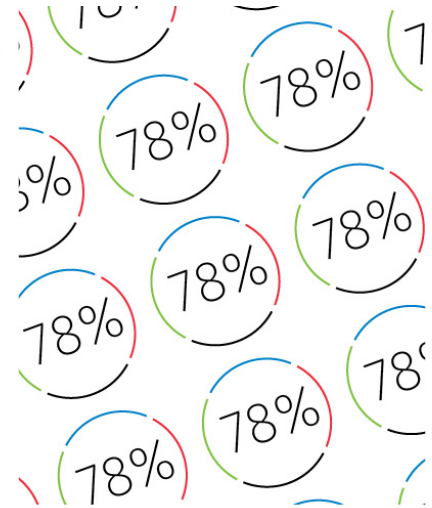
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