THE GLOBALISATION OF TAX GOOD GOVERNANCE

***By Professor Christiana HJI Panayi**

(I) INTRODUCTION

This is a unique era where the international tax community, most vocally represented by developed countries mainly through the OECD/G20 is engaged in a global fight against tax evasion/avoidance. It is thought that lack of tax cooperation increases the risk of cross-border tax evasion and avoidance. As noted by the OECD, "[c]o-operation between tax administrations is critical in the fight against tax evasion and protecting the integrity of tax systems."[1] The recalcitrance shown by some countries to engage in deeper cooperation is something that is widely criticised. However, apart from the traditional notions of cooperation/assistance and exchange of information commonly viewed as instrumental in the fight against tax evasion/avoidance, another concept has emerged – that of good tax governance or tax good governance or fiscal good governance.[2] Countries are increasingly being asked to adopt standards of tax good governance either on a stand-alone basis or in the context of the fight against aggressive tax planning, without a common understanding of what this concept actually entails.[3]

Notwithstanding the uncertainties surrounding tax good governance, it is acquiring increasing importance and institutional backing, both internationally but within the European Union. However, there seem to be many facets of tax good governance and it is not always clear what the term actually covers. It would seem that from the perspective of international organisations such as the OECD and the UN, the focus is on the relationship/cooperation between governments and to a lesser extent, between governments and taxpayers. There is also an emphasis on developing countries and domestic resource mobilisation. This is still very much a soft law approach. The many facets of this concept will be examined in the following sections and an attempt will be made to determine whether the soft law qualities of this concept are gradually morphing into hard law, especially in the context of the European Union. The paper will examine the implications of this approach and the paradox that it creates.

(II) GLOBAL TRENDS IN GOOD TAX GOVERNANCE

The concept of governance or good governance is not something new or specific to the tax world. It has actually been used for some time in the development literature[4]and has be used in many contexts; for example, corporate governance, international governance etc.

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[1] http://www.oecd.org/tax/exchange-of-tax-information/automaticexchange.htm

[2] The terms are used interchangeably.

[3] Alicja Brodzka & Sebastiano Garufi, *"The Era of Exchange of Information and Fiscal Transparency: The Use of Soft Law Instruments and the Enhancement of Good Governance in Tax Matters"* [2012] 8 European Taxation 394; Gemma Martinez Barbara, *"The Role of Good Governance in the Tax Systems of the European Union",* [2011] 5/6 Bulletin for International Taxation 270

[4] See "Good Governance and the World Bank", edited by Vivien Collingwood, available at: http://www.ucl.ac.uk/dpuprojects/drivers_urb_change/urb_economy/pdf_glob_SAP/BWP_Governance_World%20Bank.pdf ; See "Good Governance: An Overview", by the International Fund for Agricultural

Most quasi-definitions of good governance include the following: increased public accountability and transparency; respect for and strengthening of the rule of law and anti-corruption measures; democratisation, decentralisation and local government reform; increased civil-society participation in development; and respect for human rights and the environment. As succinctly put by Sheng, good governance has eight important characteristics: "[i]t is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law."[5] Broadly, good governance agendas focus on reforming the relationship between government, civil society and the market.[6]

As far as tax practices are concerned, there are several ways in which notions of good governance are used. Firstly, development finance institutions are increasingly focusing on promoting responsible tax practices in their *private* sector investments. This is, arguably, an extension of the controversial good governance conditionality clause imposed by development institutions in the 1980s, whereby conditions to loans were attached in order to exert pressure on borrowing countries to improve their policies and enhance the effectiveness of aid. In the context of tax governance, development institutions now try to leverage private sector investments to promote a responsible tax agenda, mainly by precluding investment in private sector businesses which engage in tax evasion and illegal tax activities. For example, the World Bank Group prohibits investments in companies controlled through an 'ineligible intermediary jurisdiction', considered non-compliant with international tax transparency standards. Other development institutions have similar policies.[7] Obviously, such policies do not prohibit investment in companies engaged in aggressive but legal tax planning,[8] as such rendering such conditionality largely ineffective.

More traditionally, the focus of good tax governance has been on domestic resource mobilisation and capacity building by developing countries. In the past decade, through a number of reports and initiatives, the OECD and the UN have called for measures to improve governance in this area – all of which were in the realm of soft law, as shown below.

(A) Domestic Resource Mobilization and Capacity Building: A Substantive But Soft Law Approach

Recognising the role of taxation as an important catalyst for state capacity development, the OECD has long been working on recommendations for institutional and organisational

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Development, available at: http://www.ipa.government.bg/sites/default/files/pregled-dobro_upravlenie.pdf . Also see "The IMF and Good Governance", available at: www.imf.org/en/About/Factsheets/The-IMF-and-Good-Governance; Anton Op de Beke, "*IMF Activities to Promote Good Governance and Combat Corruption – An Overview*", available at: *web.worldbank.org/archive/website00818/WEB/PDF/OP_DE_BE.PDF*

[5] *Ibid*.

[6] See "Good Governance and the World Bank", edited by Vivien Collingwood, available at: http://www.ucl.ac.uk/dpuprojects/drivers_urb_change/urb_economy/pdf_glob_SAP/BWP_Governance_World%20Bank.pdf

[7] See *Development Finance Institutions and the Responsible Tax Agenda – Fit for Purpose?*, published by The Tax Dialogue on Corporate Responsibility, available at: http://thetaxdialogue.org/publications/tax-corporate-responsibility-priority/

[8] See Stephanie Soong Johnston, *"World Bank Focusing on Responsible Tax Practices",* Tax Notes International 152 (Oct 12, 2015)

reforms needed to improve efficiency and effectiveness. In a report published in 2010,[9] the OECD explored how taxation could improve governance. This was to be done firstly, by developing a shared interest for economic growth. It was argued that governments which depend on taxes have stronger incentives for promoting economic growth.[10] As a second measure, there should be a development of the state apparatus and tax collection through an improved and functioning administration as well as other agencies. Such development may spur improvements in state capacity elsewhere. Thirdly, notions of accountability and responsiveness ought to be cultivated further,[11] by improving equity in tax enforcement and administration, as well as improving transparency and strengthening civil society engagement with tax issues.[12] As noted, taxation engaged taxpayer-citizens in politics; "[g]overnments which rely on taxes have incentives to improve governance in order to ensure tax compliance."[13]

Recommendations were made to governments to manage the provision of foreign aid in ways that maximise positive revenue raising incentives and local accountability.[14] In order to improve the state's administrative systems, it was argued that a supportive tax reform agenda should focus on strengthening linkages between the tax administration and other areas of government. Such linkages may generate direct incentives for improved performance elsewhere in government, and create a direct channel for successful innovations to be adopted elsewhere.[15] A supportive tax reform agenda would also focus on data gathering and transparency, as well as local taxation improvements.[16] It was argued that data gathered by tax administrations could help improve government performance more broadly in areas like investment promotion, industrial policy, land management and law enforcement. Also, efforts to build a more robust tax administration in local areas, with stronger links to the national tax system, may encourage broader improvements in local government performance and expansion of effective government in rural areas.

The overtone of the report was that an effective tax system played a key role in state building and in developing the economy.[17] For that, broader governance improvements were necessary. In its report, the OECD concluded that measures to improve tax governance and to support more integrated administrative structures were indispensable to any long-term strategy of achieving revenue stability and self-sufficiency. In order to improve responsiveness and accountability, it was crucial to improve equity in tax enforcement and administration to ensure that the legitimacy of tax systems is not undermined.[18] It was also identified as important to improve public awareness, transparency and taxpayer services and to strengthen civil society engagement with tax issues.

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[9] OECD, *Citizen-State Relations: Improving Governance Through Tax Reform* (Paris, 2010)
[10] *Ibid*, p.9
[11] *Ibid*, pp.9-10
[12] *Ibid*, pp.10-11
[13] *Ibid*, p.9
[14] See, *Ibid,* chapter 4 entitled 'The role of development partners in building tax-governance linkages', pp.51-58.
[15] *Ibid*, p.10, 19-20
[16] See pp.22-23
[17] It was, however, acknowledged in the concluding chapter 5 that further research on the linkage between taxation and state-building was necessary. It was also conceded that in the report there was heavy reliance on case studies from a relatively small number of countries. Furthermore, very few of the suggestions made had been rigorously and specifically tested in practice.
[18] *Ibid*, pp.29-30

Similarly, in developing tax good governance principles, the UN's focus has been on supporting tax policies for developing countries, removing obstacles to cross-border operations and fighting tax evasion. Following a UN-led international conference in 2008, the Doha Declaration on Financing for Development was adopted by consensus.[19] The Doha Declaration recognised the importance of strengthening technical assistance and enhancing international cooperation in addressing international tax matters, including in the area of double taxation. Commitments were made to enhance tax revenues through modernized tax systems and more efficient tax collection. This would help broaden the tax base and effectively combat tax evasion. Developed countries confirmed their strong commitment to maintain their Official Development Assistance[20] targets irrespective of the current financial crisis. The Doha Declaration also reaffirmed and built on the earlier Monterrey Consensus[21] and called for a UN Conference at the highest level to examine the impact of the world financial and economic crisis on development.

The Addis Tax Initiative (also called the Addis Ababa Action Agenda, or the Addis Ababa Initiative) is the current point of reference on development financing. It was initiated by the governments of Germany, the Netherlands, the United Kingdom, and the United States of America. The Addis Tax Initiative, together with follow-up initiatives, set out a vision of how development financing should evolve and highlighted the importance of domestic resource mobilisation. Domestic resource mobilisation was not only essential to ensuring sustainable development but it also helped strengthen the relationship between citizens and the state, fostering good governance. As discussed above, the focus on mobilising domestic public revenue had been a leading action for the Financing for Development agenda since Monterrey. The Addis Ababa Initiative called for substantial additional development cooperation in this area and highlighted the importance of tackling tax evasion and avoidance. More than 45 countries, regional and international organisations signed up to the Addis Tax Initiative.[22] Interestingly, apart from Indonesia, the Solomon Islands and the Philippines, it would seem that no other Asian country is participating in this initiative.[23]

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[19] UN, *Doha Declaration on Financing for Development: Outcome Document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus,* 9 Dec 2008, para 16, pp.8-9

[20] Official development assistance (ODA) is a term coined by the Development Assistance Committee of the OECD. This committee has the mandate to promote development co-operation and other policies so as to contribute to sustainable development, including pro-poor economic growth, poverty reduction, improvement of living standards in developing countries, and a future in which no country will depend on aid. Most ODA comes from the members of the Development Assistance Committee. The European Commission and non-member countries also provide some aid. See http://www.oecd.org/dac/developmentassistancecommitteedac.htm

[21] See *Monterrey Consensus of the International Conference on Financing for Development* (2003). Available on: http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf

[22] The following countries have joined the Addis Tax Initiative: Australia, Belgium, Burkina Faso, Cameroon, Canada, Denmark, Ethiopia, European Commission, Finland, France, Georgia, Germany, Ghana, Indonesia, Italy, Kenya, Korea, Liberia, Luxembourg, Malawi, Namibia, Netherlands, Norway, Paraguay, Philippines, Rwanda, Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Sweden, Switzerland, Tanzania, Uganda, United Kingdom and the United States of America. Furthermore, the following regional and international organisations, fora and private sector foundations have joined the Addis Tax Initiative as supporting organisations: African Tax Administration Forum (ATAF), Asian Development Bank (ADB), Bill & Melinda Gates Foundation, Center of Excellence in Finance, Commonwealth Association of Tax Administrators (CATA), Global Forum on Transparency and Exchange of Information for Tax Purposes, Inter-American Centre of Tax Administrations (CIAT), International Monetary Fund (IMF), Organisation for Economic Co-operation and Development (OECD), West African Tax Administration Forum (WATAF) and the World Bank.

[23] See https://www.addistaxinitiative.net/#slider-4 . The Asian Development Bank is a supporting organisation.

One important outcome of the Addis Tax Initiative was the promise on the part of developed countries to increase international aid and to support capacity building in developing countries in order to reduce tax evasion and abuse. In the spirit of the Addis Tax Initiative, participating countries declared their commitment to enhance the mobilisation and effective use of domestic revenues and to improve the fairness, transparency, efficiency and effectiveness of their tax systems. Furthermore, countries restated their commitment to ensure policy coherence for development. Very importantly, participating *providers* of international support promised to collectively double their technical cooperation in the area of domestic revenue mobilisation/taxation by 2020. In addition to broad-based capacity building, participating countries were also expected to take advantage of the progress made on the international tax agenda, such as the BEPS project and the increased use of automatic exchange of information. An effort would be made to integrate partner countries into the global tax debate and improve taxation and management of revenue from natural resources.[24]

The Addis Tax Initiative was agreed at the third UN International Conference on Financing for Development in July 2015. Following this, a United Nations Summit on Sustainable Development[25] was held in September 2015 which garnered visibility, political support and impetus for the truly transformative 2030 Agenda for Sustainable Development.[26] Speakers at the Summit welcomed the adoption of the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals.[27] The 2030 Agenda builds on and *integrates* the outcome of the Addis Tax Initiative.[28] It recognizes for the first time illicit financial flows as a detriment to sustainable development both in developing and developed countries. They are also seen as a sign of poor governance and weak legal and institutional frameworks.

The 2030 Agenda was expected to serve as a springboard for action by the international community and by national governments to promote shared prosperity and well-being for all over the next 15 years. A call was made to strengthen international institutions, with multilateral regional and international organisations contributing more towards sustainable development. Furthermore, many developing countries discussed their own primary responsibility for mobilizing resources to implement the 2030 Agenda and to integrate it in their national development plans, strategies and priorities. Most of the Sustainable Development Goals are to be implemented at national and local levels.

[24] See https://www.addistaxinitiative.net/

[25] https://sustainabledevelopment.un.org/content/documents/8521Informal%20Summary%20-%20UN%20Summit%20on%20Sustainable%20Development%202015.pdf

[26] The 2030 Agenda for Sustainable Development was contained in the document entitled "Transforming Our World: The 2030 Agenda for Sustainable Development", available at: https://sustainabledevelopment.un.org/post2015/transformingourworld

[27] P.1. The Sustainable Development Goals consist of 17 goals and 169 associated targets. They are expected to frame the agendas and political policies of UN member countries up to 2030. The Sustainable Development Goals have replaced the narrower Millennium Development Goals and are considered to be *universal* targets and indicators intended to eradicate poverty in all its forms and dimensions. Therefore, these goals are not just relevant to developing countries. See Jeffrey Owens, Alicja Majdańska and Rick McDonell, "*Interagency Cooperation, Illicit Financial Flows, and Sustainable Development Goals",* 85 Tax Notes Int'l 819 (Feb. 27, 2017)

[28] The 2030 Agenda highlights the importance of a number of issues for all UN Member Countries, including poverty elimination, social equality, environment protection, the security-development nexus, good and inclusive governance, human rights and gender equality.

The above developments suggest that good tax governance is closely interlinked with notions of domestic resource mobilisation, capacity building, transparency and exchange of information, and, to an extent, the implementation of the four minimum standards derived from the BEPS project. The international tax community, through its most prolific international organisations, has given a lot of emphasis on the above state functions. It is noteworthy that the above initiatives, whilst laudable, are very much in the realm of soft law – they are recommendations and guidance for good practices. However, it would seem that in addition to the soft law initiatives discussed above, there are a growing number of soft law initiatives which have hardened over time. Characteristically, these initiatives rely on multilateralism and aim to promote global standards which become binding over time. They are examined next.

(B) Global Standards and Multilateralism: The Hardening of Soft Law

In this section, the author examines what could be described as norm setting initiatives which have emerged and are gaining ground. For the time being, these are mostly of a procedural nature and are largely aimed at enhancing transparency and information exchange.

One major development arising from the intense international political interest in fighting tax avoidance/evasion is the acceptance and (broad adoption) of the OECD's global standard for automatic exchange of information. In fact, this standard is now becoming a trademark of good tax governance for countries. This is not surprising, given that in the last few years, as a result of the work of the Global Forum on Transparency and Exchange of information for Tax Purposes,[29] having the legal framework to facilitate exchange of information has become a benchmark for legitimacy in terms of the OECD's assessment of cooperative jurisdictions.

International automatic exchange of tax information generally involves the systematic and periodic transmission of a large amount of tax-relevant information regarding non-resident taxpayers by the tax administration of the source country to the residence country. The tax relevant information usually concerns various categories of income (e.g. dividends, interest, etc.).[30] Tax information, which is exchanged automatically, is normally collected in the source state on a routine basis, generally, through reporting by third parties; usually, financial institutions, that make or administer payments to non-residents. Automatic exchange of information typically serves the residence state in determining the tax liability of its residents when that liability depends on the worldwide income or assets of the resident.

Notwithstanding references to automatic or spontaneous exchange of information in Art 26 of the OECD Model and other models,[31] until relatively recently, exchange of information was

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[29] This Global Forum is hosted by the OECD but is financed by and reports only to its own members. Although the OECD merely observes during the Global Forum's meetings, it has a strong influence over its functions. See Torsten Fensby & Per Olav Gjesti, *"Global Forum and Nordic Countries Combat Tax Avoidance and Evasion",* Tax Nots International, June 12, 2017, pp.999-1000

[30] OECD, Comm. Fiscal Affairs, *Automatic Exchange of Information: What It Is, How It Works, Benefits, What Remains to Be Done*, p. 9 (OECD 2012), available at www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-of-information-report.pdf page 8. Also see OECD, Council Recommendation C (81)39. See OECD, Recommendation of the Council concerning a Standardized Form for Automatic Exchanges of Information under International Tax Agreements (OECD 1981).

[31] See, for example, the Model Agreement on Exchange of Information in Tax Matters. In the initial (2002) version of the OECD's Model Agreement on Exchange of Information in Tax Matters (the TIEA Model), the

to an extent mainly on request and rather sporadic. Exchange of information in general as an instrument for fighting international tax avoidance and tax havens received a major boost following the G20 Communiqué issued at the London 2009 Summit. In this summit, the G20 leaders agreed to take action against non-cooperative jurisdictions, including tax havens, and if necessary to deploy sanctions to protect their public finances and financial systems.[32] Countries were called to adopt and implement the international tax standards of transparency and information exchange – standards which had become top priority by then.

Since 2009, the OECD has been publishing progress reports on the implementation of the internationally agreed tax standard[33] by jurisdictions surveyed by the Global Forum on Transparency and Exchange of information for Tax Purposes. In these progress reports, jurisdictions were categorised in three lists: the white list,[34] the grey list[35] and the black list.[36] This list was regularly updated. All jurisdictions covered by the Global Forum have now committed to the international agreed tax standards and more than half have implemented them. Furthermore, a peer review process has begun through which the Global Forum monitors jurisdictions, assesses their legal and regulatory framework, the actual implementation of standards and their tax treaties and tax information exchange agreements. Again, countries have been categorised in terms of their compliance with these standards.[37] In the context of this exercise, the Global Forum has published several general progress reports and peer review reports.

On 6 September 2013, the G20 Leaders formally committed to automatic exchange of information as the new global standard and fully supported the OECD's work in this area. The standard would oblige countries and jurisdictions to obtain all financial information from their financial institutions and exchange that information automatically with other jurisdictions on an annual basis. The standard drew extensively on the intergovernmental approach to implementing the US FATCA, with a view to maximizing efficiency and reducing cost for financial institutions. On 23 February 2014, the G20 Finance Ministers endorsed the Common Reporting Standard[38] for automatic exchange of tax information.[39] A

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proposed exchange of information was upon request only. On 7 August 2015, a protocol was published by the OECD which amended the TIEA Model to include automatic exchange of information. See Model Protocol for the Purpose of Allowing the Automatic and Spontaneous Exchange of Information under a TIEA. Available on: http://www.oecd.org/ctp/exchange-of-tax-information/Model-Protocol-TIEA.pdf)

[32] G20 London Summit – Leaders' Statement – 2 April 2009, para 15
Available on: https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf

[33] This is set out in footnote 1 of the Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard, on the progress made as at 2 April 2009. *"The internationally agreed tax standard, […] requires exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic tax interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged."*

[34] This list included countries that have substantially implemented the internationally agreed tax standard.

[35] This list included countries committed to the internationally agreed tax standard but that have not yet substantially implemented it.

[36] This list included countries that have not committed to the internationally agreed tax standard.

[37] As regards the Global Forums review process, and the results, see
http://www.oecd.org/tax/transparency/brief-and-FAQ-on-progress-on-tax-transparency.pdf

[38] In this paper, the terms standard, CRS and common reporting standard are used interchangeably.

[39] OECD, Standard for Automatic Exchange of Financial Account Information: Common Reporting Standard
http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf (CRS Report)

few weeks later, there was a joint statement of an Early Adopters Group.[40] In this joint statement, more than 40 countries committed to early adoption of the Common Reporting Standard.[41]

On 21 July 2014, the OECD released the full version of the Standard for Automatic Exchange of Financial Account Information in Tax Matters.[42] The full version of the Standard includes commentaries and guidance for implementation by governments and financial institutions, detailed model agreements, as well as standards for harmonised technical and information technology modalities, notably a standard format and requirements for secure transmission of data.[43] A country adopting the Standard must be or become a party to the Council of Europe/OECD Multilateral Convention on Mutual Assistance in Tax Matters which creates the legal framework for automatic exchange of information. It must also sign a Multilateral Competent Authority Agreement containing provisions of the Standard, to operationalise the automatic exchange of information.

Another emerging standard of good tax governance which came directly out of the BEPS project is country-by-country reporting. Country-by-country reporting was something that NGOs and civil society have long called for.[44] The launch of the BEPS project helped put the discussion on country-by-country reporting at the forefront. Country-by-country reporting was finally perceived as an indispensable element of transfer pricing documentation. It was recognised that enhancing transparency for tax administrations by providing them with adequate information to assess high-level transfer pricing across national borders was crucial to the success of the BEPS project.[45] A three-tiered approach to transfer pricing documentation consisting of a master file, a local file and a Country-by-Country report, taken together, was expected to make taxpayers articulate consistent transfer pricing positions and provide tax administrations with useful information "to assess transfer pricing risks, make determinations about where audit resources can most effectively be deployed, and, in the

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[40] Joint Statement of Early Adopters Group available on: http://www.oecd.org/tax/transparency/AEOI-early-adopters-statement.pdf

[41] The early adopters were the following: Argentina, Belgium, Bulgaria, Colombia, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, the Faroe Islands, Finland, France, Germany, Greece, Greenland, Hungary, Iceland, India, Ireland, Italy, Korea, Latvia, Liechtenstein, Lithuania, Malta, Mauritius, Mexico, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, and the United Kingdom; the UK's Crown Dependencies of Isle of Man, Guernsey and Jersey; and the UK's Overseas Territories of Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Gibraltar, Montserrat, and the Turks & Caicos Islands.

[42] See Standard for Automatic Exchange of Financial Account Information Report, available on: http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters_9789264216525-en#page1

[43] See also documents published in August 2015: an implementation handbook (http://www.oecd.org/ctp/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf), a Model Protocol to the Tax Information Exchange Agreements (http://www.oecd.org/ctp/exchange-of-tax-information/Model-Protocol-TIEA.pdf), and an updated report on offshore voluntary disclosure programs (OECD, *Update on Voluntary Disclosure Programmes – A Pathway to Tax Compliance*, available on: http://www.oecd.org/ctp/exchange-of-tax-information/Voluntary-Disclosure-Programmes-2015.pdf)

[44] See, for example, http://www.taxjustice.net/topics/corporate-tax/country-by-country/ . Also see the OECD White Paper on Transfer Pricing Documentation (30 July 2013), available at: http://www.oecd.org/ctp/transfer-pricing/white-paper-transfer-pricing-documentation.pdf

[45] See http://www.oecd.org/tax/beps/country-by-country-reporting.htm Also see Andrew Hickman, Samia Abdelghani, Paul Hondius, "*Action 13: Transfer pricing documentation and country-by-country reporting*", International Tax Review. 1/4/2016, p1

event audits are called for, provide information to commence and target audit enquiries".[46] This information was also expected to make it easier for tax administrations to identify whether companies have engaged in practices that have the effect of artificially shifting income into tax-advantaged environments.

This three-tiered standardised approach to transfer pricing documentation was developed in the three discussion documents released in the context of Action 13[47] and encapsulated in the Final Report.[48] It led to the new Chapter V of the OECD Transfer Pricing Guidelines. Pursuant to the three tiered approach, MNEs are required to provide tax administrations with high-level information regarding their global business operations and transfer pricing policies in a master file that is available to all relevant tax administrations. MNEs are also required to provide in a local file specific to each country, detailed transactional transfer pricing, identifying material related party transactions, the amounts involved in those transactions, and the company's analysis of the transfer pricing determinations they have made with regard to those transactions. In addition, MNEs are required to file a Country-by-Country report that would provide annually and for each tax jurisdiction in which they do business the amount of revenue, profit before income tax and income tax paid and accrued.[49] The Country-by-Country report is to be used as a high-level risk assessment tool and not as the basis to propose transfer pricing adjustments using a global formulary apportionment of income.[50]

MNEs have to file the master file and the local file directly to local tax administrations. Country-by-Country reports are filed in the jurisdiction of tax residence of the ultimate parent entity and are shared between jurisdictions through automatic exchange of information. This is to be done through the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, bilateral tax treaties and/or tax information exchange agreements (TIEAs). In limited circumstances, secondary mechanisms, including local filing can be used as a backup. There is *no* public country-by-country reporting[51] for the time being and tax administrations must take reasonable steps to ensure that the information is not released to the public.[52]

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[46] Final Report on Action 13, Executive summary, p.9

[47] Action 13 of the BEPS project reads as follows: *"Develop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into account the compliance costs for business. The rules to be developed [would] include a requirement that MNEs provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template."*

[48] OECD (2015),Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.
http://dx.doi.org/10.1787/9789264241480-en

[49] Under this country-by-country report, MNEs must report their number of employees, stated capital, retained earnings and tangible assets in each tax jurisdiction. They must also identify each entity within the group doing business in a particular tax jurisdiction and provide an indication of the business activities each entity engages in.

[50] *Ibid*, para 25 of new Chapter V of OECD Transfer Pricing Guidelines. For a discussion of the concerns that the information provided under country-by-country reporting might lead to formulary apportionment see Maria Amparo Grau Ruiz, "*Country-by-Country Reporting: The Primary Concerns Raised by a Dynamic Approach*", 68 [2014] 10 Bulletin for International Taxation 557-566

[51] In the initial discussion draft (see OECD, *Discussion Draft on Transfer Pricing Documentation and CbC Reporting* (30 January 2014), available on: http://www.oecd.org/ctp/transfer-pricing/discussion-draft-transfer-pricing-documentation.pdf), it was uncertain and open for discussion how the master file and country-by-country report, once prepared, would be shared among participating country tax authorities. Concerns had already been noted about the confidentiality of the data.
The Country-by-Country Revised Discussion Draft stipulated that tax administrations should take all reasonable steps to ensure that there was no public disclosure of confidential information and other commercially sensitive information contained in the documentation package. Tax administrations should also assure taxpayers that the

In order to facilitate the implementation of this standard, an implementation package was developed.[53] Furthermore, influenced by the Convention on Mutual Administrative Assistance in Tax Matters and the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information, the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports was developed to set forth rules and procedures as may be necessary for competent authorities to automatically exchange Country-by-Country reports. In March 2016, the OECD released its standardised electronic format for the exchange of Country-by-Country reports between jurisdictions and a user guide for tax administrations and taxpayers.[54]

These new reporting standards are effective for fiscal years beginning on or after 1 January 2016 and apply, subject to the 2020 review, to MNEs with an annual consolidated group revenue equal to or exceeding EUR 750 million. The first automatic exchanges of Country-by-Country reports will take place no later than June 2018. All members of the OECD's Inclusive Framework on BEPS[55] have committed to implement this minimum standard on Country-by-Country reporting, and to participate in the peer review over the implementation of the standard.

In May 2017, the OECD released information on the Country-by-Country reporting implementation status and exchange relationships between tax administrations.[56] It was reported that up to that time, more than 700 automatic exchange relationships had been established among jurisdictions committed to exchanging Country-by-Country reports as of 2018. Some jurisdictions also continued to work towards agreeing bilateral competent authority agreements for the automatic exchange of Country-by-Country Reports with specific partners under tax treaties or Tax Information Exchange Agreements.

Arguably, country-by-country reporting reinforces the dialogue between governments/tax authorities and businesses in more developed jurisdictions and launches such dialogue in less

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information presented in transfer pricing documentation would remain confidential. This stipulation was in rather vague terms and did not meet the concerns of stakeholders for more certainty. The Country-by-Country Revised Discussion Draft referred to the OECD Guide 'Keeping It Safe' on the protection of confidentiality. (The OECD Guide 'Keeping It Safe' is available on: http://www.oecd.org/ctp/exchange-of-tax-information/keeping-it-safe-report.pdf) This report contained useful guidelines which were more suitable to bilateral scenarios and not necessarily tailored to the multi-jurisdictional reporting setting envisaged in the Country-by-Country Revised Discussion Draft. See Christiana HJI Panayi, *Advanced Issues in International and European Tax Law* (Hart Publishing, 2015), chapter 4 (henceforth, HJI Panayi (2015)).

[52] See paras 18-21 of new Chapter V of OECD Transfer Pricing Guidelines, set out in the Country-by-Country Revised Discussion Draft. The formal citation of this discussion draft is: OECD, *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting* (2014), available on: http://www.oecd.org/tax/guidance-on-transfer-pricing-documentation-and-country-by-country-reporting-9789264219236-en.htm)

[53] This implementation package consisted of model legislation which could be used by countries to require the ultimate parent entity of an MNE group to file the Country-by-Country report in its jurisdiction of residence and competent authority agreements that were to be used to facilitate implementation of the exchange of those reports among tax administrations.

[54] See Country-by-Country Reporting XML Schema: User Guide for Tax Administrations and Taxpayers, http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/country-by-country-reporting-xml-schema-user-guide-for-tax-administrations-and-taxpayers.htm

[55] The OECD has set up the BEPS Inclusive Framework in 2016 to monitor the implementation of the BEPS minimum standards. The BEPS minimum standards are the recommendations under Actions 5, 6, 13 and 14. OECD countries and non-OECD countries participate in the Inclusive Framework.

[56] See http://www.oecd.org/tax/beps-action-13-oecd-releases-cbc-reporting-implementation-status-and-exchange-relationships-between-tax-administrations.htm

developed jurisdictions. The correct implementation of country-by-country reporting, for which many instruments have been developed by the OECD, not only ensures a level playing field, but it also provides certainty for taxpayers and improves the ability of tax administrations to use these reports in their risk assessment work.

Overall, notwithstanding the business sector's concerns on the compliance burden that would fall on MNEs as a result of these proposals, country-by-country reporting has become a reality – arguably, one of the flagship outcomes of the BEPS project. Several countries have already started implementing all three elements of Action 13. Furthermore, as discussed below,[57] following a proposal by the European Commission, the Mutual Assistance Directive on Administrative Assistance (2011/16/EU) has been amended to comply with Action 13, by requiring automatic exchange of country-by-country reports. In fact, following the Panama leaks, the European Commission has made another proposal to require *public* country-by-country reporting for large MNEs. The issue is revisited in the next section.

The connecting link of all these emerging standards seems to be transparency – a basic tenet of good tax governance. It would seem that soft law measures linked to transparency (mostly dealing with exchange of information) are morphing into hard law gradually. In other words, measures proposed to enforce and/or monitor transparency are gradually becoming global standards and global norms. This is certainly the case in the context of the EU, as discussed in the next part of this paper.

(III) GOOD TAX GOVERNANCE IN THE EUROPEAN UNION

(A) The early developments

It is very important to examine the development of the concept of tax good governance in the EU, as this has very important implications not just within the EU but also vis-a-vis third countries. Overall, the EU is seeking to lead by example in the area of tax good governance, both by applying high internal standards and promoting similar measures abroad. In fact, the EU should perhaps be accredited with coining the concept of good tax governance or good governance in tax matters, and setting out its own criteria.[58] Up until the EU's initiatives, the application of principles of good governance in a fiscal setting focused heavily on domestic resource mobilisation and capacity building vis-à-vis developing countries, as shown in Part II.A. The EU's approach, early on, appeared to be more comprehensive and inclusive, purporting to address issues both in the context of developed and developing countries. It could be argued that the EU's support and the emphasis placed on good tax governance gave more credence to the concept and, to an extent, transformed it. In addition, it was obvious that from the start, good tax governance in the EU was to be inextricably linked with the reduction of 'unfair' tax competition – whatever that term entailed. This explains the importance given to the EU's Code of Conduct on Business Taxation and the demands for its

[57] See Part IV.A.
[58] See, for example, the OECD 2010 Report, where the term 'good governance' is mentioned only once. There is no reference to good tax governance or tax good governance.

application not only by the Member States but also third countries, as shown in subsequent developments.[59]

At an ECOFIN meeting in 2008, one of the conclusions of the Council was to promote the principles of good governance in the tax area. These principles were described as 'the principles of transparency, exchange of information and fair tax competition, as subscribed to by Member States at Community level'.[60] Good governance in the tax area was identified as an essential means of combating cross-border tax fraud and evasion and strengthening the fight against money laundering, corruption, and the financing of terrorism. This task, already buttressed by other initiatives, [61] was to be taken on by the Commission.

In 2009, the Commission produced a Communication for the promotion of good governance in tax matters.[62] In this Communication, measures were suggested to strengthen the principle of good governance in the tax area within the EU and internationally. Several existing internal initiatives were identified, as well as proposals to improve the Mutual Assistance Directive and the (now obsolete) Savings Directive. The Commission urged the Council to give the issue of good governance in the tax area appropriate political priority and to include provisions to that effect in general agreements with third countries.[63] In a rather innocuous way at the time, Member States were encouraged to establish a more unified approach towards third countries, regardless of whether those countries apply the principles of good governance in the tax area.[64] Finally, the Commission reiterated its intention to pursue a constructive dialogue with all stakeholders concerned.[65]

Following this Communication, the European Parliament adopted a resolution promoting good governance in the area of taxation. The European Parliament condemned the role played by tax havens in encouraging and profiting from tax avoidance, tax evasion and capital flight and urged the Member States to make the fight against tax havens, tax evasion and illicit capital flight a priority.[66] The resolution also noted the need for an *EU* policy of good tax governance.[67] It was obvious that a uniform policy on this matter would be easier to apply and enforce against third countries, than the policies of each Member State separately.

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[59] See the remainder of this paper. Also see Martijn F. Nouwen, *"The European Code of Conduct Group Becomes Increasingly Important in the Fight Against Tax Avoidance: More Openness and Transparency is Necessary",* 45 (2017) 2 Intertax 138

[60] Press Release, 2866th Council Meeting, Economic and Financial Affairs (8850/08 (Presse 113), Brussels, 14 May 2008) p.22

[61] Communications on Preventing and Combating Corporate and Financial Malpractice (COM (2006) 611), on Caribbean countries (COM (2006) 86), on Pacific countries (COM (2006) 248), on Hong Kong and Macao (COM (2006) 648), on Governance and Development (COM (2006) 421) and on EU competitiveness (COM (2006) 567).

[62] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Promoting Good Governance in Tax Matters, 28 April 2009. See Timothy Lyons, '*Promoting Good Governance in Tax Matters'* [2009] *British Tax Review* 361; Gemma Martinez Barbara; Alicja Brodzka & Sebastiano Garufi; Wolfang Schön, 'Tax and Corporate Governance: A legal Approach' in Wolfgang Schön and others (eds), *Tax and Corporate Governance* (Berlin Heidelberg: Springer-Verlag, 2008).

[63] *Good Governance Communication*, p. 10

[64] *Ibid*, p 13

[65] *Ibid*, p 14

[66] See European Parliament resolution of 10 February 2010 on promoting good governance in tax matters (2009/2174(INI)), para 1

[67] *Ibid*, para 17

Indeed, at a subsequent ECOFIN Council meeting, the Commission was given a mandate to initiate dialogue with Switzerland and Liechtenstein, to extend the Code of Conduct on Business Taxation beyond the Union for the first time.[68] This would facilitate the promotion of the adoption of the principles of the Code of Conduct in third countries.[69]

Shortly thereafter, in its 2010 Communication entitled "*Tax and Development – Cooperating with developing countries on promoting good governance on tax matters",*[70] the Commission set out domestic resource mobilisation as the policy basis for EU assistance to developing countries in building efficient, fair and sustainable tax systems. The Communication focused on the synergies between tax and development policies.[71] Similar to the OECD report published in the same year,[72] it was acknowledged that taxation was instrumental for state-building and fostering citizenship and that better tax governance in developing countries would increase the willingness of EU taxpayers to support development aid. Therefore, it was important to strengthen good governance in tax matters in developing countries. The report discussed the difficulties encountered by developing countries due to domestic or international factors. It was recommended that a better use of dialogue and assessment tools (e.g. governance criteria, profiles, action plans) should be made in the appropriate framework for ensuring an effective monitoring of domestic revenue issues and good governance commitments in the tax area. This would help improve domestic revenue mobilization and strengthen tax administrations.

(B) The 2012 Recommendation on Good Tax Governance

In 2012, in furtherance to the Commission's Action Plan to strengthen the fight against tax fraud and evasion,[73] the Commission published two recommendations. One dealt with aggressive tax planning[74] - henceforth, the Recommendation on Aggressive Tax Planning. The other Communication dealt with good governance and measures to encourage third countries to apply minimum standards of good governance in tax matters[75] - henceforth, the Recommendation on Good Tax Governance. To the Commission, these were two sides of the same coin. Member States should tackle aggressive tax planning but at the same time, they should also ensure that they, as well as any third countries they interact with, apply principles of good governance. By linking the EU's principles of good tax governance with the fight against aggressive tax planning, the Commission (further) legitimized its stance, facilitating the export of the EU standards in a more coercive way, as shown later on.

In the Recommendation on Aggressive Tax Planning, it was emphasised that in order for the internal market to function better, it was necessary to encourage all Member States to take the

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[68] 3020th Council meeting Economic and Financial Affairs, Luxembourg, 8 June 2010, PRESSE 162, 10689/10
[69] *Ibid*, p. 20
[70] 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/2010/0163 final
[71] *Ibid*, p.2
[72] See Part II.A
[73] Communication from the Commission to the European Parliament and the Council, *An Action Plan to strengthen the fight against tax fraud and tax evasion*, COM/2012/0722 final
[74] Commission Recommendation of 6.12.2012 on Aggressive Tax Planning (C (2012) 8806 final)
[75] Commission Recommendation of 6.12.2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters (C (2012) 8805 final)

same general approach towards aggressive tax planning. Member States were, *inter alia*, urged to introduce a subject-to-tax requirement both in their unilateral double tax relief rules and in their bilateral tax treaties with other EU Member States and with third countries. Also, Member States were encouraged to incorporate general anti-abuse rules in their national legislation.[76] The Commission emphasised the importance of an EU wide response to the problem of aggressive tax planning. If countries sought to tackle the problem alone and close loopholes, multinationals would simply relocate. The Commission undertook to monitor the implementation of these recommendations and to put pressure on countries whose progress was slow.

In the Recommendation on Good Tax Governance, the Commission sought to provide Member States a set of criteria to identify third countries that did not meet what it called 'minimum standards of good governance in tax matters'. According to the Commission, a third country only complied with minimum standards of good governance in tax matters where it had adopted legal, regulatory and administrative measures intended to comply with the standards of transparency and exchange of information,[77] where it effectively applied those measures and did not operate harmful tax measures in the area of business taxation.[78] Tax measures which provided for a significantly lower effective level of taxation, including zero taxation, were to be regarded as potentially harmful.[79] In other words, the minimum standards of good governance in tax matters encompassed transparency, exchange of information and fair tax competition.

The Commission proposed a number of measures to be taken vis-à-vis third countries, with a view to encouraging those countries to comply with these standards. It was recommended that Member States should publish blacklists of third countries not complying with the minimum standards set out above.[80] Furthermore, Member States that had already adopted national blacklists should include in such lists third countries not complying with these minimum standards. Member States were encouraged to renegotiate, suspend or terminate tax treaties with non-compliant third countries, as well as initiate bilateral negotiations for tax treaties with compliant third countries. Member States were asked to consider offering closer cooperation and assistance to third countries, especially developing ones, which were committed to complying with the minimum standards. Such closer cooperation would assist those third countries in their fight against tax evasion and aggressive tax planning.[81]

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[76] Recommendation Aggressive Tax Planning, pp. 4-5.

[77] These were set out in the Annex of the Recommendation on Good Tax Governance, p.8.

[78] *Ibid*, pp.4-5

[79] When assessing whether such measures are harmful, account should be taken of *inter alia*:
(a) whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or
(b) whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or
(c) whether advantages are granted even without any real economic activity and substantial economic presence within the third country offering such tax advantages, or
(d) 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 Organisation for Economic Co-operation and Development, or
(e) whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.
In applying these criteria, the Recommendation urged Member States to take account of the conclusions reached by the Code of Conduct Group on Business Taxation on this issue. *Ibid*, p.5.

[80] *Ibid*.

[81] *Ibid*, p.6. "To this end, they could second tax experts to such countries for a limited period of time. When judging third countries' commitment to complying with those minimum standards, Member States should take

This Recommendation, together with the one on Aggressive Tax Planning and the Commission's Action Plan to strengthen the fight against tax fraud and evasion showed the beginning of a new era. From thereon it became obvious that the main focus of the Commission - and to an extent, the other EU institutions - was not only the elimination of tax obstacles to cross-border movement but also the protection of national tax bases and the prevention of tax avoidance. Furthermore, this Recommendation, although at the time seen as soft law, set the wheels in motion for the development of a uniform external fiscal policy.

(C) The External Strategy Communication - The Consolidation of Common EU Tax Good Governance Criteria

For some time, there were calls for the EU to develop a common approach to address external challenges to its Member States' tax bases. As discussed above, the 2012 Recommendation on Good Tax Governance sowed the seeds for a more concrete – hard law - approach. The international momentum gained as a result of the BEPS project certainly helped and was fully exploited by the European Commission.[82]

The first steps towards developing a uniform approach to good tax governance was taken with the Commission's Action Plan for a Fair and Efficient Corporate Tax System in June 2015.[83] This Action Plan was intended to improve the corporate tax environment in the EU, making it fairer, more efficient and more growth-friendly. The key actions included a strategy to re-launch the Common Consolidated Corporate Tax Base (CCCTB) and a framework for effective taxation where profits were generated. Very importantly, in the context of this Action Plan, the Commission published a first pan-EU list of third-country non-cooperative tax jurisdictions – about 30 non-EU tax jurisdictions in the first version of the list.[84] The list was to be updated periodically and used to develop a common EU strategy to deal with non-cooperative tax jurisdictions, including via coordinated counter measures.[85]

The 'pan-EU list' prompted a new discussion between these jurisdictions and the relevant Member States on tax good governance matters, allowing third countries to clarify issues related to their tax regimes and Member States to detail their concerns. This increased transparency also encouraged those Member States with listing processes to scrutinize their lists and ensure that they were well-founded, accurate and up-to-date. The significant divergences in the national listing processes were highlighted through the pan-EU list, along with the problems this can cause for the Single Market, third countries and businesses.[86] The pan-EU list was only intended as an interim solution. The ultimate goal was to create a

into account all concrete indications to this effect, in particular steps towards compliance already taken by the third country concerned." See para 6.1.

[82] See chapter 5 in HJI Panayi (2015)

[83] Communication from the Commission to the European Parliament and the Council, 'A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action' COM(2015) 302 final, 17 June 2015.

[84] Obviously, the first version has been replaced by later versions. The one online is the latest version. See: https://ec.europa.eu/taxation_customs/business/company-tax/tax-good-governance/tax-good-governance-world-seen-eu-countries_en

[85] *Ibid*, pp 12 and 13

[86] *Ibid*,10

common EU system for assessing, screening and listing third countries. The list was revised several times, with the latest revision being in December 2016.[87]

Given the global nature of harmful tax competition and aggressive tax planning, the need for an appropriate combination of efforts at national, EU and global level had been raised at an ECOFIN meeting in 2013.[88] The Commission's Communication on a European Union external strategy for effective taxation[89] (henceforth, the External Strategy Communication) sought to address this issue. This Communication was produced in the context of the Commission's Anti-Tax Avoidance Package, announced in January 2016,[90] as part of its ambitious agenda for fairer, simpler and more effective corporate taxation in the EU.

As regards external strategy, it was argued that the diversity in Member States' approaches sent mixed messages to international partners about the EU's tax good governance expectations. A coordinated EU external strategy on tax good governance was therefore "essential to boost Member States' collective success in tackling tax avoidance, ensure effective taxation and create a clear and stable environment for businesses in the Single Market".[91] The External Strategy Communication proposed a framework for a new EU external strategy for effective taxation, based on a revised tax good governance clause. The Commission identified the key measures which could help the EU to promote tax good governance globally but also allow it to better integrate tax good governance "into the EU's wider external relation policies and support its international commitments, particularly in the area of development".[92]

In this Communication, the *EU standards* for tax good governance first set out in the 2012 Recommendation on Good Governance - namely, transparency, exchange of information, and fair tax competition - were re-examined in light of fundamental changes in the global tax environment and the need for more coherence in Member States' assessments of third countries. The post-BEPS EU standards for tax good governance, described in more detail in Annex 1 of this External Strategy Communication, were updated to underlie all EU external policies on tax matters and provide a clearer basis for discussing and promoting tax good governance with international partners.

As regards transparency, the revised EU standards were to follow the two internationally agreed standards on transparency and exchange of information for tax purposes that had been developed by the OECD: exchange of information on request and automatic exchange of information. At the EU level, the assessment of third countries' compliance with this standard would be influenced by the compliance ratings published by the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes from its peer reviews.[93]

As regards fair competition, this was defined as meaning that a third country should not operate harmful tax measures in the area of business taxation. Following the guidelines set out in the 1998 Code of Conduct on Business Taxation and reiterated in the Recommendation

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[87] See https://ec.europa.eu/taxation_customs/business/company-tax/tax-good-governance/tax-good-governance-world-seen-eu-countries_en

[88] ECOFIN, Council conclusions on tax evasion and tax fraud, 3238th Economic and Financial Affairs Council meeting Brussels, 14 May 2013

[89] Commission Communication on an External Strategy for Effective Taxation (COM/2016/024 final)

[90] See http://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en

[91] *Ibid*, p.2

[92] *Ibid*, p.3

[93] See Annex 1, pp.2-3

on Good Governance, it is stated that "[t]ax 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."[94] It was expressly stated that 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 and the practice/guidance agreed by the Code of Council working group.

The G20/OECD BEPS standards were also relevant, especially where the G20/OECD BEPS Action Plan had resulted in the adoption of minimum standards or a common approach. BEPS action items 2, 4-10 and 13-14 were specifically mentioned as relevant standards to be followed. It was also added that in assessing standards of fair tax competition, account should be taken of the outcome of the framework put in place by the OECD/G20 to monitor the implementation of BEPS by OECD/G20.[95] Relevant good governance standards for tax purposes also included Financial Action Task Force (FATF) international standards on Combating Money Laundering and the Financing of Terrorism and Proliferation.

The revised standards also featured in Annex 2, which set out the core elements for a renewed good governance *clause* in negotiating proposals with third countries. In the External Strategy Communication, the Commission had considered ways to enhance tax good governance cooperation through agreements with third countries. It was recommended that the EU should use every tool at its disposal to promote tax good governance internationally. Bilateral and regional agreements with third countries were recommended as "particularly useful legal instruments [which] offer an opportunity to frame, in a consensual agreement, each side's commitment to adhere to international standards of transparency, information exchange and fair tax competition".[96] Such agreements would also allow the EU to ensure that its tax policy priorities vis-à-vis third countries are appropriately integrated into its wider external relations. It had already been confirmed that trade agreements would support the promotion of the international standards of transparency and good governance.[97] In fact, tax good governance clauses were already included in some trade agreements between the EU and third countries or regions though this was not always straightforward. It was admitted that so far, there was mixed success with such clauses– they were sometimes resisted, or caused delays to negotiations. Whilst it was acknowledged that due to the diversity of the EU's international partners a one-size-fits-all approach was not practical, an element of uniformity as regards tax good governance clauses was essential.

In the External Strategy Communication, the Commission emphasised how critical it was for developing countries to apply tax good governance standards. These efforts were aligned with the Addis Tax Initiative,[98] the 2030 Agenda for Sustainable Development[99] and the EU's wider development commitments.[100] It was affirmed that the Commission was working

[94] *Ibid*, p.3
[95] At the time, this framework had not been put into place.
[96] External Strategy Communication , p.5
[97] *Ibid*, p.5
[98] Available at: http://www.un.org/esa/ffd/ffd3/wp-content/uploads/sites/2/2015/07/Addis-Ababa-Action-Agenda-Draft-Outcome-Document-7-July-2015.pdf
[99] Available at: https://sustainabledevelopment.un.org/post2015/transformingourworld
[100] As noted in the External Strategy Communication, p.7, the EU annually provided €140 million to developing countries as direct support for domestic public finance reforms and had budget support programmes in more than 80 countries. Also, through the Addis Tax Initiative, which the EU had helped to launch in July 2015, the

closely with the Member States to ensure an ambitious global outcome.[101] The EU and its Member States had already undertaken a series of important commitments to support the Addis Tax Initiative and the 2030 Agenda.[102] Reference was made to the "Collect More-Spend Better" strategy set out in a separate report,[103] which focused on developing countries. The Collect More-Spend Better report explained how the EU intends to assist developing countries improve domestic resource mobilisation and having more effective and efficient public expenditure and debt management. It was argued that the inclusion of developing countries in the global good governance network would prevent weaknesses in the international tax structure that may create opportunities for base erosion and profit shifting.[104] The ultimate aim was to help developing countries participate in relevant international discussions and standard setting processes.

In the External Strategy Communication, the Commission also announced its intention to develop a screening process to assess and list third countries on the basis of their adherence, or lack of, to basic indicators of tax good governance. Developing an EU listing process was thought to be crucial to the development of the common EU approach on tax good governance. It was thought that a single EU list of non-cooperative jurisdictions would carry more weight than the patchwork of national lists that currently exists and would facilitate in dealing with third countries that do not comply with international tax good governance standards. Furthermore, a common EU list would also prevent aggressive tax planning by using mismatches between the different national systems.[105] It would also give international partners greater clarity on the EU's expectations in this field.[106]

Lastly, the Commission recommended that the link between EU funds and tax good governance be reinforced.[107] The EU Financial Regulation (Art. 140 (4)) prohibits EU funds from being invested in or channelled through entities in third countries which do not comply with international tax transparency standards. EU and international financial institutions (IFIs) must also transpose these good governance requirements in their contracts with all selected financial intermediaries. The Commission argued that these provisions could be extended further than the current transparency requirements, to also encompass the EU's principles for fair tax competition. The European Parliament has also asked for measures to ensure that EU funding cannot be routed through low/no tax jurisdictions. The Commission would, therefore, propose to integrate the EU's updated tax good governance standards into the Financial Regulation.

It would seem that this Commission Communication closely follows some of the work and actions undertaken by the European Parliament in this area. The European Parliament has addressed tax good governance issues in a number of its resolutions, in particular in the

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Commission and other international partners committed to doubling the support to developing countries for domestic revenue mobilisation.

[101] See also Commission Communication, Proposal for a new European Consensus on Development Our World, our Dignity, our Future, COM(2016) 740 final (22.11.2016)

[102] For more information, see report entitled "Financing Global Sustainable Development: Illustrations of EU contributions to the 2030 Agenda", available at: https://ec.europa.eu/europeaid/sites/devco/files/brochure-financing-for-development-20160706_en.pdf

[103] Available at: https://ec.europa.eu/europeaid/sites/devco/files/swd-collect-more-spend-better.pdf

[104] Collect More-Spend Better report, p.7

[105] IBFD White Paper, "European Union: Blacklists as a tool to fight tax avoidance", (authored by Aleksandar Bal), dated 25 September 2016

[106] External Strategy Communication, p.9

[107] External Strategy Communication, pp.12-13

resolution prepared by the Special Committee on tax rulings (TAXE 1), adopted in plenary on 25 November 2015.[108] Here, the negative spillover effect of tax avoidance and tax evasion was stressed.[109] It was emphasised that ensuring fair competition in the internal market and protecting Member States' tax bases depended very much on addressing the weakest link regarding interactions with low or no-tax and secrecy jurisdictions.[110] Good tax governance criteria were crucial to this objective. The role of the EU in promoting the concept of good tax governance to third countries was further considered in another study commissioned by the European Parliament.[111]

Similar issues were addressed in a report on bringing transparency, coordination and convergence to corporate tax policies in the EU, adopted in plenary on 2 December 2015.[112] The report set out numerous legislative recommendations to address aggressive corporate tax practices, focusing on transparency, coordination and convergence. The Committee's recommendations included, in particular, country-by-country reporting based on BEPS, but also taking into account Parliament's position on public reporting, effective protection of whistle-blowers, a 'fair tax payer' label linked with corporate social responsibility, a common European definition of tax havens and setting principles for tax amnesties and tax forgiveness schemes, automatic exchange of tax rulings, the introduction of a common European tax identification number the CCCTB etc. Many of these recommendations became legislative proposals in the next 12 months.

In a related study dealing with the macro-economics of the issues,[113] the inefficiencies arising from some aggressive tax strategies both for businesses and governments were examined in more detail. It was concluded that the implementation of the CCCTB would help to overcome the problem of aggressive tax planning leading to corporate tax avoidance. A common and cost-effective Union-wide regulatory framework was the most sensible and effective way of limiting and eroding these practices.[114]

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[108] See European Parliament resolution of 25 November 2015 on tax rulings and other measures similar in nature or effect (2015/2066(INI)) (available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0408+0+DOC+XML+V0//EN&language=EN#BKMD-8) and more specifically, para 152, where it is stated:
"Considers that the setting up of free trade agreements needs to be accompanied by enhanced tax cooperation, preventing tax avoidance by firms competing on the same markets and ensuring a level playing field; asks the Commission, therefore, to introduce tax provisions in all EU free trade agreements which would bind partner countries to apply good tax governance and ensure reciprocity in tax matters; stresses that the work undertaken by the Platform for Tax Good Governance forms a good basis on which to implement this concept; underlines the fact that the same could apply to EU cooperation agreements;". Also see European Parliament, Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect, Report on tax rulings and other measures similar in nature or effect.
[109] *Ibid*, para M
[110] *Ibid*, para 80
[111] The study was authored by Jeffery Owens. See European Parliament, *Promoting Good Tax-Governance in Third-Countries: The Role of The EU*. Available at:
http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/569976/IPOL_IDA(2015)569976_EN.pdf
[112] See European Parliament, Report with recommendations to the Commission on bringing transparency, coordination and convergence to Corporate Tax policies in the Union (2015/2010(INL)), dated 2 December 2015. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0349+0+DOC+PDF+V0//EN
[113] European Parliamentary Research Study, "Bringing transparency, coordination and convergence to corporate tax policies in the European Union: I-Assessment of the magnitude of aggressive corporate tax planning".
Available at:
http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558773/EPRS_STU(2015)558773_EN.pdf
[114] *Ibid*, p.36

Undeniably, both the Commission and the European Parliament are on the same wave length in this area, recognising the importance of applying standards of good tax governance both internally and vis-à-vis third countries. At the same time, this is obviously a great opportunity for the Commission to push forward its agenda on developing a uniform external fiscal policy which would incidentally also support the fight aggressive tax planning. This political setting helps to explain the gradual transformation of what are effectively soft law initiatives into quasi-hard law, or hard law – to an extent, the Europeanisation of good tax governance standards.

(IV) Follow-up to the External Strategy Communication: The Europeanisation of good tax governance standards

(A) Automatic Exchange of Information and Country-by-Country Reporting

As far as exchange of information is concerned, the EU has been at the forefront of developments, with the Commission fast-tracking important amendments to existing legislation (i.e. the Mutual Assistance Directive on Administrative Cooperation 2011/16/EU). For example, in 2014, at the ECOFIN meeting in October 2014, Member States agreed on a Commission proposal to apply the widest possible scope of automatic exchange of information within the EU, to mirror the global standard of automatic information exchange agreed by the G20.[115] It was agreed that from 2017, Member State tax authorities would automatically exchange information with each other on most categories of income and capital held by private individuals and certain entities.[116] The revised Mutual Assistance Directive would cover a wide scope of income and capital.

This Directive was amended again following a legislative proposal for the automatic exchange of information on tax rulings.[117] This proposal was in the context of the Tax Transparency Package, produced by the Commission in February/March 2015,[118] under the auspices of the new Commission president, Jean-Claude Juncker, who was poised to demonstrate to the world that he was tough on tax avoidance. The Commission proposed new provisions on exchange of tax rulings that were to be built into the existing legislative framework for information exchange. Under the proposal, the Member States would be required automatically to exchange information with regard to their tax rulings. Every three

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[115] See Part II.C.

[116] Austria was to be given an additional year to apply the new rules, so as to have sufficient time to make the necessary technical adaptations.

[117] Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, SWD(2015) 60 final, COM(2015) 135 final, 2015/0068 (CNS) (18 Mar. 2015), EU Law IBFD.

[118] The Tax Transparency Package was based on the Commission's commitment in its Work Programme in December 2014 to counter tax evasion and tax avoidance and to ensure that taxes were paid in the country where profits are generated (*see* European Commission Press Release IP/14/2703, A New Start: European Commission Work Plan to Deliver Jobs, Growth and Investment (16 Dec. 2014), available at http://europa.eu/rapid/press-release_IP-14-2703_en.htm). Among the 23 initiatives, *see* the initiative, entitled "A Fairer Approach to Taxation", which sated the following: "An Action Plan on efforts to combat tax evasion and tax fraud, including measures at EU level in order to move to a system on the basis of which the country where profits are generated is also the country of taxation; including automatic exchange of information on tax rulings and stabilising corporate tax bases".

months, national tax authorities would have to send a short report to all other Member States on all cross-border tax rulings and advance pricing agreements (APAs) that they have issued after the date of entry into force of the proposed Directive, including those that were issued during the last 10 years, but remained valid on 1 January 2016. The Member States could then ask for more detailed information on a particular ruling. This would enable the rapid implementation of automatic exchange of information on tax rulings, as the procedures and processes to do so were already in place. On 6 October 2015, the Commission announced that the Member States had reached an agreement on the automatic exchange of tax rulings,[119] with some amendments to the initial proposal.

In the context of the Anti-Tax Avoidance Package, the Commission again proposed to amend the Mutual Assistance Directive on Administrative Cooperation (2011/16) to ensure adoption of Action 13 of the OECD/G20 BEPS project on Country-by-Country reporting.[120] The proposed amendment was approved at the ECOFIN meeting of 25 May 2016, without discussion.[121] Therefore, even though the OECD/G20 recommendations under Action 13 BEPS are a minimum standard (which means that OECD and non-OECD countries are strongly encouraged to adopt it but not legally bound to do so), EU Member States are under an additional legal obligation to adopt those rules through the amendment of the Directive.

Emboldened by the release of the Panama Papers in April 2016 and the global reverberations therefrom, the Commission furthermore proposed legislation requiring *public* country-by-country reporting.[122] This initiative took the form of a proposal to amend the Accounting Directive requiring disclosure of financial accounts (2013/34/EU).[123] It was accompanied by a long impact assessment on public tax transparency rules for multinationals formally underpinning the Commission’s proposal.[124]

[119] European Commission Press Release IP/15/5780, Tax Transparency: Commission Welcomes Agreement Reached by Member States on the Automatic Exchange of Information on Tax Rulings (6 Oct. 2015), available at http://europa.eu/rapid/press-release_IP-15-5780_en.htm.

[120] European Commission, Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (COM/2016/025 final (CNS)).

[121] The information to be reported within this document is similar to that described in Action 13 of the BEPS Action Plan. MNE groups should provide annually and for each tax jurisdiction in which they do business the amount of revenue, profit before income tax, and income tax paid and accrued. MNE groups should also report the number of their employees, stated capital, accumulated earnings and tangible assets in each tax jurisdiction. Finally, they also should identify each entity within the group doing business in a particular tax jurisdiction and provide an indication of the business activities in which each entity is engaged. The information above should be reported on an aggregated basis for all entities resident in a specific jurisdiction and not entity-by-entity.
Under the amended directive, the obligation of preparing a Country-by-Country report will apply to very large MNE groups for which the total consolidated group revenue exceeds €750 million (or an amount in local currency approximately equivalent to €750 million). The obligation of preparing a Country-by-Country report will apply for the fiscal year commencing on or after 1 January 2016 (subject to exceptions).
Country-by-Country reporting concerns both MNE groups headquartered in an EU Member State and those headquartered outside the EU. If the parent entity is headquartered outside the EU, one of the subsidiaries or branches established within the EU and appointed by the parent entity will be in charge of the Country-by-Country report on behalf of the parent.

[122] See Taxation paper No 61: Study on Structures of Aggressive Tax Planning and Indicators. Final report.

[123] See Proposed amendment to Accounting Directive (2013/34/EU) regarding disclosure of income tax information (COM(2016) 198/2). Transparency requirements already exist for banks under Capital Requirement Directive (CRD IV) and for large extractive and logging industries under the Accounting Directive in the form of country-by-country reporting. Also see Part II.C.

[124] See Taxation paper No 61: Study on Structures of Aggressive Tax Planning and Indicators. Final report.

Pursuant to this proposal, MNEs (EU/non-EU) with a consolidated turnover of EUR 750 million would be required to publish annually a report disclosing the profit and the tax accrued and paid in each Member State on a country-by-country basis for EU Member States, and in the aggregate for all non-EU countries. There is also a requirement that filing entities provide a written explanation of any material discrepancies between income tax paid and income tax accrued and the addition of accumulated earnings to the list of required quantitative data. This information, which is less detailed than under the currently approved country-by-country reporting,[125] would be made available in a stand-alone report accessible to the public for at least 5 years on the company's website. Companies would also have to file the report with a business register in the EU.

There is also a requirement for disaggregated data to be published regarding non-EU Member States that do "not respect international tax good governance standards".[126] The Commission has added this country-specific reporting requirement for tax haven jurisdictions in its final proposed directive on public country-by-country reporting, following the political uproar caused by the Panama Papers revelations. This requirement was one way of "help[ing the Commission] advance the tax governance agenda internationally".[127]

Under this proposal, the Commission would determine which countries to include on the list of tax jurisdictions subject to the country-specific reporting requirements based on transparency and information exchange, fair tax competition, adherence to G20 and OECD standards, and other relevant standards. The proposal allows an exception for entities in designated jurisdictions that do not transact with affiliated EU enterprises.

As the proposal for public country-by-country reporting is made in the context of the Accounting Directive, it requires qualified majority only.[128] Furthermore, penalties for noncompliance would be determined based on the penalty provisions adopted by Member States under the Accounting Directive. The latest negotiation documents suggest that the EU Council and the European Parliament are set to water down this proposal.[129] Nevertheless, the fact that this proposal is even debated at the level of the EU institutions when it was fervently rejected during the discussions on the BEPS project[130] shows the level of activism that has been generated following this project. It also shows how the Commission has used BEPS initiatives and post-BEPS soft law in a way that helps advance *its* tax governance agenda internationally. In fact, the Commission has managed to turn much of this soft law into hard law, not just in the area of exchange of information but also in other areas, as shown below.

(B) Transparency and the link with money laundering – The European Parliament's initiatives

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[125] Unlike the Country-by-Country reporting template included in the OECD's action 13 report, the proposal would not require reporting of stated capital or tangible assets or segmentation of related- and unrelated-party revenues.

[126] See European Commission, Factsheet, Introducing public country-by-country reporting for multinational enterprises - Questions & Answers, Strasbourg, 12 April 2016. Available at: http://europa.eu/rapid/press-release_MEMO-16-1351_en.htm

[127] *Ibid*.

[128] The amendments, which were proposed by DG FISMA (Directorate-General for Financial Stability, Financial Services and Capital Markets Union) required qualified majority under Art 50 TFEU.

[129] Elodie Lamer EU Set to Water Down Public CbC Reporting Proposal, 86 Tax Notes International 565 (May 15, 2017)

[130] See HJI Panayi (2015), chapter 4, part 4.3.

As a follow-up to the External Strategy Communication, in a press release published on 5 July, 2016,[131] the Commission unveiled its latest proposals to tackle terrorism financing and money laundering, as well as the next steps to increase tax transparency and tackle tax abuse. The new proposals included two legislative proposals to amend the Anti-Money Laundering Directive (2015/849/EU) and, once more, the Mutual Assistance Directive on Administrative Cooperation in the field of direct taxation (2011/16/EU). As explained in the accompanying Communication,[132] the proposed measures were, *inter alia*, aimed at protecting tax good governance globally.

The Commission proposed that tax authorities have access to national anti-money laundering information, in particular as regards beneficial ownership and due diligence information.[133] The Commission also proposed that both existing and new accounts be subject to due diligence controls and that passive companies and trusts be subject to higher scrutiny and tighter rules.[134]

In order to improve information exchange on beneficial ownership, the Commission also announced that it was examining the most appropriate framework through which Member States could automatically exchange national information on beneficial owners of companies and trusts. This initiative follows an earlier proposal[135] to revise the fourth Anti-Money Laundering Directive to include a specific reference to tax crimes, as well as to require Member States to store beneficial ownership information in central registers which would be accessible to the public. On 20 April, 2015 the Council had approved some revisions to this directive, including the requirement for all Member States to create central registers of beneficial ownership information for companies, other legal entities, and trusts incorporated in their respective territories.[136] It was, however, up to the discretion of Member States to decide whether to make their beneficial ownership registers public.[137] Interestingly, The European Parliament's Economic and Monetary Affairs and Civil Liberties, Justice, and

[131] See http://europa.eu/rapid/press-release_IP-16-2354_en.htm

[132] Communication on further measures to enhance transparency and the fight against tax evasion and avoidance, COM(2016) 451 final. Available at: http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/fairer_corporate_taxation/com_2016_451_en.pdf

[133] This was to be attained through an amendment to the Mutual Assistance Directive on Administrative Cooperation in the field of direct taxation (2011/16).

[134] This was to be attained through amendments to the Anti-Money Laundering Directive (2015/849) which would be adopted by the European Parliament and the Council of the European Union as co-legislators.

[135] Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. See release on 12 January, 2015, available on: http://data.consilium.europa.eu/doc/document/ST-5116-2015-ADD-2/en/pdf

[136] Member States had to ensure that the registers are available to competent authorities, financial intelligence units, and 'obliged entities', such as banks conducting due diligence tasks. A person had to show a legitimate interest in alleged money laundering, terrorist financing, and predicate offenses such as tax crimes to be able to access the beneficial ownership details. For trusts, central beneficial ownership information registers would be used when the trust generated tax consequences. See Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, Brussels, 8 April 2015 (OR. en). Also see regulation, available on: 2015 WTD 76-20.

[137] For commentary, see Stephanie Soong Johnston, *"EU Council Approves Beneficial Ownership Register Rules",* 2015 WTD 76-1 (21 April, 2015)

Home Affairs committees on February 28 2017 adopted by a wide majority draft (non-legally binding) plans that would require beneficial ownership registers to be made fully public, setting up a potential clash with the governments of EU Member States.

On 6 July 2016, the European Parliament voted in plenary session on the report prepared by the Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect (TAXE2). The report, which was adopted by 514 votes to 68, with 125 abstentions, contained recommendations to make corporate taxation fairer and clearer and to tackle tax evasion and aggressive tax planning.[138] Some of the recommendations were an EU register of beneficial owners of companies; a tax havens blacklist; sanctions against non-cooperative tax jurisdictions; action against abuse of 'patent box' regimes; a code of conduct for banks and tax advisors; tax good governance rules in EU trade agreements; and a withholding tax on profits leaving the EU.

The Special Committee also urged the Commission to present a proposal on the CCCTB before the end of 2016, and to present concrete legislation on transfer pricing issues and clarifying guidelines as regards their interaction with State aid. The European Parliament had already voted the previous month, on 8 June 2016, for the creation of a Panama Papers committee of inquiry "to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion".[139]

The TAXE report and the European Parliament's resolutions are indicative of the increasing pressure that the European Parliament is putting on other EU institutions with respect to countering aggressive tax planning and promoting tax transparency. Indeed, on 6 December 2016, the Council adopted a directive granting access to tax authorities to information held by authorities responsible for the prevention of money laundering.[140] The Directive requires Member States to provide access to information on the beneficial ownership of companies. Member states will have until 31 December 2017 to transpose the directive into national laws and regulations.

The European Parliament has also been pushing hard to ensure the European Investment Bank does not use public money in tax havens. It has been reported that in 2016, the European Commission vetoed projects worth up to €1 billion because it considered the financing arrangements linked to those projects to be dubious.[141] The European Parliament has proposed a provision aimed at ensuring that the European Investment Bank would not maintain business relations with entities incorporated or established in non-cooperative

[138] European Parliament, European Parliament resolution of 6 July 2016 on tax rulings and other measures similar in nature or effect (2016/2038(INI)), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0310+0+DOC+PDF+V0//EN

[139] See European Parliament Directorate General For Internal Policies, Policy Department A: Economic and Scientific Policy, *The Mandate of the Panama Inquiry Committee – An Assessment,* (November 2016), p.10. The author of this report (Professor Robby Houben) concluded that the focus of the Committee of inquiry should probably lie on the alleged failure of the Commission to enforce and of Member States to implement and to enforce effectively the third anti money laundering directive, the 2011 directive on administrative cooperation in the field of taxation and the 2006 directive on statutory audits of annual accounts and consolidated accounts. *Ibid*, p.29.

[140] See Council Directive amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, available at: http://data.consilium.europa.eu/doc/document/ST-13885-2016-INIT/en/pdf

[141] See Elodie Lamer, *EU Pushing European Investment Bank to Avoid Tax Havens*, Tax Analysts Doc 2017-54356

jurisdictions. This was rejected in Council and the Commission presented a compromise in that the European Investment Bank should not maintain business relations with entities established in jurisdictions mentioned in the EU blacklist or that do not cooperate with the EU, except where the project to be financed is located in the same jurisdiction.

Furthermore, in the wake of the 'Panama Papers' leaks, the European Parliament decided to establish a Committee of inquiry (the PANA committee) to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion. In the context of this, an ex post impact assessment was published in March 2017 regarding the role, powers, and activities of financial intelligence units in combating financial crimes such as tax evasion.[142]

Overall, although the European Parliament's resolutions and recommendations are not legally binding in this area of law, they certainly buttress the efforts of the Commission to adopt binding rules.

(C) The EU Listing Process

The EU Listing Process, first announced in the External Strategy Communication,[143] is becoming a very important tool in the Commission's efforts to 'export' its tax good governance standards.

On 14 September 2016, the Commission completed the first step of this listing process: a Scoreboard of all third countries and jurisdictions for tax purposes according to key indicators, including economic data, financial activity, institutional and legal structures and basic tax good governance standards. The Commission emphasised that the scoreboard did not represent any judgement of third countries, nor was it a preliminary EU list.[144] It was merely "an objective and robust data source, produced by the Commission, to help Member States in the next steps of the common EU listing".[145] As a second step, Member States in the Code of Conduct Group would choose which third countries should be screened more fully so as to determine the non-cooperative jurisdictions. In the final step, as stipulated in the External Strategy Communication, Member States would decide whether to add the jurisdiction in question to a common EU list of problematic tax jurisdictions. This decision would be based mainly on the screening process.

In the External Strategy Communication, it was stated that listing a jurisdiction would be a last resort option to incentivise transparency and fair taxation. Once a jurisdiction was added to the EU list, all Member States would apply common counter-measures against it. There was no mention of common measures or sanctions in the September 2016 document setting out the scoreboard approach.

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[142] *http://pdfs.taxnotes.com/2017/2017-55169_PDFOnly_WTDDocs_EU_study_FIUs.pdf . The study was undertaken by the* DG EPRS Ex-post Assessment Unit (IMPT).

[143] See Part IV.C.

[144] https://ec.europa.eu/taxation_customs/sites/taxation/files/2016-09-15_scoreboard-indicators.pdf#page=1&zoom=auto,-20,842

[145] *Ibid*.

In the Scoreboard published in September 2016, the results of a thorough pre-analysis were presented, under which third country jurisdictions were examined to determine their risk of facilitating tax avoidance. This pre-assessment was firstly based on a wide range of neutral and objective indicators; namely, strength of economic ties to the EU,[146] financial activity[147] and stability factors.[148] For each indicator, the jurisdiction with the highest value received '1', the second-highest received '2', and so forth.

The jurisdictions that featured strongly in these three categories (Table I) and the five jurisdictions with transparency agreements with the EU (Table II) were then set against risk indicators, such as their level of transparency and exchange of information[149] or the potential use of preferential tax regimes.[150] Another risk factor was the existence of a tax system with no corporate income tax or a zero corporate tax rate. These three risk indicators reflected the situation in July 2016. The risk indicators did not pre-empt the in-depth analysis of each jurisdiction's tax system, which would take place in the screening stage. It was only intended to provide Member States with as much information as is possible to decide on the jurisdictions that they would want to screen.

In November 2016, the Council published conclusions on the criteria and process for screening jurisdictions with a view to establish an EU list of non-cooperative jurisdictions for tax purposes.[151] Whilst several third country jurisdictions are being screened, Member States are considering what deterrent measures to introduce. There is no agreement yet on a uniform design. It has been reported that the Maltese presidency suggested three different approaches to adopting countermeasures: a flexible one, a rigid one, and a "toolbox plus" approach.[152] Under the flexible approach, Member States would be required to indicate which countermeasures they will apply, and to which jurisdictions. Member States would be required to apply the same countermeasures to all blacklisted jurisdictions. Finally, under the toolbox plus approach, countermeasures would be targeted and Member States would still be given flexibility in their implementation.

A final EU tax haven blacklist and its countermeasures are expected to be adopted by the end of 2017 – another example of the hardening of soft law.

(D) The Corporate Tax Reform Package

[146] In order to see how strong the economic ties are between the third country and the EU, indicators such as trade data, affiliates controlled by EU residents and bilateral FDI flows were examined.
[147] In order to determine if a jurisdiction had a disproportionately high level of financial services exports, or a disconnection between their financial activity and the real economy, indicators such as total FDI, specific financial income flows and statistics on foreign affiliates were used.
[148] In order to see if the jurisdiction would be considered by tax avoiders as a safe place to place their money, general governance indicators such as corruption and regulatory quality were examined.
[149] Here, what was examined was the jurisdictions' status with regard to the international transparency standards i.e. exchange of information on request and automatic exchange of information.
[150] Here, what was examined was the existence of potential preferential regimes, identified by the Commission on the basis of publicly available information (IBDF, national websites etc.).
[151] These conclusions were adopted by the Council at its 3495th meeting held on 8 November 2016.
[152] See Elodie Lamer, *"EU Considering Tax Anti-Tax Haven Rules",* Tax Analysts, Doc 2017-55585 (25 May 2017)

Following on its commitments from the 2015 Action Plan, on 25 October 2016, the Commission proposed a comprehensive tax package which consisted of four new draft EU Directives on the Common Corporate Tax Base (CCTB Directive) and the Common Consolidated Corporate Tax Base (CCCTB Directive), a Directive on Hybrid mismatches with third countries and a Directive on Double taxation dispute resolution mechanisms in the EU.

As already mentioned,[153] in its 2015 summer Action Plan, the Commission had announced that it would relaunch the CCCTB project in 2016. This would be done through a two-step approach: Member States would first agree on rules for a Common Corporate Tax Base (CCTB), after which agreement would be reached on the consolidation element. Neither the original proposal published in 2011,[154] nor the current proposals involved changes to Member States' corporate tax rates. Indeed, the proposals published in October 2016 consisted of two separate draft Directives, one for a CCTB[155] and the other for a CCCTB.[156] If approved, the CCTB proposal would apply from 2019 and the CCCTB proposal from 2021. The difference between the CCTB and the CCCTB is the cross-border consolidation of profits and losses, as well as the elimination of intra-group transactions.

What is noteworthy – and to an extent expected – was that under the new proposals the focus of attention has shifted from the objective of facilitating corporate groupings and simplifying compliance, to countering tax avoidance. The draft Directives contain provisions that are similar to those already adopted under the Anti-Tax Avoidance Directive adopted in the summer of 2016 (ATAD I).[157] However, in order to ensure a more harmonised implementation, the new proposals give Member States less flexibility to apply stricter rules than required by ATAD I.

Along with the CCTB and CCCTB proposals, as expected from earlier announcements, the Commission proposed a Directive to broaden the scope of the Anti-Tax Avoidance Directive as regards hybrid mismatch arrangements (ATAD II),[158] so as to align it with the corresponding provisions of the CCTB proposal. Under the proposed Directive, the hybrid provisions would not only apply to mismatch arrangements within the EU, but also to

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[153] See Part VI.B.

[154] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) COM(201), 121/4 2011/0058 (CNS). See, generally, Christiana HJI Panayi, *European Union Corporate Tax Law* (Cambridge University Press, 2013), Ch 3. Also see Christiana HJI Panayi, *The Common Consolidated Corporate Tax Base and the UK* (Institute for Fiscal Studies, 2011).

[155] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016)685 final. Available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_685_en.pdf

[156] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, COM(2016)683 final. Available at: http://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_683_en.pdf

[157] See Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, adopted by the Council of the European Union on 1 July 2016. See OJ 2016 L193/1. The revised directive lays down anti-tax-avoidance rules for situations that may arise in five specific fields, after deleting the switch-over clause. Member States now have until 31 December 2018 to transpose the Directive into their national laws and regulations, except for the exit taxation rules, for which they will have until 31 December 2019. Member States that have targeted rules that are equally effective to the interest limitation rules may apply them until the OECD reaches agreement on a minimum standard, or until 1 January 2024 at the latest.

[158] Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, COM(2016)687 final. Available at:
https://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_687_en.pdf

mismatches arising in relation to third countries.[159] At the ECOFIN meeting on 6 December 2016, Member States failed to reach an agreement on this proposal but undertook to continue the discussion. On 21 February 2017, the EU 28 Finance Ministers in the ECOFIN Council meeting reached agreement on a general approach to amending this Directive. On 29 May 2017, the Council formally adopted the Commission's proposal for ATAD II[160] without further discussion. Member States have until 31 December 2019, to adopt and publish the laws, regulations, and administrative provisions necessary to implement ATAD2, and must apply those provisions as of 1 January 2020, with the exception of rules on reverse hybrid mismatches, which must be transposed into domestic law by 31 December 2021.[161] Therefore, at least in the area of hybrids mismatch arrangements, EU Member States have uniform (hard law) rules vis-à-vis third countries.

The Commission also delivered on earlier plans to improve the existing dispute resolution mechanism for the elimination of double taxation. The Commission argued that the proposed Directive would have a wider scope than the Arbitration Convention,[162] would be more effective, would work quicker and be less costly. The proposed Directive provides for the elimination of double taxation by agreement between the Member States including, if necessary, by reference to the opinion of an independent advisory body. It focuses on business and companies. The proposed Directive builds on the existing Arbitration Convention but broadens the scope to areas which are not currently covered, by applying to all instances of double taxation of income from business. It also adds targeted features to address the main shortcomings of the Arbitration Convention, such as enhancing enforceability and the effectiveness of this mechanism.

The proposed Directive provides for *mandatory* resolution of double taxation disputes, if necessary by way of arbitration within strict and enforceable timelines. It sets out when access to national courts should be granted for clarifying whether there is an obligation to eliminate double taxation and, if so, empowers national courts to take action. Furthermore, the proposed Directive allows Member States to choose the methods for solving their double taxation disputes provided that double taxation is eliminated within the timelines laid down in the Directive. In addition, the proposed Directive allows the Commission to assist Member States in the proceedings and increases transparency by requiring at least abstracts of the decisions to be published.[163]

As a final sign of the Commission's commitment to tax good governance, in November 2016, a public consultation was launched to gather feedback on how to deal with advisers and intermediaries who facilitate potentially aggressive tax planning schemes and the disincentives that can be imposed. This was a response to the European Parliament's call to develop an EU Code of Conduct for all advisory firms to regulate the provision of tax

[159] The hybrid provisions would also deal with mismatches involving PEs, imported mismatches, hybrid transfers and dual resident mismatches.

[160] I.e. Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (ATAD II)

[161] In line with the compromise agreement, the adopted ATAD2 directive includes a carve-out option through to 31 December 2022, for hybrid regulatory capital in the banking sector, and a carve-out for financial traders involving hybrid transfers made in the ordinary course of business.

[162] Convention 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises

[163] For commentary, see Sriram Govind and Laura Turcan, "*The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive*", 71 (2017) Bulletin for International Taxation, No. 3/4

advice,[164] especially following the release of the Panama Papers which highlighted how certain intermediaries actively helped their clients to conceal money offshore.

The Commission's public consultation sought to gather views on whether there is a need for EU action aimed at introducing more effective disincentives for intermediaries or taxpayers engaged in operations that facilitate tax evasion and tax avoidance and in case there is, how it should be designed.[165] Rather unsatisfactory, the Commission seems to lump together aggressive tax planning and tax evasion and avoidance.[166]

As a follow-up to these initiatives, on 21 June 2017, the Commission proposed another amendment to the Mutual Assistance Directive (2011/16/EU) as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. The proposal introduces a requirement for intermediaries to disclose potentially aggressive tax planning arrangements to their tax authorities.[167] The tax authorities will subsequently exchange this information automatically with other tax authorities. The proposal does not dictate penalties, but defers to the discretion of Member States to implement effective, proportionate, and dissuasive penalties. The aim of this proposal is to enhance transparency, reduce uncertainty over beneficial ownership and dissuade intermediaries from designing, marketing and implementing harmful tax structures.

This is another example of an area where the EU is moving forward with hard law, going very much above the OECD/G20 BEPS recommendations on minimum standards.

(V) CONCLUSION

In this paper, the author examined the various facets of good tax governance, in an attempt to delineate the actual scope of this concept. A review of the latest initiatives at the level of the OECD and UN showed that this concept was closely interlinked with notions of domestic resource mobilisation, capacity building, transparency and exchange of information, and, to an extent, the implementation of the four minimum standards derived from the BEPS project. The international tax community seems to have given a lot of emphasis on the above state functions, as shown in Part II.A. There was emphasis on more resources for capacity building and domestic resource mobilisation/taxation as well as more ownership and commitment for the establishment of transparent, fair and efficient tax systems.

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[164] See para 23, in the Draft Report on tax rulings and other measures similar in nature or effect (2016/2038(INI)) of the Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect (TAXE2), 2016/2038 (INI), dated 11 May 2016. The Special Committee called "on the Commission to come forward with a Union Code of Conduct for all advisory services, including a Union incompatibility regime for tax advisers, in order to prevent them from advising both public and private sectors and to prevent other conflicts of interest".

[165] These intermediaries included among others consultants, lawyers, financial (investment) advisors, accountants, solicitors, financial institutions, insurance intermediaries, and company-formation agents.

[166] See the title of the consultation and the objectives of it. Available at: https://ec.europa.eu/taxation_customs/consultations-get-involved/tax-consultations/consultation-disincentives-advisors-and-intermediaries-potentially-aggressive-tax-planning-schemes_en

[167] The proposal does not contain a definition of the terms "arrangement" or "aggressive tax planning". However, an annex to the proposal lists a number of "hallmarks" that present a strong indication of tax avoidance or abuse. A cross-border arrangement becomes reportable if it meets one or more of the hallmarks.

These initiatives are very much in the realm of soft law. However, it is shown that in addition to these soft law initiatives, there is a growing number of soft law initiatives which have hardened over time. The standards emerging from these initiatives are linked with transparency: exchange of information, automatic exchange of information, country-by-country reporting etc. The distinguishing factor of the soft law initiatives described in Part III is their reliance on multilateralism and peer pressure by other countries which has enabled them to be morphed into hard law gradually.

Whilst measures proposed to enforce and/or monitor transparency are gradually becoming global standards and norms, the European Union is using hard law *ab initio*, at least as far as internal measures (i.e. intra-EU) are concerned. Aided by the political momentum generated by the OECD/G20 BEPS project, the EU has effectively moved to harmonize BEPS compliance and implementation among Member States. As noted by Christians and Shay, the general reporters to the 2017 IFA Congress, Member States "see these EU actions as bedrocks to their future BEPS compliance" [and] "responding to mandatory EU measures is expected to be a primary method through which EU Member States operationalize their BEPS compliance".[168]

It would seem that measures implementing the BEPS minimum standards are not just perceived as the follow-up to the BEPS project, but essentially, a means of further internal harmonisation. However, these measures are very much ad hoc and deal with the exceptions to a tax system – i.e. the provisions trying to prevent abuse of that system. Recognising the peculiarity of having harmonised anti-abuse rules in a largely unharmonised system and seizing on the political momentum of the post-BEPS era, the Commission has recently re-proposed the CCTB/CCCTB. This was partially rebranded as an instrument to combat tax avoidance/evasion. In reality, this is very much a harmonising proposal – rock solid hard law.

It is also obvious from the developments described in Part IV that the Commission has used BEPS initiatives and post-BEPS soft law in a way that helps advance its tax governance agenda not just within the EU but also internationally. In fact, from the 2012 Recommendation on Good Governance, to the External Strategy Communication, to the EU listing process, we are increasingly seeing efforts by the EU to export *its* tax good governance policies. Indicatively, the EU's standards of good tax governance include not just transparency and exchange of information, but also the concept of fair tax competition. The latter, is a very vague concept which lends itself to some manipulation as regards inclusion of preferred policies. As fair tax competition is likely to be inextricably linked with harmful tax competition – another vague concept used in the past[169] to address similar concerns – the objectivity of a tax good governance clause is likely to be debatable.[170]

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[168] Christians, Allison and Shay, Stephen E., Assessing BEPS: Origins, Standards, and Responses (June 15, 2017). General Report, in 102A Cahiers de Droit Fiscal International: Assessing BEPS: Origins, Standards, and Responses 17 (Int'l Fiscal Ass'n 2017), p.20

[169] See, for example, OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris: OECD, 1998) and the follow-up reports. For an overview, see chapters 1-3 of the Final Report on Action 5: OECD (2015), Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 -2015 Final Report, OECD Publishing, Paris (Available at: http://dx.doi.org/10.1787/9789264241190-en) . For developments in the EU, see http://ec.europa.eu/taxation_customs/business/company-tax/harmful-tax-competition_en

[170] Timothy Lyons, "Brexit: Negotiating to Resist the Export of EU Tax Law and Policy", (2016) British Tax Review 379. Citing Andrew G. Brown and Robert M. Stern, "Concept of Fairness in the Global Trading System", (2007) 12(3) Pacific Economic Review 293. Also see Matthias Risse and Gabriel Wollner, "Three Images of Trade: On the Place of Trade in a Theory of Global Justice", Harvard Kennedy School Faculty Research Working Paper Series RWP14-011, February 2014.

Nevertheless, by linking the EU standards of good tax governance with the polemic against aggressive tax planning and in a very timely manner, the EU has managed to overcome the reluctance of some of its most recalcitrant (vis-à-vis harmonization) Member States. The author had argued elsewhere, that "[o]utside of the EU, instilling and institutionalizing principles of good tax governance may not be an easy task as such principles are likely to be seen as interfering with a state's sovereignty in a much more politically sensitive way than any suggested anti-abuse measures targeted against what appears to be stateless income".[171] However, it has been shown in the last two years that if these principles are rebranded in a certain way, they amass support – or at least they stave off the opposition. In other words, tax good governance and BEPS seem to be a very good excuse for further integration.

It should be noted that most of the recommendations in the area of good tax governance especially as regards third countries, are in the realm of soft law as there is no competence to harmonise the EU's external fiscal policy - hence why there are no hard law proposals. However, one could say that there is an element of coercion towards third countries to adopt the EU's agenda in this area. The demand for the insertion of the good tax governance clauses in bilateral and regional agreements between the EU and some trading partners, combined with the possibility of countermeasures and sanctions in the context of the EU listing process are two good examples of this. Arguably, such proactive policies risk exacerbating conflicts (trade and tax ones) and may be ineffective without inside knowledge that drives decision-making and the structure of the system in the other jurisdiction.

The author believes that the Commission and to an extent the European Parliament are likely to continue working very hard to promote the "Europeanisation" of tax good governance standards, not just because it is the natural thing to do, but for existential reasons. In the post-Brexit era, the EU desperately needs to present a united front, in as many areas as is possible. Fiscal policy is one of them. The problem with this approach is that the concept of tax good governance may end up not having a uniform meaning amongst the major international players. And herein lies the paradox resulting from the globalisation of good tax governance: powerful countries and/or economic blocks are likely to give a domestic flavour to the constituent elements of this concept, thus leading to more uncertainties, variable standard setting and (erosive) tax competition. This is likely to frustrate existing synergies and detrimentally affect developing countries that were initially viewed as the primary beneficiaries for the global development of good tax governance standards.

[171] HJI Panayi (2015), pp.27-28