Dissemination of tax good governance standards by the EU and the OECD: A comparative analysis of changes in treatment and tone

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1. Introduction

The limited powers of the European Union (EU) in the field of direct taxation law have traditionally been interpreted against the background of the significance of fiscal policy for national concepts of sovereignty.[2] The EU's actions in direct tax matters have therefore chiefly focused on selective measures to harmonize the corporate taxation systems of the Member States.[3] Nevertheless, initiatives for a common external fiscal policy at the Union level have grown in importance in the 21st century, in particular in connection with the dissemination of the EU standards for good governance in the tax area (hence, tax good governance[4]).

From the outset, tax good governance has been linked to the ideas of transparency, exchange of information and fair tax competition (those were later complemented by anti-BEPS minimum standards). Notwithstanding, the EU's approach to communicating, disseminating and executing its norms has undergone noticeable changes over the past 14 years. Early documents still centered on pushing the EU's agenda forward by way of identifying case-by-case solutions at the negotiation stage, thereby arguably acknowledging the importance of equal footing. By contrast, more recent

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[2] E.g. S. Kingston, 'A Light in the Darkness: Recent Developments in the ECJ's Direct Tax Jurisprudence', 44(5) Common Market Law Review 1321 (2007).
[3] Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States [2003] OJ L157/49 [hereafter Interest-Royalties Directive]; Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (codified version) [2009] OJ L310/34 [hereafter Merger Directive]; Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1; Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1 [hereafter Mutual Assistance Directive]; Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast) [2011] OJ L345/8 [hereafter Parent-Subsidiary Directive]; 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 [2016] OJ L193/1; Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union [2017] OJ L265/1.
[4] Both the terms "tax good governance" and "good tax governance" are used in official documents and academic scholarship. For reasons of coherence, the following assessment refers throughout to "tax good governance".

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instruments – most prominently the EU list of non-cooperative jurisdictions for tax purposes[5] (EU blacklist[6]) – are characterized by the unilateral imposition of EU standards and parallel introduction of defensive (tax and non-tax) measures to encourage compliance by third countries, in particular low-income countries.[7]

These developments have not taken place in a vacuum and should therefore be read in connection with the actions taken by the relevant stakeholders as well as external powers such as international organizations and intergovernmental networks.[8] In this regard, the different development of the approaches of the EU and the OECD to disseminate their standards of tax good governance seems particularly remarkable, since the EU has often relied on OECD concepts for the legal design of its hard or soft law[9] and thus largely paralleled the measures taken and methods chosen at the OECD level.

Against this background, this paper sets out to contribute to the scholarly discussions on the EU's mission to promote tax good governance standards and its intersections with corresponding OECD work by assessing the changes in treatment and tone at the EU level and contextualizing these developments with parallel initiatives on harmful tax competition,[10] transparency, exchange of information and BEPS at the OECD level.[11] This comparative analysis allows to yield the following conclusions: that the EU's attitude has changed diametrically in comparison to the OECD's approach; that there are several factors which might be able to explain this rather unusual phenomenon; and that the current EU policy actions to promote tax good governance are nevertheless faced with criticism for reproducing antiquated and biased patterns of thought and behavior in relation to low-income countries which, in light of the current zeitgeist and geopolitical developments, deserve a reassessment.

[5] Originating in Council of the European Union, *The EU list of non-cooperative jurisdictions for tax purposes – Council conclusions*, 15429/17 FISC 345 ECOFIN 1088 (5 Dec. 2017) [hereafter Council Conclusions 2017].

[6] It is acknowledged that the EU list of non-cooperative jurisdictions for tax purposes comprises not only a blacklist, but also a gray list for countries and jurisdictions the measures of which are under observation, but have not (yet) lead to sanctions. The term "EU blacklist" is nevertheless used in the following for the sake of simplicity.

[7] The unequal treatment of different third countries and jurisdictions is explored in Sec. 2 and 4.

[8] See for an in-depth analysis of the interconnectedness of international and European initiatives in the field of tax good governance C. HJI Panayi, 'The Europeanization of Good Tax Governance', 36 Yearbook of European Law 442–495 (2018).

[9] To name but one example, the exchange of tax information under the Mutual Assistance Directive is based on the concept of foreseeable relevance. This concept was "borrowed" from Article 26 OECD Model Tax Convention (as amended by the 2005 update) and has been interpreted by the Court of Justice of the European Union (CJEU) in broad accordance with its inspirational source (CJEU, 16 May 2017, C-682/15, *Berlioz Investment Fund*, EU:C:2017:373; 25 Nov. 2021, Case C-437/19, *État luxembourgeois (Informations sur un groupe de contribuables)*, EU:C:2021:953). See in detail S. Geringer, 'Is the OECD Able to Exert Influence on the Essence of OECD-Inspired EU Secondary Law?' in A. Huldqvist and J. Lindholm (eds), *The Power to Tax in Europe*, Swedish Studies in European Law Series (Hart Publishing, 2022) (forthcoming).

[10] For the sake of completeness, it should be pointed to the fact that harmful tax practices do not necessarily equate to unfair tax practices. However, these concepts overlap and, most importantly for the purposes of this paper, unfair tax competition, as the broader concept, should cover all types of harmful tax competition.

[11] Accordingly, OECD work in the areas of domestic resource mobilization and capacity building – arguably the traditional fields of tax good governance – or enhanced cooperation/cooperative compliance is not included in the following assessment. See therefore Panayi, *supra* n. 8, at 445–454.

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2. From negotiation to confrontation: changes in the EU's approach over the course of time

The EU's initiative for tax good governance emerged in response to the financial and economic crisis 2007/2008. According to the description provided by the 2008 ECOFIN Press Release,[12] tax good governance ought to be understood as embodying the principles of transparency, exchange of information and fair tax competition as subscribed to by the Member States at the EU level.[13] In a similar vein, the 2009 Commission Communication on Promoting Good Governance in Tax Matters[14] used this expression as a synonym for international tax cooperation and common standards.[15]

These buzzwords broadly outline the background and the objectives behind the EU tax good governance agenda. The financial and economic crisis 2007/2008 highlighted the potential impact of widely liberalized markets on national budgets and social justice. Tax havens[16] and insufficiently regulated international financial centers in non-EU countries which "refused to accept the principles of transparency and information exchange"[17] were accordingly found to enable tax fraud, evasion and avoidance, thereby contributing to losses in tax revenues in other countries and jurisdictions. The dissemination of the EU tax good governance standards has hence been carried by the aim of counteracting these undesirable side effects of globalization. Money laundering, corruption and the financing of terrorism were brought up as additional issues to be resolved by way of promoting good governance in the tax area.[18]

In essence, this narrative has been broadly reproduced ever since. Notwithstanding, the terminology has been adjusted to accommodate "linguistic trends" in international tax policy. The 2015 Commission Communication on an External Strategy for Effective Taxation[19] accordingly referred to the more recently developed concept of aggressive tax planning[20] and further spoke of "external base

[12] Council of the European Union, *Press Release, 2866th Council Meeting Economic and Financial Affairs*, 8850/08 (Presse 113) (14 May 2008) [hereafter ECOFIN Press Release 2008].

[13] ECOFIN Press Release 2008, *supra* n. 12, 23. These were later concretized as to reflect the OECD standards in the area of transparency and exchange of information (fn. 69) and the standard of the EU Code of Conduct in the area of fair tax competition respectively; see also I. J. Mosquera Valderrama, "The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries", 47(5) Intertax 454, 455–456 (2019).

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

[15] Commission Communication 2009, *supra* n. 14, 4.

[16] In the Commission Communication 2009 (*supra* n. 14), reference is made to the definition provided in the 1998 OECD Report on Harmful Tax Competition (*ibid*, 6–7, fn. 11). See on the tax haven definition in the 1998 Report below (at Sec. 3).

[17] Commission Communication 2009, *supra* n. 14, 4.

[18] ECOFIN Press Release 2008, *supra* n. 12, 23; Commission Communication 2009, *supra* n. 14, 4. See also C. HJI Panayi, *European Union Corporate Tax Law*, 2nd ed. (Cambridge University Press, 2021), 22–23.

[19] European Commission, *Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation*, COM(2016) 24 final (28 Jan. 2016) [hereafter Commission Communication 2016].

[20] See for a description e.g. Recital 2 of European Commission, *Commission Recommendation of 6 Dec. 2012 on aggressive tax planning*, OJ L 338 (12 Dec. 2012): "Aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability. Aggressive tax planning can take a multitude of forms. Its consequences include double deductions (e.g. the same loss is deducted both in the State of source and residence) and double non-taxation (e.g. income which is not taxed in the source State is exempt in the State of residence)."

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erosion threats" when discussing the need for re-examining the EU's tax good governance criteria.[21] It seems rather obvious that the Commission's diction was inspired by the language used in the context of the OECD/G20 base erosion and profit shifting (BEPS) project.[22] This assertion holds also true for the 2017 Council Conclusions adopting the EU blacklist, which similarly underlined the importance to provide efficient means to prevent and combat "the erosion of Member States' tax bases".[23] Against this background, it is not surprising that the EU criteria of tax good governance have likewise been adapted over time to additionally comprise the minimum standards of the OECD BEPS project (i.e. OECD BEPS actions 5, 6, 13 and 14).[24]

The overall objective – the promotion of EU tax good governance standards (however they have been defined) – has hence remained unwavering. What however seems to have more significantly changed over the years is the EU's perception and attitude towards the third country jurisdictions concerned. In its 2008 Press Release, the ECOFIN proposed advancing the EU's agenda on transparency, exchange of information and fair tax competition by negotiating and including respective clauses in "relevant agreements"[25] between third countries and the EU and the Member States respectively.[26] This approach was mimicked in the 2009 Commission Communication. In addition, the Commission particularly emphasized that

> [t]he objective is not to target tax havens per se but to reach agreement with as many third countries as possible on common principles of cooperation and transparency.[27]

The fact that the EU thereby attempted to impose its understanding of transparency, exchange of information and fair tax competition on third countries and jurisdictions, and was also willing to bring its qualities as an important market and development aid donor for this purpose into play, does not have to be concealed.[28] Whether these standards would become relevant for third countries and jurisdictions was nevertheless made dependent on conscious action, hence on the acceptance of these conditions in negotiation talks. Seen in this light, it can be argued that the EU's initiative to promote tax good governance standards in its early phase was predominantly inspired by achieving these goals through dialogue and consensus, hence by the idea of operating on an equal footing with the third

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[21] Commission Communication 2016, *supra* n. 19, 2.

[22] See for example OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publications, 2013). The OECD/G20 BEPS project was also recognized as at least one of the sources of inspiration for the unified EU position on tax good governance proposed in this document; Commission Communication 2016, *supra* n. 19, 3. See on the OECD/G20 BEPS project in detail below (at Sec. 3).

[23] Council Conclusions 2017, *supra* n. 5, 3.

[24] See also Mosquera Valderrama, *supra* n. 13, at 454; S. Geringer, 'The EU's Uncoordinated Approach to Tax Avoidance and Tax Abuse in Relation to 'Uncooperative' Tax Jurisdictions', 50(3) Intertax 205, 211 (fn. 60) (2022). Note that the European Commission suggested to include the minimum tax standard of the OECD's Two Pillar Solution (see Sec. 3) as an additional criterion for purposes of the EU blacklist; European Commission, *Communication from the Commission to the European Parliament and the Council: Business Taxation for the 21st Century*, COM(2021) 251 final (18 May 2021), at 9.

[25] The statements in the 2008 ECOFIN Press Release did not make clear which agreements were considered relevant for these purposes. Due to the fact that the draft text referred to the (fictituous) contracting partners' aims of "strengthening and developing economic activities" (ECOFIN Press Release 2008, *supra* n. 12, 24), it can be assumed that the ECOFIN members particularly had agreements on trade, foreign investment and developmental aid in mind.

[26] ECOFIN Press Release 2008, *supra* n. 12, 23. See for a draft text *ibid*, 24.

[27] Commission Communication 2009, *supra* n. 14, 7.

[28] Compare e.g. Commission Communication 2009, *supra* n. 14, 12 (where the Commission stressed that "[t]he coherence between EU financial support and provision of access to EU markets to particular countries and their level of cooperation with the principles of good governance in the tax area should be considered" [emphasis omitted]).

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countries and jurisdictions concerned.[29] This is also illustrated by the fact that the Commission sought to be given

> sufficient flexibility in its negotiations on wording, while preserving the substantial elements and objectives of good governance, so as to be able to negotiate solutions that best fit the specific case of each country.[30]

Not only theoretical relevance can be attributed to this authorization. Agreements concluded thereafter have indeed contained different clauses,[31] underscoring the EU's willingness to take into account the interests of the respective contracting partner as well as the specifics of the respective cross-border situation.

This attitude has apparently been abandoned (at least to a certain extent) in the course of the 2012 Commission Communication regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters.[32] In addition to specifying the essence of the principles of transparency, exchange of information and fair tax competition,[33] the European Commission invited the Member States to introduce a set of unilateral measures to be applied to third countries which did not meet the standards of tax good governance. The proposed actions included:[34]

- Publishing (or accordingly adapting) a national blacklist of third countries not complying with the minimum standards of good governance in tax matters (as described in the 2012 Commission Communication[35]);
- Renegotiating, suspending or terminating double tax conventions concluded with these third countries (the concrete measure being chosen according to which alternative appears most appropriate to ensure compliance in the future).

Conversely, the Member States should also "reward" third countries which adopted the EU standards of tax good governance, by removing them from their national blacklists, initiating negotiations over double tax conventions and/or offering closer cooperation.[36]

Not surprisingly, these recommendations of the European Commission led to highly diverging approaches to countering unacceptable practices by third countries and jurisdictions in the Member States. Against this backdrop, the Commission outlined the cornerstones for coordinated action in its

[29] In a similar vein, Panayi, *supra* n. 8, at 460.
[30] Commission Communication 2009, *supra* n. 14, 11.
[31] See for a detailed comparison Mosquera Valderrama, *supra* n. 13, at 461.
[32] European Commission, *Commission Communication of 6 Dec. 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters*, OJ L 338 (12 Dec. 2012) [hereafter Commission Communication 2012]. Conversely, in its 2010 Communication, the Commission still stressed the need to seek agreement with the third countries and jurisdictions concerned; see particularly European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Tax and Development Cooperating with Developing Countries on Promoting Good Governance in Tax Matters*, COM(2010) 163 final (21 Apr. 2010), at 6 and 10. At that time, the European Parliament has however already demanded that the EU "step up its action and […] take immediate concrete measures – such as sanctions – against tax havens, tax evasion and illicit capital flight"; European Parliament resolution on promoting good governance in tax matters, 2010/C 341 E/07 (10 Feb. 2010), at point 1 [hereafter European Parliament Resolution 2010].
[33] See above (at fn. 13).
[34] Commission Communication 2012, *supra* n. 32, point 4.
[35] Commission Communication 2012, *supra* n. 32, point 3.
[36] Commission Communication 2012, *supra* n. 32, points 5 and 6.

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2016 Communication on an External Strategy for Effective Taxation.[37] As a baseline, the EU should "use every tool at its disposal to promote tax good governance internationally".[38] Bilateral and regional agreements with third countries and assistance in the implementation of the standards[39] accordingly ought to be paralleled by "stronger instruments to respond to third countries that refuse to respect tax good governance standards",[40] hence an EU blacklist and common defensive measures.[41] These counter-measures were aimed at both protecting the tax bases of the Member States and incentivizing the third countries and jurisdictions in question "to make the necessary improvements in [their] tax system[s]".[42]

This language has been broadly replicated in the Council conclusions related to the EU blacklist. In this context, it was argued, for example, that jurisdictions that "have taken no meaningful action to effectively address the deficiencies and do not engage in a meaningful dialogue on the basis of the Criteria that could lead to such commitments" should be "strongly encouraged to make the changes needed to remedy this situation".[43]

Beginning with the 2012 Commission Communication, the EU has hence substantially changed its treatment and tone in promoting the EU standards of tax good governance. While the EU and the Member States have still made efforts to spread their understanding of good governance in tax matters via agreements with third countries, they have similarly made clear that they would not take no for an answer. Quite on the contrary, they have tried to pressure certain 'reluctant'[44] third countries and jurisdictions to adopt the EU standards of tax good governance by including them in a publicly available EU blacklist, restricting developmental aid[45] and discouraging foreign investment in their territories.[46] However, these rigid measures have not been applied equally to all third countries and jurisdictions. The EU has often (and rightly[47]) been criticized for taking a hard line towards low-income countries and territories[48] while showing generous indulgence towards powerful economies such as Australia and the United States of America.[49]

[37] European Commission, Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, COM(2016) 24 final (28 Jan. 2016).
[38] Commission Communication 2016, *supra* n. 19, 5.
[39] See in detail Commission Communication 2016, *supra* n. 19, 5–9.
[40] Commission Communication 2016, *supra* n. 19, 9.
[41] Commission Communication 2016, *supra* n. 19, 10.
[42] Commission Communication 2016, *supra* n. 19, 10–11.
[43] Council Conclusions 2017, *supra* n. 5, 3.
[44] Although they have often been framed as reluctant, it is highly questionable whether at least some of the alleged countries and jurisdictions have indeed been reluctant, or have simply lacked the capacities to comply with the demanded standards; see also S. Geringer, *supra* n. 24, at 211; I. Lazarov, 'The Compatibility of the EU Tax Haven "Blacklist" with the Fundamental Freedoms and the Charter' in A. Martín Jiménez (ed), *The External Tax Strategy of the EU in a Post-BEPS Environment* (IBFD, 2019), 29.
[45] So-called defensive measures in the non-tax area; Council Conclusions 2017, *supra* n. 5, Annex III., A.
[46] So-called defensive measures in the tax area (for example stricter controlled foreign company (CFC) rules or non-deductibility of costs); Council Conclusions 2017, *supra* n. 5, Annex III., B.
[47] In this sense already S. Geringer, *supra* n. 24, at 214.
[48] Particularly small tropical islands that have been hit hard by multiple tropical storms over the past few years; S. Geringer, *supra* n. 24, at 211 (with further references).
[49] Geringer, *supra* n. 24, at 214 (fn. 95); A. P. Dourado, 'The EU Anti Tax Avoidance Package: Moving Ahead of BEPS', 44(6/7) Intertax 440, 443 (2016).

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3. From confrontation to negotiation: changes in the OECD's approach over the course of time

The EU was not the first organization that has sought to disseminate its standards of good governance in the tax area. The roots for the OECD's related commitment lie in the 1998 Report on Harmful Tax Competition,[50] which was drawn upon a request of the OECD member countries.[51] The overarching goal was to promote fair competition for real economic activities so that location decisions are primarily based on economic rather than tax considerations,[52] or as expressed by the OECD: "Countries should remain free to design their own tax systems as long as they abide by internationally accepted standards in doing so."[53]

Harmful tax competition was described as to materialize either in the form of tax havens[54] or harmful preferential tax regimes.[55] Both were found to

> affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally.[56]

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[50] OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publications, 1998) [hereafter OECD Report 1998].

[51] OECD, *Meeting of the Council at Ministerial Level, Paris, 21-22 May 1996, Communiqué*, para. 15 (xv), available at http://www.g8.utoronto.ca/oecd/oecd96.htm (last assessed 16 June 2022). See on the making of the 1998 OECD Report in detail A. Christians, 'Hard Law, Soft Law, and International Taxation', 25(2) Wisconsin International Law Journal 325, 326 (fn. 8) (2007); H. Ault, 'Reflections on the Role of the OECD in Developing International Tax Norms', 34(3) Brooklyn Journal of International Law 757, 764 (2009).

[52] OECD Report 1998, *supra* n. 50, para. 8.

[53] OECD Report 1998, *supra* n. 50, para. 26.

[54] Tax havens were described as countries that generally impose no or only nominal tax on income from geographically mobile activities. Additional factors that ought to be taken into account are the lack of effective information exchange and transparency as well as the absence of a requirement that an activity within their territory be substantial. See in detail OECD Report 1998, *supra* n. 50, paras. 52–56.

[55] Harmful preferential tax regimes, within the meaning of the 1998 Report, are preferential features of a domestic individual or corporate tax system which allow the relevant income (see fn. 54) to be subject to low or no effective taxation and/or no effective information exchange. These regimes might also be characterized through ring-fencing or non-transparent structures; an artificial definition of the tax base; their failure to adhere to 'international' (i.e. OECD) transfer pricing regimes; exemptions of foreign source income from residence country tax; negotiable tax rates or tax bases; the existence of secrecy provisions; the provision of access to a broad tax treaty network; or their promotion as tax minimization vehicles or their quality to encourage purely tax-driven operations or arrangements. It was acknowledged that the countries and jurisdictions concerned might nevertheless raise significant revenues from other types of (particularly domestic) income. See in detail OECD Report 1998, *supra* n. 50, paras. 57–84. The distinction between these two types of harmful tax competition was made against the background that countries and jurisdictions with harmful preferential tax regimes were considered to rather agree on concerted action (as opposed to tax havens); OECD Report 1998, *supra* n. 50, para. 43.

[56] OECD Report 1998, *supra* n. 50, para. 4. These observations are remarkable considering that at the same time it had to be acknowledged that adverse economic impacts could not be quantified; *ibid*, paras. 35–36.

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Due to the fact that unilateral[57] and bilateral[58] responses were not seen as entirely effective ways to counter these practices,[59] the 1998 Report recommended to complement these actions by collective measures. These included the introduction of a Forum on Harmful Tax Practices,[60] the development and promotion of principles of good tax administration relevant to counteracting harmful tax practices[61] and a list of tax havens (i.e. a blacklist).[62]

The Forum on Harmful Tax Practices was understood as a body where problems and issues regarding tax havens and harmful preferential tax regimes should be discussed. However, access was only granted to OECD member countries.[63] In relation to non-member countries and jurisdictions, the Forum on Harmful Tax Practices should nonetheless engage in a dialogue "on how they could apply the Guidelines [of the 1998 Report]".[64] It was hence made clear that the OECD understanding of harmful (or 'harmless') tax competition was considered non-negotiable, or conversely, that the OECD member countries expected non-member countries and jurisdictions to accept and comply with their rules. Otherwise, they were likely to be included in the list of tax havens commissioned by the Forum on Harmful Tax Practices and first appearing in the 2000 Report.[65] Arguably, the original approach of the OECD towards non-member countries and jurisdictions in this area was thus characterized in particular by the concept of "naming and shaming" as well as by the use of peer pressure.[66]

In 2001, however, the narrative of the OECD initiative to promote tax good governance standards altered significantly, as did (slowly) also its treatment of non-member countries and jurisdictions. While the earlier work of the OECD from 1998 and 2000 was still coined by the concept of harmful tax

[57] Such as CFC rules or participation exemption restrictions; see in detail OECD Report 1998, *supra* n. 50, paras. 97–112.

[58] Such as restrictions to access to tax treaty benefits or coordinated enforcement regimes (e.g. joint audits); see in detail OECD Report 1998, *supra* n. 50, paras. 113–137.

[59] OECD Report 1998, *supra* n. 50, paras. 4 and 87–88.

[60] OECD Report 1998, *supra* n. 50, paras. 140–148.

[61] OECD Report 1998, *supra* n. 50, paras. 154–155.

[62] See in detail OECD Report 1998, *supra* n. 50, paras. 149–151.

[63] OECD Report 1998, *supra* n. 50, para. 143.

[64] OECD Report 1998, *supra* n. 50, para. 156.

[65] Famously including, besides rather obvious candidates (e.g. Andorra, Liechtenstein or Monaco), poor and war-torn countries such as Liberia; OECD, *Towards Global Tax Co-operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs: Progress in Identifying and Eliminating Harmful Tax Practices* (OECD Publications, 2000), para. 17 [hereafter OECD Report 2000]. See for a critical analysis S. Dean & A. Waris, 'Ten Truths About Tax Havens: Inclusion and the "Liberia" Problem', 70(7) Emory Law Journal 1659–1684 (2021).
For the sake of completeness, it should also be mentioned that the preferential regimes of OECD member countries were likewise featured in a list; OECD Report 2000, *supra* n. 65, para. 11. Nevertheless, these situations can hardly be considered comparable as the OECD member countries were able to participate in the process of developing the essence of the OECD understanding of harmful tax competition.

[66] R. Avi-Yonah, 'The OECD Harmful Tax Competition Report: A Tenth Anniversary Retrospective', 34(3) Brooklyn Journal of International Law 783, 786 (2009); M. Sheild Johansson, 'Tax', *Cambridge Encyclopedia of Anthropology* (14 Dec. 2020), available at http://doi.org/10.29164/20tax (last assessed 16 June 2022). See also Ault, *supra* n. 51, at 770: "While the OECD did have an extensive dialogue with the havens in connection with the commitment process, the process still had a confrontational tone."

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competition, the focus then "surprisingly"[67] shifted to transparency and effective exchange of information.[68] Potentially even more remarkably, the Committee concluded that although

> [it] believes that a framework of co-ordinated defensive measures can help mitigate the impact of the erosive effects of harmful tax practices and ensure against their spread, it strongly prefers an approach that promotes change through dialogue and consensus.[69]

Early signs of a shift in attitudes on how non-member countries and jurisdictions should be involved in the process of defining the OECD tax good governance standards may have already shown in the context of the establishment of the Global Forum on Taxation, which should serve as a platform for OECD member and non-member countries and jurisdictions to discuss harmful tax competition issues.[70] However, it still took a few more years for the new spirit to catch on. The OECD unwaveringly issued a list of uncooperative tax havens in 2002, encompassing the seven countries and jurisdictions[71] that had not made formal commitments to the OECD standards of transparency and exchange of information[72].[73] In the wake of the financial and economic crisis 2007/2008, the Global Forum on Taxation published a more sophisticated list, assigning 84 countries to four categories based on whether they had committed to and substantially implemented the 'internationally agreed' (i.e. OECD) standard on exchange of information.[74]

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[67] A. Brodzka & S. 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', 52(8) European Taxation 394, 396 (2012).

[68] OECD, *The OECD's Project on Harmful Tax Practices: The 2001 Progress Report* (OECD Publications, 2001), para. 28 [hereafter OECD Report 2001]. This change of heart was argued against the background that the no substantial activities criterion was deemed too difficult to apply; *ibid*, paras. 26–27. Nevertheless, it might rather be traced back to the fact that the United States of America withdrew its support for the original concept; see on the political background (in particular the central role of the Congressional Black Caucus in the process) S. Dean, 'FATCA, the U.S. Congressional Black Caucus, And the OECD Blacklist', 99 Tax Notes International 83–90 (2020); Dean & Waris, *supra* n. 65, at 1674–1676.

[69] OECD Report 2001, *supra* n. 68, para. 49. Over the following years, beginning with 2006, the OECD documented the follow-up work on transparency and tax information exchange in its annual report 'Tax Co-operation: Towards a Level Playing Field', available at https://www.oecd-ilibrary.org/taxation/tax-co-operation_20775547 (last assessed 16 June 2022).

[70] Avi-Yonah, *supra* n. 66, at 786; Brodzka & Garufi, *supra* n. 67, at 396.

[71] Andorra, Liechtenstein, Liberia, Monaco, the Marshall Islands, Nauru and Vanuatu. See on the controversial composition of the OECD blacklist already above (fn. 65).

[72] The OECD standard on exchange of information was developed in the context of the model for tax exchange information agreements (TIEAs) in 2002. Most notably, it stipulates the elimination of bank secrecy as a reason for refusing to provide information as well as the inclusion of a major information clause (which covers not only information necessary to assess the applicability of treaty provisions (like minor information clauses), but, more broadly, any information that is foreseeably relevant for the administration or enforcement of national tax laws). These criteria have then been adopted for the purposes of Article 26 of the OECD MTC in the course of the 2005 update. These established mechanisms were complemented by the OECD Common Reporting Standard (CRS) for the automatic exchange of financial account information in 2014. See in detail Brodzka & Garufi, *supra* n. 67, at 397–398; R. Seer and S. Kargitta, 'Exchange of information and cooperation in direct taxation', in C. HJI Panayi, W. Haslehner and E. Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar, 2020), 494–495 and 499–500.

[73] By May 2009, the last three jurisdictions (Andorra, Liechtenstein and Monaco) were removed from the list; https://www.oecd.org/tax/harmful/list-of-unco-operative-tax-havens.htm (last assessed 16 June 2022).

[74] The list is available at https://www.oecd.org/tax/exchange-of-tax-information/42497950.pdf (last assessed 16 June 2022).

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The slow progress in this area in the 2000s arguably illustrates that the established methods did not prove to be fully effective.[75] Against this backdrop, the Global Forum on Taxation underwent noticeable changes in the course of the meeting in Mexico in September 2009. It was renamed to the "Global Forum on Transparency and Exchange of Information for Tax Purposes" and its membership expanded to allow for a broad participation on an equal footing. In addition, the monitoring and evaluation of the countries' progress in achieving transparency and effective exchange of information was to be carried out via a peer review mechanism.[76]

Despite the overall success of the Global Forum's new format,[77] the OECD only gradually mimicked these structures in the context of the OECD/G20 BEPS project.[78] Only non-member G20 countries[79] as well as Colombia and Latvia ('BEPS associates') were directly involved in carving out the recommendations of the 15 BEPS Action Reports (from 2013–2015).[80] In 2016, however, the OECD/G20 Inclusive Framework on BEPS was established to oversee the implementation of the BEPS project through peer-review evaluation (similar to the Global Forum on Transparency and Exchange of Information for Tax Purposes).[81] The OECD/G20 Inclusive Framework on BEPS has also provided the institutional basis for the discussions concerning the (re-)allocation of taxing rights on the profits of the most prosperous multinationals ('Two-Pillar Solution').[82] 141 countries and jurisdictions, including 14 observer organizations, have joined this forum so far.[83]

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[75] See for a detailed discussion of related criticism Brodzka & Garufi, *supra* n. 67, at 398. See for a different view Avi-Yonah, *supra* n. 66, at 791–793 (arguing that without the OECD's pressure on tax havens, even more money would have been transferred to those jurisdictions).

[76] OECD, *Summary of Outcomes Outcomes of the Meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes Held in Mexico on 1-2 September 2009*, available at https://www.oecd.org/ctp/exchange-of-tax-information/43610626.pdf (last assessed 16 June 2022). See on the mechanisms in detail Brodzka & Garufi, *supra* n. 67, at 398–400; A. Christians, 'International tax organizations' in Y. Brauner (ed), *Research Handbook on International Taxation* (Edward Elgar, 2020), 34–35.

[77] As of writing, the Global Forum on Transparency and Exchange of Information for Tax Purposes consists of 164 members, the majority of which are developing countries; https://www.oecd.org/tax/transparency (last assessed 16 June 2022). According to the annual report, there were around 7,500 exchange relationships in 2021; OECD/Global Forum on Transparency and Exchange of Information for Tax Purposes, *Reinforcing Multilateral Co-operation in Tax Matters for a Fair and Inclusive Recovery: 2021 Global Forum Annual Report* (OECD Publications, 2021, 4.

[78] For the sake of completeness, it should be pointed to the fact that while the EU considered the BEPS minimum standards to form part of the internationally agreed tax good governance standards (Sec. 2), this cannot be considered the (original) intent behind the OECD BEPS initiative; Panayi, *supra* n. 8, at 450.

[79] I.e. Argentina, Brazil, People's Republic of China, India, Indonesia, Russia, Saudi Arabia and South Africa.

[80] Developing countries and other non-member countries were only consulted and later allowed to attend meetings; OECD, *OECD Secretary-General Report to the G20 Leaders* (Nov. 2014), 7, available at http://www.g20.utoronto.ca/2014/OECD_secretary-generals_report_tax_matters.pdf (last assessed 16 June 2022); OECD, *The BEPS Project and Developing Countries: from Consultation to Participation* (Nov. 2014), available at https://www.oecd.org/ctp/strategy-deepening-developing-country-engagement.pdf (last assessed 16 June 2022).

[81] Panayi, *supra* n. 8, at 449. Arguably, the OECD however launched the OECD/G20 Inclusive Framework on BEPS in particular to prevent the UN Tax Committee from gaining greater influence in setting standards in the area of international tax law; A. Christians, 'A Wish for the Future of International Tax Cooperation', 105 Tax Notes International 61 (2021).

[82] See in detail https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm (last assessed 16 June 2022).

[83] The figures available are from November 2021; https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf (last assessed 16 June 2022).

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According to the description on the OECD's webpage,

> [a]ll members of the Inclusive Framework participate on an equal footing, and the widespread adherence to and further development of the BEPS standards have resulted in tangible progress under the three principles of coherence, substance and transparency as articulated under the original BEPS Action Plan.[84]

In all probability, it is doubtful whether the theoretical claim to cooperation on an equal footing has actually (already) been fully realized in the context of both the Global Forum on Transparency and Exchange of Information for Tax Purposes and the OECD/G20 Inclusive Framework on BEPS.[85] Despite all the related (justified) criticism,[86] it should still be acknowledged that the tendency in the OECD has increasingly been to place dialogue and cooperation at the forefront of its approach to non-member countries and jurisdictions.

4. Frictions between the EU's and the OECD's approaches: potential explanations and critical assessment from a socio-political and socio-legal perspective

The investigations in the previous sections clearly show that the EU's and the OECD's approaches to disseminating their understandings of tax good governance have developed diametrically. At first sight, this observation seems intriguing, bearing in mind that the EU has often build on previous OECD work and thereby widely paralleled the steps taken at the OECD level.[87] Nevertheless, several arguments can be identified that might explain this rather unusual development.

First of all, the different political dynamics at the EU and OECD levels have to be taken into account. In the related literature, the OECD's turnaround in the early 2000s has been traced back, inter alia, to a shift in political leadership in the United States of America after the 2000 presidential elections.[88] As was also recently demonstrated in the context of the envisaged international tax reform (Two-Pillar

[84] https://www.oecd.org/tax/beps/about (last assessed 16 June 2022).

[85] Representatives of low-income countries are confronted with issues such as limited personal capacities, less well-established networks, little experience with the processes (unwritten laws) in the global tax policy community, language barriers and travelling costs as obstacles to (regular) participation in face-to-face meetings. Nevertheless, recent research efforts illustrate that seeing things in black and white would fall short in this context. Most notably, the influence of certain individuals and concerted action by countries with similar interests can be particularly crucial in ensuring that the voices of low-income countries are heard. See in detail R. C. Christensen, M. Hearson and T. Randriamanalina, *At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations*, ICTD Working Paper 115 (Dec. 2020), available at https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15853/ICTD_WP115.pdf?sequence=9 (last assessed 16 June 2022).

[86] E.g. Brodzka & Garufi, *supra* n. 67, at 399–400; S. Fung, 'The Questionable Legitimacy of the OECD/G20 BEPS Project', 11(2) Erasmus Law Review 76–88 (2017); A. Christians and L. van Apeldoorn, *Tax Cooperation in an Unjust World* (Oxford University Press, 2021), 52–57; N. Pushkareva, 'Reforming International Taxation: Participation and Collaboration of Developing Countries' in B. Alepin, L. Latulippe and L. Otis (eds), *Coordination and Cooperation: Tax Policy in the 21st Century*, Series on International Taxation Vol. 81 (Kluwer Law International, 2022), 107–120.

[87] See above (at Sec. 1).

[88] See above (fn. 68).

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Solution),[89] the support of the United States of America is inevitably required to decide on any substantial measure in the relevant OECD fora. This factor alone seems capable of explaining, to some extent, the deviating approaches to promoting tax good governance.

The importance of timing should also not be overlooked. When the OECD launched its initiative on harmful tax practices in the late 1990s, the appetite for coordinating the legal design of domestic tax rules was not yet sufficiently present.[90] This has apparently changed in the course of the financial and economic crisis 2007/2008, which led to revamping the Global Forum on Transparency and Exchange of Information for Tax Purposes and establishing the OECD/G20 BEPS project.[91] The intensifying discourse in international tax matters might have thus allowed a more confrontative EU approach to gain momentum in the Member States.[92] The ongoing Covid-19 pandemic and the corresponding financial fallouts (increased state expenditures and losses in tax revenues respectively) are likely to have reinforced these tendencies.[93]

The contemporary support of punitive measures in the tax (and non-tax) area should moreover be read against the background of the EU legal framework. At the beginning of their harmonization efforts in the area of direct tax law, the Member States adopted three directives (Merger Directive, Parent-Subsidiary Directive, Interest-Royalties Directive)[94] which were predominantly aimed at eliminating tax barriers prone to hamper the establishment and good functioning of the internal market. These measures naturally led to decreases in tax revenues,[95] which can yet be assumed to have been taken into account by the EU lawmakers. In addition to these deliberate acts, however, the European Court of Justice (ECJ) has torn down various defensive measures such as interest deductibility restrictions,[96] controlled foreign company (CFC) rules[97] and limitations to consolidation regimes[98] on the basis of the fundamental freedoms in a series of widely discussed decisions, thereby exposing the Member States to widely unregulated tax competition in the EU territory.[99] Most notably, they have been severely limited in their ability to counteract the exploitation of the benefits of EU law by third-country residents via a branch or intermediary in a Member State with comparably lax standards.[100] Against

[89] R. Mason, 'The 2021 Compromise', 172 Tax Notes Federal 569–575 (2021).
[90] Christians & van Apeldoorn, *supra* n. 86, 54.
[91] See above (at Sec. 3).
[92] In the same vein, Panayi, *supra* n. 8, at 467.
[93] The importance of the EU blacklist as a tool to combat tax fraud and other unfair practices and thereby to generate the tax revenues needed in (post-)pandemic times was explicitly stressed in European Commission, *Communication from the Commission to the European Parliament and the Council, An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy*, COM(2020) 312 final (15 July 2020), at Sec. 1. See also Geringer, *supra* n. 24, at 205.
[94] See above (fn. 3).
[95] Due to the fact that, for example, the EU Member States had to abolish withholding taxes on interest and royalty payments falling within the scope of the Interest-Royalties Directive.
[96] Case C-324/00, *Lankhorst-Hohorst*, EU:C:2002:749.
[97] Case C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas*, EU:C:2006:544.
[98] Case C-309/06, *Marks & Spencer*, EU:C:2008:211.
[99] See for a critical stance on the Court's interference with national financial and budgetary sovereignty e.g. A. Cordewener, 'Company Taxation, Cross-Border Financing and Thin Capitalization in the EU Internal Market: Some Comments on *Lankhorst-Hohorst GmbH*', 43(4) European Taxation 102, 106–107 (2003); V. Ruiz Almendral, 'Tax Avoidance and the European Court of Justice: What is at Stake for European General Anti-Avoidance Rules?', 33(12) Intertax 562, 573 (2005). The critique issued by the German Federal Financial Court (BFH) appears particularly remarkable; see therefore the BFH ruling of 14 July 2004, I R 17/03, para. 21.
[100] The significance of this issue has also been acknowledged by the European Commission; see for instance Recital 6 of the Commission Communication 2012 (*supra* n. 32): "Member States whose tax base has been negatively affected by a lack of transparency or by harmful tax measures on the part of third countries have taken steps to remedy that situation. However, taxpayers respond to such measures by routing business or transactions

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this backdrop, it seems plausible that the Commission and the Member States have felt a higher need to execute compliance with the EU tax good governance standards more rigidly.

Lastly, it cannot be ruled out that the EU, by introducing defensive measures to promote the implementation of its standards for transparency, exchange of information, fair tax competition and BEPS, has (additionally) sought to increase its influence as a front runner and standard-setter[101] in the international tax area (and thereby trigger the 'Brussels Effect'[102]). After the United Kingdom left the EU ('Brexit'), the desire to present the EU as a united region and as an unwaveringly important global player is likely to have even further increased.[103]

However reasonable or desirable a common global standard in the areas of transparency, exchange of information, fair tax competition and BEPS might be, it seems dubious whether the end justifies the means. The legitimacy of expecting from non-member countries and jurisdictions to devise their tax rules in accordance with OECD and/or EU standards has been called into question ever since,[104] and indeed neither institution has so far been able to provide any convincing arguments in this regard.[105] However, while the OECD has gradually adapted its approach to include non-OECD member countries and jurisdictions (especially emerging and developing countries) in the standard-setting process, the EU has chosen to reproduce outdated and biased assessment patterns by adopting different standards for powerful and wealthy economies on the one hand and low-income countries and territories on the other, particularly in the context of the EU blacklist initiative.[106] The signals thereby sent to countries and jurisdictions outside Europe can be considered highly problematic:

> The excessive punishment meted out to Dominica [i.e. being blacklisted after having been devastated by two natural disasters] for the crime of being a tax haven fits an all-too-recognizable pattern of an unlevel playing field. And it fueled perceptions of disparate treatment of nations with predominantly Black or Brown populations. […] Punishing Dominica […] seems peculiar at best and driven by racial animus at worst.[107]

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through another jurisdiction with a lower level of protection. This risk is particularly relevant within the Union given the freedom of economic operators to do business anywhere in the Union. Consequently, the level of protection available within the Union against such erosion of the tax base tends to correspond to the lowest level of protection offered by any Member State."

[101] In this sense, Panayi, *supra* n. 8, at 459: "the EU is seeking to lead by example in the area of good tax governance, both by applying high standards internally and promoting similar measures abroad"; Mosquera Valderrama, *supra* n. 13, at 454: "One of the reasons for the introduction of this standard is the will of the EU to have a more important role regarding international tax developments."

[102] See also A. Bradford, *The Brussels Effect* (Oxford University Press, 2020), 26: "the Brussels Effect emanates as a result of a combination of bestowed market size, political decision-making, and market forces that drive corporate behavior."

[103] Panayi, *supra* n. 8, at 494 (who, in this context, sees the Europeanization of tax good governance as to be promoted "also for existential reasons").

[104] E.g. Panayi, *supra* n. 8, at 494; Bradford, *supra* n. 102, at 247–253; A. Christians, 'Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20', 5(1) Northwestern Journal of Law and Social Policy 19, 23 (2010); J. Wouters & K. Meuwissen, 'Global Tax Governance: Work in Progress?' in G. Kofler, M. Poiares Maduro & P. Pistone (eds), *Human Rights and Taxation in Europe and the World*, GREIT Series (IBFD, 2011), 224.

[105] The author disagrees with the European Parliament's view that "strengthening good tax governance within the EU will provide a political and moral basis from which to demand good tax governance of third countries" (European Parliament Resolution 2010, *supra* n. 32, point H.).

[106] See above (at Sec. 2).

[107] Dean & Waris, *supra* n. 65, at 1673–1674.

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For these reasons, and moreover in light of current geopolitical developments,[108] the EU might therefore critically reassess its contemporary point of view and consider following the OECD towards creating more equitable decision-making processes and thereby also more equal societies:

> At a minimum, the value of tax haven blacklists must be weighed against their costs, including a perception of racial bias perpetuated by influential policymakers.[109]

5. Concluding remarks

Over the past 24 years, both the EU and the OECD have aimed to disseminate their tax good governance standards among non-member countries and jurisdictions. Notably, their approaches to achieving this goal have changed diametrically. While the OECD skipped its 'naming and shaming' campaign to increasingly seek the inclusion of non-member countries and jurisdictions in the dialogue and decision-making process, the EU has sharpened the tone and adopted defensive measures in relation to (certain) third countries and jurisdictions which were not able or willing to meet these expectations.

The frictions between the EU's and the OECD's initiatives appear rather exceptional, given that the EU has usually mimicked the concepts and methods developed at the OECD level. This notwithstanding, several reasons could be identified in this paper that may explain the EU's recent (confrontative) solo run:

- Different political dynamics (particularly due to the natural absence of the United States of America in the EU fora);
- The timing (i.e. the importance of momentum for tough action against BEPS and 'uncooperative jurisdictions' after the economic and financial crisis 2007/2008 and the ongoing Covid-19 pandemic);
- The particularities of the EU legal environment (i.e. the potentially higher threats to the Member States' tax bases due to the liberal regulatory framework of the internal market);
- The EU's aim to gain further influence in international taxation and show unity after 'Brexit'.

Regardless of any eventual positive effects stemming from globally harmonized tax good governance standards, the problematic aspects of the EU's current related policies should not be overlooked. Similar to the OECD, the EU has forced (certain) third countries to adopt its understanding of good tax governance without ever questioning or justifying the legitimacy of its actions. Whereas the OECD has however gradually moved to an approach characterized by inclusion and dialogue, the EU has instead decided to apply controversial tools in a seemingly discriminatory manner. These policy patterns might be found to perpetuate and institutionalize inequality and even racism in the international tax area. For these reasons, and also in light of current geopolitical developments, the EU should consider reassessing its strategy to promote high standards of tax good governance and thus following the OECD towards creating more equitable decision-making processes and thereby also more equal societies.

[108] For instance, particularly since invading Ukraine, Russia has ramped up its disinformation campaign in Africa in an effort to weaken the EU's position and gain influence on the continent itself. See for an overview of its related initiatives Africa Center for Strategic Studies, *Mapping Disinformation in Africa* (26 Apr. 2022), available at https://africacenter.org/spotlight/mapping-disinformation-in-africa (last assessed 16 June 2022).
[109] Dean & Waris, *supra* n. 65, at 1684.

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