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The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries

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This article analyses the standard of good governance in tax matters introduced by the Economic and Financial Affairs Council (ECOFIN) in 2008, with a view to tackle tax fraud and tax evasion. At that time, the standard included transparency, exchange of information and fair tax competition. Later on, several OECD and EU developments have changed the content of this standard. As of April 2018, the standard of good governance includes also the four Minimum Standards of the Project to tackle base erosion and profit shifting (BEPS) practices by multinationals. This standard has been introduced by the EU as a precondition for third (non-EU) countries that receive EU development aid, conclude strategic partnership agreements, free trade and economic partnership agreements and more recently as a standard that determines whether the third (non-EU) country should be included in a single EU common list of non-cooperative jurisdictions. This article aims answers two questions (1) whether the standard of good governance in tax matters is an import and/or export of EU norms? and (2) what is the legal status of this standard vis-á-vis third (non-EU) countries? Finally, this article provides conclusions and recommendations for further research.

1 Introduction

In 2008, the EU ECOFIN introduced the standard of good governance in tax matters for third (non-EU) countries with a view to tackle tax fraud and evasion. At that time good governance was understood as transparency, exchange of information, and fair tax competition. However, this standard has changed over the years. The most recent development took place in April 2018, when ECOFIN introduced a new standard provision of good governance in tax matters that included transparency, exchange of information, fair taxation, and the four Minimum Standards of the Project to tackle BEPS practices by multinationals.

One of the reasons for the introduction of this standard is the will of the EU to have a more important role regarding international tax developments.[1] In the 2016 EU Communication on an External Strategy for Effective Taxation, the EU Commission stated that 'as a major political and economic player internationally, the EU now also has an important role to play in continuing to support BEPS, by pushing for its smooth and timely implementation in the Single Market and internationally'.[2]

This new role of the EU generates tensions between EU and non-EU countries and it also raises questions regarding the legal status of this standard, as the EU is implementing the standard of good governance in tax matters in international agreements concluded with third (non-EU) countries. The standard of good governance in tax matters has been introduced as a

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1 Two international tax developments are relevant. The first is the creation of the OECD Global Forum on Transparency and Exchange of Information in 2000 (restructured in 2009) and, later on, the introduction in 2013 of the Global Standard on Automatic Exchange of Financial Account Information. The second is the introduction in 2013 of the OECD/G20 BEPS Project and in 2016 the commitment of countries to participate as BEPS Associates in the BEPS Inclusive Framework. Members of the BEPS Inclusive Framework have committed to implement the BEPS four Minimum Standards which deal with harmful tax competition, tax treaty abuse, transfer pricing documentation and dispute resolution. *See also* s. 4.2 below.

2 European Commission, *Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation*, COM/2016/024 final, Annex II (28 Jan. 2016).

precondition for third (non-EU) countries that receive EU development aid, conclude strategic and economic partnership and free trade agreements, and, more recently, as a standard to determine whether third (non-EU) countries should be included in a single EU common (black) list of non-cooperative jurisdictions.

This article aims to answer two questions: Are the elements of the standard of good governance in tax matters regarded as an import or an export of EU norms? How can the legal status of the standard of good governance vis-à-vis third (non-EU) countries be assessed? section 2 describes the EU standard of good governance in tax matters. The first and second questions are answered in sections 3 and 4, respectively. Finally, section 5 provides conclusions and recommendations for further research.

2 The standard of good governance in tax matters

2.1 *The Principles of the Standard of Good Governance in Tax Matters: Transparency, Exchange of Information, and Fair Tax Competition*

In 2008, ECOFIN recommended the introduction of the standard of good governance in tax matters, comprising the principles of transparency, exchange of information and fair tax competition. At that time, the 2008 financial crisis resulted in the need for countries to tackle tax fraud, tax avoidance, and the use of tax havens by ensuring their commitment to transparency and exchange of information. ECOFIN also recognized the need to promote, with the broadest possible geographical scope, the standard of good governance. The objective was to get as many third (non-EU) countries as possible to adhere to common principles of cooperation and transparency.

In order to achieve this, the Council recommended to insert the following text in relevant agreements concluded between third countries and the Community or its Member States:

> 'With a view to strengthening and developing economic activities while taking into account the need to develop an appropriate regulatory framework, the Parties recognise and commit themselves to implement the principles of good governance in the tax area as subscribed to by Member States at Community level. To that effect, without prejudice to Community and Member States' competences, the Parties will improve international cooperation in the tax area, facilitate the collection of legitimate tax revenues, and develop measures for the effective implementation of the abovementioned principles'.[3]

In 2009, the EU Commission published a Communication – 'Promoting Good Governance in Tax Matters'[4] for EU Member States, EU potential candidates, and third countries (including those receiving EU development aid).[5] The aim of which was to address how good governance could be improved within the EU and 'the particular tools that the European Community and EU Member States may have at their disposal to promote good governance internationally'.[6] In a 2010 Communication, the EU Commission stated that:

'the EU is seeking from all countries, and in particular its partner countries, agreement on the basic cooperation principles of good governance in the tax area (transparency of the tax system, exchange of information and fair tax competition) that its Member States have already achieved. This would enhance the capacity of EU Member States and their partner countries to address international tax evasion and avoidance, building on complementary international initiatives'.[7]

In a 2010 Resolution, the EU Parliament stressed:

> (i) the need for provisions on good governance to be negotiated in the context of general or specific agreements with third countries and the need to ensure an effective process for monitoring their implementation and proposed (ii) the implementation of the Code of Conduct for Business Taxation in their relations with third countries in a manner consistent with EU efforts to promote good governance in tax matters.[8]

Finally, the European Parliament also stated the willingness to strengthen good tax governance within the EU in order for it to have 'a political and moral basis from which to demand good tax governance of third countries'.[9]

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[3] Council of the European Union, *2866th Council Meeting Economic and Financial Affairs*, 8850/08 (Presse 113), 22–23 (Press Release 14 May 2008), https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ecofin/100339.pdf (accessed 14 Dec. 2018).

[4] European Commission, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Promoting Good Governance in Tax Matters*, COM(2009) 201 final (28 Apr. 2009), at 13.

[5] In the Communication, the EU stated that 'third countries eligible for development aid should also enhance commitments on tax governance. Otherwise, aid funding may be reallocated to other countries, or in some cases even canceled'. Communication from the Commission, *supra* n. 4, at 12.

[6] *Ibid.*, at 5.

[7] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *Tax and Development: Cooperating with Developing Countries on Promoting Good Governance in Tax Matters*, COM (2010)163 final (21 Apr. 2010), at 6.

[8] European Parliament resolution of 10 Feb. 2010 on promoting good governance in tax matters (2009/2174(INI)) (10 Feb. 2010), paras 12–13.

[9] *Ibid.*

2.2 *Fair Tax Competition and the List of Non-Cooperative Jurisdictions*

On 6 December 2012, the Commission published an Action Plan – plus two Recommendations[10] – to strengthening the fight against tax fraud and tax evasion. The standard of good governance in tax matters, addressed in the second of those Recommendations, defined the conditions that should be met by third countries, namely[11]:

– the adoption of legal, regulatory, and administrative measures in order to comply with the standard of transparency and exchange of information, mainly regarding the OECD terms of reference (addressing availability of information, access to information and exchange of information)[12]; and
– the absence of harmful tax measures in the area of business taxation.

In order to assess whether the tax measures of a country are harmful, the Second Recommendation included several criteria – such as the lack of real economic activity and substantial economic presence, rules providing advantage to non-residents or rules regarding the profit determination that deviates from internationally accepted principles such as the OECD, rules among others.[13]

Finally, the EU Commission asked EU Member States to publish a black list of third countries that do not comply with these minimum standards; would there be a double taxation convention with a country not complying with them, then the EU country should 'either seek to renegotiate the convention, suspend or terminate the convention'.[14] Despite these efforts to set up a black list, it was not published and no tax treaty changes took place.[15]

2.3 *Fair Tax Competition, BEPS, and Listing of Countries*

Following the introduction of the BEPS Project in 2013, on 26 January 2016 the EU Commission presented the Anti-Tax Avoidance Package,[16] which has three pillars: (1) ensuring effective taxation in the EU, (2) increasing tax transparency and (3) securing a level playing field. This package included a 2016 Communication on an External Strategy for Effective Taxation (and an Annex).[17] In this Communication, the tax haven black list was referenced in order to 'secure effective taxation in relation to third countries, which is mainly tackled through national anti-avoidance measures. It complements the anti-tax-avoidance measures'.[18]

Furthermore, the Commission re-examined the criteria for the EU good governance in tax matters and developed a process for assessing and blacklisting third countries not complying with the criteria of good governance.[19] According to the EU Commission, the objectives of the EU list is to 'improve tax good governance globally, and to ensure that the EU's international partners respect the same standards as EU Members States do'.[20] The elements

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[10] One on aggressive tax planning (First Recommendation) and another on measures intended to encourage third countries to apply minimum standards of good governance in tax matters (Second Recommendation). Furthermore, in point 9 of the Action Plan, the Commission announces its intention to set up a platform for Tax Good Governance. European Commission, from the Commission to the European Parliament and the Council, *An Action Plan to Strengthen the Fight Against Tax Fraud and Tax Evasion*, COM (2012) 722 final (6 Dec. 2012). *See also* European Commission, *Commission Decision of 23 Apr. 2013 on setting up a Commission Expert Group to be known as the Platform for Tax Good Governance, Aggressive Tax Planning and Double Taxation,* OJ C120/17 (26 Apr. 2013), at 3.

[11] European Commission, *Commission Recommendation of 6 December 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters*, C(2012) 8805 final (6 Dec. 2012), at 4. [hereinafter Commission Recommendation].

[12] *Ibid.*, Annex. The EU uses (with some wording adjustments, e.g. third country instead of jurisdiction) criteria set by the OECD in 2010. OECD, *Launch of a Peer Review Process: Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information for Tax Purposes*, Global Forum on Transparency and Exchange of Information for Tax Purposes, 4–9 (OECD Publishing 2010), http://www.oecd.org/ctp/44824681.pdf (accessed 14 Dec. 2018).

[13] The criteria are as follows: (1) whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, (2) whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, (3) whether advantages are granted even without any real economic activity and substantial economic presence within the third country offering such tax advantages, (4) whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD or (5) whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way. Commission Recommendation, *supra* n. 11, at 5.

[14] Commission Recommendation, *supra* n. 11.

[15] Even though no list was made available during this time, the Platform of Good Governance was discussing the criteria applied by EU Member States to establish lists of non-cooperative jurisdictions. European Commission, Platform for Tax Good Governance, *Discussion Paper on Criteria Applied by EU Member States to Establish Lists of Non-Cooperative Jurisdictions*, Platform/11/2014/EN (Oct. 2014).

[16] The Anti-Tax Avoidance Package was presented by the EU Commission on 26 Jan. 2016. European Parliament, *Legislative Train Schedule, External Strategy For Effective Taxation*, http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-taxation/file-external-strategy-for-effective-taxation (accessed 14 Dec. 2018).

[17] Communication from the Commission on an External Strategy for Effective Taxation, *supra* n. 2, Annex I and II.

[18] European Parliament, *supra* n. 16.

[19] Following the black listing, 'the Council adopted defensive measures against the blacklisted jurisdictions, both non-tax countermeasures (related to the European Fund for Sustainable Development) and tax countermeasures (reinforced monitoring of certain transactions, increased audit risks for taxpayers investing or using structures or arrangements involving the black-listed jurisdictions, and several anti-BEPS measures)'. P. J. Wattel & A. P. Dourado, *Third States and External Relations*, in *European Tax Law: General Topics and Direct Taxation,* Fed Fiscale Studieserie vol. 1, 214 (P. J. Wattel, O. Marres & H. Vermeulen eds, Kluwer 2018).

[20] European Commission, *Common EU List of Third Country Jurisdictions for Tax Purposes,* https://ec.europa.eu/taxation_customs/tax-common-eu-list_en (accessed 14 Dec. 2018).

taken into account for blacklisting a jurisdiction are the following:

- *transparency*: Does the jurisdiction comply with the international standards on information exchange?;
- *fair tax competition*: Does the country have harmful tax practices or regimes? Does it apply anti-BEPS measures?; and
- *real economic activity*: Does the country's tax rate encourage artificial tax structures?

The work of the Commission also takes into account some EU Parliament Resolutions, namely: (1) the Resolution prepared by the Special Committee on Tax Rulings (TAXE 1), adopted in plenary on 25 November 2015 and (2) the resolution on 'bringing transparency, coordination and convergence to corporate tax policies in the Union', adopted in plenary on 16 December 2015. Accordingly, in:

> 'these resolutions, Parliament stressed in particular the negative spill-over effect of tax avoidance and tax evasion and that ensuring fair competition in the internal market and protecting Member States' tax bases depends very much on addressing the weakest link regarding interactions with low or no-tax and secrecy jurisdictions'.[21]

Following this Communication, on 5 December 2017 the EU Council adopted the EU blacklist of non-cooperative jurisdictions for tax purposes.[22] This list builds on the countries provided by EU Member States, and includes seventeen non-EU countries or territories that failed to make sufficient commitments in response to EU concerns. Since its adoption, the number of jurisdictions in this list has been reduced: there are only five countries left in it as at 14 December 2018.[23]

2.4 *Standard of Good Governance in Tax Matters for Third Countries Including BEPS Minimum Standards*

On 26 April 2018, ECOFIN introduced a new standard of good governance in tax matters that also includes the implementation of the BEPS Minimum Standards. For this purpose, ECOFIN recalled the Council Conclusions of 14 May 2008 and 25 May 2016, recommending the introduction of the following text in all relevant agreements concluded with third countries by the EU and EU Member States:

> 'The Parties recognise and commit themselves to implement the principles of good governance in the tax area, including the global standards on transparency and exchange of information, fair taxation, and the minimum standards against Base Erosion and Profit Shifting (BEPS).
>
> The Parties will promote good governance in tax matters, improve international cooperation in the tax area and facilitate the collection of legitimate tax revenues'.[24]

2.5 *Intermediate Conclusion*

The standard of good governance in tax matters has been developed by EU institutions, mainly ECOFIN, the Commission and the Parliament. The text of the standard, as introduced in 2008, has changed throughout the years along with international tax developments.

When the standard of good governance in tax matters was introduced, the priority of the EU, the G20, and the OECD was to strengthen international tax cooperation in order to tackle tax fraud and tax evasion. Therefore, in the 2008 ECOFIN, the 2009 and 2010 Commission Communications, and the 2010 Parliament resolution, transparency and exchange of information were encouraged. Furthermore, the standard of fair tax competition was regarded in light of the EU (soft) law Code of Conduct for Business Taxation. The 2009 Communication also stated that this standard should be implement not only for EU countries and potential candidates, but also for third countries requiring EU development aid, or countries concluding agreements with the EU or with EU Member States.

The introduction of the BEPS Project has changed this standard not only within the EU but also in respect of third (non-EU) countries. These changes have taken place by means of the introduction of (1) the 2016 Anti-Tax Avoidance Package, (2) the publication of the 2016

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21 European Parliament, *supra* n. 16.

22 In addition to the blacklist, there is also a grey list, and a list with a category of countries removed from the blacklist but subject to close monitoring. As explained by Wattel and Dourado, in the 'grey list' (at that time 2017) forty-seven jurisdictions 'are expected to upgrade their "tax good governance principles" sufficiently so as not to be blacklisted. These 47 have publicly committed to implement automatic exchange of information, to conclude a relevant network of agreements covering EU Member States, to implement minimum anti-BEPS standards, to abolish harmful tax regimes and tax regimes facilitating offshore structures that attract profits without real economic activity and/or to become a member of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes'. Wattel & Dourado, *supra* n. 19, at 214. As of 14 Dec. 2018, this 'grey list' has increased to sixty-three jurisdictions. For an overview of the EU list of tax havens in European Commission, *see Evolution of the EU List of Tax Havens*, https://ec.europa.eu/taxation_customs/sites/taxation/files/eu_list_update_04_12_2018_en.pdf (accessed 14 Dec. 2018).

23 The last country taken out of the black list is Namibia. As at 14 Dec. 2018, there are five countries on the black list: American Samoa, Guam, Samoa, Trinidad and Tobago and US Virgin Islands. Council of the European Union, *Taxation: EU List of Non-Cooperative Jurisdictions*, https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/# (accessed 14 Dec. 2018).

24 Council of the European Union, *Council Conclusions on the 'EU Standard Provision on Good Governance in Tax Matters for Agreements with Third Countries*, FISC 180, ECOFIN 364 (26 Apr. 2018), http://data.consilium.europa.eu/doc/document/ST-8344-2018-INIT/en/pdf (accessed 14 Dec. 2018).

Communication on an External Strategy for Effective Taxation and an Annex, (3) the publication of the EU list of non-cooperative tax jurisdictions to secure effective taxation in relation to third countries – and the new text (2018) of the EU standard of good governance in tax matters (which includes, in addition to transparency, exchange of information and fair tax competition) and (4) the adoption of the BEPS Minimum Standards.

The analysis of the legal status of the standard in the agreements will be addressed in section 4 below. The following paragraph will address the standard of good governance as export and/or import of norms.

3 The standard of good governance in tax matters as developed by the EU: export and/or import of norms?

3.1 *The Import and Export of Standards by the EU*

The introduction of standards by the EU in its agreements is not a new development. In the past, scholars have analysed the import and export of standards in other areas,[25] but not so much in the field of taxation.[26]

The import and export of standards can take place due to different reasons.[27] One of them could be authority,[28] when the EU is exporting standards to third (non-EU) countries as a condition to conclude trade agreements e.g. EU environmental or labour standards introduced in trade agreements with third (non-EU) countries.[29] Countries can also voluntarily adopt the EU legal framework due to necessity. This is true for the legal framework provided in the EU 1995 Data Protection Directive, which has been voluntarily adopted (imported) by non-EU countries in order to regulate data protection and privacy.[30]

However, in some cases, the standards are not standards developed by the EU, but international standards which are thereafter used by the EU in agreements concluded with third (non-EU) countries. For instance, in a comparison made by Scott on climate change, environment, maritime transport, air transport, and financial services, the author concluded that some of the standards introduced by the EU were not norms developed by the EU, but international standards.[31]

For Scott, in principle, the standards required by the EU are regarded as:

> international agreed standards, but occasionally, these standards are required by the EU before the relevant international standards have entered into force, or before the standards are in a binding form, or even in cases where these standards have been ratified by only a small number of states.

For Scott, by requiring countries to adopt international standards, the EU is influencing the evolution of international law.[32]

Another way for the EU to influence international law in the rest of the world is by means of the so-called 'Brussels effect'. For Bradford, the EU has a regulatory power, as the EU sets the global rules across a range of areas, such as food, chemicals, the environment, competition, and the protection of privacy. This author rightly states that:

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[25] *See* e.g. a comparative analysis of the import and export of EU norms by several EU countries and some non-EU countries (Australia, China, New Zealand and Russia, as well as ASEAN countries) including how the norms are adopted, adapted, resisted or rejected in those countries. A. Björkdahl, N. Chaban, J. Leslie & A. Masselot, *Importing EU Norms: Conceptual Framework and Empirical Finding*, United Nations University Series on Regionalism vol. 8 (Springer 2015). *See also* M. Cremona, *The Single Market as a Global Export Brand: Exporting the Single Market*, 21(5) Eur. Bus. L. Rev. 663 (2010).

[26] Two exceptions are a reference to EU's good tax governance standards exporting in C. Panayi, *Europeanization of Good Tax Governance*, 36(1) Y.B. Eur. L. 442 (2017); Wattel & Dourado, *supra* n. 19, at 179 (referring to the 'exportation' to third States of EU tax good governance rules).

[27] The reasons for import and export in norms has been discussed in comparative legal scholarship when referring to legal transplants. In the past, I addressed the reasons suggested by legal scholars as the predominant factor in determining which laws are transplanted. Accordingly, legal transplantation takes place due to (1) authority, (2) prestige and imposition, (3) chance and necessity, (4) expected efficacy of the law and (5) political, economic and reputational incentives from the countries and third parties. I. J. Mosquera Valderrama, *Leasing and Legal Culture: Towards Consistent Behaviour in Tax Treatment in Civil Law and Common Law Jurisdictions*, dissertation (2007). *See also* I. J. Mosquera Valderrama, *Legal Transplants and Comparative Law*, Int'l L.J. 261 (2004).

[28] As argued by Meunier and Nicolaïdis, this development is the result of the EU becoming 'a power through trade. Increasingly, it uses market access as a bargaining chip to promote changes in the domestic arena of its trading partners, from labour standards to development policies. Indeed, the last decade its policy makers have sought to "harness globalization" and spread, through the negotiation of trade agreements, the "European model" to the rest of the world'. S. Meunier & K. Nicolaïdis, *The European Union as a Trade Power*, in *International Relations and the European Union* 294 (C. Hill & M. Smith eds, Oxford University Press 2011).

[29] In trade, scholars have addressed the influence of EU including also the problems of legitimacy of international trade and investment agreements concluded by the EU with third countries. *Global Governance Through Trade: EU Policies and Approaches*, Leuven Global Governance Series. (J. Wouters, A. Marx, D. Geraets & B. Natens eds, Edward Elgar Publishing 2015). *See also* K. Yiannibas, *Democratizing International Trade and Investment Agreements in the European Union,* in *Democratic Legitimacy in the European Union and Global Governance* 343 (B. Pérez de las Heras ed., Palgrave Macmillan 2017).

[30] In taxation, in a comparison of data protection rules in four non-EU countries, Brazil, Colombia, Uruguay and South Africa it was concluded that the domestic data protection rules have been based in the definitions and safeguards provided in the EU 1995 Data Protection Directive. This 1995 Directive has been repealed by the Apr. 2016 Regulation and the Directive adopted by the European Parliament. I. J. Mosquera Valderrama et al., *The Rule of Law and the Effective Protection of Taxpayers' Rights in Developing Countries,* WU International Taxation Research Paper Series No. 2017-10 (2017).

[31] For the author, the EU measures are based on international standards, and when not, the standards tend to 'characterized by a contingent quality that flows from the provisionality and substantive openness of the measures concerned. This contingent quality injects a dynamic dimension into EU law, whereby the EU intervenes not with a view to exporting its standards but with a view to launching interactive processes to identify and evaluate the different approaches that may adopted to ensure that shared regulatory objectives can be met'. J. Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62(1) Amer. J. Comp. L. 125 (2014).

[32] Scott, *supra* n. 31, at 112.

'without resorting to international institutions or seeking other nations' cooperation, the EU is able to promulgate regulations that become entrenched in the legal frameworks of developed and developing markets alike, leading to the "Europeanization" of important aspects of global commerce'.[33]

The analysis of the EU's active engagement with the international legal order has been done in several areas such as the promotion of the rule of law, WTO (trade) law, climate change policy, and environmental and financial regulations.[34] As rightly stated by Kochenov and Amtenbrink, the EU plays an important role in the formation of international law. This new role of the EU:

> takes place through a number of avenues ranging from the consequences of the mere existence of this supranational legal order within the sphere of international law – providing a model way of thinking about an alternative approach to the prevalent practice of framing international relations, thus inciting actions of others and providing a point of inspiration to the attempts by the Union to engage in a proactive co-shaping of the international legal order alongside other actors.[35]

In light of the use of international standards by the EU and its active engagement in the international legal order, this article will analyse whether the use of the standard of good governance by the EU in the field of taxation is an import or export of norms, and to assess the legal status of the standard of good governance vis-à-vis third (non-EU) countries. This analysis will be made in sections 3.2 and 4.

3.2 *The Standard of Good Governance in Tax Matters*

3.2.1 *Transparency, Exchange of Information and the BEPS Four Minimum Standards: Import of Norms*

The introduction of transparency, exchange of information and the BEPS four Minimum Standards by the EU – as described in section 2 above – shows that the content of the standard of good governance in tax matters is not a new standard developed by the EU, because it comprises several international standards drafted by the OECD with the political support of the G20. These standards are transparency, exchange of information (on request and automatic), and the BEPS four Minimum Standards.

The development of these standards by the OECD took place in 2000, 2009, 2013, 2015 and 2016. For instance, in 2000, the OECD Global Forum on Transparency and Exchange of Information for tax purposes was created with the aim to promote the standard of transparency and exchange of information on request. Later, in 2009, the Forum was restructured 'in response to the G20 call to strengthen implementation of these standards'.[36] In 2013, the OECD introduced a global standard on automatic exchange of financial account information. Thereafter in 2013, the OECD/G20 introduced the BEPS Project and, in 2016, it introduced the BEPS Inclusive Framework where countries commit to the implementation of the BEPS four Minimum Standards.

Parallel to these developments, the EU has made use of these standards for instance in the 2008 ECOFIN Recommendation,[37] the 2012 EU Action Plan,[38] the 2016 Anti-Tax Avoidance Package including the External Strategy for Effective Taxation,[39] and the 2018 ECOFIN Recommendation.[40]

Therefore, the standard of transparency, exchange of information and the BEPS four Minimum Standards are international standards developed by the OECD and the G20 that have been (or will be) imported by the EU in the agreements concluded (or under negotiation) between the EU or its Members and third (non-EU) countries. The legal status of these standards will be addressed in section 4 below.

3.2.2 *Fair Tax Competition: Export of Norms*

Unlike the standards mentioned in section 3.2.1, the EU standard of fair tax competition is not based on an international OECD/G20 standard, but on a standard developed by the EU.

In 1996, at an informal ECOFIN meeting in Verona, Finance Ministers agreed to establish a High-Level Group

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33 A. Bradford, *Exporting Standards: The Externalization of the EU's Regulatory Power via Markets*, 42 Int'l Rev. L. & Econ. 158 (2015).

34 *The European Union's Shaping of the International Legal Order (D.* Kochenov & F. Amtenbrink eds, Cambridge University Press 2013). *See also* M. Telò, *The European Union and Global Governance*, Routledge/GARNET series, Book 6 (Routledge 2009).

35 D. Kochenov & F. Amtenbrink, *Introduction: The Active Paradigm of the Study of the EU's Place in the World*, in Kochenov & Amtenbrink eds, *supra* n. 35, at 2.

36 In the Sept. 2009 meeting of the Global Forum, the members decided to create a self-standing secretariat based in the OECD and agreed on reviewing the effective implementation of the OECD standards by means of carrying out a monitoring and peer review of the jurisdictions that have implemented these standards. As of Aug. 2018, this Global Forum has 153 members. OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes*, http://www.oecd.org/TAX/TRANSPARENCY/ (accessed 14 Dec. 2018). *See also* I. J. Mosquera Valderrama, *EU and OECD Proposals for International Tax Cooperation: A New Road?*, 59(8) Tax Notes Int'l 611 (2010).

37 *See* s. 2.1 above.

38 *See* s. 2.3 above.

39 *Ibid.*

40 *See* s. 2.4 above.

to discuss the issues addressed by the Commission in its 1996 Discussion Paper, 'Taxation in the European Union'.[41] Among other tax issues, the High-Level Group addressed the lack of a common standard and objective understanding of what constitutes an unfair measure. Therefore, the members of the High-level Group 'stressed their concerns that the effects of fiscal erosion could ultimately endanger the achievement of vital Community objectives, and, as a result, called for a common approach within the Union'.

Later, in 1997, the EU referred to the positive effects of fair competition in its 'EU Package to Tackle Harmful Tax Competition', but it also stated that 'unrestrained tax competition for mobile forms of business increasingly threatens to cause economic distortions and to erode tax bases within the Community'. Therefore, one of the measures introduced by the EU to achieve fair competition was the Code of Conduct of Business Taxation. In this Code, the EU identifies 'tax measures that are potentially harmful and provides a framework within which Member States can commit themselves to follow the principles of fair competition'.[42]

This approach towards harmful taxation was followed by the OECD 1998 report on Harmful Tax Competition, in which the OECD stated that the location decisions by investors should be driven by economic considerations rather than by tax factors. Therefore, in an attempt to make a distinction between the effects of tax competition, the OECD stated that particular tax practices can have a harmful effect in other countries' tax bases, and that these practices should be labelled as harmful tax competition.[43]

In respect of the EU standard of good governance in tax matters, fair tax competition has been addressed since 2008 as one of the elements of this standard. Later, in the 2012 Commission Recommendation,[44] the EU stated that one of the criteria for third non-EU countries to meet the standard of good governance was to 'not operate harmful tax measures in the area of business taxation'.[45]

More recently, fair tax competition has become a relevant concept following international tax developments, mainly through the introduction of the OECD BEPS Project. The EU Commission, in its 2016 Communication on an External Strategy for Effective Taxation, stated that:

'when the Commission's 2012 Recommendation was presented, the issue of fair tax competition was not central to the international agenda. The Commission recommended that Member States assess third countries' tax systems on the basis of the Code of Conduct on Business Taxation, which is the EU's own tool for countering harmful tax regimes. In the meantime, after two years of negotiation, the OECD's Base Erosion and Profit Shifting (BEPS) project has been finalized and endorsed by the G20. This has created new international standards for fair corporate taxation, which all G20/OECD members and associated countries have committed to implement'.[46]

As a result of the application of the standard of good governance in tax matters – and, more specifically, in respect of fair tax competition – countries have been assessed to find out whether they have harmful tax practices or regimes.[47] In addition, the EU has decided to go further in the evaluation of the fair tax competition by: (1) re-examining the EU good governance criteria to include state aid rulings[48]; (2) by developing a process for assessing and listing third countries that do not comply with the criteria of good governance; and (3) by introducing the BEPS four Minimum Standards in the standard of fair tax competition.[49] This new approach generates tensions between EU and non-EU countries, and it also raises questions regarding the link between fair tax competition, BEPS, and the legal status of the standard of good governance in tax matters.

4 The Legal Status of the Standard of Good Governance in Tax Matters

4.1 *The Different Approaches to the Standard in Agreements with Third Countries*

ECOFIN stated in 2008 (and again in 2018) that the standard of good governance in tax matters shall be adopted in all agreements concluded by EU and EU Member States with third countries without prejudice of the respective competences.[50] This means that this text

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41 Commission of the European Communities, *Taxation in the European Union – Discussion paper for the Informal Meeting of ECOFIN Ministers*, SEC(96) 487 final (20 Mar. 1996).

42 Communication from the Commission to the Council and the European Parliament, *A Package to Tackle Harmful Tax Competition in the European Union*, COM(97) 564 final (5 Nov. 2997), at 7.

43 OECD, Committee on Fiscal Affairs, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publishing 1998), para. 9.

44 Commission Recommendation, *supra* n. 11, at 4.

45 *See* s. 2.2 above.

46 Communication from the Commission on an External Strategy for Effective Taxation, *supra* n. 2, at 5.

47 European Commission, *supra* n. 20.

48 State aid rulings and the effect in the EU, in third (non-EU countries) and companies will be addressed in another forthcoming article by this author. For the purposes of this article, some reference to the problems in the 2016 definition of fair tax competition that includes state aid rulings will be addressed in s. 4.3.1 below.

49 For an analysis of BEPS in the standard of fair tax competition, *see* s. 4.3 below.

50 This clause included in addition to transparency, exchange of information, and fair taxation, also the adoption by third (non-EU) of the Financial Action Task Force (FATF) international standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. Communication from the Commission on an External Strategy for Effective Taxation, *supra* n. 2, Annex 2.

can also be included, for instance, in trade, strategic, and economic partnership agreements – including the agreements currently under negotiation by the EU and its Member States.[51]

The Commission asked ECOFIN for flexibility for the negotiation of this clause. For instance in the 2009 Communication, the Commission asked for 'sufficient flexibility in its negotiations on wording, while preserving the substantial elements and objectives of good governance, so as to be able to negotiate solutions that best fit the specific case of each country'.[52] The 2009 EU Communication also stated that the provision to be introduced in the agreements should be mentioned as early as possible in the negotiation of the agreement, and 'in cases where it is known in advance that the discussion of the principles of good governance in the tax area will be contentious, or where such principles are not understood the introduction of this provision should be addressed in advance (for instance, in trade-related negotiations)'.[53]

This requirement for flexibility was also addressed by the EU Commission in Annex 2 of the 2016 EU Recommendation, stating that 'considering the diversity of the EU's international partners the Council should give the Commission sufficient flexibility in its ongoing and future negotiations with third countries on the basis of the agreed clause'.[54]

Consider the following texts of the standard of good governance in tax matters in various agreements:

- EU–Canada 2016 Strategic Partnership Agreement: Article 11: Cooperation on taxation: 'to apply the principles of good governance in the tax area i.e. transparency, exchange of information and avoidance of harmful tax practices in the framework of the OECD Forum on harmful tax practice and the Union Code of Conduct on business taxation, as applicable';
- EU–Japan 2018 Strategic Partnership Agreement: Article 19: Taxation:
  - 'to enhance transparency, ensure exchange of information and eliminate harmful tax practices';
- EU–South Korea 2010 Framework Agreement: Article 12: Taxation:
  - 'commit to implement in the tax area the principles of transparency, exchange of information and fair tax competition';
- EU–China 2020 Strategic Agenda for Cooperation:
  - 'Commit to reach an agreement on the adoption of the Global Standard on Automatic Exchange of Information'; and
- EU–Colombia-Peru 2010 Free Trade Agreement Article 155(5) Effective and Transparent regulation:
  - 'The parties also take note of the 'Ten Key Principles for Information Sharing' promulgated by the Finance Ministers of the G7 Nations and the Agreement on Exchange of Information on Tax Matters of the OECD and the statement on transparency and exchange of information for tax purposes of the G20'.

As seen in the above list, the EU Commission has made use of wording flexibility of the in the negotiation of the agreements, as the text of the standard in the agreements concluded up until now varies between 'exchange of information', 'harmful tax practices', and/or 'fair tax competition'. The type of agreement also varies between 'strategic partnership agreements' (Canada and Japan), 'framework agreement' (South Korea), 'strategic agenda for cooperation' (China), and 'Free Trade Agreement' (Colombia and Peru).

Furthermore, the use of the standard of good governance has resulted in different approaches for each agreement. For instance, in the Strategic Partnership between the EU and Canada, Article 11 has a complete provision of good tax governance based in the 2008 wording, whereas the strategic agenda for cooperation between EU and China includes only the requirement for China to adopt the Global Standard on automatic exchange of information.

However, it is not clear how this flexibility will be assessed: if the result is that some countries will only be required to implement exchange of information, whereas others will also have to comply with the fair tax competition requirement. In addition, the 2018 wording of the standard that includes BEPS four Minimum Standards may also raise tensions, as not all third countries have committed to the implementation of these BEPS four Minimum Standards.

In some cases, a country can be compelled to adopt the BEPS four Minimum Standards, even when it has decided not to do so. For instance, in the ASEAN region, there is an ongoing trade negotiation[55] between the EU and ASEAN countries – Singapore, Malaysia, Vietnam, Thailand, Indonesia and Philippines – of which Philippines has not committed to the implementation of the BEPS four Minimum Standards.[56] However, if the standard of good

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[51] European Commission, *Overview of FTA and Other Trade Negotiations* (Dec. 2018), http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (accessed 19 Dec. 2018).

[52] Communication from the Commission, *Promoting Good Governance in Tax Matters, supra* n. 4, at 11.

[53] *Ibid.*

[54] Communication from the Commission on an External Strategy for Effective Taxation, *supra* n. 2, Annex 2.

[55] European Commission, *supra* n. 51.

[56] The Philippines was invited by the OECD to participate in the meetings on the BEPS Project. As explained by Jacinto-Henares, the Internal Revenue Commissioner of Philippines (until 30 June 2016), at the time of the discussion of the BEPS Project, 'as a participant, the Philippines did not have any right to vote, and was merely asked to participate to provide the viewpoint of a developing country and to allow the OECD to be able to say that their actions are inclusive. The Philippines agreed to participate

governance in tax matters (which also includes the BEPS four Minimum Standards) is introduced as a condition, Philippines may be compelled to introduce these standards even though it has no political will to do so at this time. Therefore, the successful conclusion of trade negotiations would become more difficult.

Another example can be found in the different approaches of the standard of fair tax competition in trade or economic partnership negotiations, such as the recent Directives[57] on the negotiation of a new Partnership Agreement between the EU and its Members with African, Caribbean and Pacific countries (the ACP Cotonu Agreement).[58] In the negotiation Directives, the EU Council stated that the parties will commit to take concrete measures to adopt the international standards, paying particular attention to increasing tax transparency, exchange of information, and fair tax competition. Notwithstanding the introduction of the BEPS Minimum Standards by ECOFIN on 26 April 2018 to the BEPS Minimum Standards, no reference was made to them in these negotiation Directives; instead, there was a reference to 'measures to tackle aggressive tax planning'. Therefore, the EU and ACP countries will need to agree on what type of measures refer to aggressive tax planning, and if so, how do these measures relate to the BEPS four Minimum Standards.

The differences in the application of the standard of good governance in tax matters in trade and strategic partnership agreements should be object of attention by the EU Institutions, as the inconsistent use of the standard of good governance in their agreements may also impact in the understanding of this standard, and may create tensions among parties during the negotiation process of trade or economic partnership negotiations. The following paragraphs will assess the legal status of the standard of good governance vis-à-vis third (non-EU) countries.

4.2 *Transparency, Exchange of Information and BEPS Four Minimum Standards*

The standards of transparency and exchange of information have been adopted by developed and developing countries via several binding instruments.[59] The first instrument is the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which enhances all forms of tax cooperation, including exchange of information as signed by 126 countries (as of 14 December 2018).[60] The second instrument is the Multilateral Competent Authority Agreement, which provides an international framework for automatic exchange of financial account information, signed by 104 countries (as of 14 December 2018).[61]

Unlike the standard of exchange of information agreed in Multilateral Conventions, the BEPS four Minimum Standards (at least BEPS Action 5 and 13)[62] are soft law,[63] and thus not legally binding; however, there is an expectation that they will be implemented by the 124 countries/jurisdictions (December 2018)[64] that are participating in the BEPS Inclusive Framework.[65] These

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when it was able to get a confirmation that whatever were decided in the said Forum would not be binding on the Philippines as it is not allowed to vote'. After the release of the 2015 BEPS package in Oct. 2015, the OECD invited the Philippines to join the Inclusive Framework in Kyoto, Japan in July 2016, but the Philippines did not join. K. Jacinto-Henares, *A Commentary on the BEPS Project and Its Influence on Developing Countries*, in *Asian Voices: BEPS and Beyond* (S. Sim & M.-J. Soo eds, IBFD 2017).

57 These Directives were approved by the Committee of the Permanent Representatives of the Governments of the Member States to the European Union (Coreper). 'Coreper is the Council's main preparatory body. All items to be included into the Council's agenda (except for some agricultural matters) must first be examined by Coreper, unless the Council decides otherwise. It is not an EU decision-making body, and any agreement it reaches can be called into question by the Council, which alone has the power to make decisions'. Council of the European Union, *Coreper I*, http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/coreper-i/ (accessed 14 Dec. 2018). For the approval by Coreper, *see* Council of the European Union, *List of 'A' Items* 2 (22 June 2018), 10013/18, PTS A 44, http://www.consilium.europa.eu/media/35738/22-ecofin-a-items-non-legislative.pdf (accessed 14 Dec. 2018).

58 According to website of the EU Commission, 'the ACP-EU Partnership Agreement, signed in Cotonou on 23 June 2000, was concluded for a 20-year period from 2000 to 2020. It is the most comprehensive partnership agreement between developing countries and the EU. Since 2000, it has been the framework for EU's relations with 79 countries from Africa, the Caribbean and the Pacific (ACP). In 2010, ACP-EU cooperation has been adapted to new challenges such as climate change, food security, regional integration, State fragility and aid effectiveness'. European Commission, *ACP – The Cotonou Agreement*, https:availableat//ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement_en (accessed 14 Dec. 2018). This agreement will come to an end by 2020. Therefore, on 22 June 2018, the EU Council gave authorization to the EU Commission to open negotiations for a new partnership agreement with countries in Africa, the Caribbean and the Pacific (ACP). European Commission, *European Commission Ready To Start Negotiations for a New Ambitious Partnership with 79 Countries in Africa, the Caribbean and the Pacific* (22 June 2018), https://ec.europa.eu/europeaid/news-and-events/european-commission-ready-start-negotiations-new-ambitious-partnership-79-countries_en (accessed 14 Dec. 2018).

59 On the content of these initiatives, *see* F. Debelva & I. J. Mosquera Valderrama, *Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions*, 45(5) Intertax 362 (2017).

60 OECD, *Jurisdictions Participating in the Convention on Mutual Administrative Assistance in Tax Matters: Status 29 November 2018*, http://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf (accessed 14 Dec. 2018).

61 OECD, *Signatories of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and Intended First Information Exchange Date: Status as of 29 October 2018*, http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf (accessed 14 Dec. 2018).

62 The introduction of two of the four BEPS Minimum Standards Action 6 and 14 in the Multilateral Instrument could be regarded as binding for the countries who have signed and ratified the Convention, which are at the time of writing (14 Dec. 2018) eighty-five countries.

63 In the past, this author has argued that even though developing countries (non G-20; non-OECD) are participating in the BEPS Inclusive Framework, 'this Framework has not made changes to the agenda and to the content of the various Actions as decided by the BEPS 44 group, which consists of G20 member countries, and OECD member countries and OECD accession countries. Developing countries have been invited to participate on equal footing, but they do not have any decision-making role, as the equal footing is only for the purposes of the implementation of the BEPS four minimum standards based on the various Actions as decided by the BEPS 44 group'. S. 1. I. J. Mosquera Valderrama, *Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative*, 72(3) Bull. Int'l Tax'n (2018).

64 OECD, *Members of the Inclusive Framework* (Nov. 2018), https://www.oecd.org/ctp/beps/inclusive-framework-on-beps-composition.pdf (accessed 14 Dec. 2018).

65 A. Christians, *Hard Law and Soft Law in International Taxation*, 25(2) Wis. Int'l L.J. 325 (2007). One definition of soft law that can be also made applicable to the BEPS Inclusive Framework is 'rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have

countries have a peer review schedule for the implementation of the BEPS four Minimum Standards, and if these Minimum Standards have not been implemented, the OECD will give a negative review that may also have consequences for the reviewed country, mainly due to the peer review pressure.[66]

In light of the above, it can be argued that the standard of good governance in tax matters uses binding and non-binding international standards. In respect of transparency and exchange of information, the standards are binding and have been ratified by more than half of the 193 countries around the world, i.e. 126 for the Multilateral Convention, and 104 for the Multilateral Competent Authority Agreement. In respect of the BEPS four Minimum Standards, these are non-binding standards that 124 countries/jurisdictions have committed to implement.

4.3 *Fair Tax Competition*

4.3.1 *Problems with the Definition of Fair Tax Competition*

In the standard of good governance, the EU has made reference to fair competition, fair taxation, unfair and harmful tax competition. In some cases, the EU refers to fair competition vs. unfair competition, and in other cases, it refers to fair competition vs. harmful tax competition.[67] The EU has also addressed fair tax competition in respect of state aid provisions.

In the EU Communication on an External Strategy for Effective Taxation dated 28 January 2016,[68] the Commission stated that, 'in view of these fundamental changes in the global tax environment, and the need for more coherence in Member States' assessments of third countries, the EU's good governance criteria should be updated'.

For this purpose, in Annex 1 to the Communication a definition of fair tax competition is provided, stating that it:

'means that a third country should not operate harmful tax measures in the area of business taxation. Tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the third country in question are to be regarded as potentially harmful. Such a significantly lower level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor. When assessing whether such measures are harmful, account should be taken of the criteria as provided for in the Code of Conduct on Business Taxation endorsed by the Council, as well as practice and guidance agreed by the Code of Council working group'.[69]

Despite this definition, as rightly argued by Panayi, the application of this standard as developed by the EU creates more vagueness and allows the EU to apply this standard in a subjective way. Panayi states that:

'by inserting the component of fair tax competition, much unnecessary vagueness has been introduced in this area. This is rather unfortunate and open to criticism, as fair tax competition is likely to be linked with harmful tax competition, itself a vague concept used in the past to address similar concerns. Arguably, fair tax competition is even harder to decipher as a concept. Although some guidelines were developed in the past in an attempt to describe what could be harmful tax practices and harmful preferential tax regimes, obviously these do not necessarily cover unfair tax competition. Arguably, something that is not harmful (as per the existing much criticized OECD guidelines) may not necessarily be fair. To an extent, there is an additional layer of value judgement–and, as a corollary, subjectivity–inherent in any concept that incorporates the term "fair"'.[70]

Following the use of the standard of fair tax competition, in 2017 EU countries created a black list of non-cooperative jurisdictions. The countries included in this list are provided by EU Member States, and after a screening and dialogue process with non-EU countries, to assess them against agreed criteria for good governance,[71]

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certain – indirect – legal effects'. L. Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?*, 9(1) Elec. J. Comp. L. (2005). In this case, unlike the Multilateral Instrument that provides for an agreement signed and ratified by countries, the 4 BEPS Minimum Standards of the BEPS Inclusive Framework does not have legally binding force, but it may change the tax laws of countries for instance regarding the Harmful Tax Practices including the Preferential tax regimes which countries have changed to comply with BEPS Minimum Standard (Action 5). *See also* in BEPS and soft law, Y. Brauner, *Treaties in the Aftermath of BEPS*, 41(3) Brook. J. Int'l L. 974, 978 (2016).

[66] In the past with the standard of transparency (exchange of information) countries participating in the Global Transparency Forum were required to implement measures to ensure efficient and timely exchange of information. The peer reviews of such implementation have had an impact in countries, as countries were required to change their laws to ensure the timely exchange of information and some countries (such as Switzerland and Uruguay) have even eliminated their bank secrecy to ensure the efficient exchange of information.

[67] The problems with tax competition have been also addressed by other scholars. From a tax perspective, *see* L. Faulhaber, *The Trouble with Tax Competition: From Practice to Theory*, 71 Tax L. Rev. 311, 312 (2018); P. Piantavigna, *Tax Competition and Tax Coordination in Aggressive Tax Planning: A False Dichotomy*, 9(4) World Tax J. 477–519 (2017). From a political science perspective, *see* T. Rixen, *Tax Competition and Inequality: The Case for Global Tax Governance*, 17(4) Global Governance: Rev. Multilateralism & Int'l Org. 447–67 (2011).

[68] Communication from the Commission on an External Strategy for Effective Taxation, *supra* n. 2.

[69] *Ibid.*, Annex 1 at 3.

[70] Panayi, *supra* n. 26, at 461, 462.

[71] These criteria relate to tax transparency, fair taxation, the implementation of OECD BEPS measures and substance requirements for zero-tax countries. European Commission, *supra* n. 20.

countries may be removed from this list by the Council of the EU.[72]

However, one of the problems in the development of the standard of fair tax competition is to establish the link between (1) fair tax competition that requires an equal level playing field, and (2) fair tax competition in the standard of good governance which does not guarantee the equal level playing field due to its sometimes political (and discretionary) application. For instance, in some cases, countries have carried out extensive (political) lobby so that they can be excluded from this list[73] and in other cases countries have not been included in the list even though these countries could meet the criteria to enter it.[74] As a result of this process, the blacklist of non-cooperative jurisdictions has been reduced from seventeen-[75] to five[76] countries in less than a year.[77]

The vagueness of the criterion of fair tax competition is also shown in the elaboration of the criteria to assess non-cooperative jurisdictions. Following the 2016 EU Communication, in order to comply with fair taxation, countries must not have harmful tax practices or regimes and must apply anti-BEPS measures. Later, in November 2016,[78] the criteria for screening jurisdictions was further elaborated by ECOFIN. In respect of fair taxation, it included the following:

(1) the jurisdiction should have no preferential tax measures that could be regarded as harmful according to the criteria set out in 1997 Code of conduct for business taxation; and
(2) the jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.[79]

As rightly argued by Dourado:

> the vagueness of the later criterion is an interesting link to the Base Erosion and Profit Shifting Project, but gives rise to a discretionary assessment by the Member States and the Code of Conduct Group leading the screening and follow up processes. The latter criterion also introduces pressure on the EU Member States as regards whether they themselves comply with the fair taxation criteria.[80]

Dourado rightly concludes that the 'worldwide credibility of the EU black list will very much depend on the implementation of the fair taxation criterion by the EU Member States themselves'.[81]

If one example may illustrate this, is that the use of the blacklist only for third (non-EU) countries has been criticized by civil society. In their view, EU countries should be also included in this list. For instance, George Turner, in a Tax Justice Network blog, stated that:

> 'one of the issues the EU faces is that a number of its own members – the UK, Ireland, Malta, Cyprus, Luxembourg and the Netherlands – are all playing the game themselves. Putting in place aggressive tax policies designed to pinch profits made abroad. They have little interest in the EU taking a strong stance against tax havens, and some of these governments have lobbied for years to water down the EU's efforts'.[82]

Another important criterion in fair tax competition included in the 2016 (January) EU Communication and in the 2016 (November) ECOFIN Conclusions refers to BEPS. In this regard, two criteria were introduced in the

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[72] In May 2016, EU Finance Ministers endorsed the new listing process set out in the External Strategy, and subsequently agreed on common criteria to assess selected countries. They asked the Code of Conduct Group, the body comprising of Member State taxation experts in the Council, to manage the process and to present a first EU list by the end of 2017. European Commission, *Fact Sheet: Questions and Answers on the EU List of Non-Cooperative Tax Jurisdictions* (5 Dec. 2017), http://europa.eu/rapid/press-release_MEMO-17-5122_en.htm (accessed 14 Dec. 2018).

[73] One interesting example is Mauritius, a country initially included in the list, but thereafter taken out after extensive lobbying. Global Finance Mauritius, *Mauritius Not on EU List of Non-Cooperative Jurisdictions* (6 Dec. 2017), https://lcabelheim.com/2017/12/06/mauritius-not-eu-list-non-cooperative-jurisdictions/ (accessed 14 Dec. 2017). *See also* FSPA, *Mauritius IFC endorsed as a Cooperative Jurisdiction by the European Union* (6 Dec. 2017), http://www.mauritiusifc.mu/pdfs/Final-Communique-EU-Blacklist.pdf (accessed 14 Dec. 2018).

[74] One example mentioned by civil society (Tax Justice Network) is the United States. Tax Justice Network, *Will the EU Really Blacklist the United States?* (11 June 2018), https://www.taxjustice.net/2018/06/11/will-the-eu-really-blacklist-the-united-states/ (accessed 14 Dec. 2018). However, this may be also the case due to the use of FATCA that provides for Automatic Exchange of Information. It remains to be seen how the assessment of fair tax competition in accordance to the EU criteria can result in US to be included in this list. For some thoughts on the US and the EU, *see* A. P. Dourado, *The US Base Erosion and Anti-Abuse Tax, and the EU Response,* 46(4) Intertax 166, 167 (2018).

[75] The countries included in the list were American Samoa, Bahrain, Barbados, Grenada, Guam, Korea (Rep.), Macao, Marshall Islands, Mongolia, Namibia, Palau, Panama, Saint Lucia, Samoa, Trinidad and Tobago, Tunisia and United Arab Emirates.

[76] The countries left are American Samoa, Guam, Namibia, Samoa, Trinidad and Tobago and the US Virgin Islands.

[77] Between Dec. 2017 and Oct. 2018. European Commission, *supra* n. 20.

[78] Council of the European Union, *Criteria and Process Leading to the Establishment of the EU List of Non-Cooperative Jurisdictions for Tax Purposes*, Fisc 187, ECOFIN 1014 (8 Nov. 2016), http://data.consilium.europa.eu/doc/document/ST-14166-2016-INIT/en/pdf (accessed 14 Dec. 2018).

[79] *Ibid.*, Annex.

[80] A. P. Dourado, *The EU Black List of Third-Country Jurisdictions*, 46(3) Intertax 179 (2018).

[81] *Ibid.*, at 180.

[82] G. Turner, *Tax Justice Network, EU Tax Blacklist Is a Whitewash* (8 Dec. 2017), https://www.taxjustice.net/2017/12/08/eu-tax-haven-blacklist-toothless-whitewash/ (accessed 14 Dec. 2018).

ECOFIN document for the jurisdiction to be considered compliant with BEPS: one initial criterion and one future criterion (to be applied once the reviews by the Inclusive Framework of the agreed minimum standards are completed). The initial criterion is the commitment, by the end of 2017, to the agreed OECD anti-BEPS Minimum Standards and their consistent implementation. The future criterion is for the jurisdiction to receive a positive assessment for the effective implementation of the agreed OECD anti-BEPS minimum standards.[83]

However, as not all countries have committed to the BEPS four Minimum Standards (124 of 193 countries/jurisdictions in the world as at 14 December 2018), this criterion may also raise questions regarding the legitimacy of these standards in respect of these countries (mostly developing countries).[84] The analysis of the use of this standard of fair tax competition will be addressed in the following section.

4.3.2 *The Use of the Standard of Fair Tax Competition in Bilateral and Multilateral Agreements*

The use of the standard of good governance, including fair tax competition, raises several problems vis-à-vis third (non-EU) countries.[85]

The first problem is the use of the Code of Conduct for business taxation to assess the tax measures that could be regarded as harmful tax competition within the scope of the Code. This Code of Conduct, adopted in December 1997, is soft law, and in principle only works as a recommendation.[86] However, with the developments on good tax governance and also the EU listing, third (non-EU) countries are compelled to follow this Code and to abolish measures that can constitute harmful tax competition.[87] The result is that if the standard is introduced in binding (trade and economic partnership) agreements concluded by the EU with third (non-EU) countries, this makes fair tax competition a binding standard for the latter countries, even though it is based in a Code of Conduct (soft law) not binding for EU countries. If the standard is included in agreements signed and ratified, this standard will be binding for third countries but also for EU countries, and therefore, the question will be: how will this standard be enforced for third and EU countries?

The second problem is that the 2016 EU Communication[88] included in the standard of good governance in tax matters, state aid provisions. The Communication states that:

> State aid provisions in bilateral agreements, which can increase transparency on subsidies, prohibit the most harmful types of subsidies and provide for consultations on harmful subsidies, would create fairer competition between Member States and third countries in the area of business taxation. The Commission will therefore work to include state aid provisions in negotiating proposals for agreements with third countries, with a view to ensuring fair tax competition with its international partners.[89]

As rightly argued by Dourado, there are problems arising from the introduction of state aid provisions in the standard of good governance in tax matters and in the agreements/treaties concluded with third countries. For Dourado:

> [from] an EU perspective, state aid provisions in bilateral treaties may increase transparency on subsidies and create fairer tax competition between Member States and third countries in the area of business taxation.

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83 Council of the European Union, *supra* n. 78, Annex.

84 *See also* on the legitimacy I. J. Mosquera Valderrama, *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, 7(3) World Tax J. (2015); Mosquera Valderrama, *supra* n. 63.

85 Another problem that has been addressed by another author is in relation to the standard of good governance in tax matters and the TFEU Fundamental Freedoms. For Dourado, the standard can be also included in association agreements, and therefore, 'if these clauses require a minimum level of taxation in the third state, they may be incompatible with the non-discrimination clauses often included in those agreements, and with any provisions in those treaties on the freedom of establishment and free movement of capital. In fact, some association agreements include clauses on fundamental freedoms that may have direct effect. In such agreements, an issue of internal (in) consistency between or among different good governance clause and non-discriminatory clauses may arise'. A. P. Dourado, *The EU Anti-Tax Avoidance Package: Moving Ahead of BEPS*, 44(6/7) Intertax 445 (2016).

86 *Council Conclusions of the ECOFIN Council meeting of 1 December 1997 concerning taxation policy (98/C 2/01)*, OJ C2/1 (6 Jan. 1998) introducing the Code of Conduct for Business Taxation Annex 1. The conclusions stated that the code of conduct is a 'political commitment and does not affect the Member States' rights and obligations or the respective spheres of competence of the Member States and the Community resulting from the Treaty'. On the Code of Conduct and the importance of the Code of Conduct Group in the coordination of tax policies, *see* M. Nouwen, *The European Code of Conduct Group Becomes Increasingly Important in the Fight Against Tax Avoidance: More Openness and Transparency is Necessary*, 45(2) Intertax 141 (2017).

87 EU Monitor, *Code of Conduct Group (Business Taxation)*, https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7ej5swx001 (accessed 14 Dec. 2018).

88 An earlier reference to state aid in the standard of good governance was made in the 2009 EU Commission Communication stating that 'State aids – In addition, EU state aid policy as applied to fiscal state aids has contributed to removing distortions of competition resulting from specific business tax regimes introduced by individual Member States' In the 2009 Communication, state aid was referred as one of the elements in the existing tax cooperation within the EU. In addition, the EU Commission also stated that the content of such agreements should, where appropriate, also include provisions similar to those applicable within the EU under State aid rules. This would improve fair competition between Member States and third countries in the area of business taxation. It should, for example, make it possible to tackle distortive practices unduly detrimental to EU Member States' budgets and businesses, and not necessarily addressed by WTO rules. However, unlike the 2016 Communication, no specific elements were added to the standard of good governance. Communication from the Commission, *Promoting Good Governance in Tax Matters*, *supra* n. 4, at 6 & 11.

89 Communication from the Commission on an External Strategy for Effective Taxation, *supra* n. 2, at 7.

However, they will also increase uncertainty, overload the Commission with notifications and be detrimental to the investment in the EU. From the perspective of the rest of the world, the introduction of state-aid provisions in bilateral treaties with third countries can be seen as interference in their tax policies that are aimed at attracting genuine investment. By prohibiting selected tax competition, the European Union is requiring third countries to adopt the EU parameters on tax good governance, which may result in indirect protectionism for EU companies.[90]

5 Conclusions and recommendations

The standard of good governance in tax matters has been discussed since 2008, when ECOFIN introduced the standard with a view to tackle tax fraud and tax evasion. At that time, the standard included transparency, exchange of information, and fair tax competition. Later, several international and EU developments have changed the content of this standard. The international developments are, for instance, the adoption of the Global standard on automatic exchange of information in 2013, the BEPS Project in 2013, the BEPS Inclusive Framework, and the BEPS four Minimum Standards in 2016. The EU developments are, for instance, the five amendments to the Administrative Cooperation Directive, the Anti-Tax Avoidance Directives (ATAD I and II), and the list of non-cooperative jurisdictions. As of April 2018, the standard of good governance in tax matters includes transparency, exchange of information, fair taxation and the BEPS four Minimum Standards.

This standard has been introduced as a precondition for third (non-EU) countries that receive EU development aid, conclude strategic partnership agreements, free trade and economic partnership agreements, and, more recently, as a standard that determines whether the third (non-EU) country should be included in a single EU common list of non-cooperative jurisdictions.

This article has addressed two questions, namely (1) whether the standard of good governance in tax matters is an import and/or export of EU norms and (2) what is the legal status of these standards vis-à-vis third (non-EU) countries?

In respect of the first question, one of the findings of this article is that, in some elements of this standard (exchange of information, BEPS and transparency), the EU is introducing international tax standards, and is therefore an import of norms; and in another element (fair tax competition), the EU has developed its own standard and is therefore an export of norms. In respect of the second question, the aim of the EU when importing international tax standards is to play a predominant role in the current discussion by the OECD/G20 of exchange of information and BEPS. By doing so, the EU is ensuring that international tax developments are also addressed in the relationship by the EU with third (non-EU) countries. However, in respect of fair tax competition, the EU is going further than the OECD by introducing its own standard – one that includes the Code of Conduct of Business Taxation and the introduction of its own list of non-cooperative jurisdictions.

Some of the problems identified in this article are: (1) the vagueness of the fair tax competition concept; (2) the condition to implement BEPS four Minimum Standards as a condition for aid, and/or trade for countries who have decided not to do so (e.g. Philippines) (3) the use of state aid provisions in the standard of fair tax competition, and; (4) the different use of the standard in the agreements (either concluded or ongoing negotiations) with third (non-EU) countries. These differences have an effect in the enforcement of this standard, as well as in its implementation by third (non-EU) countries.

Therefore, the following paragraphs will provide some questions for further research regarding the implementation of the standards of good governance in tax matters.

The changes of the standard of good governance in tax matters raise several questions regarding the legitimacy of this standard in respect of third (non-EU) countries and the practical application of this standard by countries, and EU officials. Since this standard has been used in agreements which are binding for the countries who have signed such agreements (e.g. strategic partnership agreement EU and Canada), countries are questioning the legitimacy of the standard of fair tax competition, as it is mainly based in the EU on the Code of Conduct and the work of the Code of Conduct Group (both soft law instruments). The question is, then, how will the standard of fair tax competition become hard law in the EU and, if it does not, whether it is legitimate for the EU to ask third (non-EU) countries to commit to EU soft law instruments in binding agreements (hard law).

Another question addresses the introduction of the BEPS four Minimum Standards in the standard of good governance in tax matters. Even though 124 countries/jurisdictions (December 2018) are participating in the BEPS Inclusive Framework, not all countries currently negotiating agreements with the EU are participating in this Framework (e.g. Philippines). Therefore, the question that is being raised is whether, by signing the EU (trade, economic, strategic partnership) agreement, the third (non-EU) countries who are not participating in the BEPS Inclusive Framework will still be obliged to meet the BEPS Minimum Standards.

Notes

[90] Dourado, *supra* n. 85, at 444.

Finally, two questions that will need to be further researched are: (1) how will the 2018 text of the standard of good governance in tax matters influence the current negotiations on trade, economic, and strategic partnership agreements and (2) will there be a renegotiation to include BEPS for the concluded agreements. As there are current negotiations with ASEAN countries, Latin American countries or ACP countries, it will be vital to research how the bargaining power of these countries will influence the introduction of the standard of good governance in tax matters. Therefore, further research should be carried out on the use of this standard in current and future agreements concluded by the EU and its Members.