

Subtopic 1

International Tax Policy

The Trend Toward International Tax Justice: A Historical Review

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1. Introduction

Justice and equality are core principles in the design of tax policy, especially in today's globalized business environment. The advancement of cross border trade and investment along with evolving methods of conducting business globally requires constant evolution in tax policy design with justice as a main objective. Different meanings of international tax justice are mentioned in the second chapter along with factors leading to international tax injustice. As mentioned by Hongler, "If the international tax regime was considered to be just, one could question the need for a normative review of the international tax regime."¹ Chapter 3 will provide a brief overview of the historical and recent tax policy measures that were and have been implemented to achieve tax justice through multilateral initiatives by supranational institutions such as the European Union (EU) and the Organisation for Economic Cooperation and Development (OECD). Additionally, unilateral tax policy measures introduced to achieve tax justice will be explained in Chapter 3. An analysis of the effectiveness of the above tax policy measures in achieving tax justice will be analysed in Chapter 4.

Throughout history, numerous tax measures have been introduced to achieve tax justice. Therefore, the measures selected in the analysis are limited to some of the EU and OECD tax measures and initiatives as well as tax measures and initiatives regarding the digital economy. Further, while the analysis of the tax policy measures will not be examined in-depth, different perspectives on the impacts of the measures will be considered. The historical and recent tax measures are steps in the right direction towards more tax justice, although achieving absolute tax justice may not be a realistic goal. The reason may either be due to the difficulty for tax policy to keep pace with the evolving global business landscape or/and due to a lack of perfection in tax policy design resulting in loopholes which often leads to abuse of tax policy. The road to tax justice is recognizing these loopholes with efforts to adopt additional measures so that tax injustice is minimized or abolished. Therefore, efforts to achieve tax justice is a continuous process, and the measures analysed below highlight some of those efforts.

2. International Tax Justice

2.1. Meaning of International Tax Justice

It is generally accepted that tax systems serve three functions: raising revenue, redistributing wealth, and regulating taxpayer behaviour.² In reaching the objective of achieving a tax system that serves these functions, legislators should take into account fairness/justice.³ There is no accepted definition of fairness and

1 Peter Hongler, *Justice in International Tax Law* (Amsterdam: IBFD Publications, 2019) p. 14.

2 R.S. Avi-Yonah, *The Three Goals of Taxation*, 60 *Tax Law Review* 1, pp. 3–5 (2006).

3 P. Harris & D. Oliver, *International Commercial Tax* p. 15 (Cambridge University Press 2010).

justice,⁴ however, below are a few definitions that may be relevant from an international tax perspective.

Sen's idea of fairness "can broadly be seen as a demand for impartiality".⁵ Impartiality from an international tax policy perspective means removing bias when analysing whether a certain tax principle or rule is just.⁶

According to NGOs such as Christian Aid,⁷ Tax Justice Network,⁸ and Oxfam,⁹ international tax justice means that taxpayers such as multinational enterprises (MNEs) pay their fair share of tax in the jurisdictions where economic activities and investments take place rather than using aggressive tax planning to shift profits to other jurisdictions (to benefit from a lower tax liability).¹⁰

International tax expert Vogel argues that "equity" or "justice" is a concept that bridges the moral and legal world.¹¹ While aggressive tax planning may be legal, it is debatable whether such behaviour is moral and fair in comparison to taxpayers who pay their fair share in the place of economic activity/value creation and avoid aggressive tax planning.

2.2. International Tax Injustice

To understand international tax justice, it will help to understand reasons for international tax injustice. As mentioned above, one of the purposes of collecting taxes is to raise government revenue. Lower tax rates may attract investment as "countries have entered into a tax-induced competition for corporate investment by reducing effective corporate tax burdens and, with that, have initiated a 'race to the bottom'".¹² However, reducing tax rates can be seen as a form of harmful

4 Filip Debelva, 'Fairness and International Taxation: Star-Crossed Lovers?', *World Tax Journal* (2018) p. 565.

5 Amartya Sen, *The Idea of Justice* (Harvard University Press 2009).

6 Peter Hongler, *Justice in International Tax Law*, p. 334.

7 According to the website of Christian Aid, Christian Aid "is a Christian organisation that insists the world can and must be swiftly changed to one where everyone can live a full life, free from poverty. We work globally for profound change that eradicates the causes of poverty, striving to achieve equality, dignity and freedom for all, regardless of faith or nationality. We are part of a wider movement for social justice". http://www.christianaid.org.uk/aboutus/who/aims/our_aims.aspx.

8 The mission of Tax Justice Network is to "change the weather on a wide range of issues related to tax, tax havens and financial globalisation" <http://www.taxjustice.net/about/who-we-are/goals/>.

9 The mission of Oxfam is "to help create lasting solutions to the injustice of poverty. We are part of a global movement for change, one that empowers people to create a future that is secure, just, and free from poverty" <https://www.oxfam.org.au/>.

10 I.J.J. Burgers & I.J. Mosquera Valderrama, *Fairness: A Dire International Tax Standard with No Meaning?*, 45 *Intertax* 12, p. 773 (2017).

11 K. Vogel, *Worldwide Vs. Source Taxation of Income a Review and Re-Evaluation of Arguments (Part III)*, 16 *Intertax* 11, p. 393 (1988).

12 M.F. de Wilde & C. Wisman, 'Chapter 19' in: *Netherlands in Tax Avoidance Revisited in the EU BEPS Context* (A.P. Dourado ed., IBFD 2017), Books IBFD (accessed 21 Mar. 2022).

tax competition that reduces the ability of governments to raise revenues.¹³ This results in base erosion and profit shifting¹⁴ (BEPS) to lower-tax jurisdictions which leads to underfunding of governments of developing countries to raise tax revenues, and such tax-motivated behaviour is seen to be unjust.¹⁵

MNEs are engaging in BEPS by “shifting USD 1.19 trillion worth of profit into tax havens¹⁶ a year, causing governments around the world to lose USD 312 billion a year in direct tax revenue”.¹⁷ While some low tax jurisdictions are seen as constituting harmful tax competition, some, such as Malta which “is the smallest economy in the Eurozone”, require a low tax policy in order to attract foreign investors to foster its economy.¹⁸

Additionally, countries that have financial (bank) secrecy rules attract wealthy individuals that shift their wealth to such jurisdictions since it is easy to “to hide their identity and their wealth from the rule of law”.¹⁹ Such offshore shifting of financial individual wealth is causing the governments to lose USD 171 billion.²⁰ On the other hand, there is an argument that taxpayers should have protection rights including confidential information from disclosure as argued by Baker and Pistone in the IFA 2015 General Report.²¹

Finally, Sen’s idea of fairness as a demand for impartiality is relevant in the inclusion and participation of all countries in the discussion of international tax policy design. Certain international tax principles or rules are not agreed by consensus which infringes the sovereignty of states by forcing certain states to follow certain international guidelines.²² In a Swiss Parliament member’s own words, “the fact

13 Leaman, Jeremy (2013). *Tax justice and the political economy of global capitalism, 1945 to the present*. New York, NY: Berghahn Books.

14 BEPS relates chiefly to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation. It also relates to arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place. See OECD (2013), *Addressing Base Erosion and Profit Shifting*, OECD Publishing, Paris, p.10. For a brief summary on BEPS, see Page 1 and 2 of H. Zolbalia & J. Devani, ‘Base Erosion and Profit Shifting Report and Action Plan – Overview and Relevance in Indian Context’, 20 Asia-Pac. *Tax Bull.* 1 (2014), Journal Articles & Opinion Pieces IBFD (accessed 10 May 2022).

15 Peter Hongler, *Justice in International Tax Law*, p. 17.

16 While the concept of “tax haven” does not have a precise meaning, a useful distinction may be made between countries that are able to finance their public services with no or nominal income taxes and that offer themselves as places to be used by non-residents to escape tax in their country of residence or countries that raise significant revenues from their income tax but whose tax system has features constituting harmful tax competition; OECD, *Harmful Tax Competition: An Emerging Global Issue* (1998), p. 20.

17 Tax Justice Network, *The State of Tax Justice 2021* (November 2021) page 6.

18 C. Cassar Torregiani, Malta – Business and Investment sec. 1., Country Tax Guides IBFD (accessed 16 May 2022) p. 3.

19 Ibid.

20 Ibid.

21 Christiana HJI Panayi, ‘Current Trends on Automatic Exchange of Information’, *Singapore Management University* March 2016, p. 30.

22 Ring Diana M., What’s at Stake in the Sovereignty Debate?: International Tax and the Nation-State, *Virginia Journal of International Law* (2008) p. 190 et seq.

that states are forced to change their laws due to international pressure is not driven by justice considerations, but by the self-interest of other states”.²³ Such unjust international pressure is seen to be Machiavellian according to Essers whereby countries blacklist, name, and shame other countries that do not conform with “good tax governance”.²⁴

3. Tax (Policy) Measures to Achieve Tax Justice

3.1. EU Measures

3.1.1. 1960s

In the European Union (EU), attempts to achieve justice in the field of direct taxation date back to 1962 when the Neumark committee²⁵ published a report²⁶ for harmonization of income tax, capital gains tax, corporate tax, and indirect taxes.²⁷ This was followed by the Segre Report published in 1966 in which one of the chapters looked at tax obstacles and the importance of fiscal neutrality for capital movements.²⁸

The report identified three obstacles to fiscal neutrality: double taxation, preferential treatment of investments made in the country of residence, and different treatment (from one Member State to the other Member State) of income paid to non-residents.²⁹ To tackle these obstacles, the commission concluded that a multilateral convention was required, and temporary solutions were needed until then.³⁰ Tax harmonization suggestions and attempts continued within the EU, however, it proved to be difficult “not only because of sovereignty reasons but also due to the different economic and social underpinnings of Member State tax systems”.³¹ However, efforts towards tax harmonization are proof of initiatives towards tax justice within the internal market³² in the 1960s. In fact, while tax harmonization proved to be difficult, such EU efforts eventually led to secondary

23 Keller-Sutter Karin, Swiss Parliament, State Council, Amtliches Bulletin (2015).

24 Essers Peter, International Tax Justice between Machiavelli and Habermas, Bulletin for International Taxation (2014) p. 65.

25 The Neumark committee was set up by the commission in 1960 under the chairmanship of Fritz Neumark in order to investigate all aspects of taxation in relation to the common market.

26 Report of the Fiscal and Financial Committee, in The EEC Reports on Tax Harmonization (IBFD 1963).

27 Ibid, p. 102.

28 EEC Commission, The Development of a European Capital Market p. 11 (EEC Commission 1966).

29 Ibid, p. 294–298.

30 Ibid, p. 296.

31 Report from the Commission to the Council on Scope for Convergence of Tax Systems in the Community, COM(80)139 final 2, pp. 6–7, para. 5.

32 The internal market of the European Union (EU) is a single market in which the free movement of goods, services, capital, and persons is assured and in which citizens are free to live, work, study, and do business thereby removing trade barriers in the EU; https://eur-lex.europa.eu/summary/chapter/internal_market.html?root_default=SUM_1_CODED%3D24#:~:text=The%20internal%20market%20of%20the,work%2C%20study%20and%20do%20business (accessed 30 March 2022).

EU law in the form of directives such as the Merger Directive³³ and the Parent-Subsidiary Directive³⁴ which achieved more tax neutrality in 1990.

3.1.2. 1997–1998

In 1997, the Member States made a political commitment (not legally binding) to curb harmful tax competition by adopting a resolution on a code of conduct for business taxation.³⁵ The commitment by the Member States was to re-examine, amend, or abolish their existing tax measures that constitute harmful tax competition and refrain from introducing new ones in the future.³⁶

Based on the Code of Conduct Group,³⁷ the Primarolo Group was established consisting of members from all 15 Member States at the time. The Primarolo Group assessed whether tax measures and regimes were harmful within the EU and its dependent territories, identifying 66 harmful tax regimes. Certain criteria were identified to determine whether a regime was harmful including whether tax advantages were accorded only to nonresidents, whether tax advantages were ring-fenced³⁸ from the domestic market, whether tax advantages were granted even without the taxpayer's having any real economic activity or substantive economic presence, and whether the tax measures lack transparency.³⁹ Such a report along with the continuing work of the Code of Conduct Group has played an integral role in achieving tax justice in the internal market.

33 Council Directive 90/434/EEC on a common system of taxation applicable to mergers, divisions, transfers of assets, and exchanges of shares concerning companies of different Member States; https://research.ibfd.org/#/doc?url=/linkresolver/static/tt_e2_76_eng_1990_tt%23tt_e2_76_eng_1990_tt (accessed 17 December 2021).

34 Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States https://research.ibfd.org/#/doc?url=/linkresolver/static/tt_e2_76_eng_1990_tt%23tt_e2_76_eng_1990_tt (accessed 17 December 2021).

35 European Council of the European Union. *Code of Conduct Group (Business Taxation)*; <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/> (accessed 19 December 2021).

36 Ibid.

37 The Code of Conduct Group comprises officials of the ministries of finance of the Member States and monitors compliance with the European Code of Conduct that (politically) prohibits harmful tax competition and offers a (political) base for a coordinated approach to combat tax avoidance; Martijn F. Nouwen, 'The European Code of Conduct Group Becomes Increasingly Important in the Fight Against Tax Avoidance: More Openness and Transparency is Necessary', (2017), 45, *Intertax*, Issue 2, p. 138.

38 IBFD, International Tax Glossary: Ring fence: A restriction placed round certain transactions or circumstances in order to isolate them for tax purposes. Ring fences are used to restrict the application of particular provisions to transactions or circumstances inside the ring fence or to prohibit the application of general provisions to transactions or circumstances inside the ring fence. For example, losses arising in one category may be ring fenced from profits in another and accordingly cannot be set off against those profits. Typically encountered in connection with particular activities, such as those relating to petroleum tax rules or in the context of schedular tax systems. Also encountered in the context of certain offshore tax regimes under which benefits of the regime are ring fenced such that they are only available, e.g. to companies that are not owned by local residents.

39 Robert Goulder, Taxnotes, *Primarolo Group's Report Identifies 66 Harmful Tax Regimes*, 20 March 2000 <https://www.taxnotes.com/tax-notes-international/tax-havens/primarolo-groups-report-identifies-66-harmful-taxregimes/2000/03/20/1tdp3?highlight=Primarolo%20Group%27s%20report%20identifies%2066%20harmful%20tax%20regimes> (accessed 20 December 2021).

3.1.3. 2000s

Harmonizing the tax base in the EU was another step towards tax justice in the internal market. In 2011, the EU Commission proposed for a Common Consolidated Corporate Tax Base (CCCTB)⁴⁰ that was a follow up from the 2011 Company Tax Study⁴¹ in order to harmonize the calculation of taxable profits in the EU as the coexistence of multiple Member State tax systems raised barriers to cross-border movement.⁴² Eventually, the C(C)CTB proposal was not adopted due to the reservations of several Member States.⁴³ While removing tax obstacles and facilitating cross-border groupings within the EU was a priority, the C(C)CTB was seen as protecting the tax base of Member States from tax avoidance or aggressive tax planning thereby trying to achieve tax fairness.⁴⁴

While the OECD is known for its BEPS Action Plan, the EU also had an action plan published in 2012 by the EU Commission whose main objective was “to secure sustainable tax revenues for Member States by protecting tax systems against abuses and loopholes and, in particular, to reduce cross-border international tax fraud and tax avoidance affecting the revenue of Member States”.⁴⁵ The EU was ahead of the OECD in releasing an action plan for addressing aggressive tax planning and avoidance that addresses three categories of action, namely, existing initiatives, newly proposed initiatives, and future initiatives.⁴⁶ Additionally, the commission adopted two recommendations⁴⁷ to the Member States calling for coordinated EU action on *Third Countries Not Meeting Minimum Standards of Good Governance in Tax Matters* and on *Aggressive Tax Planning*.⁴⁸

40 European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121/4 (2011).

41 Commission Staff Working Paper, Company Taxation in the Internal Market, SEC (2001) 1681 (23 Oct. 2001).

42 C. HJI Panayi, ‘60 Years of Harmonization Initiatives on Corporate Taxation’, 61 Eur. Taxn. 12 (2021), *Journal Articles & Opinion Pieces IBFD*, p. 4.

43 C. HJI Panayi, *European Union Corporate Tax Law* ch. 3, part 3.6 (Cambridge University Press 2013).

44 C. HJI Panayi, *Advanced Issues in International and European Tax Law* ch. 5 (Hart Publishing 2015); and C. HJI Panayi, The Compatibility of the OECD/G20 Base Erosion and Profit Shifting Proposals with EU Law, 70 *Bull. Intl. Taxn.* 1/2, p. 70 (2016), *Journal Articles & Opinion Pieces IBFD*.

45 M.F. Nouwen, ‘The Gathering Momentum of International and Supranational Action against Aggressive Tax Planning and Harmful Tax Competition: The State of Play of Recent Work of the OECD and European Union’, 53 Eur. Taxn. 10 (2013), *Journal Articles & Opinion Pieces IBFD* p. 5.

46 Ibid, p. 6.

47 Recommendations are not binding unlike directives and regulations that are binding. See Article 288 of The Treaty on the Functioning of the European Union; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E288>.

48 Commission recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters, C(2012) 8805 final (6 Dec. 2012); and Commission Recommendation on aggressive tax planning, C(2012) 8806 final (6 Dec. 2012). For further commentary on these Recommendations, see M.F. Nouwen, Highlights and Insights on European Taxation 1.4 and 1.5 (2013).

Other measures adopted by the EU Commission in 2011 included amendments to the Directive on Administrative Cooperation (DAC)⁴⁹ standardizing automatic exchange of information⁵⁰ on taxes of any kind with an exception for certain indirect taxes. Amendments to the DAC have played a major role to more tax justice such as DAC 3 of 2015 regarding mandatory automatic exchange of information regarding cross-border tax rulings issued by competent authorities of a Member State.⁵¹

Further, in 2016, the EU adopted a directive on common anti-abuse rules – the anti-tax avoidance directive (ATAD)⁵² which aims at implementing five legally binding anti-tax abuse rules by Member States to protect against corporate tax avoidance in the EU. Going forward, the EU Commission stated that, by 2023, it would present a new framework for business taxation in the European Union: the “Business in Europe: Framework for Income Taxation” (or BEFIT).⁵³ The commission expects the BEFIT to provide a single corporate tax rulebook for the European Union allowing for fairer allocation of taxing rights between Member States.⁵⁴ Another recent proposed measure by the EU that has not yet been implemented is the proposed unshell directive⁵⁵ (to come into effect in 2024) to “fight against the misuse of shell entities for improper tax purposes ensuring entities with no or minimal economic activity are unable to benefit from any tax advantages”.⁵⁶

3.2. OECD Measures

3.2.1. 1998 Harmful Tax Competition Report

The OECD’s Harmful Tax Competition Report of 1998 was a step toward international tax justice as the report identified and addressed harmful tax competition including “harmful tax practices in the form of tax havens and harmful preferential tax regimes”,⁵⁷ (similar to the Primarolo report). Certain identifiers of tax havens included jurisdictions imposing no or nominal taxes, laws and practices that prevent effective exchange of information with governments on taxpayers, lack of transparency, and an absence of a substantial activity requirement in the jurisdiction.⁵⁸

49 Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, OJ L 64 (2011), Primary Sources IBFD.

50 C. HJI Panayi, 61 Eur. Taxn. 12 (2021), *Journal Articles & Opinion Pieces IBFD*, p. 6.

51 Council Directive 2015/2376/EU of 8.12.2015 regarding mandatory automatic exchange of information in the field of taxation. Also referred to as DAC 3. Other amendments have been made to the DAC with the latest being DAC 7.

52 Council Directive 2016/1164 of 12 July 2016 Laying Down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, OJ L 193 (2016). For a brief summary on ATAD see https://ec.europa.eu/taxation_customs/anti-tax-avoidance-directive_en (accessed on 12 May 2022).

53 European Commission, Communication from the Commission to the European Parliament and the Council: Business Taxation for the 21st Century, COM (2021) 251 final (18 May 2021).

54 C. HJI Panayi, 61 Eur. Taxn. 12 (2021), *Journal Articles & Opinion Pieces IBFD*, p. 7.

55 For more information on the proposal see https://ec.europa.eu/taxation_customs/taxation-1/unshell_en (accessed on 23 March 2022).

56 Ibid.

57 OECD, *Harmful Tax Competition: An Emerging Global Issue* (1998), p. 3.

58 Ibid, p. 22.