

INCLUSIVENESS OR COHERENCE IN INTERNATIONAL TAX POLICY-MAKING?

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Executive summary: At a time when media scandals concerning the taxation of multinational companies abound and public and political attention are at unprecedented levels, the governance of the international corporate tax system requires serious scrutiny. This policy brief highlights the historical lack of inclusiveness in international tax policy-making. This lack has helped ensure coherence in basic governance principles, but has also contributed to a resistance towards change, potentially threatening the long-term legitimacy of the international tax system. Policy-makers must now weigh the (lack of) inclusiveness of international tax policy-making against the ability to achieve change and the overall coherence and sustainability of the system.

Policy recommendations:

- ▶ Policy-makers in the OECD, the EU and beyond should formalize ambitions for the stakeholder diversity in international tax policy-making.
- ▶ These ambitions should be realized after careful consideration of the trade-offs between diversity and inclusiveness, political progress and responsiveness, and coherence.
- ▶ These ambitions should be realized via actionable initiatives to support stated objectives for the overall design of international tax policy-making processes.

Introduction

Who makes the international rules governing the taxation of multinational companies, how, and with what effects? At a time when media scandals concerning the taxation of multinational companies abound and public and political attention are at unprecedented levels, these questions require serious scrutiny. The overall coherence, legitimacy and sustainability of the international corporate tax system is at stake. This policy brief analyses the policy-making process. The brief draws on research conducted under the European Union's Horizon 2020 framework programme 'Combating Fiscal Fraud and Empowering Regulators' (#727145)¹.

Specifically, the brief highlights the historical lack of inclusiveness in international tax policy-making. This lack of inclusiveness has two dimensions. First, geopolitically, the system of rules governing

the taxation of multinational corporations has historically been dominated by a small group of states from the Global North². This is supported by an organizational property: for 60 years the Organisation for Economic Development and Co-operation (OECD), derogatorily named the 'rich countries club', has remained the focal point for international tax policy-making³. Second, in terms of expertise, the diversity of voices deemed relevant and credible in international tax policy-making has traditionally been largely restricted to specific government and business perspectives. While the first dimension has been explored at length in previous research, the second dimension has received less scrutiny. This is particularly relevant because international tax policy-making is under significant pressure, as media exposés on the tax affairs of multinational companies, large-scale tax haven leaks and the context of a global financial crisis, have caused an explosion of public and political interest in what was historically a policy area with significant immunity to politicization⁴. New actors have entered the stage and found a platform, including actors in and around the European Union, civil society activists, and traditionally marginalised countries from the Global South.

These developments have brought longstanding concerns about the legitimacy of the policy-making dynamics in international taxation to the surface. However, while critical questions about inclusiveness are pertinent, it is worthwhile noting that 'closedness' has also contributed to coherence in basic governance principles, due to strong normative homogeneity in the exclusive group of policy-makers⁵. The current climate, calls for a careful examination of the properties of contemporary international tax policy-making, its impact on diversity/inclusiveness, its responsiveness, and the overall coherence of the system.

Expertise in international tax policy-making

The 2007-08 global financial crisis was followed by a raft of high-level reform initiatives aimed at 'fixing' the international tax system, politically identified as a key problem for states under sudden and striking fiscal pressure. Amongst these initiatives, the Base Erosion and Profit Shifting (BEPS) project, launched in 2013, was arguably leading. Combining strong political backing from the

- 1 Specifically, the brief ties in insights from four research outputs: Christensen, R. C. (2017). Professional Competition in Global Tax Reform: Transparency in Global Wealth Chains. <https://doi.org/10.31235/osf.io/gu63m>; Christensen, R. C. (2019). Transparency. In L. Seabrooke & D. Wigan (Eds.), *Global Wealth Chains: Asset Strategies in the World Economy*. Oxford: Oxford University Press; Christensen, R. C., & Seabrooke, L. (2019). Global Tax Governance: Is the EU promoting Tax Justice? In R. Coman, A. Crespy, & V. Schmidt (Eds.), *Governance and politics in the post-crisis European Union*. Cambridge University Press; Christensen, R. C. (2019). The Rise of the EU in International Tax Policy. In G. Christou & J. Hasselbalch (Eds.), *Global Networks and European Actors: Navigating and Managing Complexity*. Routledge.
- 2 Rixen, T. (2008). *The Political Economy of International Tax Governance*. Palgrave Macmillan.
- 3 Sharman, J. C. (2006). *Havens in a Storm: The Struggle for Global Tax Regulation*. Ithaca: Cornell University Press.
- 4 Berg, C., & Davidson, S. (2017). "Stop This Greed": The Tax-Avoidance Political Campaign in the OECD and Australia. *Econ Journal Watch*, 14(1), 77–102; Dover, R. (2016). Fixing Financial Plumbing: Tax, Leaks and Base Erosion and Profit Shifting in Europe. *The International Spectator*, 51(4), 40–50. Oei, S.-Y., & Ring, D. (2018). Leak-Driven Law. *UCLA Law Review*, 65(3).
- 5 Genschel, P., & Rixen, T. (2015). Settling and unsettling the transnational legal order of international taxation. In T. C. Halliday & G. Shaffer (Eds.), *Transnational Legal Orders*. New York: Cambridge University Press.

G20 with the OECD forum's track record in the creation and diffusion of regulatory innovations, BEPS aimed at comprehensive change to tax treaties, tax law mismatches, corporate tax transparency and more. However, once the political momentum that had put 'BEPS' on the global agenda was channelled into the OECD policy-making process, the impetus for change was subdued, and the project resulted in a series of compromise agreements diverging substantially from the pre-BEPS political rhetoric. This was particularly so in the area of corporate tax transparency, which had a marked presence in public discussions and was targeted by civil society activists and critical politicians.

Central to this is expertise dynamics in international tax policy-making. The technical BEPS policy discussions were organised around the OECD's 'soft law' mode of governance and shielded from the public and the political limelight. 'Closedness' around a narrow group of stakeholders manifests in competition between technical experts from national governments, international organisations, and the private sector over policy ideas. Within this group, hierarchies of prestige and influence are based on strategic combinations of expertise and network positioning. For instance, credibility may be enhanced by going through 'revolving doors', i.e. moving strategically between sectors and work roles. In particular, those at the top of the expert hierarchy, and best positioned to promote their policy ideas, were either able to leverage a broad expertise base – drawing on knowledge resources from economics, accounting, and law, obtained through diverse careers – or able to leverage strong network positioning in prestigious global tax committees and clubs alongside a narrow, specialized expertise base.

These properties enabled certain professionals to speak authoritatively, mobilise credibility, set the standard for accepted arguments, and ultimately shape the policy process. Specifically, the highly political discussions were embedded in a specialised, expertise-intensive policy-making milieu. And this subdued the post-crisis political surge for change to the international tax system. This dynamic had several features. First, it was marked by policy insulation. The access and influence of outsiders was restricted, as discussions were shielded from politicisation and public conflict,

with emphasis on technical consensus and the 'OECD way' of conducting politics. To illustrate, the figure below shows the participation of different stakeholder groups in one key public consultation during the BEPS project (Action 13). Second, key policy ideas that had been brought onto the pre-BEPS global political agenda were re-framed, from being radical proposals aimed at fundamentally changing the international tax system to technical tools 'aiding' professional insiders in everyday practice. Third, the appropriateness of policy proposals discussed as part of the BEPS process were judged against established knowledge in the entrenched technical community, while claims based on appeals to more broadly framed societal values such as 'morality' and 'fairness' were largely discounted.

The process thus privileged technical experts in general, and specifically certain established professionals, who in large part favoured minimal change and opposed the radical overhauls promoted pre-BEPS by civil society activists and some politicians. In contrast, the broader ecology of stakeholders, including civil society organisations and stakeholders from non-OECD countries, particularly the Global South, gained little foothold in the policy processes. However, this 'closedness' importantly helped ensure the coherence of the system by enabling the diffusion and implementation of agreed policy recommendations to national governments around the world. Despite formal status as 'soft law', or policy recommendations, policy proposals agreed as part of the BEPS project, including those originating from critical outsiders, were effectively diffused amongst and beyond the policy-making community itself. Today more than 100 governments have committed to implementing the basic regulatory standards formulated in the BEPS⁶.

These expertise dynamics in policy-making at the OECD stand in sharp contrast to the tax policy processes of the European Union, a key present-day challenger to the OECD's dominance over global tax policies. The European Union has, in the post-crisis years, become an arena for some of the highest profile global tax policy discussions. These are marked by a high diversity of voices and expertises, politicization and instability, and importantly produce hard law. Specifically, the contemporary EU international tax poli-

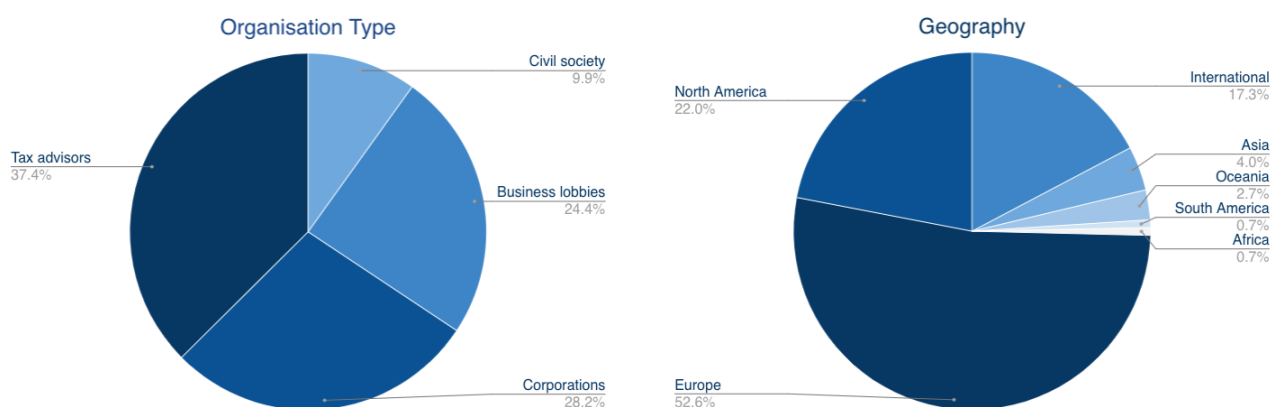


Figure: Responses to OECD BEPS Action 13 consultation, by organisation type and geography

6 <http://www.oecd.org/tax/beps/beps-about.htm>.

cy-making context is characterised by the active involvement and participation of a highly heterogeneous group of stakeholders, including civil society campaigners, a diverse range of business coalitions, politicians from the European Parliament, and an activist bureaucracy in the European Commission. However, historically dominant stakeholders, namely Member State governments, retain significant formal authority over EU tax policy-making, with each state holding formal veto powers over direct tax policy issues. In this setting, radical political reform initiatives and proposals on international tax issues have emerged. These have gone beyond and even directly against consensus positions agreed at the OECD, but have also exposed increasingly vocal internal controversies and hypocrisy among the Union's Member States.

Implications and policy recommendations

What do these findings mean for international tax policy-making? It is clear that historically, and to a notable extent still in recent years, the dominant forum for setting rules governing the taxation of multinational corporations has been characterised by a significant lack of inclusiveness, yet has achieved an impressive consensus around basic policy principles. In recent years, in the context of exploding issue salience and public attention, this 'closedness' has come under scrutiny and pressure. The EU has emerged as a key challenger to the OECD, with policy-making marked by a radically different mode of policy-making, which is more open, heterogeneous and conflictual. However, while the diversity of voices and inclusiveness of policy-making in the EU has fostered a responsiveness to public calls for change that the OECD was not well-suited for, it potentially comes at a significant cost. The EU's rise and conflict with the established 'OECD consensus' threatens the overall coherence of the international tax system.

In other words, there appears to be a trade-off between inclusiveness and coherence in international tax policy-making, at least in terms of the two key institutions shaping international corporate tax rules. Inclusiveness and coherence both speak to the overall legitimacy of the system. Simply modelled⁷, we might think of inclusiveness as representing what is conventionally called the 'input' aspect of legitimacy, or the responsiveness of the policy-making system to citizen concerns, and coherence as representing 'output' legitimacy, or the effectiveness of policy outcomes.

Historically, international tax policy-making has prioritized output legitimacy, ensuring the internationally consistent adoption of technically sophisticated policies based on expert consensus, over input legitimacy, broad stakeholder participation and receptiveness to public concerns. However, at this juncture this trade-off is strained, not only due to the rise of the EU, but also due to conflicts between historical allies inside the OECD, as well as between the OECD and the G77. This raises the prospect of the further fracturing of international tax collaboration⁸.

This, more than ever, calls for a careful re-examination of these trade-offs within and the properties of contemporary international tax policy-making⁹. In particular, policy-makers must weigh the promotion of inclusiveness and/or coherence, and evaluate the contextual factors that condition this trade-off. Initiatives to increase inclusiveness might, for instance, entail opening up public consultation processes at the OECD in a way that more proactively included a greater breadth of stakeholders, moving away from an exclusively technically-based discourse and institutionalising deeper collaboration with historical 'outsiders'. Of note, the OECD has already done a significant amount of work in this direction in the post-BEPS era. Its 'Inclusive Framework' now encompasses more than 100 countries as members on equal footing, involved in policy discussions, mutual peer review and more. Ongoing proposals to move the focal point of international tax policy collaboration to a United Nations forum¹⁰ might prompt greater diversity of voices. At the same, initiatives to increase coherence might, for instance, entail a closer alignment of OECD and EU policy processes through institutionalised collaboration. This would, for instance, mitigate against current risks of individual countries pursuing unilateral actions to 'fix' multinational corporate taxation, rather than relying on collaborative solutions¹¹. Or perhaps more controversially, it might entail the return of an OECD-dominated mode of policy-making.

However, it is important to note that these are not necessarily mutually exclusive pathways to addressing legitimacy concerns around international tax policy-making. Further, the utility of such initiatives is crucially dependent on what is trying to be achieved and the feasibility of each initiative in a broader context of international politics. For instance, a geopolitical balance, in which the Global North, OECD, EU members, and specific countries within these blocs, possess disproportionate economic and political in-

7 Scharpf, F. W. (1999). *Governing in Europe: Effective and democratic?*. Oxford University Press.

8 E.g.: Edwards, S. (2017, January 13). The G77 will push for "tax justice" through a UN tax body, says Ecuador's foreign affairs minister. Devex. <https://www.devex.com/news/sponsored/the-g77-will-push-for-tax-justice-through-a-un-tax-body-says-ecuador-s-foreign-affairs-minister-89442>; Kelpie, C. (2018, February 26). OECD warns over interim moves to curb tax avoidance. The Irish Independent. <https://www.independent.ie/business/world/oecd-warns-over-interim-moves-to-curb-tax-avoidance-36642540.html>.

9 On this topic, see also the ERC-funded 'GLOBTAXGOV' project (<https://globtaxgov weblog.leidenuniv.nl>) and the Horizon 2020-funded 'FairTax' project (<http://www.org.umu.se/fairtax/english/>). On OECD legitimacy more broadly, see also Clifton, J., & Díaz-Fuentes, D. (2011). From 'Club of the Rich' to 'Globalisation à la carte'? Evaluating Reform at the OECD. *Global Policy*, 2(3), 300–311.

10 Edwards, S. (2017, January 13). The G77 will push for "tax justice" through a UN tax body, says Ecuador's foreign affairs minister. Devex. <https://www.devex.com/news/sponsored/the-g77-will-push-for-tax-justice-through-a-un-tax-body-says-ecuador-s-foreign-affairs-minister-89442>

11 See e.g. OECD. (2018). *Tax Challenges Arising from Digitalisation – Interim Report 2018*.

fluence and capacity is potentially the most significant barrier to greater inclusiveness. Equally, the large differential in professional-technical capabilities amongst stakeholder groups is notable. At the same time, the increasing geopolitical might of emerging markets, who may have fundamentally different views on the governance of international corporate taxation, must be a central consideration in the pursuit of system coherence. These are unescapable factors in evaluating the trade-offs in designing international tax policy-making processes.

What is perhaps of greatest importance, then, is that policy-makers make clear and strategically pursue their ambitions for international tax policy-making. Policy-makers are highly active in promoting various ambitions for the content of international tax

policy, yet the structure of the process to bring those substantive ideas about are all too often left implicit, bar scattered calls from outsiders for radical institutional reform. Initially, policy-makers in the OECD, the European Union and beyond should explicate their goals for the involvement and diversity of stakeholders and types of expertise in international tax policy-making. Second, these ambitions should be accompanied by careful and transparent considerations of the trade-offs between diversity and inclusiveness, political progress and responsiveness, and coherence, in the broader context of international politics. Third, these ambitions should be accompanied by actionable initiatives to support the stated objectives for the overall design of international tax policy-making processes.