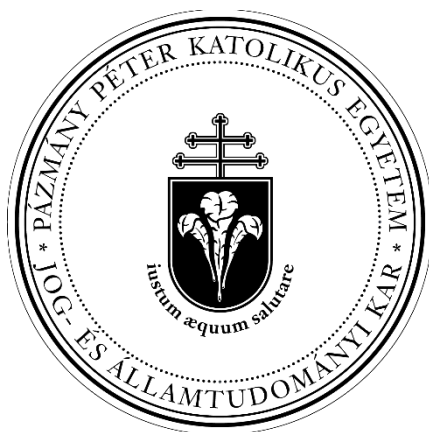




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Instruments for international tax harmonization

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Instruments for international tax harmonization

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1. Normative legal framework

When we look at international tax law as a normative legal framework, we talk about a very broad concept that includes international law and national law while the two levels uphold an interaction with each other.² ‘International tax law’ as a term in tax law scholarship is used as a reference to all international and domestic tax provisions in relation to cross-border situations.³ It encompasses both material law issues and procedural issues, dealing with both aspects in relation to the cross-border situations. As such, it covers for example the allocation of taxing rights as a material law issue and exchange of information or assistance in collection of taxes due as procedural issues.

The sources of international tax law consist of hard law, soft law and case law.⁴ At the legislative level, the international aspect of tax payment is governed by bilateral and multilateral treaties, domestic legislation and international soft law.⁵ Where a taxpayer is not bound to only one jurisdiction (main headquarters in the state of residence but income derived also from another source state), an agreed system is needed to determine the rights of taxation for the given type of income. It would be extremely burdensome for the taxpayer if both the resident and source state would levy taxes on the income, but it is also not ideal if neither does.

Taxation is a key state-economy area for jurisdictions, the lack of material international harmonization present for a long time can be traced back to the fact that taxation issues are closely connected to the issue of state sovereignty.

2. Legal Instruments for Harmonization

In the last decades, especially from 2013 onwards, we have seen various harmonization initiatives employing various instruments. Some, for example harmonization with multilateral treaties or soft law instruments can only be considered a novelty because in the field of tax they were not employed so enthusiastically before, but we have seen search for new instruments and

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² Florian Haase – Georg Kofler (eds.): *The Oxford Handbook of International Tax Law*. Oxford, Oxford University Press, 2023. <https://doi.org/10.1093/oxfordhb/9780192897688.001.0001>

³ Klaus Vogel: *Klaus Vogel on Double Taxation Conventions*. 3rd ed. Boston, Kluwer Law International, 1997. Introduction, m.no. 5.

⁴ Haase – Kofler op. cit.

⁵ Michael P. Devereux – Alan J. Auerbach – Michael Keen – Paul Oosterhuis – Wolfgang Schön – John Vella: *Taxing Profit in a Global Economy*. Oxford, Oxford University Press, 2021. 86. <https://doi.org/10.1093/oso/9780198808060.001.0001>

the introduction of newly developed ones. To define and inspect these instruments, there are characteristics to consider for each one. One of these characteristics is if the instrument is considered hard law or soft law. Consequently, binding force, enforceability, precision and clarity, the source of the instrument, mode of adoption, their place in the legal hierarchy (historical context, intent), implementation into national legal systems, degree of delegation to monitor compliance, interpretation or adoption of the instrument.

2.1. Treaties

Based on the Vienna Convention on the Law of Treaties, treaty means “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”⁶.

On one hand, bilateral treaties are by nature agreements between two states. Traditionally in taxation, these are bilateral treaties on the prevention of double taxation and double non-taxation of income and capital, thus of direct taxation of said types of income of both entities and private persons. Since it is an agreement between two states, the bilateral treaty itself creates rights and obligations only for the two signatory states, not concerning their relationships with other states and jurisdictions. These bilateral treaties are based on model conventions, developed by international organizations (e.g. the OECD⁷ or the UN⁸) or regional groups (e.g. the ATAF model convention⁹). For the negotiations all countries have their own model to follow, normally based off of one of the models developed by an organization or group of countries modified by the given country’s specific interests, but these are mostly not accessible for the public. Mostly, it is considered an in-house policy document and not as public information. There are some countries (most notable the United States of America¹⁰) who chose to publish their own models for information of other negotiating parties and the public in

⁶ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), *United Nations Treaty Series*, Vol. 1155. 331. Article 2(1)(a)

⁷ OECD: *The 2025 Update to the OECD Model Tax Convention*. Paris, OECD Publishing, 2025. <https://doi.org/10.1787/5798080f-en>

⁸ United Nations: *United Nations Model Double Taxation Convention between Developed and Developing Countries* 2021. New York, United Nations, 2021. [https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model 2021.pdf](https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model%202021.pdf)

⁹ African Tax Administration Forum: *ATAF Model Agreement for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Avoidance and Evasion*. ATAF, 2012. [https://events.ataftax.org/media/documents/7/documents/S-4019_English ATAF MODEL AGREEMENT LR.pdf](https://events.ataftax.org/media/documents/7/documents/S-4019_English_ATAF_MODEL_AGREEMENT_LR.pdf)

¹⁰ U.S. Department of the Treasury: *United States Model Income Tax Convention*. Washington, D.C., 17 February 2016. https://home.treasury.gov/system/files/131/Treaty-US-Model-2016_1.pdf

general. These models and their commentaries form an integral part of tax treaty practice but as they are non-binding by nature.

Bilateral tax treaties are the first instruments used to allocate the taxing rights of countries for given categories of income. These treaties have been used since the early 20th century to govern bilateral relationships, to enhance economic relationships by facilitating avoidance of double taxation.¹¹ Since tax treaties go back to more than a hundred years, and taking into the economic importance of erasing the barrier of double taxation of income in enhancing trade, there is a wide network of treaties around the globe. Most developed countries have tax treaties with close to a hundred jurisdictions each. Globally this means thousands of treaties forming a network with treaties of different ratification dates and negotiating conditions. This leads to inconsistent rules and standards even in the practice of one country – looking at it globally, the treaties sometimes show contradictory or significantly different conditions.¹² Negotiations are between the two signatory countries, which means that they can and will tailor the clauses to fit their own relationship and negotiating powers.

Normally bilateral treaties are not mentioned or classified as legal instruments for harmonization. From an international taxation perspective, they normally govern the bilateral relationship between two states by allocating the taxing rights between them from one income category to another. While by their nature, tax treaties are more for coordination than effective harmonization, the model treaties give their wording a degree of unity and if we look at dialogue about harmonization as a whole, the practice of tax treaties is the first step. Discussing tax practices, establishing the common language of international taxation is based on the bilateral treaty network. Nowadays during the UN Framework Convention negotiations¹³, we are reminded of how important it is to have a commonly accepted meaning for each word used

¹¹ League of Nations, Economic and Financial Commission: *Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp*. Geneva, League of Nations, 1923. Doc. E.F.S.73.F.19.

¹² In theory states are free to set conditions suiting their bilateral relationship but normally the treaties are closely following one of the models. Typical points of difference are the permanent establishment thresholds (in OECD Model Article 5), the definition of royalties, the inclusion of a separate article on the remuneration of teachers and researchers, the rights of taxation of pensions (very common if State A have tax-free state-pensions based on a TTE system, while State B taxes pensions in a EET system), inclusion of limitation of benefits rule or the allocation ratio for passive income items to list a few. A common consistency is the taxation of income from the sale of real estate where the link is not based on the source of the income or the residency of the taxpayer but the place of the real estate.

¹³ UN General Assembly Resolution 77/244 of 30 December 2022, Promotion of inclusive and effective international tax cooperation at the United Nations, UN Doc. A/RES/77/244, <https://undocs.org/en/A/RES/77/244>; UN General Assembly Resolution 78/230 of 22 December 2023, UN Doc. A/RES/78/230, <https://undocs.org/en/A/RES/78/230>; UN General Assembly Resolution 79/235 of 24 December 2024, UN Doc. A/RES/79/235, <https://undocs.org/en/A/RES/79/235>.

in international taxation and the difficulties of not speaking in the same terms (or the same meanings behind the same word). If we look at bilateral treaties, decades of practice and multiple model conventions established the common language of negotiations where misunderstanding on meaning is marginal. In my opinion this in itself makes bilateral treaty practice the first step in the harmonization of income taxes: establishing a commonly spoken language, forming the bases as step zero.

On the other hand, multilateral treaties are between three or more jurisdictions, making them a more all-encompassing legal instrument in comparison to bilateral treaties. It is an agreement among multiple states, establishing uniform rights and obligations across several jurisdictions. Since there is the potential for multiple jurisdictions to participate under the same conditions, there is a great potential for coherence in regulating the covered areas. With the higher level of coherence comes a reduction of inconsistencies. Compared to bilateral treaties multilateral treaties provide the opportunity for a higher level of standardization and legal certainty which are core components of harmonization.

Since multilateral treaties require the agreement of many, the negotiations might be longer and turn highly political. Since reaching an agreement is somewhat harder and future amendments are also in need of multilateral consent, the modification of such agreements may also be more difficult.

Utilizing multilateral treaties would create a uniform legal text binding for all parties involved and would cement harmonization efforts into undisputable hard law. While BEPS 2.0¹⁴ Pillar One was developed as a multilateral treaty¹⁵, utilizing this legal instrument in the context of taxation of digital services, it has not been open to signature yet. The example of Pillar One attests to the difficulty of developing a multilateral treaty. It was developed on a high technical level to minute detail, a long and complicated text, negotiated for years by the Inclusive Framework¹⁶ members in the OECD. Even with all the work, its success is dependent upon the participation of one country – the United States – and the current administration’s stance is against the harmonization efforts. Thus, we have a developed instrument that is not taking effect – indefinitely.

¹⁴ OECD/G20 Inclusive Framework on BEPS: *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*. Paris, OECD, 8 October 2021.

¹⁵ OECD/G20 Inclusive Framework on BEPS: *Multilateral Convention to Implement Amount A of Pillar One*. Paris, OECD, 11 October 2023. (hereinafter: **Pillar One**)

¹⁶ The OECD/G20 Inclusive Framework on BEPS is the forum within the OECD in which decisions on BEPS-related issues are made. For an analysis of its status, see Allison Christians – Laurens van Apeldoorn: The OECD Inclusive Framework. *Bulletin for International Taxation*, Vol. 72., No. 4/5. (2018) 226.

2.2. Multilateral legal instruments

For Action 15 of BEPS¹⁷, to effectively implement minimum standards in the bilateral tax treaties without having to renegotiate and modify each and every one of them separately – which in case of a developed country could mean close to a hundred treaties – a new hybrid instrument was developed to establish a multilateral mechanism of modifications. The Multilateral Instruments (“**MLI**”) is designed as a multilateral treaty (Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting¹⁸) which countries sign and ratify in line with their constitutional practices¹⁹.

This is a hybrid instrument, while it takes the form of a multilateral convention, it is a technical instrument to implement material law modifications to existing tax treaties. MLI is unique in its nature because it integrates modifications stemming from the soft law minimum standards established by the BEPS action plan into the hard law of bilateral tax treaties. It is a tool for batch modifications in the form of a convention.

2.3. Soft Law Instruments

While hard law generally refers to legal obligations that can be legally enforced before a court, which are binding on the parties involved, soft law instruments are instruments which are not legally binding, but have political, practical or normative influence on the behaviour of state actors. As a consequence, soft law as a term is employed to denote principles, declarations and agreements without legally binding force.²⁰ From a public international law perspective – that now has also gained relevance from a tax perspective with the United Nation’s ambition to establish the Framework Convention on Tax – prominent examples are resolutions and declarations adopted by the UN General Assembly or specialized agencies, guidelines, codes of conduct and principles, UN conference declarations. More prominent in tax law are guidelines and recommendations of the OECD, for example the Transfer Pricing Guidelines, model tax

¹⁷ Base Erosion and Profit Shifting (BEPS) is the OECD/G20 framework addressing international tax avoidance.

¹⁸ Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Paris, 24 November 2016). <https://www.oecd.org/tax/beps/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>

¹⁹ An example of domestic implementation is the Hungarian Act of Parliament LXXXI of 2017 on the Promulgation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

²⁰ European Center for Constitutional and Human Rights: Hard law/soft law. ECCHR Glossary. <https://www.ecchr.eu/en/glossary/hard-law-soft-law/>

treaties and their commentaries²¹ and even the model tax treaties adopted by regional groups²² in interpreting treaties where the text is based on those models with the intention to convey application and interpretation in accordance with these non-binding documents.

What is a common sentiment when defining the term soft law is its lack of formal binding force. This lack of legal obligation, from a technical point, is the *differentia specifica* in dividing hard law and soft law. A direct consequence of the difference in binding force is the lack of judicial enforceability of soft law instruments. Without legally binding force, enforceability cannot follow since no legal base is provided for it. Another common denominator of soft law is that it is issued by a non-legislative body, either international (the OECD, the European Commission) or domestic (tax authorities).

Since there is no legal base to enforce soft law, the question of is soft law even classified as law arises. Looking at the problem from the other end, when does a non-binding document become soft law, what is bases for the differentiation between a somewhat normative document of soft law and a simple guideline that doesn't even constitute to be soft law?

A number of characteristics are discerned in tax law scholarship that make soft law into soft law. While these instruments are worded in the style of a normative text, they contain non-binding language²³, for example, words like 'encourage', 'should', 'recommend', which give leeway for non-application. Another characteristic is that they are issued by an international organization without law-making power of its own²⁴ (or a body without legislative powers). Soft law instruments are not subject to ratification or parliamentary approval, they lack the formal characteristics of international agreements.²⁵ Since there is no legal obligation, there is no dispute settlement mechanism either, no legal remedy for breach.²⁶ This also follows from

²¹ OECD: *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*. Paris, OECD Publishing, 2022. <https://doi.org/10.1787/0e655865-en>. And UN Model Double Taxation Convention cited above.

²² See 1987 Intra-ASEAN Model Double Taxation Convention signed by the members of the Association of South East Asian Nations (ASEAN) and the ATAF Model Agreement for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Avoidance and Evasion published by the African Tax Administration Forum.

²³ Hans Gribnau: Soft Law and Taxation: EU and International Aspects. *Legisprudence*, Vol. 3., No. 1. (2009) 67–86.

²⁴ Pasquale Pistone: General Report. In: Michael Lang – Pasquale Pistone – Josef Schuch – Claus Staringer (eds.): *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties*. Cambridge, Cambridge University Press, 2012. 1-36.

²⁵ Daniel Thürer: Soft Law. In: Anne Peters (ed.): *Max Planck Encyclopedia of Public International Law*. Oxford, Oxford University Press, last updated March 2009. para. 31. <https://doi.org/10.1093/law:epil/9780199231690/e1469>

²⁶ Joost Pauwelyn: Is It International Law or Not, and Does It Even Matter? In: Joost Pauwelyn – Ramses A. Wessel – Jan Wouters (eds.): *Informal International Lawmaking*. Oxford, Oxford University Press, 2012. 125–161.

the lack of binding force, disputes arising from a soft law instrument will have to find legal bases to become enforceable elsewhere, in norms which are enforceable in front of a court. Despite all reasons to the contrary, soft law instruments are widely adopted and influential.

But where is the point a soft law instrument becomes quasi binding? There is no formal transition and there is no act of any international or national institution proclaiming the point of time soft law starts to have notable influence on legal practice. There are instances when it becomes clear that soft law became binding law when it is incorporated to domestic law or when a bilateral or multilateral treaty contains provisions previously provided by soft law instruments. In these cases, even if the transition is not proclaimed – there is no disclaimer that the provision was taken from soft law guideline – the material rule itself will gain binding force. Another scenario is, when the guideline itself is non-binding but compliance is measured by peer review procedures thus the international expectation makes states comply in case they do not want negative publicity based on the result of the peer review process. This type of soft law is present in the BEPS action plan as the OECD published peer review reports. It is also present in the work of the Code of Conduct on Business Taxation in the EU²⁷, since the practice of blacklisting jurisdictions based on non-cooperation with international standards and obscure practices third party jurisdictions that do not cooperate become non-cooperative and the list serves as political and economic pressure to change their legislation. In case of BEPS, normative and / or political pressure results in practical effectiveness even without legal enforceability. A note must be made though that soft law instruments do not necessarily remain soft law for all state parties, since the EU often adopted binding instruments based on the OECD-developed best practices and model rules.²⁸

From the above it follows that a non-binding document becomes soft law when it becomes relevant as repeated practice, political pressure or economic consequences cause jurisdictions to align with its norms without any legal obligation to do so.

2.4. Customary norms and general principles

Since international tax law is part of international public law, it is a direct consequence that the customary norms and general principles underpinning it are also present in international tax law

²⁷ Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 8 November 2022 on a revised Code of Conduct for Business Taxation, OJ C 433, 15.11.2022, pp. 1–8.

²⁸ Compare, for example, OECD: *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*. Paris, OECD Publishing, 2015. <https://doi.org/10.1787/9789264241442-en> with Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139, 5.6.2018, pp. 1–13

concerning direct taxation. For corporate taxation these are mainly that of sovereignty and territoriality, the arm's length principle, the principle of non-discrimination, the rule against foreign revenue enforcement, principle of cooperation and equity. These principles are present in the creation and interpretation of tax treaties, domestic laws and international cooperation mechanisms alike.

According to scholarship, customary international laws exist in some instances of international tax regime, but their scope is limited because they are frequently violated in practice.²⁹ The caveat of this statement is that in states where between international law and domestic law, international law overrides domestic law,³⁰ the derogation and violation of customary international law might not be as present.³¹

2.5. EU legislation

Tax integration in the EU is a much-debated subject. The playing field is different for direct and indirect taxation, EU primary law providing the framework in which integration could take place. Looking at possible legal instruments to use, examination needs to be done in primary law, secondary law and soft law.

2.5.1. *Legislative Framework*

While for value added tax, excise duties and other indirect taxation Art. 113 of the Treaty on the Functioning of the European Union³² establishes the harmonization order, for direct taxation there is nothing as such laid down in the treaty. That said, directives concerning direct tax issues are based on Art. 115 of the TFEU. Since taxation, especially direct taxation remained in the competency of the Member States based on the principle of conferral. Based on Art. 115 of the TFEU, a consultation procedure, for the approximation of laws, directives can be adopted by the Member States by unanimity, regulations or administrative provisions of the Member States in case they directly affect the functioning or establishment of the internal market.

²⁹ Reuven S. Avi-Yonah: Does Customary International Tax Law Exist? University of Michigan Law & Economics Working Papers, No. 161, 2019. https://repository.law.umich.edu/law_econ_current/161

³⁰ A notable exception is the United States, where the Supreme Court held in *The Paquete Habana* that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations [...]” *The Paquete Habana*, 175 U.S. 677, 700 (1900).

³¹ Avi-Yonah op. cit. 10.

³² Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, p. 47. Article 113. (hereinafter: TFEU)

2.5.2. EU soft law

Soft law is a term in EU law that is difficult to classify. This is mostly due to the fact that neither the establishing treaties nor the European Court of Justice decisions mention the term ‘soft law’ and as a term it is not well mentioned in other EU documents either.³³ That said, there is a part of EU sources that are non-binding and serve as instruments for consideration and convincing, for co-operation and best practices urging changes in the legal framework or practice of the Member States.³⁴

In the scholarship on soft EU law, the obvious definition is all law that is non-binding is soft law, whereas law with a binding effect is hard law³⁵ appears to be a too black and white position to take.³⁶ This can be explained with the complexity of institutions and the array of instruments these institutions are able to employ to create secondary sources. The ECJ explicitly stated in the Grimaldi case that the fact that an EU soft norm does not have legal effect, does not mean that they have no effect at all.³⁷ In case of soft norms, we can determine a spectrum of normativity which is softer than that of a hard norm, softer than the obligations on domestic courts, lawmakers and authorities to implement.³⁸

According to Láncoş, there are three determined classes on this spectrum: soft law for the approximation of laws, true soft law and binding legal sources disguised as soft law. Soft law for the approximation of laws constitutes formal recommendations of actions which target the approximation of domestic laws on non-binding bases. Based on case law³⁹, domestic courts are bound to consider the recommendations for the cases in front of them. While there is no formal interpretation on what the obligation to consider means, but scholarship agrees, that it cannot reach the consideration obligation of indirect effect, it is more a minimal effort obligation where the total non-consideration is not permitted.⁴⁰ For this harmonization effort, examples in direct

³³ Vassilios Christianos: Effectiveness and Efficiency through the Court of Justice of the EU. In: Julia Iliopoulos-Strangas – Jean-François Flauss (eds.): *Das soft law der europäischen Organisationen*. Baden-Baden, Nomos, 2012. 327.

³⁴ Petra Lea Láncoş: Az uniós soft law kutatásának főbb eredményei és aktuális kihívásai [Main Results and Current Challenges of EU Soft Law Research]. *Iustum Aequum Salutare*, 2018/4. 56.

³⁵ Francis Snyder: Soft Law and Institutional Practice in the European Community. In: Stephen Martin (ed.): *The Construction of Europe. Essays in Honour of Emile Noël*. Dordrecht, Kluwer Academic Publishers, 1994.

³⁶ Opinion of Advocate General Bobek in Case C-16/16 P, Kingdom of Belgium v European Commission [ECLI:EU:C:2017:959] para. 82.

³⁷ Case C-322/88, Salvatore Grimaldi v Fonds des maladies professionnelles [ECLI:EU:C:1989:646] paras 16 and 18.

³⁸ Petra Lea Láncoş: A Hard Core under the Soft Shell: How Binding Is Union Soft Law for Member States? *European Public Law*, Vol. 24., No. 4. (2018) 619–627. <https://doi.org/10.54648/euro2018042>

³⁹ Grimaldi, paras 16 and 18.

⁴⁰ Linda Senden: *Soft Law in European Community Law*. Oxford, Hart Publishing, 2004. 449 et seq.

taxation are the Commission Recommendation on Aggressive Tax Planning⁴¹, Commission Recommendation on Good Governance in Tax Matters⁴², Commission Recommendation (2016) on the Implementation of Measures Against Tax Treaty Abuse (BEPS)⁴³ and the Code of Conduct for Business Taxation⁴⁴.

True soft law instruments are informal norms, in nature more for information sharing than normativity. These are norms that do not bind the member states at all, they did not participate in their development, did not consent to the documents themselves. While this type of Commission de minimis communications currently are non-present in direct taxation, we have seen them in connection to state aid legislation. A good example of Commission Notice on the Notion of State Aid⁴⁵, which is a non-binding instrument as it is the Commission's soft law communication. While it is not a formal legal instrument, the Commission is shaping the behaviour of Member States through it nonetheless. In the future, we might see similar instruments used in connection to global minimum taxation, as it is one subject matter governed by EU law for the Member States.

For the third category, in case the Commission and Member States' cooperation results in soft law in a suitable instrument, by concession of the Member States an instrument might raise to binding soft law level. We have not seen an example of this in direct taxation as of now.

In general, soft law instruments are present in direct taxation in the EU legislative framework, especially since the framework for harmonization is not set by the establishing treaties or the TFEU.

3. The Advantage of Soft Law

In legal scholarship, multiple reasons are identified for using soft law as an alternative to establishing legal norms by tax treaties.⁴⁶ These reasons stem from states' reluctance to enter binding commitments especially in case key aspects of their sovereign competences (which bears an even larger significance when looking at the functioning of the EU), the inherent non-

⁴¹ Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU), OJ L 338, 12.12.2012, pp. 41–43.

⁴² Commission Recommendation of 6 December 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters (2012/771/EU), OJ L 338, 12.12.2012, pp. 37–40.

⁴³ Commission Recommendation (EU) 2016/136 of 28 January 2016 on the implementation of measures against tax treaty abuse (notified under document C(2016) 271), OJ L 25, 2.2.2016, pp. 67–68.

⁴⁴ See footnote No. 26.

⁴⁵ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), OJ C 262, 19.7.2016, pp. 1–50.

⁴⁶ Alan Boyle: The Choice of a Treaty: Hard Law versus Soft Law. In: Simon Chesterman – David M. Malone – Santiago Villalpando (eds.): *The Oxford Handbook of United Nations Treaties*. Oxford, Oxford University Press, 2019. <https://doi.org/10.1093/law/9780190947842.003.0007>

flexibility of binding agreements and the possible domestic administrative burden in entering an international agreement. On the other side, from the international organization serving as a catalyst for the negotiating process, adopting a soft law instrument serves a timely validation of the procedure, an economic and / or political consensus between the parties involved.⁴⁷

The question arises, is soft law an effective tool to employ in international taxation? Looking at it from a technical legal point of view, the answer is no. Soft law instruments lack legitimacy and enforceability. The application of soft law raises concerns of legal certainty, of tax transparency and fairness, since obligations – from a purely legal technical perspective – cannot be based on anything besides the law itself.⁴⁸ In case a state did not consent to an international standard set in soft law, it undermines its sovereignty in application without its former consent. It might even bypass rule of law and democratic oversight.⁴⁹ It can also lead to asymmetric power dynamics between groups of countries, their application giving power to those consenting to them, whose interests are served by their application while takes power from those that did not agree or whose interests are not served by the instruments. This dynamic is acutely presented in the debate between the OECD member states and the so-called Global South of developing countries, that led to the ongoing UN procedure on tax cooperation⁵⁰ turning the table on the debate on decision making powers.

On the other hand, soft law is an effective and functionally useful tool used in international taxation. It allows the flexibility to develop solutions to pressing issues in a reasonable timeframe and handle the quickly evolving tax issues as seen in the BEPS action plan. For the fundamental architecture of international tax law, the OECD Transfer Pricing Guidelines and the model commentary are both soft law instruments that are widely implemented and used for interpretation even by courts. BEPS actions also gained recognition on multiple issues, especially with the implementation of minimum standards.⁵¹ While hard law harmonization

⁴⁷ Christine Chinkin: The Challenge of Soft Law: Development and Change in International Law. *International and Comparative Law Quarterly*, Vol. 38., No. 4. (1989) 850. <https://doi.org/10.1093/iclqaj/38.4.850>; Kenneth W. Abbott – Duncan Snidal: Hard and Soft Law in International Governance. *International Organization*, Vol. 54., No. 3. (2000) 421. <https://doi.org/10.1162/002081800551280>; Hartmut Hillgenberg: A Fresh Look at Soft Law. *European Journal of International Law*, Vol. 10., No. 3. (1999) 499. <https://doi.org/10.1093/ejil/10.3.499>; Hanspeter Neuhold: The Inadequacy of Law-Making by International Treaties: ‘Soft Law’ as an Alternative? In: Rüdiger Wolfrum – Volker Röben (eds.): *Developments of International Law in Treaty Making*. Berlin–Heidelberg, Springer, 2005. 40.

⁴⁸ Allison Christians: Hard Law, Soft Law, and International Taxation. *Wisconsin International Law Journal*, Vol. 25., No. 2. (2007) 325–366.

⁴⁹ Yariv Brauner: An International Tax Regime in Crystallization. *Tax Law Review*, Vol. 56., No. 2. (2003) 310.

⁵⁰ See footnote No. 12.

⁵¹ OECD: OECD/G20 Base Erosion and Profit Shifting Project: Explanatory Statement, 2015 Final Reports. Paris, OECD, 2015.

works from the top to the bottom, employing soft law instruments by the international tax practice supports bottom-up harmonization.

4. The Technical Side: Implementation Frameworks

International tax norms, be it hard law or soft law, both need translation into domestic legal orders. National implementation of these rules differ based on the structure of the state's legal system, constitutional requirements and interpretative culture. How international law becomes part of domestic law is dependent on the constitutional traditions of a given state.

4.1. International vs. Supranational vs. Domestic Level Implementation

For EU Member States, there is an additional level of legislation between the international and domestic level. In the BEPS project, the EU did not only participate but acted as flagship for change as all the Member States are Inclusive Framework members and actively participating in negotiations. In the BEPS action plan, not only the minimum standards were implemented on an EU level but also additional solutions, like the Mandatory Disclosure Rules translating into a directive.⁵² Since implementation occurred at the EU level, for Member States there is the supranational level of legislation in between the international soft law and domestic law.

The problem occurs in case a binding EU legislative act translates international soft law into binding supranational law for the Member States, fixing the text in one specific moment during the international negotiations at other forum while it is still evolving. In case of the global minimum tax rules⁵³, the EU directive⁵⁴ got accepted prematurely while the OECD text was still changing. As administrative guidance is ever-revised and safe harbour rules are again and again renegotiated, it seems that there might not be a time when the text settles into a permanent state. With the model rules, commentary and administrative guidance⁵⁵ still changing, the provisions of the EU directive – the supranational hard law – and the international soft law diverged. Since all Member States have to agree on the adoption and modification of directives unanimously, the EU text is not easily modified. During domestic implementation, Member States faced the dilemma of breaching either international soft law or EU hard law. Breaching soft law would

⁵² See footnote No. 27.

⁵³ OECD: *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*. Paris, OECD Publishing, 2021. <https://doi.org/10.1787/782bac33-en>

⁵⁴ Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ L 328, 22.12.2022, pp. 1–58.

⁵⁵ OECD: *Tax Challenges Arising from the Digitalisation of the Economy – Consolidated Commentary to the Global Anti-Base Erosion Model Rules (2026): Inclusive Framework on BEPS*. Paris, OECD Publishing, 2026. <https://doi.org/10.1787/4377e89f-en>

risk the international coherence of the rules while that of hard law risk EU infringement procedures⁵⁶.

4.2. Domestic Law

While international tax law is negotiated on an international level – between states in bilateral or multilateral environments under the aegis of an international forum or hosted by one of the negotiating parties – domestic implementation is a key moment. In case of a dualist constitutional system, it is what gives legitimacy to the hard law, while in case of soft law instruments, the implementation into domestic law is what gives legitimate legal value to the legislation itself. How the rules take form in domestic law will be the starting point when the provisions are applied for individual cases.

5. Question of Legal Value – Quasi Binding Soft Law?

When evaluating the international direct tax legal order as a whole, we see a mass of different legal instruments with differing effects and relevance. The foundation is a broad network of bilateral tax treaties and soft law tools supporting their interpretation and application. In the last decade to combat harmful tax practices, there has been an upsurge of legal instruments – both hard and soft law – filling out gaps and providing guidance on subtopics of international corporate taxation. The legal value of these instruments differ.

The fundamental differentiation to make is based on binding and non-binding nature, where hard law stands at the end of the spectrum as binding and soft law at the other and as non-binding. In between are the quasi-binding soft law instruments, that gained enforceability through translation to domestic legislation or implementation pressure be it political or economic. As a consequence, we see enforceability of binding instruments and also quasi-binding instruments to some degree.

To sum up, hard law is legally binding, its implementation requires ratification and thus it is enforceable in front of courts. It establishes rights and obligations with differing levels of legal certainty. In international tax law, hard law means bilateral treaties with the addition of MLI as a multilateral treaty but with a non-traditional aim and purpose. Soft law is not legally binding; its implementation is voluntary and has no enforceability in front of courts or other fora. Its legal certainty is low (it is even a question if we could talk about the legal certainty of soft law).

⁵⁶ E.g. Article 258 TFEU.

The status of the in-between, of the quasi-binding instruments is determined by their implementation which is triggered by either political or economic factors. It is not the clear cut taking on of obligations as it is with hard law where states sign up and declare their intent by ratification but it is not necessarily voluntary either. Enforceability does not become direct, but indirectly – either by the monitoring procedure or domestic implementation – quasi enforceability applies.