

Soft law in international taxation

Alberto VEGA
 Department of Law, UPF

Introduction to the problem

Soft law, such as model conventions, guidelines and recommendations of international organisations, is basic in the design of the international tax regime. Even if these instruments are not legally binding, they seem to have a very relevant influence on the formal sources of law. However, the making process of soft law may not be transparent enough and all the affected parties may not be able to participate in its drafting, especially in the context of the OECD. Thus, we analyse which is role of soft law in the regulation of international tax matters and whether its making process is consistent with its practical influence.

Research questions

Which is the role of soft law in international tax matters?
How does soft law influence hard law? May soft law end up becoming hard law?

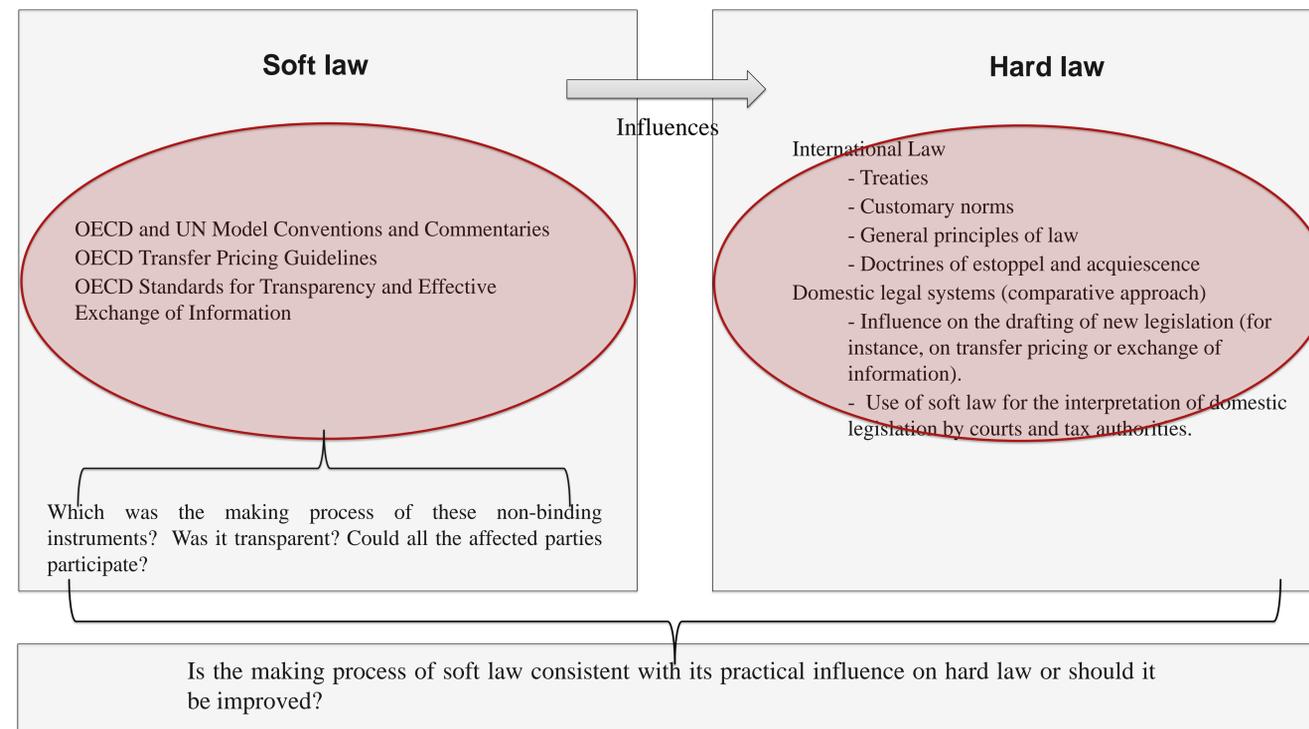
Which is the making process of soft law on taxation in the OECD and United Nations? Is it transparent enough? Do all the affected parties have a say? Would it be convenient to introduce certain reforms in the making process of soft law dealing with international taxation?

Main Hypothesis

The great influence of soft law on hard law is not consistent with the characteristics of the making process of soft law, especially in the OECD.

Methodology

- I. Legal methodology
 - International Public Law
 - Domestic Tax Law (comparative approach)
 - Theoretical approach: analysis of the notion of soft law in the context of the sources of international law and the legal status of certain instruments (such as models, guidelines or recommendations from international organisations).
 - Empirical approach: analysis of the influence of soft law in practice. For instance, we compare the influence of the OECD and UN models and study the use of soft law as an interpretative tool in the case-law of several countries.
- II. Other approaches to the study of soft law
 - I. International relations and political science
 - II. Economic analysis of law



Objectives

- With respect to the three main examples of soft law on international tax matters (Model Conventions and Commentaries thereon, OECD Transfer Pricing Guidelines, OECD Standards for Transparency and Effective Exchange of Information):
 - Analysis of their making process: historical evolution, countries that participated, degree of transparency...
 - Analysis of their legal status and their influence on hard law (both from the perspective of international and domestic law).
- Presentation of proposals for the improvement of the making process of soft law on international taxation

Basic structure

- I. Introduction to the notion of soft law
- II. Main examples of soft law in international taxation: their making process and their influence on hard law
 1. Model Conventions and Commentaries
 2. OECD Transfer Pricing Guidelines
 3. OECD Standards for Transparency and Effective Exchange of Information
- III. Alternatives for the improvement of the making process of soft law (reforms in the OECD/UN, establishment of new international organisations to deal with international tax matters...)

Expected original contribution

The thesis applies the doctrinal debate about the role of soft law in the framework of the sources of International Public Law to the particular area of international taxation. Despite the relevance of soft law in this sector, it has received less attention than the influence of soft law in other areas such as the international protection of the environment and human rights or the regulation of international financial transactions.

We relate the practical influence of soft law on hard law with the making process of soft law and introduce some proposals to improve its transparency and legitimacy.

Basic references

- Abbott, K.W. and D. Snidal, "Hard and Soft Law in International Governance", *International Organization*, vol. 54, no. 3, 2000, p. 401-419.
- Ault, H.J., "Reflections on the Role of the OECD in Developing International Tax Norms", *Brooklyn Journal of International Law*, vol. 34, 2009, p. 757-781.
- Calderón, J.M., "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?", *Intertax*, vol. 35, no. 1, 2007, p. 4-29.
- Chinkin, C.M., "The Challenge of Soft Law: Development and Change in International Law", *International and Comparative Law Quarterly*, vol. 38, no. 4, 1989, p. 850-866.
- Christians, A., "Hard Law & Soft Law in International Taxation", *Wisconsin International Law Journal*, vol. 25, no. 2, 2008, p. 235-333.
- Klabbers, J., "The Undesirability of Soft Law", *Nordic Journal of International Law*, vol. 67, p. 381-391.
- Ring, D. "Who is Making International Tax Policy? International Organizations as Power Players in a High Stakes World", *Fordham International Law Journal*, vol. 33, no. 3, p. 649-722.
- Weil, P., "Towards relative normativity in International Law?", *The American Journal of International Law*, vol. 73, no. 3, 1983, p. 413-442.

Acknowledgments

Funding for this project was provided by the Spanish Ministry of Science and Innovation (Grant BES-2008-003252) and the European Social Fund. This work is also part of the activities of the Research Group on Tax Law (2009 SGR 886), funded by the Government of Catalonia.