RULE OF LAW, LEGALITY, AND THE OECD PILLAR TWO MODEL RULES

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Executive summary

With the EU’s adoption of the Minimum Tax Directive, a complex and intricate legal landscape has emerged. This research delves into the crucial question of the legal status of that legal status that can be attributed to the Commentaries and additional OECD implemental documents, particularly in Sweden. One of the study’s objectives is to evaluate whether these documents adhere to the criteria outlined in Article 2 of the Treaty of the European Union. Specifically, it examines whether the use of OECD documents to interpret legal acts aligns with the principles of rule of law, legality, and democratic values.

Legal Status of OECD Documents

During the past 50 years, the question of the legal status of the Commentaries to the MTC has been discussed, and OECD and non-OECD Member states have taken different approaches. Undoubtedly, the legal status of Tax Conventions depended on the constitutional provisions of the contracting states. However, the main issue has been whether the Commentaries were to be considered as ancillary interpretive documents as provided for by the VCLT and whether an ambulatory or static approach is adopted.

One crucial difference between the OECD/G20 Inclusive Framework Pillar Two Model Rules and the previously published OECD Model Tax Convention and its Commentaries is the required all-in approach. Namely, the Model Rules demand states to fully abide by the rules, with some limited and mainly procedural rules reserved, to reap the benefits of the Pillar Two solution. However, the non-application of specific model rules may lead to a jurisdiction being considered non-compliant, potentially resulting in a forfeiture of tax revenue that the UTPR rule would have collected. This underscores the importance of this study.

Notably, the OECD/G20 IF published, in addition to the Model Rules, an additional package of interpretative and implemental documents: the Commentaries, the Illustrative Examples, the Safe Harbor Rules, the Agreed Administrative Guidance, and recently, the updated Commentaries. One of the study’s objectives is to evaluate whether these documents adhere to the criteria outlined in Article 2 of the Treaty of the European Union. Specifically, it examines whether the use of OECD documents to interpret legal acts aligns with the principles of rule of law, legality, and democratic values.

Although adhering to a legal positivistic view, this research project considers that the legal status of OECD documents and soft law, in general, may vary depending on nationally prevailing legal concepts. Would it be possible for a court to use the OECD Pillar Two set of documents to interpret the Minimum Tax Directive and national law implementing the Directive? Would this be consistent with the rule of law, and is it legitimate — based on democratic values as part of the principle of legality — the cornerstone that provides trust in the legal system?

OECD AND DEMOCRATIC VALUES?

Article 2 of the Treaty of the European Union states that the European Union is founded on, amongst others, the values of democracy, the rule of law, and respect for human rights. According to the Convention on the OECD, the OECD can make binding decisions on all the Members or make recommendations to the Members, as is the case in fiscal affairs. However, the Committee on Fiscal Affairs makes all decisions on recommendations. It is one of the over 300 committees of the OECD, which later were adopted by the OECD Council, consisting of the Secretary-General and Member states’ ambassadors, without any formal subsidiarity in the decision-making process.

OECD Documents Timeline

October 2015
The 15 Action Plans of the OECD/G20 BEPS project are adopted

July 2016
The ATAD is adopted

May 2018
The DAC 6 is adopted

October 2020
The Pillar One and Pillar Two blueprints are published.

December 2021
A Minimum Tax Directive is proposed

December 2022
The Minimum Tax Directive is adopted

December 2023
National legislation is adopted

April 2024
OECD publishes the Consolidated Commentary

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