Harmful tax competition in the East African community: the case of Rwanda with reference to EU and OECD approaches

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Pie Habimana

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List of abbreviations

APA	Advance Pricing Agreement
APJT	Asia-Pacific Journal of Taxation
AU	African Union
Aust.J.Int'l Aff.	Australian Journal of International Affairs
Austl.Tax.F.	Australian Tax Forum
BEPS	Base Erosion and Profit Shifting
BFIT	Bulletin for International Taxation
BrookJIntlL	Brooklyn Journal of International Law
BYUL.Rev.	Brigham Young University Law Review
BCInt'l&CompLRev.	Boston College International and Comparative Law Review
BCThirdWorldL.J.	Boston College Third World Law Journal
CAN	Consolidated Application Note
CEU	Council of the European Union
CG	Commissioner General (of the Rwanda Revenue Authority)
CILJSA	Comparative and International Law Journal of Southern Africa
CIT	Corporate Income Tax
CJEU	Court of Justice of the European Union
CJTL	Columbia Journal of Tax Law
CMLRev.	Common Market Law Review
COCG	Code of Conduct Group
CTJ/RFC	Canadian Tax Journal/Revue Fiscale Canadienne
CUP	Cambridge University Press
DEI	Development and Expansion Incentive
DPTI	*Diritto E Pratica Tributaria Internazionale*
DTA	Double Taxation Agreement
EAC	East African Community
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
EC	European Community
ECOFIN	Economic and Financial (Affairs Council)
ECSC	European Coal and Steel Community
EEC	European Economic Community
ELR	Erasmus Law Review
EoI	Exchange of Information
EStAL	European State Aid Law Quarterly
EU	European Union
EU Com.	European Union Commission
Euro.Tax.	European Taxation
FDI	Foreign Direct Investment
Fla.Tax.Rev.	Florida Tax Review

FLC	Frontiers of Law in China
FordhamInt'lL.J.	Fordham International Law Journal
Frw	*Francs Rwandais* (Rwandan Franc)
GeoW.J.Int'lL.&Econ.	George Washington Journal of International Law and Economics
GeoW.Int'lL.Rev.	George Washington International Law Review
GloBE	Global Anti-Base Erosion
GoR	Government of Rwanda
HPTR	Harmful Preferential Tax Regime
HarvLRev	Harvard Law Review
Hous.J.Int'lL.	Houston Journal of International Law
ILJTBE	International Law Journal on Trade, Business and Economics
Ind.J.Glob.Leg.Stud.	Indiana Journal of Global Legal Studies
Int'lT.Rev.	International Tax Review
IMF	International Monetary Fund
IPAR	Institute of Policy Analysis and Research
J.Dev.Stud.	Journal of Development Studies
J.MarshallL.Rev.	John Marshall Law Review
JCMS	Journal of Common Market Studies
JIEL	Journal of International Economic Law
LJ	Law Journal
L.Rev.	Law Review
MichJIntlL	Michigan Journal of International Law
Minn.J.Int'lL.	Minnesota Journal of International Law
MNC	Multinational Corporation
Nat'lTaxJ.	National Tax Journal
NID	Notional Interest Deduction
Nw.J.Int'lL.&Bus.	Northwestern Journal of International Law & Business
O.G.	Official Gazette
OECD	Organization for Economic Cooperation and Development
OEEC	Organization for European Economic Cooperation
OJEC	Official Journal of the European Communities
OJEU	Official Journal of the European Union
OUP	Oxford University Press
PTR	Preferential Tax Rate
PULP	Pretoria University Law Press
R&D	Research and Development
RDB	Rwanda Development Board
Reg.Sci.Ur.Econ.	Regional Science and Urban Economics
Rev.Int'lStud.	Review of International Studies
RIPA	Rwanda Investment Promotion Agency
RRA	Rwanda Revenue Authority
SADC	Southern African Development Community
SuffolkU.L.Rev.	Suffolk University Law Review
Sw.JIL	Southwestern Journal of International Law

TFEU	Treaty on the Functioning of the European Union
TJNA	Tax Justice Network Africa
UAE	United Arab Emirates
US	United States
USD	United States Dollars
Va.J.Int'lL.	Virginia Journal of International Law
VAT	Value Added Tax
WHT	Withholding Tax
WP	Working Paper
WTJ	World Tax Journal
YaleJInt'lL	Yale Journal of International Law
YEL	Yearbook of European Law

1 GENERAL INTRODUCTION

States' tax competition is one of the hot topics that attract the attention of lawyers. And not only lawyers; it has also become a global topic[1] discussed by politicians, economists, policymakers, commentators, academicians, etc in most parts of the world.[2] International tax competition is one of the international tax issues that are constantly and hotly discussed.[3] International tax competition is also a controversial area, that challenges scholars to continue research in this area.[4]

This situation underlies the context in which this study was conducted. Focusing on Rwanda, amidst other East African Community (EAC) countries, this study lines up with existing international initiatives aimed at countering harmful tax competition. The lack of in-depth academic legal research on the Rwandan aspects of tax competition, a situation that extends to other EAC countries, justifies the need to conduct research such as this one to fill the gap and build knowledge in this area.

That being the case, the main purpose of this first chapter is to introduce the subject of the study, why and how the study was conducted, and the research context. This chapter is divided into seven sections. The chapter begins by justifying the need for the research before presenting the context in which it was conducted. Thereafter, the research problem and the focal research questions are presented. Then follows an indication of the research output, the scope, as well as the societal and scientific relevance of the research findings. The methodology used is then explained and the chapter concludes with an overview of all chapters.

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[1] M P van der Hoek, 'Tax Harmonization and Competition in the European Union' (2003) *eJournal of Tax Research* 1(1), p. 19; H G Petersen (ed), 'Tax Systems and Tax Harmonization in the East African Community' (2010) Report for the GTZ and the General Secretariat of the EAC, p. 24.

[2] L Cerioni, 'Harmful Tax Competition Revisited: Why not a Purely Legal Perspective under EC Law?' (2005) *Euro.Tax.*, p. 267; S Drezgić, 'Harmful Tax Competition in the EU with Reference to Croatia' (2005) *Journal of Economics and Business* 23(1), p. 72; F Wishlade, 'When Policy Worlds Collide: Tax Competition, State Aid, and Regional Economic Development in the EU' (2012) *Journal of European Integration* 34(6), p. 586; M P Devereux and S Loretz, 'What do we Know about Corporate Tax Competition?' (2013) *Nat'l Tax J.* 66(3), p. 745; L V Faulhaber, 'The Trouble with Tax Competition: From Practice to Theory' (2018) *Tax L.Rev.* 71(311), p. 311.

[3] OECD (2015), *Countering Harmful Tax Practices More Effectively Taking into Account Transparency and Substance: Action 5: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 3; H Gribnau, 'The Integrity of the Tax System after BEPS: A Shared Responsibility' (2017) *ELR* 1, p. 12.

[4] Faulhaber (n 2) p. 323.

1.1. Research justification

According to the general principles of international law, states are entitled to a sovereignty which allows them to run their internal affairs without interference. The principle of state sovereignty is enshrined in several international legal instruments such as the United Nations (UN) Charter,[5] the African Union (AU) Constitutive Act,[6] the Treaty establishing the EAC,[7] to name a few. State sovereignty as a concept is very large, both in theory and in practice, due to a number of sovereignty's inner features that cut across a wide range of areas such as political, military, economic, social, and legal.

One hallmark of a sovereign state is fiscal sovereignty. Some scholars have argued that state fiscal sovereignty is a key element of state sovereignty, to such an extent that it constitutes its classic attribute.[8] Put simply, state fiscal sovereignty involves the state's right to design its own tax system. This entails establishing a tax system that best suits the country's particular characteristics and needs. This is done mainly to reflect the citizens' preferences while taking into account the conflicting objectives of economic efficiency.[9] To that is added the fact that every state, developed or developing, desires to attract as much investment as possible.[10] Therefore, states consistently need to ensure their economic competitiveness.

In order to satisfy their competitiveness, states design their tax systems with a vision of providing the most investment-friendly environment. In doing so, two main objectives are paramount: to prevent domestic businesses from flowing outside the national territory; and to attract foreign businesses to flow into the country. To maximize the latter, a variety of instruments are used, some of which lead to the game of tax competition.

Tax competition happens between sovereign nations or territories that set their respective tax systems bidding for investments in an uncooperative way, each acting

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[5] UN Charter, 1945, art. 2(1).
[6] AU Constitutive Act, art. 3 and 4.
[7] Treaty for the Establishment of the East African Community (As amended on 14/12/2006 and 20/08/2007), art. 6(1)(a).
[8] J Li, 'Tax Sovereignty and International Tax Reform: The Author's Response' (2004) *CTJ/RFC* 52(1), p. 144; P Lampreave, 'Fiscal Competitiveness versus Harmful Tax Competition in the European Union' (2011) *BFIT* 65(6), p. 4; A C Santos and C M Lopes, 'Tax Sovereignty, Tax Competition and the Base Erosion and Profit Shifting Concept of Permanent Establishment' (2016) *EC T.Rev.* 5/6, p. 296.
[9] J Englisch and A Yevgenyeva, 'The Upgraded Strategy against Harmful Tax Practices under the BEPS Action Plan' (2013) *British L.Rev.* 5, p. 622.
[10] A Sanni, 'Sovereign Rights of Tax Havens and the Charge of Harmful Tax Competition' (2011) <www.thesait.org.za/news/96869/Sovereign-Rights-Of-Tax-Havens-And-The-Charge-Of-Harmful-Tax-Competition.htm> accessed 30/07/2019.

independently.[11] It consists of lowering the tax burden in order to increase the country's competitiveness, which in turn boosts the national economy.[12] This is mainly done by setting favorable tax measures through the provision of preferential tax rates (PTR) or preferential tax bases. At this level, all taxpayers stand as beneficiaries,[13] which, along with increasing the national welfare, is not a bad thing.

Put another way, countries are engaged in a strategic uncoordinated competition, in which each country seeks to attract capital to its jurisdiction, while protecting its own tax base. To this end, a variety of methods are used, including fashioning preferential tax regimes for foreigners, secrecy rules, and lax enforcement of existing rules.[14] The result of such rules and practices is the creation of a comparatively advantageous tax environment.

In the literature, tax competition is described as a long-standing phenomenon. Some of its features existed in ancient and medieval times.[15] Similarly, tax competition is considered an unquestionable fact, inevitable, natural, and necessary phenomenon given the structure of the international tax system.[16] In this way, tax competition stands as a global phenomenon.

The global character of tax competition is shown by its presence everywhere, from developing to developed countries. For illustration, starting with developed countries, the issue of harmful tax competition has been frequently tabled in the summits of the European Union (EU) and continues to intensify in the EU Member States.[17] Europe also experienced the race to the bottom with an insurgence of the preferential tax regimes in the 1980-90s.[18] In addition, the EU Code of Conduct on business taxation acknowledged the EU Member States'

[11] Englisch and Yevgenyeva (n 9) p. 621.
[12] C Pinto, *Tax Competition and EU Law* (Ph.D Thesis, UVA 2002), p. 1.
[13] Ibid.
[14] P Dietsch and T Rixen, 'Tax Competition and Global Background Justice' (2014) *The Journal of Political Philosophy* 22(2), p. 153.
[15] G A McCarthy, 'Promoting a More Inclusive Dialogue', in R Biswas (ed), *International Tax Competition: Globalization and Fiscal Sovereignty* (Commonwealth Secretariat 2002), p. 36.
[16] Faulhaber (n 2) p. 312 and 321; V Chand and K Romanovska, 'International Tax Competition in light of Pillar II of the OECD Project on Digitilization', Kluwer International Tax Blog, 14/05/2020 <http://kluwertaxblog.com/2020/05/14/international-tax-competition-in-light-of-pillar-ii-of-the-oecd-project-on-di gitalization/> accessed 29/07/2021.
[17] Pinto, Tax competition (n 12) p. 25; C M Radaelli, 'Harmful Tax Competition in the EU: Policy Narratives and Advocacy Coalitions' (1999) *JCMS* 37(4), p. 675; O Pastukhov, 'Counteracting Harmful Tax Competition in the European Union' (2010) *Sw.JIL* 16, p. 166;
[18] Lampreave (n 8) p. 4; A P Morriss and L Moberg, 'Cartelizing Taxes: Understanding the OECD's Campaign against Harmful Tax Competition' (2012) *CJTL* 4(1), p. 36; M F Nouwen, *Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition* (Ph.D Thesis, UVA 2020), p. 27.

engagement in (harmful) tax competition, and thus the need to curb it.[19] Equally, the 1998 Report of the Organization for Economic Cooperation and Development (OECD) on harmful tax competition recognized the existence of (harmful) tax competition in both Organization members and non-members.[20] All these examples illustrate the existence of (harmful) tax competition in developed countries.

From the perspective of developing countries, an example can be taken from the EAC. In 2012, the Community's Legislative Assembly (EALA) admitted the Partner States' engagement in tax competition, against each other.[21] Similarly, a Memorandum of Understanding (MoU) signed between members of Southern African Development Community (SADC) containing a clause to avoid harmful tax competition signals the Community's awareness and acknowledgement of that practice.[22] Some African countries also have been pointed out to have preferential tax regimes such as Mauritius' and South Africa's headquarters company regime, Botswana's intermediary holding company regime, and Liberia's shipping regime.[23] All these examples show how (harmful) tax competition exists in both developed and developing countries.

It is important to highlight that tax competition *per se* is generally not considered a problem. The problem arises when the situation escalates from good and desirable tax competition to harmful tax competition. Harmful tax competition occurs when states go beyond building a competitive tax system, i.e. beyond lowering the general tax burden for the sake of putting the general taxpayers in a tax-friendly environment, and attempt to erode other states' tax bases by attracting highly mobile investment. The general discussions on good versus bad tax competition are presented in the second chapter, while the normative discussions are detailed in chapters four and five, respectively focusing on the OECD, EU, and EAC works on harmful tax competition.

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[19] EU Code of Conduct 1997: Conclusions of the ECOFIN Council meeting of 1/12/1997 concerning taxation policy DOC 98/C2/01, *OJEC* (6.1.98) C 2/1; Pinto, Tax competition (n 12) p. 166.
[20] OECD (1998), *Harmful Tax Competition: An Emerging Global Issue*, OECD Publishing, p. 3 and 7; B Persaud, 'The OECD Harmful Tax Competition Policy: A Major Issue for Small States', in R Biswas (ed), *International Tax Competition: Globalization and Fiscal Sovereignty* (Commonwealth Secretariat 2002), p. 23.
[21] EAC, 2nd Meeting of the 1st Session of the 3rd East African Legislative Assembly, Oral Answers to Priority Questions, Question: EALA/PQ/OA/3/06/2012, Nairobi, 13/09/2012, p. 10 [EALA].
[22] SADC, Memorandum of Understanding on Cooperation in Taxation and related matters, 08/08/2002, art. 4(3)(a); Z C Robinson, *Tax Competition and its Implications for Southern Africa*, (Ph.D Thesis, UCT 2002), p. 267.
[23] A W Oguttu, 'International tax competition, Harmful tax practices and the 'Race to the bottom': a special focus on unstrategic tax incentives in Africa' (2018) *CILJSA* 51(3), pp. 299-302.

On a separate but close note, and without undermining the long existence of tax competition, the problem of (harmful) tax competition was intensified by globalization from the 1980s-90s onwards. It was at this time that tax competition became a concern for more countries.[24] That was due to globalization, which facilitated the free movement of capital and persons, which subsequently encouraged states to strategize, each seeking to take a large share of the international tax base. Playing the same game in a process of retaliation, states end up harming each other. Similarly, countries end up with a spillover situation of their peers' policies. Thereby, some of the harmful consequences become inevitable, such as the significant erosion of the tax revenues, which end up creating a situation of fiscal degradation characterized by the states' inabilities to cater public services.

Faced with that situation, it becomes evident that states could not stay inactive. In that regard, the OECD rightly points out that:

> States could not stand back while their tax bases are eroded through the actions of countries which offer taxpayers ways to exploit tax havens and preferential regimes to reduce the tax that would otherwise be payable to them. [25]

The above consideration pushed the states, among other international tax actors, to engage in the fight against harmful tax competition. Given the international character of harmful tax competition, it is evident that multilateral measures are more effective than unilateral measures. This idea justifies the active involvement of international or regional organizations in such endeavors. An example of this is the active role played by the EU and the OECD, respectively at European and developed countries levels.

Unfortunately, when it comes to developing countries, this area seems to have received very little attention. This is evidenced by a comparatively low engagement in the development of policies and practices to counteract harmful tax competition, such as seen in developed countries. This low level of engagement is typical of the EAC Partner States, Rwanda included. This situation could be interpreted as facilitating a continuous will to engage in harmful tax competition. Alternatively, the situation could be interpreted as a result of low technical capacity regarding tax competition, among others. Whatever the case, the situation is potentially alarming and calls for research-based interventions.

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[24] Faulhaber (n 2) p. 326.
[25] OECD 1998 Report (n 20) p. 37; K van Raad, *Materials on International & EU Tax Law* (13th edn, International Tax Center 2013), p. 1323.

With a particular focus on Rwanda, among other EAC Partner States, since 1994 Rwanda initiated a number of programs aimed at boosting economic development and growth, with a goal of transforming the country from a low income to a middle income country. Such programs include Vision 2020, Vision 2050, Economic Development and Poverty Reduction Strategies (EDPRS), Vision Umurenge Program (VUP), to name a few. Some of these programs are, in one way or another, linked to fiscal policies in the broader context of development. For instance, Vision 2020 recommends the development of effective strategies to expand the tax base and attract foreign investors as one way to reduce dependence on foreign aid.[26]

In the same vein, the government has developed strategies to improve Rwanda's competitiveness with a view to make the country one of the top business-friendly jurisdictions in the region and globally. In this approach, attracting Foreign Direct Investment (FDI) is a blatant goal. To this end, Rwanda has modernized its commercial laws and commercial dispute resolution systems to create a safe investment climate for foreign investors.[27] As a result, leaning on peace, security, and political stability, Rwanda managed to improve its business environment[28] and made itself a place for investment opportunity.

In parallel, Rwanda has also improved the competitiveness of its tax system and significant changes have been made to business taxation laws. This mainly concerns income tax laws and investment promotion and facilitation laws.[29] Currently, these two laws are of great importance to investors as they contain several favorable tax measures.

Nevertheless, from a legal research perspective, and as far as Rwanda is concerned, the study of (harmful) tax competition appears to have received little attention. This is epitomized by the paucity of available legal literature on this topic. However, Rwanda is not an island in the matter of harmful tax competition. This means that Rwanda may, to a given extent, be involved in harmful tax competition with corresponding fiscal externalities. Therefore, this justifies the need for a legal study to clarify the situation of Rwanda, in the midst of the EAC, in terms of of (harmful) tax competition.

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[26] Republic of Rwanda, Ministry of Finance and Economic Planning, *Rwanda Vision 2020*, Kigali, Jul. 2000, p. 11; Republic of Rwanda, *Rwanda Vision 2020*, revised edition 2012, p. 6.
[27] N Huls, 'Constitutionalism à la Rwandaise', in M Adams, A Meuwese and E H Ballin (eds), *Constitutionalism and the Rule of Law: Bridging the Idealism and Realism* (CUP 2017), pp. 197-98.
[28] Id., p. 218.
[29] Law No. 016/2018 of 13/04/2018 establishing taxes on income, *O.G.* No. 16 of 16/04/2018; Law No. 006/2021 of 05/02/2021 on investment promotion and facilitation, *O.G.* No. 04 *bis* of 08/02/2021.

This study was triggered by a number of reprimanding reports, mainly from Non-Governmental Organizations (NGOs), mentioning how Rwanda engages in tax competition.[30] It is unfortunate that such reports do not distinguish tax competition, which is good and desirable, from harmful tax competition, which is bad and undesirable. Again, this justifies the rationale of this legal study, which focuses on applying the international standards that distinguish good tax competition from harmful tax competition to the Rwandan case.

Thus, this study is contextualized to Rwanda, amidst other EAC countries. Although, reference is often made to the EU and OECD for reasons that are explained in the next section along with details on Rwanda as a country under study.

1.2. Research context

In legal research, the context is important for a better understanding of the circumstances in which the research was conducted. Context also helps to understand the characteristics of the research input in order to determine the possible generalization of the research output. This section describes the context in which the research was conducted. Sequentially, Rwanda and the EAC are introduced first, followed by a brief explanation of the choice of the EU and OECD as references.

1.2.1. Introduction to Rwanda and EAC

This sub-section introduces Rwanda and the EAC as the jurisdictions under study. Then follows the rationale for choosing the EAC rather than other regional integrations to which Rwanda belongs.

1.2.1.1. Introduction to Rwanda and its tax system

Rwanda is a small landlocked country located in the east-central part of Africa. It shares borders with Tanzania in the east, Burundi in the south, the Democratic Republic of Congo in the west, and Uganda in the north. As of August 2021, Rwanda had a population of about thirteen

[30] P Abbott et al., 'The Impact of Tax Incentives in East Africa: Rwanda Case Study Report' (2011) IPAR; TJNA & ActionAid, 'Tax Competition in East Africa: A Race to the Bottom?' (2012) Nairobi; TJNA & ActionAid, 'Tax Incentives for Investors: Investment for Growth or Harmful Taxes?' (2011) Policy Brief on Impact of Tax Incentives in Rwanda; D Malunda, 'Corporate Tax Incentives and Double Taxation Agreements in Rwanda: Is Rwanda getting a Fair Deal? A Cost Benefit Analysis Report' (2015) IPAR; ActionAid & IPAR, 'Corporate Tax Incentives in Rwanda: Strategic Allocation of Tax Incentives to promote Investment and Self-Reliance in Rwanda' (2015) Policy Brief, p. 1.

million.[31] Rwanda's gross domestic product in 2020 was 10.33 billion USD,[32] equivalent to 0.01% of the world economy.[33]

For many decades, Rwanda was classified among the least developed countries. However, since 1994, Rwanda has been striving to upgrade to a middle-income country. One way to achieve this goal has been to open up to the global economy by providing a conducive legal environment for business.[34] As a result, Rwanda is currently one of the most attractive countries to do business in Africa[35] and is ranked by global financial institutions as one of the best choices for doing business in East Africa and Africa.

As far as the Rwandan tax system is concerned, Rwanda's tax law arsenal is currently based on a variety of legal instruments, at the top of which is the Constitution.[36] The supremacy of the constitution is provided for by article 95 of the Constitution of the Republic of Rwanda, which establishes the hierarchy of laws, while taxation matters are regulated by article 164 of the same Constitution. Article 164 states that '*tax is imposed, modified or removed by law*' and that '*no exemption or reduction of a tax can be granted unless authorized by law*.' Below the Constitution, Rwanda's tax law arsenal includes international tax treaties, national laws, orders by the Prime Minister, ministerial orders, CG rules, and CG instructions. Rwandan tax law also recognizes the use of tax rulings, both public and private.[37]

The implementation of the above-mentioned legal instruments is entrusted to a number of institutions that deal with tax matters in one way or another. At the forefront is the Rwanda Revenue Authority (RRA), an institution established in 1997 to take over from the Ministry of finance and economic planning the functions of tax administration.[38] Currently, the RRA has sole authority over tax collection and administration, among other functions in relation to the implementation of tax laws.[39]

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[31] See NISR, *Statistical Publications* <https://www.statistics.gov.rw/statistical-publications/subjects> accessed on 28/07/2021.
[32] See Trading Economics, *Rwanda GDP*, <https://tradingeconomics.com/rwanda/gdp> accessed on 28/07/2021.
[33] Ibid.
[34] Huls (n 27) pp. 197-198.
[35] Id., p. 218.
[36] The Constitution of the Republic of Rwanda of 2003 revised in 2015, *O.G.* No. Special of 24/12/2015.
[37] Law No. 026/2019 of 18/09/2019 on tax procedures, *O.G.* No. special of 10/10/2019, art. 9.
[38] Law No. 15/97 of 08/11/1997 establishing Rwanda Revenue Authority, *O.G.* No. 22 of 15/11/1997 reviewed by the Law No. 08/2009 of 27/04/2009 determining the organization, functioning and responsibilities of Rwanda Revenue Authority, *O.G.* No. special of 15/05/2009.
[39] Id., art. 3.

Besides the RRA, the ministry of finance plays a role in tax matters as it is responsible for formulating and implementing policies on financial matters including taxation. This ministry is also the supervising authority of the RRA.[40] The Rwanda Development Board (RDB) also intervenes in tax matters when it comes to tax incentives granted to registered investors. The Parliament also intervenes in tax matters and plays a dual role. First, tax laws are enacted by the Parliament; and second, the Parliament controls the actions of the Government including budget execution. Districts also play a role in taxation with regard to decentralized taxes.[41]

The taxes applicable in Rwanda are currently classified into two main categories in consideration of where they go after collection. Some are centralized while others are decentralized. Centralized taxes are collected by the RRA and are destined for the central government treasury. These include value added tax (VAT), personal income tax (PIT), capital gains tax, and corporate income tax (CIT). Also centralized are withholding taxes (WHT) such as payroll tax; WHT on imports and public tenders; import duties; consumption taxes; etc. Decentralized taxes are also collected by the RRA, but are for the districts. These taxes are only three: immovable property tax, trading license tax, and rental income tax.[42]

That being a summary of the main aspects of Rwanda and its tax system viewed in the lens of legal, institutional, and structural framework, the following paragraphs provide a brief introduction to the EAC.

1.2.1.2. Introduction to the EAC and its law

The EAC has its roots in the 1900s initiatives that brought together the former eastern African British colonies.[43] A formal EAC as a regional community was established in 1967 as a tripartite

[40] Id., art. 4.

[41] Decentralized taxes are governed by the Law No. 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities, *O.G.* No. 44 of 29/10/2018 and the Ministerial Order No. 008/19/10/TC of 16/07/2019 determining tax procedures applicable to collection of taxes and fees for decentralized entities, *O.G.* No. Special of 18/07/2019.

[42] Decentralized Taxes Law, Id., art. 5.

[43] J A Mgaya, *Regional Integration: The Case of the East African Community*, (MA Thesis, ANU 1986), pp. 2-3; W Masinde and C O Omolo, 'The Road to East African Integration', in E Ugirashebuja, J E Ruhangisa, T Ottervanger and A Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2017), p. 15; A Titus, 'How Can the East African Community Guard against Base Erosion and Profit Shifting while Working towards Deeper Integration? Lessons from the European Union' (2017) *WTJ*, p. 574; J Otieno-Odek, 'Law of Regional Integration: A Case Study of the East African Community', in J Döveling, H I Majamba, R F Oppong and U Wanitzek (ed), *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities* (LawAfrica Publishing 2018), p. 19; A T Marinho and C N Mutava, 'Tax Integration within the East African Community: A Partial Model for Regional Integration in Africa', p. 1 <https://pdfs.semanticscholar.org/3cd7/ce5b507d7a04acd640dfb37401d6aebc33f6.pdf> accessed 27/03/2020.

intergovernmental organization consisting of Kenya, Tanzania, and Uganda. Ten years later, in 1977, this Community collapsed. Some of the reasons mentioned for the collapse were lack of political will, lack of strong participation and cooperation of the private sector and civil society, and disproportionate benefit sharing between member states.[44] The EAC was later revived in 1999. In 2007, two more members were admitted, namely Burundi and Rwanda, and in 2016, South Sudan became the sixth member. The EAC is considered one of the oldest regional economic integration organizations in the world, as its earlier initiatives date back to the 1900s.[45] However, despite its long existence, it is not the most advanced regional integration in the world today.

In its current status, the EAC is established as a body with perpetual succession and right to admit new members upon fulfillment of the requirements.[46] The EAC objectives are outlined in article 5(1) of the Treaty as follows:

> The objectives of the Community shall be to develop policies and programs aimed at widening and deepening cooperation among the Partner States in political, economic, social, and cultural fields, research and technology, defense, security, and legal and judicial affairs, for their mutual benefit.

The EAC governance structure is divided by the Treaty into organs and institutions. The organs of the Community are the Summit, the Council, the Coordination Committee, the Sectoral Committees, the East African Court of Justice (EACJ), the EALA, the Secretariat, and such other organs as may be created by the Summit.[47]

The Summit consists of the Heads of States or Governments. Its mandate is to provide the general directions and impetus for the development and achievement of Community objectives.[48] Below the Summit is the Council. This is the Community's policy organ[49] and its composition is laid down in article 13 of the Treaty. Chapter 9 of the Treaty concerns the affairs of the EALA while Chapter 8 concerns the affairs of the EACJ.

[44] EAC Treaty (n 7) preamble.
[45] Marinho and Mutava (n 43) p. 1.
[46] EAC Treaty (n 7) art. 4 and 3.
[47] Id., art. 9(1).
[48] Id., art. 10(1) and 11(1).
[49] Id., art. 14.

As for the EAC institutions, these consist of bodies, departments, and services that may be established by the Summit.[50] Currently, the Community has nine semi-autonomous institutions, namely the East African Development Bank, the Inter-University Council for East Africa, the East African Science and Technology Commission, the East African Health Research Commission, the East African Competition Authority, the Civil Aviation Safety and Security Oversight Agency, the East African Kiswahili Commission, the Lake Victoria Fisheries Organization, and the Lake Victoria Basin Commission.[51]

As far as regional integration processes are concerned, the EAC Treaty envisions four stages towards a fully matured regional integration, namely the Customs Union, the Common Market, the Monetary Union, and the Political Federation.[52] So far, the Community has established the Customs Union, which has been in force since 01 January 2005. The Protocol establishing the Common Market was signed on 01 July 2010 and this phase is underway. The Monetary Union, the Protocol of which was signed on 30 November 2013, and the Political Federation have not yet been started, except for some preliminary and ongoing preparations.

As far as the EAC law is concerned, the Community's legal arsenal is headed by the Treaty establishing it. Under the Treaty, there are Protocols that consist of agreements that supplement, amend or qualify the Treaty.[53] In terms of article 1 of the Treaty on the interpretation of key terms, the term 'Treaty' includes the Treaty itself, plus annexes and protocols thereto,[54] whose adoption and practical modalities are laid down in article 151 of the Treaty.

With regard to Community sources of law, the Treaty is silent as to which sources of law are available to Community Court. As a result, the Treaty serves as the main source of law. Article 23(1) of the Treaty establishes the EACJ as the Community judicial body responsible for ensuring the adherence to law in the interpretation, application of, and compliance with the Treaty. The Treaty also gives the Court privilege of establishing its procedural rules to regulate the detailed conduct of the court business.[55] These rules are considered as the Court's second

[50] Id., art. 9(2) and (3).
[51] EAC, EAC Institutions <https://eac.int/eac-institutions> accessed 18/03/2020.
[52] EAC Treaty (n 7) art. 5(2).
[53] Id., art. 1.
[54] Id., art. 1 and art. 151(4).
[55] Id., art. 42(1).

source of law. The EACJ also relies heavily on precedents, with a number of judgments referring to precedents as a source of law.[56]

It is worth noting EAC law *per se* is less developed so far. In other words, the EAC legal order, in the sense of a specific legal system particular and pertaining to the EAC, is at a nascent stage. For this reason, the law in the EAC territory is mainly dominated by the respective domestic laws of the Partner States, despite the primacy of the EAC law as enshrined in the text of the Treaty,[57] which has so far remained more theoretical and less practical. For instance, it is difficult to find a domestic judgment in which the judge has made a reference to an EACJ decision.

Given the focus of this book, further elements of EAC law relating to the topic under study are detailed in chapter five. In the meantime, it is worthwhile to elaborate on why the EAC was chosen among other regional integration bodies of which Rwanda is a member.

1.2.1.3. Rationale for the choice of EAC

Rwanda belongs to several regional organizations. In this study, the choice of the EAC among others was motivated by several legal and factual factors, as detailed below.

Foremost, Rwanda, as a member of the EAC, is understandably subject to a legal obligation to abide by the acts of the EAC. The binding supremacy of EAC law over Rwandan law and other Partner States laws is explicitly stated in article 8(4) of the EAC Treaty which provides that: '*[C]ommunity organs, institutions, and laws shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty*'. This paragraph is complemented by paragraph 5, which sets out the implementation framework of paragraph four as follows: '*Partner States undertake to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones*'.[58] Article

[56] EACJ, Appellate Division, Appeal No. 2 of 2011, Alcon Int'l Ltd and The Standard Chartered Bank of Uganda, Att'y Gen. of Uganda and Reg. of the High Court Uganda, 16/03/2012, para. 18 and 19; EACJ, Appellate Division, Appeal No. 3 of 2011, Att'y Gen. of Tanzania and African Network for Animal Welfare, 15/03/2012, para. 23, 24, and 31; EACJ, First Instance Division, Ref. No. 1 of 2014, EALS v. Att'y Gen. of Burundi and The EAC Secr.Gen., 15/05/2015, para. 33 and 53; EACJ, First Instance Division, Ref. No. 1 of 2011, The EALS v. EAC Secr.Gen., 14/02/2013, p. 10, 11, 12, 14, 15, and 20; EACJ, First Instance Division, Ref. No. 6 of 2011, Democratic Party and Mukasa Mbidde v. EAC Secr.Gen. and the Att'y Gen. of Uganda, 10/05/2012, para. 18, 33, and 44; EACJ, First Instance Division, Ref. No. 10 of 2011, Legal Brains Trust Ltd v. Att'y Gen. of Uganda, 30/03/2012, para. 68; EACJ, First Instance Division, Ref. No. 11 of 2011, Mbugua Mureithi wa Nyambura v. Att'y Gen. of Uganda & Att'y Gen. of Kenya and Avocats sans Frontières, 24/02/2014, para. 36, 56, 61, 62, and 63.

[57] EAC Treaty (n 7) art. 8 and art. 33(2); EACJ, First Instance Division, Ref. No. 5 of 2011, Samuel Mukira Mohochi v. Att'y Gen. of Uganda, 17/05/2013, para. 53.

[58] EAC Treaty, Id. art. 8(5).

16 of the Treaty emphasizes the effects of regulations, directives, decisions, and recommendations of the EAC Council by stating that they:

> Shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may under the Treaty be addressed.

By virtue of the primacy of the Community organs and institutions, EACJ decisions on interpretation and application of the Treaty have precedence over national courts' decisions on the same.[59] The EACJ has also affirmed the primacy of Community law over some matters that are provided for in domestic laws. For example, the EACJ held that the principle of state sovereignty, which is provided for, guaranteed, and protected as inalienable in the respective constitutions of the Partner States, cannot take away the supremacy of Community law.[60]

Beyond the supremacy of EAC law over Rwandan law, the importance of EAC law in this study is also justified by the progressive development of EAC law in the area of tax competition. Thus, if Rwanda has to develop a tax competition law, it should be done in consideration of, and in accordance with EAC law.

Furthermore, the choice of the EAC is motivated by the fact that among the eight regional economic organizations recognized by the AU,[61] the EAC is the oldest,[62] and has progressed faster than others, which make it the most active and successful African regional integration organization.[63] In fact, the EAC is the most advanced compared to others, currently with a fully functioning customs union and an ongoing common market. This is unlike other regional integrations to which Rwanda belongs, such as the Common Market for Eastern and

[59] EAC Treaty, Id., art. 8(4) and art. 33(2); C Nalule, 'Defining the Scope of Free Movement of Citizens in the East African Community: The East African Court of Justice and its Interpretive Approach' (2018) *Journal of African Law* 62(1), p. 6.
[60] EACJ Ref. No. 5 of 2011 (n 57) para. 53.
[61] C Nalule, *Advancing Regional Integration: Migration Rights of Citizens in the East African Community*, (Ph.D Thesis, Witwatersrand Univ. 2017), p. 74.
[62] Marinho and Mutava (n 43) p. 1.
[63] A P van der Mei, 'Regional Integration: The Contribution of the Court of Justice of the East African Community' (2009) *ZaöRV* 69, p. 404; P Apiko, 'Understanding the East African Court of Justice: The Hard Road to Independent Institutions and Human Rights Jurisdiction', p. 4 <https://ecdpm.org/wp-content/uploads/EACJ-Policy-Brief-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf> accessed 27/05/2019.

Southern Africa (COMESA), which has only reached a stage of customs union.[64] All these reasons make the EAC the most dynamic regional organization for Rwanda.

Nevertheless, and notwithstanding the above achievements, the development of tax competition regulation in the EAC is not yet far advanced. Harmful tax competition is also not commonly understood in the EAC.[65] The few writings that exist on tax competition in the EAC are dominated by the economic perspective, while writings from the legal perspective are almost non-existent. Also the distinction between tax competition in the economic sense versus the legal sense, as discussed in the third section of chapter two, is virtually non existent in the EAC. This situation, therefore, compels a reference to other laws with advanced developments such as the EU and the OECD instruments, whose legal thinking on tax competition provides some inspiration in this study.

1.2.2. Why EU and OECD references?

The international character of tax competition compels studying this field in the context of the international or regional legal framework. This book examines the Rwandan aspects of harmful tax competition, amidst other EAC countries, with reference to international standards as developed by the EU and the OECD. The choice of the two is not happenstance, but rather motivated after a brief introduction to their legal background.

1.2.2.1. Brief overview of EU law

The European Union as it is today is a result of a long journey that started in the twentieth century, more precisely shortly after the Second World War.[66] Through the historical journey that led to the EU, several institutions were created such as the European Coal and Steel Community created in 1952,[67] the European Economic Community and the European Atomic Energy Community created in 1957,[68] etc. The EU as such was established by the Treaty signed

[64] OECD Directorate for Financial and Enterprise Affairs Competition Committee (2018), *Regional Competition Agreements: Inventory of Provisions in Regional Competition Agreements: Annex to the Background note by the Secretariat*, DAF/COMP/GF(2018)12, p. 3 <https://one.oecd.org/document/DAF/COMP/GF(2018)12/en/pdf> accessed 26/08/2019.
[65] B C Kagyenda, 'Development of an EAC Model Agreement for the Avoidance of Double Taxation and an EAC Code of Conduct against Harmful Tax Competition', Final Report, EAC Secretariat – GIZ EAC Tax Harmonization Project, Arusha, p. 11.
[66] J Fairhurst, *Law of the European Union* (6th edn, Pearson Longman 2007), p. 3.
[67] Id., p. 5; A Cuyvers, 'The Road to European Integration', in E Ugirashebuja, J E Ruhangisa, T Ottervanger and A Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2017), p. 28.
[68] Fairhurst (n 66) p. 6; A Cuyvers, Ibid.

at Maastricht in 1992, which came into force in 1993 after ratification by the Member States.[69] The EU currently counts 27 member states.[70]

The EU legal order is led by two Treaties of equal value namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).[71] It also comprises other several legal instruments such as the Charter of Fundamental Rights of the European Union; soft law; decisions and opinions of the Court of Justice; general principles of law, regulations, directives, and recommendations.[72] One element of the EU legal order that falls directly within the scope of this study is the EU Code of Conduct on Business Taxation adopted on 1 December 1997. The details of this Code and subsequent work are presented in chapter four of this book.

1.2.2.2. Brief overview of OECD instruments

The OECD is an intergovernmental economic organization whose founding convention was signed by 20 countries in Paris on 14 December 1960, and came into force on 30 September 1961.[73] Currently, 36 countries belong to the OECD, and five other countries have the status of 'key partner'.[74] It is interesting to note that of the 36 OECD members, 23 countries, i.e. almost two thirds, are EU Members. The OECD's objective is to promote the economic development of its members and non-members through cooperation programs.[75] In this regard, the OECD is largely known for its economic activities and has developed several policies since its creation.

As far as the regulatory framework of the OECD is concerned, this Organization does not have a specific legal order. Its instruments consist of decisions, recommendations, declarations, international agreements, arrangements, understandings, and others.[76] In principle, the OECD has no coercive power to impose rules on sovereign state members, let alone non-

[69] P Kent, *Law of the European Union* (4th edn, Pearson Longman 2008), p. 52; Fairhurst, Id., p. 11; A Cuyvers, Id., p. 30; D M Ring, 'What's at Stake in the Sovereignty Debate: International Tax and the Nation-State' (2008) *Va.J.Int'Ll.* 49(1), p. 36.
[70] https://europa.eu/european-union/about-eu/countries_en, accessed 27/06/2021.
[71] A Cuyvers (n 67) p. 32.
[72] Id., p. 33; A Cuyvers, 'The Legal Framework of the EU', in E Ugirashebuja, J E Ruhangisa, T Ottervanger and A Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2017), p. 133; P Kent (n 69) pp. 52-53; Fairhurst (n 66) p. 54 and 60.
[73] www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm, accessed 27/08/2019.
[74] www.oecd.org/about/members-and-partners/, accessed 26/07/2019.
[75] OECD Convention (n 73) art. 1.
[76] OECD Legal Affairs, 'OECD Legal Instruments' <www.oecd.org/legal/legal-instruments.htm> accessed 12/11/2018.

members.[77] Rather, the OECD relies on its technical capacity and political influence to build consensus to its instruments.[78] Therefore, the OECD instruments can be taken as agreed principles, but cannot be considered binding legal instruments until countries adopt them into their national legislation,[79] which often happens.[80] The OECD also has the power to make recommendations and enter into agreements with its members, non-members, and other international organizations.[81] As a result, and much connected to its political influence, OECD membership brings with it an obligation to implement and comply with its instruments,[82] another reason why OECD instruments are widely followed.

Moreover, OECD membership contributes to its high political influence. Indeed, OECD members are the most industrialized, wealthy, successful, prosperous, powerful, and politically influential countries, which gives rise to the OECD's designation as the 'rich man's club'.[83] Such a reputation contributes to a high level of acceptance of OECD instruments.

In relation to the subject of this book, the OECD has undertaken several tax-related activities since its inception. In this area, the OECD's unique combination of geopolitical power dynamics and dedicated expertise, has placed it at the center of other international institutions as far as international tax issues are concerned.[84] The OECD's good standing in resolving international tax matters since the 1970s has also made it a respectable source of technical expertise.[85] It is also considered the most important multilateral forum for tax issues and stands

[77] Dietsch and Rixen (n 14) p. 170; M Seeruthun-Kowalczyk, *Hard Law and Soft Law Interactions in EU Corporate Tax Regulation: Exploration and Lessons for the Future* (Ph.D Thesis, Edinburgh Univ. 2011), p. 194; I J Mosquera Valderrama, 'Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism' (2015) *WTJ* 7(3), p. 6; A Christians, 'BEPS and the New International Tax Order' (2017) *BYUL.Rev.* 2016(6), p. 1608 and 1622.
[78] Santos and Lopes (n 8) p. 299.
[79] V Hernandez Guerrero, 'Defining the Balance between Free Competition and Tax Sovereignty in EC and WTO Law: The 'due respect' to the General Tax System' (2004) *German LJ* 5(1), p. 93.
[80] Mosquera Valderrama, Legitimacy and the making of international tax law (n 77) p. 6.
[81] OECD Convention (n 73) art. 5.
[82] Mosquera Valderrama, Legitimacy and the making of international tax law (n 77) p. 1.
[83] R S Avi-Yonah, 'Bridging the North/South Divide: International Redistribution and Tax Competition' (2004) *MichJIntlL* 26, p. 384; J C Sharman, 'Norms, Coercion and Contracting in the Struggle against 'Harmful' Tax Competition' (2006) *Aust.J.Int'l Aff.* 60(1), p. 160; R A Johnson, 'Why Harmful Tax Practices will Continue after Developing Nations Pay: A Critique of the OECD's Initiative Against Harmful Tax Competition' (2006) *BCThirdWorldL.J.* 26(2), p. 353; H J Ault, 'Reflections on the Role of the OECD in Developing International Tax Norms' (2009) *BrookJIntlL* 34(3), p. 758; J Wouters and S van Kerckhoven, 'The OECD and the G20: An Ever Closer Relationship' (2011) *GeoW.Int'lL.Rev.* 43, p. 350; Y Brauner, 'What the BEPS?' (2014) *Fla.Tax.Rev.* 16(2), p. 62; S Fung, 'The Questionable Legitimacy of the OECD/G20 BEPS Project' (2017) *ELR* 10(2), p. 80.
[84] Christians, BEPS and the New International Tax Order (n 77) p. 1611; R S Avi-Yonah, 'Globalization and Tax Competition: Implications for Developing Countries' (2001) *Cepal Review* 74, p. 64.
[85] Morriss and Moberg (n 18) p. 24.

as the world's most influential organization in international tax matters.[86] The OECD also stands as a prominent, central, global institution for the technical design of tax policy and as the geopolitical manager of international tax law.[87] Similarly, it appears as the principal architect of international tax cooperation,[88] the primary forum for the coordination of international taxation,[89] and a *de facto* world tax organization.[90] One of the OECD landmark works that directly lines up with this study is the 1998 report on harmful tax competition. This report is discussed in the fourth chapter of this book.

1.2.2.3. Rationale for the choice of the EU and the OECD

This study extensively refers to the works of the EU and the OECD in many respects. The rationale for referring to the EU and OECD for a study that focuses on Rwanda and the EAC is developed in the next paragraphs.

Starting with the EU, the reference to EU law is justified by its role and great progress in terms of regional integration, as well as its particular role in regulating tax competition in the EU and beyond. The EU Code of Conduct has gained a *de facto* global application and the Code of Conduct Group (COCG) reviews tax regimes globally.[91] Not only that, the influential role of the EU at the global level is another justification for this choice. For example, the EU Commission associates European development aid to the recipient states' commitment to good governance principles in the tax area.[92] Beyond that, a reference to EU law is justified by its comparative aspect with the EAC.

In a comparative view, the EU is considered a good example for African regional communities.[93] More specifically, the EAC closely looks like an African model of the EU, and

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[86] Id., p. 3.
[87] A Christians, 'Sovereignty, Taxation and Social Contract' (2009) *Minn.J.Int'lL.* 18(1), p. 99; A Christians, 'Networks, Norms, and National Tax Policy' (2010) *Wash.Univ. Global Studies L.Rev.* 9(1), p. 15; A Christians and L van Apeldoorn, 'The OECD Inclusive Framework' (2018) *BFIT*, pp. 5-6.
[88] Christians, BEPS and the New International Tax Order (n 77) p. 1609.
[89] Ring, Sovereignty Debate (n 69) p. 2.
[90] Christians and Apeldoorn (n 87) p. 7.
[91] F Heitmüller and I J Mosquera Valderrama, 'Special Economic Zones facing the Challenges of International Taxation: BEPS Action 5, EU Code of Conduct, and the Future' (2021) *JIEL* 24, p. 481.
[92] EU Com., Communication from the Commission to the Council, The European Parliament and the European Economic and Social Committee on Promoting Good Governance in Tax Matters, COM(2009) 201, 28/04/2009, p. 12; A Renda, 'Reflections on the EU Objectives in Addressing Aggressive Tax Planning and Harmful Tax Practices' (2020) Final report to EU Commission, p. 21 <http://aei.pitt.edu/102468/1/KP0419785ENN.en_.pdf> accessed 29/04/2020.
[93] S O Oyetunde, *The Role of Tax Incentives in a Trio of Sub-Saharan African Economies: A Comparative Study of Nigerian, South African and Kenyan Tax Law* (Ph.D Thesis, QMUL 2008), p. 280.

always follows the structural and organizational models of the EU, such as the establishment of a single market without internal borders.[94] The EAC Treaty also resembles the EU Treaty in many respects and looks like its refined version.[95] The EU and the EAC are also the older regional integration communities and could have started the integration processes almost at the same time.[96] In this respect, the EAC can learn a lot from the EU experience.

Especially with regard to tax competition, the role of the EU in regulating (harmful) tax competition is evident.[97] This is affirmed and evidenced by some of the Union's initiatives, such as the 1997 Economic and Financial affairs (ECOFIN) Council Conclusions on the Code of Conduct on Business Taxation,[98] and the subsequent monitoring works of the COCG. Thus, in consideration of the achievements of the EU through successes and failures, the EAC has much to learn from the EU, which can serve as a model for the future developments of the EAC in tax competition. All the above reasons justify why EU law has been associated with this study, mainly for the purpose of clarification and inspiration.

The same reasoning applies to OECD instruments. To date, none of the EAC Partner States is a member of the OECD, nor a key partner. However, in recognition of this Organization's contribution to the development of international tax law, this book makes extensive reference to its works. This applies more particularly to its works on harmful tax practices.

Indeed, the OECD is considered the pre-eminent global body for international tax coordination through which countries identify and share experiences and best practices.[99] Similarly, the OECD's role is said to be central to the formulation and dissemination of international tax policies.[100] For example, the 1998 OECD Report on harmful tax competition has acquired the status of international soft law.[101] The same report encouraged non-members

[94] Petersen (n 1) p. 13; Huls (n 27) p. 218.
[95] Marinho and Mutava (n 43) p. 2.
[96] Id., p. 1.
[97] Petersen (n 1) p. 22.
[98] EU Code of Conduct (n 19).
[99] G J Ramos, 'The OECD in the G20: A Natural Partner in Global Governance' (2011) *GeoW.Int'lL.Rev.* 43, p. 335; M Hearson, 'Developing Countries' Role in International Tax Cooperation' (2017), p. 12 <www.g24.org/wp-content/uploads/2017/07/Developing-Countries-Role-in-International-Tax-Cooperation.pdf> accesse 31/08/2018.
[100] M C Webb, 'Defining the boundaries of legitimate state practice: Norms, transnational actors and the OECD's project on harmful tax competition' (2004) *Review of international political economy* 11(4), p. 792; A Christians, 'Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20' (2010) *North-western Journal of Law & Social Policy* 5(1), p. 20.
[101] J McLaren, 'The OECD's Harmful Tax Competition Project: Is it International Tax Law' (2009) *Austl.Tax.F.* 24, p. 436 and 452.

to curb harmful tax competition by relying on the principles established by the OECD.[102] In this regard, the OECD's works go beyond its members to reach and impact non-members.

In addition, Rwanda was recently admitted to the OECD Development Centre.[103] Since 2017, Rwanda is also participating in the Induction Program of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum). All these processes justify more the interest of Rwanda in regard to the OECD, whose practical influence goes beyond the Organization's members.

Thus, the inclusion of EU law and OECD instruments in this study acknowledges the best practices of these two institutions and their global influence. Therefore, this book is an analysis of the interaction between Rwandan law, EAC law, EU law, and OECD instruments. The above serves as a brief context in which this research was conducted. The next section states the research problem and the corresponding research questions.

1.3. Problem statement, focal research questions, and objectives

Viewed globally, tax competition is not a new issue. In the last three decades, projects have been undertaken on tax competition topics. Hotly debated in the EU since the 1990s,[104] tax competition topics have attracted considerable attention in international forums.[105] Similarly, tax competition issues are one of the most pressing issues for tax administrations in modern societies.[106] Until today, tax competition-related issues continue to be raised as contemporary discussion topics. Examples include the regular COCG reports, some of which date recently as 2021,[107] the Base Erosion and Profit Shifting (BEPS) project, and the Global Anti-Base Erosion (GloBE) project.

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[102] OECD (2000), Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices, Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, OECD Publications, p. 22.

[103] OECD Secretary General letter AG/2019.182.pb to Rwanda Minister of Foreign Affairs and International Cooperation (9/05/2019).

[104] H Gribnau, 'Soft Law and Taxation: EU and International Aspects' (2008) *Legisprudence* 2(2), p. 76 and 81; B I Bai, 'The Code of Conduct and the EU Corporate Tax Regime: Voluntary Coordination without Harmonization' (2008) *Journal of International and Area Studies* 15(2), p. 118; Nouwen (n 18) p. 26.

[105] Wishlade (n 2) p. 586.

[106] V Sobotková, 'Revisiting the Debate on Harmful Tax Competition in the European Union' (2012) *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis* 36(4), p. 344.

[107] CEU, Outcome of Proceedings on COCG (Business Taxation) – Council Conclusions, 9896/21 FISC 100 ECOFIN 604, 21/06/2021; CEU, COCG Report to the Council: Approval Lithuania'S holding company regime (LT008), 9341/21 ADD 8 FISC 91 ECOFIN 554, 14364/18 ADD 15, 04/06/2021; CEU, COCG (Business Taxation): Work Program during the Portuguese Presidency, 6004/21 FISC 22 ECOFIN 114, 09/02/2021.

Tax competition issues have also been discussed at several international academic conferences and political meetings,[108] and have made headlines in the media.[109] Addressing tax competition has become a global concern with high priority, which has precipitated the involvement of many states and NGOs in the development of measures against it.[110] Examples of the momentous projects in recent decades include the ECOFIN Council Conclusions of 1 December 1997 on the Code of Conduct on business taxation, the OECD Project that ended with the 1998 Report on harmful tax competition, and the OECD/G20 BEPS Project with its 2015 report.

International tax competition has also attracted the attention of legal scholarship over the past decades and remains an interesting topic today. Tax competition is also discussed in many scientific publications,[111] to such an extent that research on this topic has been considered a boom of the academic business, which today remains unabated.[112] The importance of this topic in academic research is also evidenced by a number of scholarly publications dating back over three decades,[113] while others are published very recently.[114]

Even so, it is fascinating to observe a big difference between the focus of developed countries on (harmful) tax competition compared to that of developing countries. Evidence to this is the fact that most international initiatives to combat the negative effects of tax competition have so far been undertaken by developed countries or through organizations whose members are developed countries. This is the case with the OECD instruments and the EU rules fighting against harmful tax competition.

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[108] Cerioni (n 2) p. 267; Radaelli, HTC in EU (n 17) p. 675.
[109] Radaelli, Id., p. 662; Faulhaber (n 2) p. 332; D M Broekhuijsen, *A Multilateral Tax Treaty: Designing an Instrument to Modernize International Tax Law* (Ph.D Thesis, Leiden Univ. 2017), p. 1; M Nouwen, 'The European Code of Conduct Group Becomes Increasingly Important in the Fight against Tax Avoidance: More Openness and Transparency is Necessary' (2017) *Intertax* 45(2), p. 139.
[110] S Leviner, 'The Intricacies of Tax and Globalization' (2014) *CJTL* 5(207), p. 223; McLaren, OECD's Harmful Tax Competition (n 101) p. 423.
[111] J Hey, 'Tax Competition in Europe: The German Perspective' (EATLP Conference, Lausanne, 2002), p. 2 <www.eatlp.org/uploads/Members/Germany02.pdf> accessed 13/08/2019.
[112] Devereux and Loretz (n 2) p. 745; J D Wilson, 'Theories of Tax Competition' (1999) *Nat'l Tax J.* 52(2), p. 269; T Rixen, 'Taxation and Cooperation: International Action against Harmful Tax Competition', in S A Schirm (ed), *Globalization: State of the Art and Perspectives* (Routledge 2007), p. 62.
[113] See for example J Bossons, 'International Tax Competition: The Foreign Government Response in Canada and other Countries' (1988) *Nat'l Tax J.* 41(3); B L Benson, 'Interstate Tax Competition, Incentives to Collude, and Federal Influences' (1990) *Cato Journal* 10(1); H-W Sinn, 'Tax Harmonization and Tax Competition in Europe' (1990) National Bureau of Economic Research WP 3248.
[114] See for example Nouwen (n 18); G Perotto, 'How to Cope with Harmful Tax Competition in the EU Legal Order: Going beyond the Elusive Quest for a Definition and the Misplaced Reliance on State Aid Law' (2021) *European Journal of Legal Studies* 13(1).

Considering the general trend that prevails in developing countries, the situation is further aggravated when it comes to Rwanda and the EAC. This is illustrated by a paucity of research on the Rwandan aspects of harmful tax competition. The concept of harmful tax competition has also been described as uncommon in the EAC Partner States.[115] Yet, considering the international aspect of harmful tax competition, any national tax system is inevitably conditioned by other states' tax sovereignties.[116] These fiscal externalities[117] do not allow any single state to be shielded from the spillover effects of other states' tax policies. The OECD voiced a similar concern in its 2000 Progress Report as follows:

> Harmful tax competition is by its very nature a global phenomenon and therefore its solution requires global endorsement and global participation. Countries outside the OECD must have a key role in this work since a number of them are either seriously affected by harmful tax practices or have potentially harmful regimes.[118]

In particular, harmful tax practices are said to exist in the EAC[119] and there have been reports that Rwanda largely engages in tax competition.[120] What has not yet been clarified is whether Rwanda keeps itself within the margins of acceptable tax competition. This confirms the need to undertake a legal analysis on Rwanda's tax competition practices amidst other EAC countries. In this regard, this study was guided by the following four inter-linked research questions: (1) What is the current state of affairs of favorable tax measures in Rwanda?; (2) What (and why) conventional benchmarks can be used to identify Rwanda's harmful tax practices?; (3) To what extent are the currently available favorable tax measures identified under question (1) harmful (using the results of the second research question)?; and (4) What (and why) proposals, in light of the answers to the preceeding questions, can be developed to safeguard Rwanda from engaging in harmful tax practices? The first research question is answered in chapter three, the second in chapters four and five, the third in chapter six, and the fourth in chapter seven.

With these research questions in mind, the main objective of this book is to examine the current situation in Rwanda, in order to determine whether Rwanda's tax practices are within

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[115] Kagyenda (n 65), p. 11.
[116] Lampreave (n 8) p. 4
[117] Wilson (n 112) p. 272; J M Mintz and M Smart, 'Recent Developments in Tax Coordination: A Panel Discussion by Bev Dahlby, Robert Henry, Michael Keen, and David E. Wildasin' (2000) *CTJ/RFC* 48(2), p. 400.
[118] OECD 2000 Progress Report (n 102) p. 22.
[119] J B Kiprotich, *Income Tax in the East African Community: A Case for Harmonization and Consolidation of Policy and Law with a Focus on Corporate Income Taxation* (Ph.D Thesis, UoN 2016), p. 170.
[120] Abbott et al., Tax incentives in East Africa (n 30); TJN & ActionAid, Tax Competition in EAC (n 30); TJN & ActionAid, Tax Incentives (n 30); Malunda (n 30); ActionAid & IPAR (n 30) p. 1.

the limits of internationally acceptable tax competition. The study's main orientation is not to coin a new distinction between acceptable versus unacceptable tax practices. Rather, it seeks to apply the criteria already developed and accepted at the international level to the particular case of Rwanda. Therefore, and in relation to the research questions, the specific objectives of this research are: (a) to explore the current state of affairs of Rwanda's favorable tax measures; (b) to determine the conventional benchmarks to identify Rwanda's harmful tax practices; (c) to assess the harmfulness of the currently available Rwanda's favorable tax measures; and (d) to suggest the proposals that can be designed to (potentially) safeguard Rwanda from engaging in harmful tax practices. Granted that, the research was conducted within a limited scope as explained below alongside the output.

1.4. Research output and scope

This study leads to several results that complement existing legal scholarship.[121] First is the systematic presentation of the materials and instruments in the field of tax competition. Second is the coherent application of OECD, EU, and EAC laws to the Rwandan situation. Third is the development of proposals to safeguard Rwanda's favorable tax measures from harmful tax practices. Fourth is the development of recommendations for future use in matters of tax competition, both at the Rwandan and EAC levels. In summary, this book, in recognition of the global character of harmful tax competition, shows how it is possible for jurisdictions outside the EU and OECD to rely on the standards established by these two organizations to set up tax systems that are free from harmful tax competition. As such, this book helps to fill the gap in developing countries that do not have strong legal foundations to address harmful tax competition. While the findings of this book focus on Rwanda and the EAC, it is quite possible to apply the findings herein to other developing countries.

As far as the scope of the research is concerned, it would be utopian to claim that this work exhaustively examines all situations related to tax competition. Therefore, the presentations in this book are based on purely legal research and are limited to legal matters and legal points of view. This book does not, for example, deal with the economic impact and effectiveness of favorable tax measures.

[121] Some parts of chapters one, two and five have been published in P Habimana 'The Polarities of Tax Competition' (2021) *The Journal of Sustainable Development, Law and Policy* 12(2), pp. 314-331; P Habimana 'In Search of the Boundaries between Harmless and Harmful Tax Competition' (2021) *Amsterdam Law Forum* 13(1), pp. 31-50; P Habimana, 'The Regulation of Harmful Tax Competition in the EAC: Current Status, Challenges, and ways forward' (2020) *KAS African Law Study Library* 7(4), pp. 601-620; and P Habimana, 'Tax Competition: Global but Virgin under Rwandan Law' (2020) *Recht in Afrika* 23(1), pp. 41-55.

Considering the wide nature of the legal field, this book is, *ratione materiae*, essentially limited to the Rwandan income tax law and the law on investment promotion. *Ratione loci*, this book is essentially limited to the Rwandan legal jurisdiction. Even though, in recognition of the international inner character of tax competition, the study was done in relation to the EAC law with significant reference to EU law and OECD instruments. EU law and OECD instruments are used as best practices for the purpose of clarification. They should not be considered as jurisdictions under study, nor ones under a comparative approach. Important to emphasize again, this book does not reinvent the wheel. In this respect, it does not undertake to develop harmful tax competition definitions, factors, characteristics, etc. Rather, it applies EU and OECD traditions to the Rwandan situation.

1.5. Societal and scientific relevance

Legal scholarship plays a role in strengthening nations through law and development. For example, legal scholarship can help build a better legal infrastructure to improve a country's economic prosperity.[122] This philosophy guides the relevance of this study. A study that focuses on Rwanda, in the midst other EAC members, in the perspective of international taxation is of relevance both at the national and international levels.

At the national level, it is expected that the findings of this research will be used by tax law policymakers, namely the ministry of finance and the RRA. In this regard, this study has the potential to greatly influence the way tax policies and tax laws are designed and implemented, particularly in relation to tax competition. To this end, the policy implications may lead to tax law reform, strategic application of existing tax law, or both.

The findings herein are also relevant to other researchers interested in this area. Indeed, academics, researchers, and university students will take advantage of having new research findings to draw upon in their research, teaching, and studies in the area of tax competition. This book also makes a positive contribution to current discussions and research on tax competition, especially in developing countries. In particular, this book adds to the body of knowledge available worldwide on the situation of Rwanda and the EAC with regard to harmful tax practices.

[122] R A Posner, 'Creating a Legal Framework for Economic Development' (1998) *The World Bank Research Observer* 13(1), 1 and 3 <https://pdfs.semanticscholar.org/d859/07211bdfc039662f1d2f3d3803f69b38beaf.pdf> accessed 28/03/2020.

The relevance of the study at the regional and international levels is justified by the consideration of the research's international character. Although it focuses on Rwanda, policymakers, researchers, academics, and students from other countries with a comparable situation to that of Rwanda will benefit from having research findings that can be used in their respective activities. Beyond that, it is useful for developing countries to be informed about the international legal environment of state tax competition and the changing dynamics of international tax law in general. Thus, this book is essential reading for anyone interested in tax competition, especially those interested in tax competition in or by developing countries. Finally, it is hoped that this study will awaken the EAC on the relevance of preventive and responsive measures against harmful tax practices.

1.6. Research methodology

The research in this book used a qualitative methodology. The main techniques used to collect data were desk research (or library-based). The study mainly thrives on a legal doctrinal approach coupled with comparative law research complements. These two reflect the process used to collect data and information presented in this book and the way in which they were treated.

Considered as the most dominant legal method in the legal world of research,[123] the legal doctrinal approach has been used extensively and guided the preparation of this book. It consisted of an extensive examination, review, investigation, analysis, and synthesis of the relevant literature on the research topic. This included a critical analysis of national, regional, and international legal texts, textbooks, scholarly publications, reports, academic papers, as well as other reliable available documented information.

Regarding the complement of the comparative legal research, EU law and OECD instruments on tax competition were extensively consulted. These include OECD reports and COCG assessments filtered from the two institutions' databases.[124] With resepect to the COCG, it should be noted that it works under a veil of diplomatic confidentiality, which hinders scientific research as many of its working documents are unavailable and unknown to the

[123] T Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) *European L.Rev.* 3, p. 131.
[124] OECD publications & documents <www.oecd.org/ctp/harmful/publicationsdocuments/37/>; CEU Code of Conduct Group Business Taxation <www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/>.

public.[125] Nevertheless, a sufficient number of its assessments has been accessed. Among more than 700 COCG assessments conducted since its establishment,[126] the focus has been on regimes that are comparable to Rwandan regimes, or with a comparable aspect to one or more Rwandan regime(s). This approach has been the same for the OECD assessments. However, the OECD and COCG reports were not used for the purpose of a comparative study *per se,* but merely for reference, clarification, and inspiration.

With respect to the above, the main materials used in this book are: the EAC Treaty, the draft Code of Conduct against harmful tax competition in the EAC, the EU Code of Conduct on business taxation, and the 1998 OECD Report on harmful tax competition. COCG assessment reports and OECD Progress reports are also extensively referred to. The Rwandan income tax law of 2018 and the investment law of 2021 are also central to this study. That being the case, the content of this book is based on materials available up to August 2021.

1.7. Synopsis of chapters

This book is divided into eight chapters, including the general introduction and conclusion. This first chapter has an introductory function. It begins with the research justification. It further sets out the research context. It then states the problem of research and the focal research questions. Thereafter, it elaborates on the research output, its scope, its relevance, and the methodology used, to conclude with this introduction to the structure of the book.

Considering the global characteristic of tax competition, the second chapter provides a general panorama of tax competition. It begins with a brief description of the concept of tax competition, its main features, and its relationship with globalization. It then explains the main principles of tax competition, dominated mainly by the principle of state sovereignty and the vicious circle between state sovereignty and tax competition. It then discusses the practices of tax competition at the global level. After that, it sheds light on the economic and normative

[125] CEU Conclusions of 9 March 1998 concerning the establishment of the Code of Conduct Group (business taxation) 98/C 99/1, *OJEC* (1.4.98) C 99/2; Nouwen (n 109) p. 139, 145 and 146; R Szudoczky and J L van de Streek, 'Revisiting the Dutch Interest Box under the EU State Aid Rules and the Code of Conduct: When a 'Disparity' is Selective and Harmful' (2010) *Intertax* 38(5), p. 274; M Nouwen and P J Wattel, 'Tax Competition and the Code of Conduct for Business Taxation' in P J Wattel, O Marres, and H Vermeulen (eds), *European Tax Law* (7th edn, Wolters Kluwer 2019), pp. 931-32; Nouwen (n 18) p. 18, 19, 20, 72, 87-88, 158, 406.

[126] CEU, Overview of EU Member States' preferential tax regimes examined since the creation of the COCG in March 1998, 8602/1/20 REV 1 FISC 125 ECOFIN 478, 21/06/2021 <https://data.consilium.europa.eu/doc/document/ST-8602-2020-REV-1/en/pdf> accessed 30/07/2021; CEU, Overview of the preferential tax regimes examined by COCG since its creation in March 1998, 9639/4/18 REV 4 FISC 243 ECOFIN 557, 05/12/2019 <https://data.consilium.europa.eu/doc/document/ST-9639-2018-REV-4/en/pdf> accessed 30/07/2021.

perspectives of tax competition. Towards the end, the chapter focuses on the distinction between good tax competition and bad tax competition.

The third chapter provides an overview of the favorable tax measures under Rwandan law. It begins by benchmarking the elements that identify favorable tax measures. It then presents a brief historical development of tax competitiveness in Rwanda. Afterward, it presents the legislative framework of favorable tax measures and the regulatory and administrative practices amounting to favorable tax measures.

In recognition of the global role of the EU and the OECD in regulating tax competition, the fourth chapter focuses on the approaches of these two leading institutions to harmful tax competition. The chapter begins with the 1998 OECD Report on harmful tax competition and the subsequent progress reports. It then looks at the EU's approaches to harmful tax practices mainly through the lens of the EU Code of Conduct on business taxation. After that, it compares the EU criteria with the OECD factors of harmful tax competition. Thereafter, it explores the role of the EU and the OECD in regulating harmful tax practices, including their merits and demerits for developing countries.

In the fifth chapter, the focus switches to the EAC approach to harmful tax practices. The chapter begins with an account of the situation of tax competition in the EAC. It then explains the EAC agenda on tax competition. This is followed by a comparison of the EAC and EU approaches to harmful tax practices before concluding with a reflection on the EAC contribution to the regulation of harmful tax practices.

The sixth chapter is the discussion chapter. This chapter critically analyzes Rwanda's situation of tax competition amidst other EAC countries. It begins with benchmarking of the factors guiding the discussion. It then moves into its core element by critically analyzing the degree of harmfulness of each identified favorable tax measure. It then analyzes the general Rwandan tax system in terms of the situation of exchange of information (EoI) for tax purposes and concludes discussing the impact the OECD proposal for a global minimum tax rate on Rwanda.

With reference to the measures identified as having harmful tax competition aspects, the seventh chapter proposes remedies to build a system that is free of (potential) harmful tax practices. It begins with suggestions on the needed adjustments to refine the current Rwandan tax system. It then suggests the measures that should be taken at the EAC level, particularly in

relation to the draft Code of Conduct against harmful tax competition in the EAC. The chapter concludes by demystifying the myth of tax competition in the EAC and proposes a Model of the EAC Code of Conduct.

The eighth chapter draws a conclusion that summarizes the whole book and recapitulates the main findings from the preceding chapters. It also suggests practical and actionable recommendations for improvement. Afterward, it acknowledges the research limitations and suggests some areas for future research before concluding the book with highlights of the study key contributions.

2 TAX COMPETITION GENERAL PANORAMA

This chapter provides a general overview of (harmful) tax competition. It does so seeking to answer the question of the boundaries between good and bad tax competition. The chapter's aim is to present the general aspects of the phenomenon of harmful tax competition. More specifically, the aim is to present the background of bad (harmful) tax competition as opposed to good (harmless) tax competition. This is done with the aim of reaching the established boundaries between the two. In this respect, the chapter runs through the existing body of knowledge on the subject and does not intend to coin a new boundary.

The chapter is structured as follows: section one attempts to foster an understanding of the main features of tax competition and how it arises. Section two focuses on the principles that guide discussions on tax competition. The main focus is on the principle of state fiscal sovereignty, which implies the right to design one's own preferred tax system, including tax competition policies. The same section highlights the vicious circle between tax sovereignty and competition and addresses the tax competition practices that are currently taking place around the world. The third section reviews two economic schools of thought on tax competition. It also highlights the normative perspectives on tax competition, namely the interactions between tax competition and regional integration, and the development of international standards to palliate the absence of an international legal order on the subject. The fourth section highlights the need to distinguish bad tax competition from good tax competition and clarifies the boundaries between the two. Thereafter comes a conclusion.

2.1. Conceptual and historical background

In a search of understanding what tax competition is, reference is herein made to the concept itself and its key characteristics. The reason to engage in tax competition, its impact, and dimensions also contribute to a better understanding of tax competition. All these aspects are elaborated on below.

2.1.1. A triangular conceptual framework

The phenomenon of tax competition involves three terms, namely tax competition *per se*, harmful tax competition, and harmful tax practices. Starting with the term 'tax competition', its

introduction is largely associated with C. Tiebout in 1956[1] and it has several definitions. From a variety of available definitions, three elements are of central importance, namely the parties involved, the way tax competition is done, and the reasons to engage in tax competition.

In an attempt to define tax competition, and without undermining the economic consideration of local tax competition, i.e. between municipalities or federations, tax competition happens between sovereign and independent states.[2] In other words, tax competition is practiced by and between governments of sovereign states.[3]

Engaging in tax competition, states use their tax-setting powers to work on their tax systems' features by trying to provide the most attractive and competitive tax environment.[4] This is done by lowering the internal tax burden[5] through tax rates or tax base reductions.[6] Although interdependent, this is usually, if not always, done in a strategic uncooperative manner, by which each sovereign state determines its tax policy in disregard of other states' interests.[7]

In this way, states seek to gain a large share of the international tax base.[8] To this end, attracting investment, business, economic activities, capital, and profits is very important and

[1] N E Mitu, 'Tax Competition: Areas of Display and Effects' (2009) *European Research Studies* XII(2), p. 67.
[2] C Pinto, *Tax Competition and EU Law* (Ph.D Thesis, UVA 2002), p. 297-98; J Englisch and A Yevgenyeva, 'The Upgraded Strategy against Harmful Tax Practices under the BEPS Action Plan' (2013) *British L.Rev.* 5, p. 621; P J Wattel, 'Forum: Interaction of State Aid, Free Movement, Policy Competition and Abuse Control in Direct Tax Matters' (2013) *WTJ*, p. 138; A Renda, 'Reflections on the EU Objectives in Addressing Aggressive Tax Planning and Harmful Tax Practices' (2020) Final report to European Commission, p. 16 <http://aei.pitt.edu/102468/1/KP0419785ENN.en_.pdf> accessed 29 April 2020.
[3] R Teather, 'The Benefits of Tax Competition' (2006) IEA Hobart Paper No. 153, p. 25 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=878438> accessed 03/08/2019; A Semeta, 'Competitive Tax Policy and Tax Competition in the EU' (2011) Speech/11/712, 2nd Taxation Forum of Diario Economico/OTOC, p. 3 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_712> accessed 14/08/2019; A P Morriss and L Moberg, 'Cartelizing Taxes: Understanding the OECD's Campaign against Harmful Tax Competition' (2012) *CJTL* 4(1), p. 5.
[4] Semeta, Id., p. 3; C Pinto, 'EU and OECD to Fight Harmful Tax Competition: Has the Right Path Been Undertaken?' (1998) *Intertax* 26(12), p. 386; D M Ring, 'Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation' (2009) *Fla.Tax.Rev.* 9(5), pp. 561-62; V Sobotková, 'Revisiting the Debate on Harmful Tax Competition in the European Union' (2012) *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis* 36(4), p. 344.
[5] Pinto, EU and OECD, Ibid.; Sobotková, Ibid., p. 344.
[6] Teather, The Benefits of Tax Competition (n 3) p. 25; M Wróblewska, 'Harmful Tax Competition in a Globalized World: Does the World Trade Organization Deal with this Issue?' (2016) *Studia Iuridica* 1, p. 15.
[7] Englisch and Yevgenyeva (n 2) p. 621; B B Kristiaji, *Incentives and Disincentives of Profit Shifting in developing Countries,* (Master Thesis, Tilburg Univ. 2015), p. 12; P Dietsch, *Catching Capital: The Ethics of Tax Competition* (OUP 2015), p. 2 and 36; P Dietsch, 'Whose Tax Base? The Ethics of Global Tax Governance', in P Dietsch and T Rixen (eds), *Global Tax Governance: What is Wrong with it and How to Fix it* (ECPR Press 2016), p. 232.
[8] Pinto, Tax competition (n 2) pp. 297-98.

is often mentioned in definitions of tax competition.[9] Thus, a combination of the above elements would lead to defining tax competition as strategic practices of states to lower the internal tax burden in order to gain a larger share of the international tax base through business attraction.

Taken as such, the situation would not raise many questions at the outset, especially in the eyes of lawyers. The challenges come when the qualification 'harmful' is added. Although important, this concept has not received many definitions. Even the major institutions that are generally considered to be at the forefront of regulating tax competition have shown little interest in defining that term. This is true of the OECD, whose 1998 Report addressed harmful tax competition without defining exactly what it is.[10] Indeed, the OECD frankly admitted that there is no technical meaning of harmful tax competition.[11] The same is also true of the 1997 EU Code of Conduct on business taxation.[12] Yet, the two organizations are internationally recognized for having pioneered the discussions and regulations of harmful tax competition.

Moreover, scholars note that it is impossible to provide an exact definition of harmful tax competition,[13] to an extent that so far there is no generally accepted legal or academic definition of harmful tax competition.[14] In this context, it has been argued that harmful tax competition cannot be defined because it has no intrinsic meaning.[15] Nevertheless, harmful tax competition is synonymously referred to as tax poaching and/or tax piracy[16] and is widely

[9] Ring, Democracy, Sovereignty and Tax Competition (n 4) pp. 561-62; Teather, The Benefits of Tax Competition (n 3) p. 25; Semeta (n 3) p. 3; Sobotková (n 4) p. 344; Pinto, EU and OECD (n 4) p. 386; Wróblewska (n 6) p. 15; Renda (n 2) p. 16; Englisch and Yevgenyeva (n 2) p. 621; D M Ring, 'What's at Stake in the Sovereignty Debate: International Tax and the Nation-State' (2008) *Va.J.Int'Ll.* 49(1), p. 21

[10] G M Melo, 'Taxation in the Global Arena: Preventing the Erosion of National Tax Bases or Impinging on Territorial Sovereignty (A Critique of the OECD'S Report: Harmful Tax Competition: An Emerging Global Issue)' (2000) *Pace International L.Rev.* 12(183), p. 186 and 197; B J Arnold and M J McIntyre, *International Tax Primer* (2nd edn, Wolters Kluwer 2002), p. 138.

[11] OECD (1998), *Harmful Tax Competition: An Emerging Global Issue*, OECD Publishing, p. 20.

[12] Wróblewska (n 6) p. 16; P Boria, *Taxation in European Union* (2nd edn, Springer 2017), p. 166.

[13] Arnold and McIntyre (n 10) p. 138; C M Radaelli, 'Harmful Tax Competition in the EU: Policy Narratives and Advocacy Coalitions' (1999) *JCMS* 37(4), p. 672.

[14] Wróblewska (n 6) p. 16; C M Radaelli, 'The Code of Conduct against Harmful Tax Competition: Open Method of Coordination in Disguise' (2003) *Public Administration* 81(3), p. 522; H Gribnau, 'Soft Law and Taxation: EU and International Aspects' (2008) *Legisprudence* 2(2), p. 76; O Pastukhov, 'Counteracting Harmful Tax Competition in the European Union' (2010) *Sw.JIL* 16, p. 161; L V Faulhaber, 'The Trouble with Tax Competition: From Practice to Theory' (2018) *Tax L.Rev.* 71(311), p. 312 and 314.

[15] Faulhaber, Id. p. 359.

[16] Pinto, EU and OECD (n 4) p. 390; Boria (n 12) p. 166; M G Asher and R S Rajan, 'Globalization and Tax System: Implications for Developing Countries with Particular Reference to Southeast Asia' (2001) *ASEAN Economic Bulletin* 18(1), p. 127; T Edgar, 'Corporate Income Tax Coordination as a Response to International Tax Competition and International Tax Arbitrage' (2003) *CTJ/RFC* 51(3), p. 1141; B J Kiekebeld, *Harmful Tax Competition in the European Union, Code of Conduct, Countermeasures and EU Law*, Deventer, Kluwer, 2004, 8-9 cited in C Biz, 'Countering Tax Avoidance at the EU Level after 'Luxleaks' A History of Tax Rulings, Transparency and BEPS: Base Erosion Profit Shifting or Bending European Prospective Solutions? (2015) *DPTI*

associated with tax havens and harmful preferential tax regimes (HPTR).[17] The details of tax havens and HPTRs are provided in this book's chapter four, the fourth sub-section of the first section.

Leaning on the synonymous use with tax poaching, harmful tax competition stands as a negative continuation of tax competition. This understanding justifies embracing the definition that describes harmful tax competition as referring to a '*country's exploitation of the interaction of the tax systems by enacting special tax provisions which principally erode the tax base of other countries*'.[18] Here, the most important and qualifying element is the erosion of the tax base of other countries, which, in one way or another, says the same thing as poaching the taxes of other countries. Harmful tax competition thus concerns tax rules that erode other countries' tax bases, but not one's own tax base, which remains intact. That would be made more specific by pointing out that the fact that a country can increase its tax base by policy competition may not in itself be considered harmful. The harmfulness arises from ring-fencing, whereby a state ensures that its favorable tax measures are not available to investors already resident in its jurisdiction.

In addition to harmful tax competition, there is also the concept of harmful tax practices. Like harmful tax competition, the definition of harmful tax practices is considered complex by scholars, with no general agreement, academic or political.[19] Nevertheless, the term 'harmful tax practice' is used interchangeably with 'harmful tax competition'. The interchangeable use stems from the OECD reports. This Organization's 1998 Report used the term 'harmful tax competition', while the 2001 Progress Report adopted the term 'harmful tax practices'.[20] Even before that, an annex to the 1998 confidential document of the OECD used the term 'harmful tax competition' while its appendix used the term 'harmful tax practices'.[21] Nevertheless, both terms are used today and are herein used interchangeably.

XII(4), pp. 1039-40; M Ronzoni, 'Tax Competition: A Problem of Global or Domestic Justice?', in P Dietsch and T Rixen (eds), *Global Tax Governance: What is Wrong with it and How to Fix it* (ECPR Press 2016), p. 204; E Traversa and P M Sabbadini, 'State Aid Policy and the Fight against Harmful Tax Competition in the Internal Market: Tax Policy Disguise', in W Haslener, G Kofler and A Rust (eds), *EU Tax Law and Policy in the 21st Century* (Kluwer Law International 2017), p. 111.

[17] I Calich, *The Impact of Globalization on the Position of Developing Countries in the International Tax System* (Ph.D Thesis, LSE 2011), pp. 59-60.

[18] Pinto, EU and OECD (n 4) p. 340.

[19] Englisch and Yevgenyeva (n 2) p. 622.

[20] Morriss and Moberg (n 3) p. 49.

[21] OECD, Confidential draft Recommendation on Counteracting Harmful Tax Competition, C(98)17 (17 Feb. 1998), p. 8 and 10, <https://one.oecd.org/document/C(98)17/en/pdf> accessed 29/08/2021.

Based on the above, and despite several initiatives dealing with tax competition, this area is characterized by a paucity of definitions of the main concepts underlying it. This has led to considering attempts to define tax competition and harmful tax competition as multi-faceted.[22] Furthermore, that leads to describing it with reference to the 'elephant test' and statements such as '*you'll know one when you see it*'.[23] Left unresolved, that paucity exists along with some other manifold discussions, including the origins of tax competition.

2.1.2. Natural background

Tax competition is contended to be a natural phenomenon among other forms of competition. In this respect, it stands as inevitable, natural, and necessary with regard to the structure of international tax systems.[24] This is due to the unavoidable differences in tax rules, where states, naturally, have different tax laws in terms of tax base, tax rates, deductions, etc.[25] This nature, therefore, enables states to compete against each other using the available natural and unavoidable tax differences such as statutory or effective tax rates.[26]

The natural essence of tax competition is also overhauled by its long existence coupled with the likelihood to continue in the future.[27] Indeed, it is evident that countries have competed and will increasingly compete to attract investments.[28] Moreover, competing for investment through tax policies has existed for centuries to such an extent that scholars consider it as old as governments' income taxation.[29] Some practices that are now considered as forms of tax competition, like tax havens, already existed in the 1920s and 1930s.[30] In the 1950s, tax competition was also complicated by the proliferation of pioneer ring-fenced tax regimes with

[22] Pastukhov (n 14) p. 163.
[23] Ibid.
[24] Faulhaber (n 14) p. 312 and 321; D C Elkins, 'The Merits of Tax Competition in a Globalized Economy' (2006) *Indiana LJ* 91(3), p. 905 and 909.
[25] Morriss and Moberg (n 3) p. 14.
[26] F Wishlade, 'When Policy Worlds Collide: Tax Competition, State Aid, and Regional Economic Development in the EU' (2012) *Journal of European Integration* 34(6), p. 586.
[27] Asher and Rajan (n 16) p. 125; R Azam, 'Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS' (2017) *SuffolkU.L.Rev.* 50(4), p. 523; M C Durst, 'Poverty, Tax Competition, and Base Erosion' (2018) *Tax Notes International* 89(12), p. 1196.
[28] Asher and Rajan, Ibid.
[29] Faulhaber (n 14) p. 312 and 326; Morriss and Moberg (n 3) p. 23; Y Brauner, 'What the BEPS?' (2014) *Fla.Tax.Rev.* 16(2), p. 64.
[30] I Calich, *The Impact of Globalization on the Position of Developing Countries in the International Tax System* (Ph.D Thesis, LSE 2011), p. 51.

reduced or exempted taxes to entities doing business abroad.[31] Beyond its natural character, tax competition is broadly associated with retaliation, which makes it a human creation.

2.1.3. Retaliation background

In contrast to the view of tax competition's natural essence, there is another approach that views it as a coined policy. The coined policy view is mainly based on retaliation as one of the most important features of tax competition. In this approach, tax competition exists as a result of retaliation, through which the first pioneers of tax competition receive retaliation from their peers. In this school of thought, tax competition develops in two stages: first, the pioneer countries alter their tax systems to lower tax rates, and second, other countries respond by lowering their tax rates too.[32] In other words, the pioneer reduction of the tax burden (first round), gets retaliated against by a reduction (second round), to which the pioneers of reduction respond by reducing again (third round), and the sequence can continue like that.

That sequence of retaliation stands as the foundation of tax competition based on the theory according to which '*people respond to tax differentials by moving tax bases to jurisdictions where tax rates are lowest*'.[33] This reasoning motivates the opinion that early practices of tax competition were accidental before governments discovered the importance of effective tax rate reductions to attract investment.[34] Thus, investment attraction stands as a motive for retaliation.

As an example of retaliation, European countries reduced their CIT rates in response to the UK and Ireland initiatives. This happened when the UK introduced a substantial reduction in the CIT rate from 52% to 35% in 1984.[35] The next year (i.e 1985) France reduced its CIT rate from 50% to 45% and later in 1988 to 42%, and Germany from 56% to 50% in 1990.[36] Another example comes from Ireland. In the 1980s, Ireland reduced its CIT rate to 12.5%. In response to Ireland's competitive pressure, some EU countries promptly reduced their CIT rates too, such as Portugal which reduced from 30% to 20%, Austria which reduced from 34% to

[31] Morriss and Moberg (n 3) p. 28.
[32] Teather, The Benefits of Tax Competition (n 3) p. 25; L Wang, *Influences of Preferential Tax Regimes Provided to Attract Non-resident Investment* (Master Thesis, Univ.Toronto 2006), p. 57.
[33] Teather, Id., p. 62.
[34] Id., p. 23.
[35] J Bossons, 'International Tax Competition: The Foreign Government Response in Canada and other Countries' (1988) *Nat'l Tax J.* 41(3), p. 350; M P Devereux, 'Business Taxation in a Globalized World' (2008) *Oxford Review of Economic Policy* 24(4), p. 629.
[36] Ibid.

25%, and Greece which reduced its CIT by 5%.[37] Another example in this respect is the 10% WHT on interest paid to bank depositors introduced by Germany in 1988, which was abolished within a few months due to the magnitude of capital flight to Luxembourg.[38] However, the above examples were not absolute trigger points as they coincided with the reduction in the US CIT rate in 1986.[39]

Another example, in terms of retaliation, is the case of the US portfolio interest exemption. In 1984, the US abolished a 30% WHT on foreign residents who earn portfolio interest income from sources within the US.[40] In retaliation, WHT on interest was eliminated in all major economies for fear of losing mobile capital flows to the US.[41] Major capital-importing countries also failed to impose a similar tax for fear of driving mobile capital elsewhere.[42] In support of this, the European Committee of Independent Experts on Company Taxation issued a report in 1992 that concluded that '*recent experience suggests that any attempt by the European Communities to impose withholding taxes on cross-border interest flows could result in a flight of financial capital to non-European Communities countries*'.[43]

In support of the above, R. S. Avi-Yonah rightly opines that countries can refrain from offering tax incentives if they can be sure that no other country will offer them.[44] This statement identifies tax competition as a game arbitrated by fear, legitimate or not, of what others are doing or may do.[45] Thus, the problem of tax competition is essentially qualified as a problem

[37] D J Mitchell, 'Europe has Caught Tax-Cut Fever', *Wall St. J. Eur.*, 3/03/2004, A8 cited in Pastukhov (n 14) p. 167.
[38] R S Avi-Yonah, 'Bridging the North/South Divide: International Redistribution and Tax Competition' (2004) *MichJIntlL* 26, p. 383.
[39] Devereux (n 35) p. 629; J G Gravelle, 'International Corporate Tax Rate Comparisons and Policy Implications' (2014) Congressional Research Service Report, p. 2 and 22 <https://fas.org/sgp/crs/misc/R41743.pdf> accessed 27/03/2020.
[40] R S Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State' (2000) *HarvLRev* 113(7), pp. 1579-81.
[41] Id., p. 158; L A Mello, *Tax Competition and the Case of Bank Secrecy Rules: New Trends in International Tax Law* (SJD Dissertation, Univ.Michigan 2012), pp. 18-19.
[42] Ayi-Yonah, Bridging the north/south divide (n 38) p. 376; Avi-Yonah, R S Avi-Yonah, 'Globalization and Tax Competition: Implications for Developing Countries' (2001) *Cepal Review* 74, p. 60.
[43] EU Com., Report of the Committee of Independent Experts on Company Taxation, Mar. 1992, p. 201 <https://op.europa.eu/en/publication-detail/-/publication/0044caf0-58ff-4be6-bc06-be2af6610870> accessed 22 Jan. 2019.
[44] Avi-Yonah, Globalization and TC (n 42) p. 63; Ayi-Yonah, Bridging the north/south divide (n 38) p. 381; M P van der Hoek, 'Tax Harmonization and Competition in the European Union' (2003) *eJournal of Tax Research* 1(1), p. 23.
[45] Avi-Yonah, Globalization and TC, Id. p. 63.

of coordination and trust.[46] With this approach, the game of tax competition becomes a vicious circle orchestrated by retaliation, mutual influence, and fear. The circle turns around the fact that one country's practice entails retaliation by other countries. This retaliatory perspective suggests that many countries would prefer to keep their tax rates higher if there were no retaliatory pressure forcing them to adjust to other countries' tax policies. It is, therefore, against that retaliation background that tax competition becomes described as a coined policy. In other words, tax competition becomes possible through states' interrelations and the situation becomes more exacerbated with globalization.

2.1.4. Globalization impact

To change the subject a bit, tax competition is widely associated with globalization. In this view, globalization is largely seen as a trigger point for the intensification of tax competition.[47] This view is shared by the OECD, whose 1998 Report identifies globalization as the main factor behind the increase in tax competition.[48] Tax competition also intensifies as countries become more interdependent as a result of globalization.[49]

In fact, before globalization, tax competition was not as fierce as it is nowadays. At that time, due to the low level of capital mobility early tax policies used to focus primarily on addressing domestic economic and social concerns.[50] The situation began to change with globalization, which greatly influenced the international mobility of capital and people. Indeed, globalization led to high capital mobility,[51] which created economic uncertainties,[52] which in turn pushed states to design tax competing policies over investments that have already started to flow to locations with low taxation.[53]

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[46] Id., p. 64; Ayi-Yonah, Bridging the north/south divide (n 38) p. 382; P Letete, 'Between Tax Competition and Tax Harmonization: Coordination of Value Added Taxes in SADC Member States' (2012) *Law Democracy and Development* 16, p. 124.
[47] Pinto, EU and OECD (n 4) p. 390; T Baskaran and M L da Fonseca, 'The Economics and Empirics of Tax Competition: A Survey and Lessons for the EU' (2014) *ELR* 1, p. 4.
[48] OECD 1998 Report (n 11) p. 7.
[49] S Leviner, 'The Intricacies of Tax and Globalization' (2014) *CJTL* 5(207), p. 213.
[50] OECD 1998 Report (n 11) p. 13; S Drezgić, 'Harmful Tax Competition in the EU with Reference to Croatia' (2005) *Journal of Economics and Business* 23(1), p. 73.
[51] OECD 1998 Report, Ibid.; Sobotková (n 4) p. 343 and 344; Asher and Rajan (n 16) p. 120.
[52] Asher and Rajan, Id., p. 127.
[53] OECD 1998 Report (n 11) p. 13; Avi-Yonah, TC and Fiscal Crisis (n 40) p. 1575; Avi-Yonah, Globalization and TC (n 42) p. 59 and 60; Sobotková (n 4) p. 343; Morriss and Moberg (n 3) p. 28; Pastukhov (n 14) p. 160; Gribnau, Soft law and taxation (n 14) p. 75; M F Ambrosanio and M S Caroppo, 'Eliminating Harmful Tax Practices in Tax Havens: Defensive Measures by Major EU Countries and Tax Haven Reforms' (2005) *CTJ/RFC* 53(3), p. 686.

Furthermore, and notwithstanding the positive effects of globalization on the development of tax systems,[54] the interactions of globalization and tax competition have created a situation where one country's tax system can potentially have an impact on, or suffer an impact from, other countries' tax systems.[55] In consequence, countries become unable to set tax rules absolutely in a unilateral way in an era of globalization and tax competition.[56]

The interactions between globalization and tax competition were first seriously noticed and focused on in the 1980-90s.[57] It was during this time that the EU and the international community began to be mindful of tax competition, especially the so-called 'unfair' tax competition.[58] It is exactly in the mid-1990s, that the EU and the OECD openly expressed their concern about the link between globalization and tax competition on the one hand and the countries' tax crisis on the other.[59] Given that interaction, international tax competition came on in two ways: one as a result of capital mobility,[60] the other as a response to the same capital mobility.[61] In both cases, tax base mobility drives tax competition.[62] However, globalization does not stand alone and other factors should also be considered.

Such other factors are the advent of scientific and technological progress, disappearance of barriers to capital movement, increased and improved transportation and communication technology, and legal and economic developments.[63] These factors have made the world very small, which in turn has fueled tax competition.[64] Hence, the consistent advance of tax competition led to consistent confrontations between the principles of tax competition and its practice, which is the subject of the next section.

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[54] OECD 1998 Report, Id., p. 14; Wróblewska (n 6) p. 13.
[55] H J Ault, 'Reflections on the Role of the OECD in Developing International Tax Norms' (2009) *BrookJIntlL* 34(3), p. 763.
[56] Avi-Yonah, Globalization and TC (n 42) p. 65.
[57] Elkins (n 24) p. 911; Calich (n 30) p. 20; Bossons (n 35) p. 347; Faulhaber (n 14) p. 326.
[58] Wishlade (n 26) p. 586.
[59] Id., p. 587.
[60] Ambrosanio and Caroppo (n 53) p. 686; Avi-Yonah, TC and Fiscal Crisis (n 40) p. 1575.
[61] OECD 1998 Report (n 11) p. 13.
[62] Ayi-Yonah, Bridging the north/south divide (n 38) p. 375; P Genschel and P Schwarz, 'Tax Competition: A Literature Review' (2011) *Socio-Economic Review* 9(2), p. 342; C O F de Almeida and M E Pereira, 'Brazilian Perspectives on Secret, Cooperation and International Tax Competition' (2016) *CIAT/AEAT/IEF Tax Administration Review* 40, p. 62.
[63] Pinto, Tax competition (n 2) p. 5; Calich (n 30) p. 21; L B Samuels and D C Kolb, 'The OECD Initiative: Harmful Tax Practices and Tax Havens' (2001) *Taxes* 79(231), p. 232; V Chand and K Romanovska, 'International Tax Competition in light of Pillar II of the OECD Project on Digitilization', Kluwer International Tax Blog, 14/05/2020 <http://kluwertaxblog.com/2020/05/14/international-tax-competition-in-light-of-pillar-ii-of-the-oecd-project-on-di gitalization/> accessed 29/07/2021.
[64] Pinto, Ibid.

2.2. Principles and practices of tax competition

Tax competition lays its foundations on some chains of reasoning, mainly dominated by state tax sovereignty. States also justify tax competition as an inalienable right to compete for the nation-building. This section discusses the confrontation between an accepted principle of state sovereignty and the states' freedom to compete.

2.2.1. State sovereignty

State sovereignty is broadly accepted as a key element forming a state as a state. It is extensively discussed both in theory and in practice. Further to state sovereignty in general, tax sovereignty is key to state self-determination. Both general state sovereignty and state tax sovereignty are discussed below.

2.2.1.1. General state sovereignty

State sovereignty is one key element in international law. State sovereignty, as a concept and a principle, is enshrined in several international legal instruments and is emphasized in most national legal instruments. It is also considerably discussed in academic debates, let alone the practice of international law. Its relevance is widely accepted to the extent that it is equated with statehood[65] while its absence would amount to there being no state.

State sovereignty is enshrined in article 2(1) of the 1945 Charter of the UN, which establishes it as one of the UN fundamental principles. The principle of state sovereignty is also embodied in several international legal instruments such as the AU Constitutive Act, which establishes the defense of member states' sovereignty and territorial integrity as some of the Union's objectives.[66] Similarly, the EAC Treaty establishes the sovereign equality of members as one of the fundamental principles of the Community.[67]

According to the theory of state sovereignty, all states are sovereign and equal. Sovereignty also entails states' authoritative power to control their internal affairs while keeping

[65] Avi-Yonah, Globalization and Tax Competition (n 42) p. 60; D Pinto, 'Governance in a Globalized World: Is it the End of the Nation State?', in R Biswas (ed), *International Tax Competition: Globalization and Fiscal Sovereignty* (Commonwealth Secretariat 2002), p. 72.
[66] AU Constitutive Act, art. 3 and 4.
[67] Treaty for the Establishment of the East African Community (As amended on 14/12/2006 and 20/08/2007), art. 6(1)(a).

independence among each other.[68] Non-interference is a core value of external sovereignty,[69] and encompasses political, social, and economic affairs.[70] It further stands as a right and an obligation. This says that every sovereign state has the right not to be interfered with by another state as every state has the duty not to interfere in the internal affairs of another state.

Applied in legal matters, state sovereignty involves the right of a state to freely promulgate, adjudicate and enforce legal rules within its territory.[71] The motive and purpose of such rules are left to the discretion of the adopting sovereign state, as it is free to manage its internal affairs. Beyond that, sovereignty in its broadest sense encompasses various aspects, including tax sovereignty.

2.2.1.2. State tax sovereignty

State tax sovereignty stands as a continuation or specific element of state sovereignty. In other words, taxation policy is part of the state's general sovereignty as the power to tax remains a sovereign right.[72] In this respect, taxation has been historically linked to sovereignty, and tax sovereignty has been guarded and protected by both states and international law for hundreds of years.[73] This leads to considering taxation as a classic attribute of state sovereignty[74] and at the heart of national sovereignty.[75] Consequently, nothing is closer to state sovereignty than

[68] D M Ring, 'What's at Stake in the Sovereignty Debate: International Tax and the Nation-State' (2008) *Va.J.Int'Ll.* 49(1), p. 4.
[69] P Dietsch, 'Rethinking Sovereignty in International Fiscal Policy' (2011) *Rev.Int'lStud.* 37, p. 2109; L van Apeldoorn, 'International Taxation and the Erosion of Sovereignty', in P Dietsch and T Rixen (eds), *Global Tax Governance: What is Wrong with it and How to Fix it* (ECPR Press 2016), pp. 217-18.
[70] Id., p. 217.
[71] Apeldoorn, Id., p. 217.
[72] P T Scanlan, 'Globalization and Tax-Related Issues: What are the Concerns?' in R Biswas (ed), *International Tax Competition: Globalization and Fiscal Sovereignty* (Commonwealth Secretariat 2002), p. 45; P Lampreave, 'Fiscal Competitiveness versus Harmful Tax Competition in the European Union' (2011) *BFIT* 65(6), p. 4.
[73] R Biswas, 'Introduction: Globalization, Tax Competition and Economic Development', in R Biswas (ed), *International Tax Competition: Globalization and Fiscal Sovereignty* (Commonwealth Secretariat 2002), p. 1; B Maurer, 'From the Revenue Rule to Soft Law and Back Again: The Consequences for 'Society' of the Social Governance of International Tax Competition' in F V Benda-Beckmann, K V Benda-Beckmann and J Eckert (eds), *Rules of Law and Laws of Ruling: On the Governance of Law* (Ashgate Publishing 2009), p. 221.
[74] A C Santos and C M Lopes, 'Tax Sovereignty, Tax Competition and the Base Erosion and Profit Shifting Concept of Permanent Establishment' (2016) *EC T.Rev.* 5/6, p. 296; K Carlson, 'When Cows Have Wings: An Analysis of the OECD's Tax Haven Work as it Relates to Favor, Sovereignty and Privacy' (2002) *J.MarshallL.Rev.* 35(163), p. 178.
[75] Ayi-Yonah, Bridging the north/south divide (n 38) p. 386; M C Webb, 'Defining the boundaries of legitimate state practice: Norms, transnational actors and the OECD's project on harmful tax competition' (2004) *Review of international political economy* 11(4), p. 788; T Rixen, 'Tax Competition and Inequality: The Case for Global Tax Governance' (2011) *Global Governance* 17, p. 447.

taxation,[76] to such an extent that no significant issue of international taxation can be discussed without reference to sovereignty.[77]

In the same vein, state tax sovereignty is one of the oldest determinants of general state sovereignty. Indeed, since antiquities, a state's absolute right to tax its subjects is broadly recognized,[78] and even today, it remains an essential component of effective government.[79] For instance, the 1998 OECD Report notes, as a matter of principle, each country's freedom to design its own tax system.[80] On this point, the OECD made it clear and explicitly emphasized in many of its reports that each country is sovereign to decide the appropriate tax rates.[81] The OECD further emphasized that it does not seek to dictate to any country, member or not, nor to impose any tax nor any tax rate nor any tax system structure.[82] The OECD also reiterated in its 2004 Consolidated Application Note that tax levels and structures are political decisions of national governments, adding that, as acknowledged by its 1998, 2000, and 2001 Reports, there is no special nor a particular reason for countries to have the same.[83] EU members also recognize national tax sovereignty as important and want to retain their rights and powers in the tax area.[84]

Tax sovereignty has also been recognized and advocated by academics,[85] with an emphasis on the right and freedom of a state to adopt any tax rule believed to further its own

[76] J Li, 'Tax Sovereignty and International Tax Reform: The Author's Response' (2004) *CTJ/RFC* 52(1), p. 144.
[77] Ring, Sovereignty Debate (n 68) p. 1.
[78] Id., p. 32; Melo (n 10) p. 186.
[79] Ring, Id., p. 187.
[80] OECD 1998 Report (n 11) p. 15; Scanlan (n 72) p. 45; T Rixen, 'Taxation and Cooperation: International Action against Harmful Tax Competition', in S A Schirm (ed), *Globalization: State of the Art and Perspectives* (Routledge 2007), p. 72.
[81] OECD (2001), The OECD's Project on Harmful Tax Practices: The 2001 Progress Report, OECD Publications, p. 4; OECD (2004), The OECD's Project on Harmful Tax Practices: The 2004 Progress Report, OECD Publications, p. 4; OECD (2006), The OECD's Project on Harmful Tax Practices: The 2006 Progress Report (OECD Publications), p. 3.
[82] OECD 2006 progress report, ibid.; OECD 2004 progress report, ibid; D Mitchell, 'Between the Lines: Havens can wait' (2002) *Foreign Policy* 131, p. 71; A W Oguttu, 'International tax competition, Harmful tax practices and the 'Race to the bottom': a special focus on unstrategic tax incentives in Africa' (2018) *CILJSA* 51(3), p. 46; Calich (n 30) p. 61.
[83] OECD (2004), *Consolidated Application Note in Applying the 1998 Report to Preferential Tax Regimes*, OECD Publishing, p. 21; Wróblewska (n 6) p. 16; Lampreave (n 72) p. 4.
[84] EU Com., Communication from the Commission to the Council, The European Parliament and the European Economic and Social Committee on Promoting Good Governance in Tax Matters, COM(2009) 201, 28/04/2009, p. 5; Pinto, Tax competition (n 2) p. 52; J McLaren, *Will Tax Havens Survive in the New International Legal Environment?* (Ph.D Thesis, RMIT Univ. 2010), p. 125; M Nouwen, 'The European Code of Conduct Group Becomes Increasingly Important in the Fight against Tax Avoidance: More Openness and Transparency is Necessary' (2017) *Intertax* 45(2), p. 138; L de Broe, R J Danon, and V Chand, 'Comments to Public Consultation Document: Global Anti-Base Erosion Proposal (GloBE) – Pillar Two' (2019), p. 13, <https://serval.unil.ch/resource/serval:BIB_D8C1987EFA9C.P001/REF> accessed 10/06/2021.
[85] W B Vlcek, *Small States and the Challenge of Sovereignty: Commonwealth Caribbean Offshore Financial Centers and Tax Competition* (Ph.D Thesis, Univ.London 2006), p. 105; D Pinto, 'Governance in a Globalised

interests.[86] This motivates qualifying tax sovereignty as a quintessential property of a nation-state, without which, a state cannot function or even exist at all.[87] Other examples of legal scholarship that recognize a state's tax sovereignty include the recognition of a state's tax self-determination,[88] the freedom to develop appropriate tax policies including the tax due, tax base, and tax rates,[89] and the right to retain control over its own tax policies.[90] Scholars also describe tax sovereignty as a fundamental component of national sovereignty,[91] inexorable principle,[92] state prerogative,[93] fundamental for the state to effectively govern its territory,[94] an essential component of sovereign states,[95] etc.

However, state tax policies are fiercely challenged by international tax developments, which makes state tax sovereignty not absolute except if the concerned country is completely isolated from others.[96] With this logic, the 1998 OECD Report, while recognizing countries' tax sovereignty, adds that they should do so abiding by internationally accepted standards.[97] International tax reforms by international organizations, engagement in the tax treaties,[98] and current integrated economies[99] also create limitations for absolute state tax sovereignty.

World: Is it the End of the Nation State?', in R Biswas (ed.), *International Tax Competition: Globalisation and Fiscal Sovereignty* (Commonwealth Secretariat, 2002), p. 78; M Gaffney, 'Competition: More Harm than Good' (1999) *Int'lT.Rev.* 10(1), p. 47; Mello (n 41), p. 32.

[86] F Cachia, 'Analyzing the European Commission's Final Decisions on Apple, Starbucks, Amazon and Fiat Finance & Trade' (2017) *EC T.Rev.* 1, p. 34.

[87] M F de Wilde, *Sharing the Pie: Taxing Multinationals in a Global Market* (Ph.D Thesis, EUR 2015), p. 5.

[88] A Christians, 'Sovereignty, Taxation and Social Contract' (2009) *Minn.J.Int'lL.* 18(1), p. 101.

[89] Apeldoorn (n 69) p. 215; A Sanni, 'Sovereign Rights of Tax Havens and the Charge of Harmful Tax Competition' (2011) <www.thesait.org.za/news/96869/Sovereign-Rights-Of-Tax-Havens-And-The-Charge-Of-Harmful-Tax-Competition.htm> accessed 30/07/2019; F Boulogne, 'Reviewing the OECD's and the EU's Assessment of Singapore's Development and Expansion Incentive' (2019) SMU Sch. of Accountancy Research Paper 7(1), p. 10 <http://dx.doi.org/10.2139/ssrn.3349404> accessed 14/08/2019.

[90] Sanni, Ibid.

[91] B Patterson and A M Serrano, 'Tax Competition in the European Union' (1998) European Parliament Directorate General for Research Economic Affairs Series WP ECON-105 EN, PE 167.812, p. 5 <http://europarl.europa.eu/workingpapers/econ/pdf/105_en.pdf> accessed 21/06/2019; B da Silva, 'Taxing Digital Economy: A Critical View around the GloBE (Pillar Two)' (2020) *FLC* 15(2), p. 122.

[92] Sanni (n 89).

[93] Ibid.

[94] A Townsend, 'The Global Schoolyard Bully: The Organization for Economic Cooperation and Development's Coercive Efforts to Control Tax Competition' (2001) *FordhamInt'lL.J.* 25(1), p. 219.

[95] Christians, Sovereignty, Taxation and Social Contract (n 88) p. 105 and 104; J Owens and R McDonell, 'Inter-agency Cooperation and Good Tax Governance in Africa: An Overview' in J Owens et al. (ed.), *Inter-agency Cooperation and Good Tax Governance in Africa* (PULP 2017), p. 3.

[96] J Li (n 76) p. 144; T Dagan (ed), *International Tax Policy: Between Competition and Cooperation* (CUP 2018), p. 2; Chand and Romanovska (n 63).

[97] OECD 1998 Report (n 11) p. 15; Lampreave (n 72) p. 5; Scanlan (n 72) p. 45; Gaffney (n 85) p. 47.

[98] Calich (n 30) p. 29; Chand and Romanovska (n 63).

[99] Id., p. 28.

The non-absolute nature of state sovereignty is further due to the fact that states are fiscally interdependent.[100] Thus, a change in the tax system of one state very likely affects the tax system in one or more other countries.[101] It, therefore, becomes impossible for a national tax system to stay away from the impact of other states' tax sovereignties.[102] For instance, one country's tax policy largely influences the allocation of the overall tax base.[103] In this respect, each state experiences constraints and competition from others.[104] Thus, even if states remain *de jure* sovereign, this actually means less in practice, which is characterized by *de facto* limited sovereignty.[105] From this, tax sovereignty becomes a *prima facie* freedom, but which is not isolated nor absolute, but rather relative.[106] In the same vein, one state's sovereignty cannot annul another state's sovereignty.[107] This line of reasoning largely dominates thinking about tax competition, which is seen as a state's right to do so, but also complemented by a state's need to be protected against the negative consequences of other states' tax competition.

Concurring with both sides, less contestable is the fact that state fiscal sovereignty implies the freedom of a state to design a tax system that better fits its own interests. This is the domestic (internal) side of sovereignty.[108] Externally, each state is sovereign to remain independent vis-à-vis other states in terms of fiscal policies. With this, the state's fiscal sovereignty goes further to refuse any outside interference in tax matters, even if the choices made will affect the tax base of other states.[109] It is within this scope that the issues of tax competition fall.

Besides, because customary international law leaves it to the state to decide who its nationals and residents are,[110] it becomes possible for a state's freedom of taxation to go beyond its territory and tax its nationals' and residents' establishments worldwide. This shows the possible extent to which a state's tax sovereignty can be exercised usefully or abusively. It

[100] Apeldoorn (n 69) p. 215.
[101] Christians, Sovereignty, Taxation and Social Contract (n 88) p. 148; Calich (n 30) pp. 28-29; S Bond et al., *Corporate Tax Harmonization in Europe: A Guide to the Debate* (2000) The Institute for Fiscal Studies, London, p. 49 <www.ifs.org.uk/comms/r63.pdf> accessed 24/08/2019.
[102] Lampreave (n 72) p. 4
[103] Apeldoorn (n 69) p. 215.
[104] D Deák, 'Illegal State Aid and Harmful Tax Competition: The Case of Hungary' (2002) *Society and Economy* 24(1), p. 24.
[105] Apeldoorn (n 69) p. 216; A Christians, 'Networks, Norms, and National Tax Policy' (2010) *Wash.Univ. Global Studies L.Rev.* 9(1), pp. 104-14.
[106] S Douma, *Optimization of Tax Sovereignty and Free Movement* (Ph.D Thesis, Leiden Univ. 2011), p. 81.
[107] Ibid.
[108] Dietsch (n 69) p. 2109.
[109] Id., p. 2108.
[110] Douma, Optimization of Tax Sovereignty (n 106) p. 22.

equally shows how a state's tax sovereignty can be exercised within and outside its territorial boundaries. Taking this into account, the internal effects of state fiscal sovereignty apparently pose fewer issues. The questions arise when the effects escalate outside the state's borders and collide with the freedoms of other states.

2.2.2. States fiscal competition freedom

States broadly engage in a variety of competitions, including tax competition. A state's freedom to compete fiscally stands as an extension of state sovereignty. The means of competition vary and include tax rules designed to create an environment of tax competition. More than just being viewed as a state's recognized right, tax competition is further compelled by the need to retain domestic businesses, but also to attract foreign businesses, which triggers the need for an internationally competitive tax system,[111] i.e. a system that is ideally designed to be competitive, but without engaging in harmful tax competition.[112]

Moreover, the theory of international tax competition is related to the principle of reciprocity. Under international law, the principle of reciprocity entails returning like-for-like behavior[113] and makes up a basis and a salient element regulating sovereign states' rational intercourse.[114] The principle of reciprocity pivots international legal relations and states largely rely on it because of the absence of a uniform authority to enforce international law.[115] The core element underlying state reciprocity, would be simplified in a state's right to respond negatively or positively to another state's behavior. However, when it comes to international tax competition, the state's behavior goes beyond the 'right to respond' and becomes the 'right to go even further' by behaving more extremely than other state(s). Thus, what is described in general international law as 'returning like-for-like behavior' i.e. proportionate retaliation, becomes 'returning beyond like-for-like behavior' in international tax competition. In this scenario, tax sovereignty becomes indistinguishable from tax competition.

2.2.3. Circle of tax sovereignty and tax competition

The two basic theories underlying this study are separate but interlinked, along with a vice-versa impact. On the one hand, with fiscal sovereignty, states are sovereign and free to design

[111] R Teather, *Harmful Tax Competition?* (Blackwell Publishers 2002), p. 59.
[112] Semeta (n 3) p. 5.
[113] F Parisi and N Ghei, 'The Role of Reciprocity in International Law' (2003) *Cornell Int'l LJ* 36(93), p. 94.
[114] Ibid; P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997), p. 6.
[115] S N Fard, *Is Reciprocity a Foundation of International Law or Whether International Law Creates Reciprocity?* (Ph.D Dissertation, Aberystwyth Univ. 2013), p. 1.

the tax systems and policies they find adequate and necessary to serve their interests, including competing by their tax systems. In doing so, they may restrict the tax sovereignty of other states and vice-versa. In this regard, the interdependence of national tax systems becomes blatant[116] and through fiscal externalities,[117] each state is inevitably influenced and conditioned by the tax systems of other states.[118] This makes tax competition between states evident and inevitable.[119]

Moreover, tax competition not only undermines the general sovereignty of a state,[120] but also restricts and affects the tax sovereignty of other states. Indeed, tax competition limits the effective freedom of sovereign states to design their tax policies,[121] which in turn constraints governments to change their tax structures[122] as long as they want to remain competitive with their peers. This puts the legal theory in contrast to reality, i.e. the exercise of *de jure* sovereignty versus *de facto* sovereignty. In other words, the legal theory advocates for each country's ability to determine its own internal tax policy.[123] However, the reality is that the so-called 'internal' tax policy goes beyond a country's borders and affects other sovereign countries, and vice-versa.

At this level, the impact of one country's tax system on other countries becomes inevitable.[124] In fact, one state's tax policy choice impedes the choices of others,[125] and a change in one state's fiscal system may affect the welfare of other states' citizens.[126] Viewed in this way, the practices of tax competition that orchestrate the tax policies limit other states' sovereignties. This leads to tax systems that are manipulated by external tax policies. Consequent to that, tax sovereignty becomes constrained by tax competition as no country is effectively sovereign. Similarly, with tax competition, each country's tax jurisdiction becomes limited in practice. This further implies that sovereignty cannot be absolute and is very difficult to exercise fully in today's era of high mobility of people, capital, and resources.

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[116] Apeldoorn (n 69) p. 216.
[117] J D Wilson, 'Theories of Tax Competition' (1999) *Nat'l Tax J.* 52(2), p. 272; J M Mintz and M Smart, 'Recent Developments in Tax Coordination: A Panel Discussion by Bev Dahlby, Robert Henry, Michael Keen, and David E. Wildasin' (2000) *CTJ/RFC* 48(2), p. 400.
[118] Lampreave (n 72) p. 4.
[119] Id., p. 3; Mello (n 41) p. 11.
[120] Oguttu, International tax competition (n 82) p. 294; Apeldoorn (n 69) p. 75 and 216; P Dietsch and T Rixen, 'Tax Competition and Global Background Justice' (2014) *The Journal of Political Philosophy* 22(2), p. 152.
[121] Apeldoorn, Id. p. 215; Teather, The Benefits of Tax Competition (n 3) p. 10.
[122] Rixen (n 80) p. 61.
[123] J Li (n 76) p. 147.
[124] Lampreave (n 72) p. 3; Ault (n 55) p. 758.
[125] Christians, Sovereignty, Taxation and Social Contract (n 88) p. 148.
[126] Bond et al. (n 101) p. 49.

On the other hand, tax competition stands as a legitimate exercise of state tax sovereignty. With this logic, the fight against tax competition, even if harmful, can be considered as an attack on state sovereignty. Proponents of this argument claim that '*sovereign nations should be able to determine their own tax policies*'.[127] Even tax cooperation, which is advocated as one of the solutions to combat harmful tax competition, is perceived as relinquishing some of the state's tax sovereignty.[128]

Undoubtedly, there is an inherent and obvious practical tension between tax sovereignty and tax competition. This reinforces the vicious circle between states' tax sovereignty and tax competition, where one influences the other and vice-versa. Moreover, tax competition has become a global concern as presented below.

2.2.4. Global practices of tax competition

By nature, tax competition is intra-states and concerns competition between national policies.[129] Over time, tax competition practices have spread all over the world to an extent that it is currently practiced everywhere. Tax competition is as well as inevitable because of the unavoidable differences in tax rules.[130] Not only differences in tax rules, but also many governments now offer favorable tax rates to ensure the international competitiveness of their tax systems.[131] International competitiveness is currently an increasing concern and stands as one of the important elements of economic life.[132] Consequently, tax competition is now an issue for many, if not all, nations.[133] Considering its widespread nature, practitioners and scholars consider that it has gained an inherent global nature.[134] The global nature is illustrated by the fact that both developed and developing countries practice tax competition to such an extent that no jurisdiction can claim to be unaffected.

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[127] Ring, Sovereignty Debate (n 68) p. 24.
[128] Dietsch (n 69) p. 2108; B Dickinson and N Nersesyan, OECD Tax and Development: Principles to Enhance the Transparency and Governance of Tax Incentives for Investment in Developing Countries, p. 4 <www.oecd.org/ctp/tax-global/transparency-and-governance-principles.pdf> accessed 23/04/2020.
[129] Wattel (n 2) p. 138.
[130] Morriss and Moberg (n 3) p. 14.
[131] Townsend (n 94) p. 217.
[132] Bossons (n 35) p. 347.
[133] McLaren, Will Tax Havens Survive (n 84) p. 89; M Hearson, 'The Challenges for Developing Countries in International Tax Justice' (2018) *J.Dev.Stud.* 54(10), p. 1935.
[134] OECD (2000), Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices, Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, OECD Publications, p. 22; Wróblewska (n 6) p. 14; C Panayi, 'The Globalization of Tax Good Governance' (2018) Singapore Management University School of Accountancy Research Paper 6(1), p. 16 <http://dx.doi.org/10.2139/ssrn.3104977> accessed 01/04/2020.

From the perspective of developed countries, for example, it is a fact that both types of tax competition take place in Europe.[135] The EU Code of Conduct on business taxation was established with the desire of curbing harmful tax competition.[136] Not only did this Code confirm the existence of both desirable and harmful tax competition in Europe, but also the adoption of the Code of Conduct itself shows that EU Member States acknowledge the existence of harmful tax competition and the particular need to curb it.[137] This is further concretized by the fact that in over 700 assessments carried out by the COCG between 1998 and 2021, almost 500 regimes are in EU members and their dependents and associates.[138]

In the same vein, most harmful tax practices are undertaken by EU members,[139] and this phenomenon seems to be more prevalent in Europe than in the rest of the world.[140] Moreover, some of the non-western tax havens are generally located within the jurisdictional sphere of EU Members. It is important to note that harmful tax practices in Europe are not new, but a long-standing issue. For example, the Isle of Man and Liechtenstein are among the oldest tax havens in Europe.[141] Moreover, preferential tax regimes surged in the EU in the 1980s-90s, as tax competition remained an acute problem in Europe raising as a concern in the late 1990s and early 2000s.[142]

From the perspective of developing countries, the situation is much the same, as they host (harmful) tax competition too.[143] As an illustration, the EAC's Legislative Assembly has

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[135] Pinto, Tax competition (n 2) p. 25;
[136] EU Code of Conduct 1997: Conclusions of the ECOFIN Council meeting of 1/12/1997 concerning taxation policy DOC 98/C2/01, *OJEC* (6.1.98), C 2/1; Pinto, Tax competition (n 2) p. 166.
[137] Pinto, Id., p. 25 and 166; Pastukhov (n 14) p. 167; M F Nouwen, *Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition* (Ph.D Thesis, UVA 2020), p. 405.
[138] CEU, Overview of EU Member States' preferential tax regimes examined since the creation of the COCG in March 1998, 8602/1/20 REV 1 FISC 125 ECOFIN 478, 21/06/2021 <https://data.consilium.europa.eu/doc/document/ST-8602-2020-REV-1/en/pdf> accessed 30/07/2021; CEU, Overview of the preferential tax regimes examined by COCG since its creation in March 1998, 9639/4/18 REV 4 FISC 243 ECOFIN 557, 05/12/2019 <https://data.consilium.europa.eu/doc/document/ST-9639-2018-REV-4/en/pdf> accessed 30/07/2021.
[139] Teather, The Benefits of Tax Competition (n 3) p. 12; K M Diaw and J Gorter, 'Harmful Tax Practices: To Brook or to Ban?' (2002-3) *Public Finance Analysis* 59(2), p. 250.
[140] P Genschel, A Kemmerling and E Seils, 'Accelerating Downhill: How the EU Shapes Corporate Tax Competition in the Single Market' (2011) *JCMS* 49(3), p. 601.
[141] S Jogarajan and M Stewart, 'Harmful Tax Competition: Defeat or Victory?' (2007) *Austl.Tax.F.* 22, p. 6.
[142] Morriss and Moberg (n 3) p. 36; M F de Wilde, 'Tax Competition within the European Union: Is the CCCTB Directive a Solution?' (2014) *ELR* 1, p. 24; K Biernacki, 'Tax System Competition: Instruments and Beneficiaries' (2014) *Ekonomia I Prawo Economics and Law* 13(2), p. 276.
[143] Oguttu, International tax competition (n 82) p. 299; R Biswas, 'International Trade in Offshore Business Services: Can Developing Countries Compete?', in R Biswas (ed), *International Tax Competition: Globalization and Fiscal Sovereignty* (Commonwealth Secretariat 2002), p. 121; Y Margalioth, 'Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries' (2003) *Virginia Tax Review*

acknowledged the existence of harmful tax competition within the Community's Partner States.[144] SADC members also noticed the existence of harmful tax competition and in 2002 signed an MoU to cooperate in taxation in an endeavor to avoid harmful tax competition.[145] Undertaking, through an MoU, to avoid harmful tax competition is an indication that member states have already perceived the existence or at least a high risk of harmful tax competition within the Community. These examples undoubtedly show the practices of tax competition in developing countries.

The above shows that tax competition has conquered all parts of the world, which explains its global nature. This nature has been recognized by the OECD, which considers harmful tax competition as a global phenomenon, a solution for which also requires global intervention.[146] In fact, any country may as well be engaged in harmful tax practices as it may be affected by harmful tax practices.[147] From this perspective, even though the levels of practice and tools used may be different, no single state can claim to be out of the circle of tax competition, thus, establishing its global practice.

However, such global practices contradict the general trend developed by some international organizations such as the EU and the OECD, which consider harmful tax practices as not permissible. This dichotomy is paired with the indecisiveness of states by the fact that the states that condemn (harmful) tax competition are the same states to engage in the condemned practices. This ultimately ends up being a game of cheating where the states' official statements are not really their beliefs, and therefore, do not reflect what they are actually doing. However, it is worth noting that this is not a particularity of tax competition, but a general situation within international tax law. One scholar described this as an issue of miscommunication and distrust in the international tax debate.[148] The area of tax competition is

23, p. 195; L Abramovsky, A Klemm and D Phillips, 'Corporate Tax in Developing Countries: Current Trends and Design Issues' (2014) *Fiscal Studies* 35(4), p. 574.

[144] EAC, 2nd Meeting of the 1st Session of the 3rd East African Legislative Assembly, Oral Answers to Priority Questions, Question: EALA/PQ/OA/3/06/2012, Nairobi, 13/09/2012, p. 10.

[145] A J van Wijk, *Whether Tax Incentives to Stimulate Foreign Direct Investment for Manufacturing in the SADC Region is an Indicator of Harmful Tax Competition* (Master Thesis, UCT 2012), p. 67; SADC, Memorandum of Understanding on Cooperation in Taxation and related matters, 08/08/2002, art. 4(3)(a).

[146] OECD 2000 progress report (n 134) p. 22.

[147] Ibid.

[148] University of Amsterdam, Inaugural Lecture Sjoerd Douma: Miscommunication and Distrust in the International Tax Debate, 12 June 2018 <www.uva.nl/en/shared-content/faculteiten/en/faculteit-der-rechtsgeleerdheid/news/2018/06/inaugural-lecture-sjoerd-douma-miscommunication-and-distrust-in-the-international-tax-debate.html> accessed 01 February 2019.

thus a pretty good and conclusive example of distrust where the players wear two hats at the same time.

Be that as it may, the field of tax competition encompasses a variety of areas. It broadly interacts with some economic elements along with the legal concerns. This is the subject of the next section.

2.3. Normative and economic perspectives

Tax competition can be viewed from different perspectives, including normative and economic. It is worth mentioning that in both perspectives, tax competition is always a controversial issue.[149] This section begins with the economic perspectives before continuing with the normative perspectives. The economic study of tax competition focuses on two dominant schools of thought, an overview of which is provided below.

2.3.1. Economic schools of thought on tax competition

From an economic perspective, tax competition theories are mainly concerned with the potential benefits and futility of tax competition. In short, both schools of thought on tax competition converge on the reduction of tax revenues, but diverge on the desirability of tax competition. In this respect, the main concern is about the possible positive or negative effects of tax competition. Therefore, tax competition becomes contended to be good and beneficial as it may be bad and harmful. Thus, there are two opposite opinions as to what the effect of tax competition is and, in particular, whether tax competition is inherently damaging. Two schools of thought can, therefore, be distinguished.[150] The first is the race to the public poverty school whose main arguments reflect fears that the tax base could be eroded and result in the under-provision of public services. The second is the taming of the Leviathan school, which mainly argues that tax competition can play a useful role in controlling public spending.[151] The two schools are detailed below.

[149] A Cassee, 'International Tax Competition and Justice: The Case for Global Minimum Tax Rates' (2019) *Politics, Philosophy & Economics* 18(3), p. 243.
[150] Ault (n 55) p. 764; H G Petersen (ed), 'Tax Systems and Tax Harmonization in the East African Community' (2010) Report for the GTZ and the General Secretariat of the EAC, p. 22; V Moutarlier, 'Reforming the Code of Conduct for Business Taxation in the New Tax Competition Environment', in I Richelle, W Schön, and E Traversa (eds), *State Aid Law and Business Taxation* (Springer 2016), p. 76.
[151] Wishlade (n 26) pp. 586-587.

2.3.1.1. Public poverty school

The public poverty school arguments relate to the effects of tax competition on the loss of tax revenues due to lowering taxes, thus leading to a regressive national system and dangerous fiscal degradation.[152] This occurs when states engage in tax competition in retaliation to pioneers' tax rates reduction. In this process, the philosophy of tax competition is orchestrated by revenge as it becomes necessary to respond with the same behavior or more behavior to remain competitive among peers.[153] On that account, tax competition is caused by rivalry between countries for the international tax base.[154] A continued retaliation process leads to tax minimization, which, when pushed to the extreme, can eventually fall to zero.[155] At this level, governments collect too little tax revenue to cover public services for the unjustified benefit of internationally mobile capital.[156] Economists label this as a race to the bottom, which poses a threat to tax revenues and creates an unbearable situation for all countries involved.

The race to the bottom is destructive and leads to permanent fiscal degradation.[157] The fiscal crisis ends with a state's inability to provide government services to its citizens, including even the minimum of necessary social conditions.[158] The former Dutch Minister of finance Wouter Bos labeled that as a 'race to public poverty'[159] and the European Commission as 'fiscal degradation.'[160] The IMF also highlighted a similar point in its 2008 report on tax competition in the EAC.[161] In this context, tax competition limits a state's ability to pursue social welfare,[162]

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[152] I O Ozai, 'Tax Competition and the Ethics of Burden Sharing' (2018) *FordhamInt'lL.J.* 42(1), p. 75; Pinto, Tax competition (n 2) p. 9; Avi-Yonah, Globalization and TC (n 42) p. 60; B J M Terra and P J Wattel, *European Tax Law* (5th edn, Kluwer 2008), p. 111; Sobotková (n 4) p. 344.
[153] K Z Yanting, *How Do Tax Incentives Affect the Composition of Foreign Direct Investment (FDI) in North-East Asia*, (Master Thesis, AUT 2009), p. 14; R H J Lemmens, *Tax Competition: How Harmful is Tax Competition Really* (Master Thesis, Tilburg Univ. 2014), p. 6.
[154] Sobotková (n 4) p. 344; Pinto, Tax competition (n 2) p. 298; J C Sharman, 'Norms, Coercion and Contracting in the Struggle against 'Harmful' Tax Competition' (2006) *Aust.J.Int'l Aff.* 60(1), p. 146.
[155] Teather, The Benefits of Tax Competition (n 3) p. 42; Wang (n 32) pp. 57-58.
[156] Wattel (n 2) p. 135.
[157] *Ibid*; Pinto, EU and OECD (n 4) p. 387.
[158] Avi-Yonah, Globalization and TC (n 42) p. 60; Avi-Yonah, TC and Fiscal Crisis (n 40) p. 1578; Petersen (n 150) p. 22; Ault (n 55) p. 764; Pinto, EU and OECD (n 4) p. 387; B I Bai, 'The Code of Conduct and the EU Corporate Tax Regime: Voluntary Coordination without Harmonization' (2008) *Journal of International and Area Studies* 15(2), p. 122; P Harris and D Olivier, *International Commercial Tax* (CUP 2010), p. 105; Ozai (n 152) p. 71.
[159] Elkins (n 24) p. 905; Teather, The Benefits of Tax Competition (n 3) p. 55; Bos, W. '*Harmful Tax Competition*', Speech to the OECD, Dutch Finance Ministry, 29/06/2000, cited in Lemmens (n 153) p. 6.
[160] Wattel (n 2) p. 135.
[161] IMF, 'Kenya, Uganda and United Republic of Tanzania: Selected Issues' (2008) IMF Country Report No. 08/353, p. 5 <www.imf.org/external/pubs/ft/scr/2008/cr08353.pdf> accessed 14/05/2019.
[162] Englisch and Yevgenyeva (n 2) pp. 622-23.

which contributes to human suffering because of the state's under-provision of public goods and services.

In addition, with the race to the bottom, the overall result becomes no tax at all on mobile capital.[163] This compels the states to shift the burden of tax to immobile tax bases, therefore placing a heavy tax burden on them, which jeopardizes distributive justice.[164] At this level, the main sufferers are the less mobile tax bases such as labor, consumption, and property.

The link between tax competition and the race to public poverty led to total condemnation, as tax competition from this perspective looks bad. An example of this condemnation comes from the EU and the OECD, which both see (harmful) tax competition as leading to state fiscal crises.[165] The two organizations believe that (harmful) tax competition contributes to the erosion of tax bases, which affects the ability of states to provide essential services.[166] Other organizations such as TJN-Africa also hold this view,[167] and scholars summarize the overall result as mutual harm.[168] Thus, the public poverty school of thought considers tax competition to be bad, harmful, and undesirable because of its inevitable relationship with the race to the bottom and its attendant consequences. However, the taming of the Leviathan school thinks otherwise.

2.3.1.2. The taming of the Leviathan school

In contrast to the public poverty school, the taming of the Leviathan school of thought views tax competition as healthy. This school advocates the idea that governments tend to maximize their budgets, which can be detrimental to the economy. Tax competition, therefore, comes in to curb the untrustworthy states' appetites for excessively high taxes along with preventing tax cartels.[169] Similarly, tax competition puts pressure on each state to behave more efficiently in

[163] Elkins (n 24) p. 905; Teather, The Benefits of Tax Competition (n 3) p. 55; M Littlewood, 'Tax Competition: Harmful to Whom?' (2004) *MichJIntlL* 26(1), p. 413; V P Stefan, 'The Effectiveness of Tax Incentives in Attracting Investment: Evidence from Developing Countries' (2012) *Réflets et perspectives de la vie économique* LI, p. 130.
[164] Ault (n 55) p. 764; Terra and Wattel (n 152) p. 111; Hoek (n 44) p. 23; Bai (n 158) p. 122; H Gribnau, 'The Integrity of the Tax System after BEPS: A Shared Responsibility' (2017) *ELR* 1, p. 20.
[165] Wishlade (n 26) p. 587.
[166] Elkins (n 24) p. 905.
[167] TJNA & ActionAid, 'Tax Incentives are draining Kenya of needed revenue for essential Public Services' <www.actionaid.org/sites/files/actionaid/brief_-_kenya_report_-_kenya_tax_competition.pdf> accessed on 02/03/2016.
[168] Terra and Wattel (n 152) p. 111; I Lamers, P Mcharo and K Nakajima, 'Tax Base Erosion and Profit Shifting (BEPS) and International Economic Law' (2014) Trade and Investment Law Clinic Papers, Graduate Institute Geneva, Centre for Trade and Economic Integration, Geneva, p. 7.
[169] Lampreave (n 72) p. 4; Hoek (n 44) p. 22; Vlcek (n 85) p. 93.

raising and spending taxes.[170] The role of tax competition is, therefore, to counter Leviathan effects by forcing governments to rationalize their public services by balancing the tax burden imposed on taxpayers and the governments' abilities to deliver public services.[171]

In this sense, reducing government waste and disciplining politicians are among the benefits of tax competition.[172] In this respect, tax competition becomes a tool to tame the Leviathan by imposing budgetary constraints on excessive or wasteful spending.[173] Tax competition also becomes a check on governments to spend more wisely,[174] as it helps governments to increase their fiscal competitiveness.[175] In short, the school of taming Leviathan sees tax competition as a positive tool to counteract governments' abuses in tax matters. Therefore, tax competition in the lens of this school of thought is good, beneficial, and desirable.

The divergence between these two schools of economic thought adds to other discussions about (harmful) tax competition. Reviewed from a legal perspective, the concerns look different from the economists' concerns.

2.3.2. Normative perspective

The normative perspective of tax competition can be developed in two points: the impact of regional integration on the regulation of tax competition and the existing international standards on the subject.

2.3.2.1. Impact of regional integration

The relationship between tax competition and regional integration is two-fold. First, due to the nature of tax competition, unilateral regulation does not bring many benefits. Therefore, this phenomenon has been mainly regulated through bilateral or multilateral measures. Second, regional integrations facilitate tax harmonization, which, in one way or another, impacts tax

[170] Lampreave, ibid.; Semeta (n 3) p. 3; Terra and Wattel (n 152) p. 111; Teather, The Benefits of Tax Competition (n 3) p. 35; Ault (n 55) p. 764; Sobotková (n 4) p. 344; Harris and Olivier (n 158) p. 107; Cassee (n 149) p. 243.
[171] Pinto, Tax competition (n 2) p. 8.
[172] Lampreave (n 72) p. 14; Deák (n 104) p. 25.
[173] Englisch and Yevgenyeva (n 2) p. 624; T Madiès and J J Dethier, 'Fiscal Competition in Developing Countries: A Survey of the Theoretical and Empirical Literature' (2010) The World Bank Development Economics Dpt Policy Research WP 5311, p. 6 <http://documents.worldbank.org/curated/en/660651468148759194/pdf/WPS5311.pdf> accessed 20/04/2020.
[174] Sobotková (n 4) p. 346; Teather, The Benefits of Tax Competition (n 3) p. 13; Ault (n 55) p. 764.
[175] Pinto, EU and OECD (n 4) pp. 386-87.

competition. The next paragraphs address both aspects, starting with the regional regulatory framework.

Notwithstanding the effectiveness of unilateral measures counteracting tax competition, global and regional approaches offer more benefits. This is due to the global nature of (harmful) tax competition, which, therefore, requires global and regional level solutions.[176] Regional solutions might be the preferred ones compared to global ones. This is because in most cases, the regional members have an almost similar situation and their interests are not very different, which is not the case with a global approach.

Moreover, the nexus between tax competition and regional integration elaborates on harmonization, which is an intrinsic element in the process of regional integration. Depending on the main objective of each regional integration, the harmonization of policies, laws, and practices greatly impacts the success or failure of the integration. In the case of regional integrations whose objectives are economically oriented, tax harmonization represents a non-negotiable pillar for rapid integration success.

Thus, it can be rightly argued that tax harmonization, in one way or another, slows down tax competition between the community member states. Actually, tax harmonization seeks compatibility by pulling closer the elements that were initially different through a reduction of the differences towards a common standard. Even if approximation doesn't amount to equality, it is at least the opposite of tax competition, which by its nature seeks rivalry, fighting for superiority among the usual peers, which escalates and increases the differences.

It is, therefore, through these lenses that the impact of tax competition on regional integration can be seen. Two types of influences can be established. One, tax harmonization and regional integration influence each other. Second, regional integration and tax competition influence each other. Consequently, there is a triangular influence between tax harmonization, regional integration, and tax competition. Besides, some standards exist internationally in regulating tax competition.

2.3.2.2. Development of international standards

At the international level, one should note an absence of an international legal order in terms of tax competition. The same applies to the area of international tax law, which remains, so far,

[176] Wróblewska (n 6) p. 21; Ayi-Yonah, Bridging the north/south divide (n 38) p. 383; OECD 2000 progress report (n 134) p. 22.

largely determined by the state's individual sovereignty save for bilateral and multilateral tax treaties.

Attempting to close the gaps, the EU and the OECD have developed some standards to counteract harmful tax competition. The details of these standards are developed in chapter four of this book. In summary, the focus of the two organizations has been on the elements that can distinguish good tax competition from bad tax competition, which is the focus of the next section.

2.4. In search of the boundaries between good and bad tax competition

The distinction between good and bad tax competition dominates discussions on tax competition. One main issue in the discussion is the dividing line between the two. In other words, where bad tax competition stops being bad and becomes good. This question is based on the legal reasoning that not every tax competition is harmful, i.e. tax competition may be good and beneficial as it may be bad and harmful.[177] In attempting to find the boundaries between the two, this section first emphasizes the need to distinguish bad tax competition from good tax competition. It then takes up what can be part of the boundaries, and concludes explaining the main concerns of lawyers in tax competition.

2.4.1. Why distinguish 'bad' from 'good' tax competition?

From a legal perspective, not every tax competition is bad.[178] Equally, not every tax competition is good. Tax competition can be good, beneficial, and desirable, and thus worthy of promotion as it can be bad, i.e. harmful, and thus, undesirable.[179] Good tax competition also exists along with bad tax competition. In this sense, harmful tax practices are unacceptable, and generally discouraged. In contrast, tax competition *per se* is generally perceived unproblematic. Hence, the need to distinguish bad i.e. harmful tax competition from good i.e. harmless tax competition arises. On the one hand, that need is justified by the consequences associated with each. On the other hand, discussions on the desirability or non-desirability of tax competition are prompted by their increasing practices.[180]

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[177] Patterson and Serrano (n 91) p. v.
[178] Pastukhov (n 14) p. 163; Lampreave (n 72) p. 8; Avi-Yonah, TC and Fiscal Crisis (n 40) p. 1610; M Rushton, 'Interprovincial Tax Competition and Tax Reform in Saskatchewan' (2000) *CTJ/RFC* 48(2), p. 386; K Dirix, 'Harmful Tax Competition: Six Belgian Tax Incentives under the Microscope' (2013) *EC T.Rev.* 5, p. 233.
[179] Pinto, Tax competition (n 2) p. 1 and 297; Gaffney (n 85) p. 46; M Schaper, 'Tax Law', in J Hage, A Waltermann and B Akkermans (eds), *Introduction to Law* (2nd edn, Springer 2017), p. 274.
[180] Sobotková (n 4) p. 344.

In this sense, good tax competition is acceptable, desirable, and is acknowledged in legal scholarship.[181] The EU and OECD standards also confirmed the desirable acceptance. Indeed, both organizations accept the potential positive effects of good tax competition. This refers to the 1998 OECD Report on harmful tax competition, which acknowledged the existence of good tax competition and points out that it includes all tax measures that a sovereign state can take without breaching internationally accepted standards.[182] Not only the OECD, but also the EU recognizes the existence of good tax competition.

This recognition is reflected in the preamble of the 1997 EU Code of Conduct on business taxation which acknowledges the positive effects of fair competition and the need to strengthen the EU's competitiveness, while at the same time pointing out the negative effects of harmful tax competition.[183] In this sense, it was not the EU's intention to end all tax competition.[184] Rather, it emphasized the need to promote good tax competition within the Union.[185] For example, the Explanatory Memorandum on the 2011 CCCTB Proposal of the European Commission states:

> Fair tax competition on tax rates is to be encouraged. Differences in rates allow a certain degree of tax competition to be maintained in the internal market and fair tax competition based on rates […] allows the Member States to consider both their market competitiveness and budgetary needs in fixing their tax rates.[186]

Moreover, Member States' fiscal sovereignty is recognized by EU law, which in principle, establishes tax competition as the norm.[187] These examples prove the need to retain and support good tax competition, based on the benefits it brings.

The benefits of good tax competition are two-fold: good for the country and good for taxpayers. As far as the country is concerned, good tax competition is necessary to enhance the

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[181] I Roxan, 'Limits to Globalization: Some Implications for Taxation, Tax Policy, and the Developing World' (2002) LSE WP 3, p. 21 <http://eprints.lse.ac.uk/46768/1/Limits%20to%20globalisation%20(lsero).pdf> accessed 07/05/2019.
[182] OECD 1998 Report (n 11) p. 15; Pinto, EU and OECD (n 4) p. 390.
[183] EU Code of Conduct (n 136) C 2/3; Genschel, Kemmerling and Seils (n 140) p. 596; Drezgić (n 50) p. 80; M Seeruthun-Kowalczyk, *Hard Law and Soft Law Interactions in EU Corporate Tax Regulation: Exploration and Lessons for the Future* (Ph.D Thesis, Edinburgh Univ. 2011), p. 169.
[184] A Haupt and W Peters, 'Restricting Preferential Tax Regimes to Avoid Harmful Tax Competition' (2005) *Reg.Sci.Ur.Econ.* 35, p. 494.
[185] EU Com., Explanatory Memorandum to a Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121/4 2011/0058 (CNS) {SEC(2011) 315} {SEC(2011) 316}, p. 4.
[186] Ibid.
[187] Pinto, Tax competition (n 2) p. 52, 78, 300 and 302.

country's competitiveness. The need to build a competitive tax system is important to compensate for some disadvantageous factors. It is also important to adjust and complete the country's economic and social comparative advantages.

In terms of general taxpayers, good tax competition is helpful because it reduces the tax burden. In fact, taxation is a part of the cost of doing business, and lowering its level is obviously beneficial to businesses.[188] This mitigation plays an important role in increasing the profitability of taxpayers. Other benefits of good tax competition include encouraging investment,[189] promoting the design of investment-friendly tax systems,[190] and increasing efficiency.[191]

In contrast, bad tax competition is generally condemned. Most often, the richest countries believe that (harmful) tax competition is bad and must be stamped out.[192] The academic community has also supported efforts to combat bad tax competition.[193] This is because tax competition is seen as a threat,[194] along with some other disadvantages associated with it, such as erosion of the tax base, which ends up creating an unbearable situation.[195] Other consequences of bad tax competition include distorting investment and trade; undermining the integrity, neutrality, and fairness of tax structures; discouraging tax compliance; undesired shifts of the tax burden; increasing administrative costs and compliance burdens; and diminution of global welfare.[196]

Consequently, bad tax competition is labeled unfair and harmful, which has led to the formulation of measures to eliminate it. This again emphasizes the need to distinguishing bad tax competition from good tax competition as the attention should be on what to eliminate and what to preserve. This is a serious matter because a wrong choice would lead to a detrimental

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[188] Id., p. 8.
[189] Boulogne (n 89) p. 3.
[190] EU Com., *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*, Communication from the Commission to the European Parliament and the Council, COM(2015) 302 final {SWD(2015) 121 final}, 17/06/2015, p. 5; A F Abbott and D R Burton, 'Apple, State Aids, Tax Competition, and the Rule of Law' (2017) *Backgrounder* 3204, p. 2.
[191] Sobotková (n 4) p. 343.
[192] Teather, Harmful Tax Competition? (n 111) p. 58.
[193] Elkins (n 24) p. 914.
[194] Morriss and Moberg (n 3) p. 57; J Hey, 'Tax Competition in Europe: The German Perspective' (EATLP Conference, Lausanne, 2002), p. 6 <www.eatlp.org/uploads/Members/Germany02.pdf> accessed 13/08/2019.
[195] Sobotková (n 4) p. 343.
[196] OECD 1998 Report (n 11) p. 16; K van Raad, *Materials on International & EU Tax Law* (13th edn, International Tax Center 2013), p. 1309; A W Oguttu, 'Tax Base Erosion and Profit Shifting in Africa: Africa's Response to the OECD BEPS Action Plan' 2016 ICTD WP 54, p. 9 <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/12802/ICTD_WP54.pdf> accessed 24 October 2019.

effect: either retention of a practice that is deemed to be part of bad tax competition or the elimination of an aspect of good tax competition.

It is therefore necessary to establish a clear understanding of the practices that form bad tax competition and the practices that form good tax competition. To this end, some benchmarks have been developed by the EU and the OECD. These are explained in details in chapter four of this book, and chapters six and seven are largely based on them to assess the Rwandan situation and formulate the proposals respectively.

In summary, tax competition becomes problematic when it goes beyond good tax competition and becomes bad tax competition. This happens when it moves from pure tax competition to harmful tax competition. The puzzling and open question, then remains the point at which one distinguishes harmless tax competition from harmful tax competition.

2.4.2. What is good and what is bad tax competition?

Since the 1990s until today, tax competition has been one of the hotly debated topics in international tax law. Considering countries' motives to engage in tax competition and its effects, these discussions are not expected to end soon. This skepticism is supported by some challenging and provocative ideas about tax competition. One example is the distinction between harmless and harmful tax competition, which has always been highly contentious,[197] difficult,[198] thorny,[199] and even impossible.[200] The difficulties are also fuelled by several factors, including the nature of tax competition itself.[201] This is because all countries engage in tax competition in one way or another, with some using more sophisticated and less transparent mechanisms than others.[202]

Moreover, it seems difficult, even impossible, to come up with a general definition of good or bad tax competition. This is mainly because such a distinction depends largely on normative perspectives. Nevertheless, this does not preclude the possibility of having a modest, workable concept of harmful tax competition. Of course, this cannot cover all harmful tax

[197] Ault (n 55) p. 765.
[198] Lampreave (n 72) p. 3; de Almeida and Pereira (n 62) p. 64; L Cerioni, 'Harmful Tax Competition Revisited: Why not a Purely Legal Perspective under EC Law?' (2005) *Euro.Tax.*, p. 267; W Schön, 'Tax Competition in Europe: The National Perspective' (2002) *Euro.Tax.* 42(12), p. 492.
[199] Pinto, Tax competition (n 2) p. 8.
[200] Petersen (n 150) p. 25.
[201] S J C Hemels, 'Fairness and Taxation in a Globalized World' (2015), p. 17 <http://dx.doi.org/10.2139/ssrn.2570750> accessed 29/07/2019.
[202] A Christians, 'BEPS and the New International Tax Order' (2017) *BYUL.Rev.* 2016(6), p. 1630.

competition to everyone's satisfaction. In this respect, the normative criteria of the EU and OECD, as described in chapter four, are at the heart of international standards.

In their efforts to distinguish good from bad tax competition, the EU and the OECD have elaborated on the components of harmful tax practices and the criteria for determining whether a regime is harmful or not. Nevertheless, the established criteria change their weight from time to time. On this matter, the substantial economic requirement is a good example. This criterion was initially established among the criteria for assessing tax havens.[203] However, it was dropped in 2001 because there were difficulties in determining exactly what substantial meant.[204] Its use was resumed in 2015, driven by the BEPS project.[205] Similarly, transparency and EoI gained momentum from time to time.[206] In 2016, the Council of the EU also accepted fair taxation and anti-BEPS implementation as part of the criteria to establish the lists of non-cooperative jurisdictions.[207]

Notwithstanding that, tax competition is acceptable if it is an expression of a country's fiscal sovereignty to attract new and genuine investment.[208] Here, the key element is attracting genuine investment. In this respect, favorable tax measures targeting manufacturing, asset investment[209] and the like are generally not harmful.

Favorable tax measures that apply to all and do not target foreigners, also generally qualify as not harmful.[210] This argument is consistent with the fact that there is nothing wrong with building a national competitive tax system as long as it has a general application.[211] In this

[203] OECD 1998 Report (n 11) p. 22.
[204] Pinto, Tax competition (n 2) p. 226; OECD 2001 progress report (n 81) p. 10; Ambrosanio and Caroppo (n 53) p. 690; Seeruthun-Kowalczyk (n 183) p. 202.
[205] OECD (2015), *Countering Harmful Tax Practices More Effectively Taking into Account Transparency and Substance: Action 5 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing <http://dx.doi.org/10.1787/9789264218970-en> accessed 21/05/2019; OECD (2019), *Harmful Tax Practices – 2018 Progress Report on Preferential Regimes: Inclusive Framework on BEPS Action 5*, OECD Publishing, p. 38.
[206] P Baker (2004), 'The World-Wide Response to the Harmful Tax Competition Campaigns', *GITC Review*, 3(2), p. 5; A P Dourado, 'The Global Anti-Base Erosion Proposal (GloBE) in Pillar II', (2020) *Intertax* 48(2) p. 153; OECD 2001 Progress Report (n 81) p. 4.
[207] CEU, Outcome of proceedings on criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes, 14166/16, FISC 187 ECOFIN 1014, 8/11/2016, pp. 4-7.
[208] Rixen (n 80) p. 72; Pinto, EU and OECD (n 4) p. 390.
[209] OECD 1998 Report (n 11) p. 8; Carlson (n 74) p. 165; Samuels and Kolb (n 63) p. 234; Pinto, EU and OECD, ibid.
[210] Elkins (n 24) p. 947.
[211] R Szudoczky and J L van de Streek, 'Revisiting the Dutch Interest Box under the EU State Aid Rules and the Code of Conduct: When a 'Disparity' is Selective and Harmful' (2010) *Intertax* 38(5), p. 275; M Nouwen and P J Wattel, 'Tax Competition and the Code of Conduct for Business Taxation' in P J Wattel, O Marres, and H Vermeulen (eds), *European Tax Law* (7th edn, Wolters Kluwer 2019), p. 933.

view, there is harmless tax competition if the country reduces the tax burden on both residents and non-residents.[212] This is in contrast to the situation of ring-fencing, which is an essential element determining harmful tax practices. Coupled with this, tax competition that boosts a country's economy and benefits all taxpayers is good. Moreover, tax competition that does little harm to other countries but brings significant benefits to the host country is also justified.[213] In contrast, tax competition that attracts tax bases at the expense of other countries, i.e. that poaches other countries' tax bases is spontaneously bad.[214] Similarly, tax competition becomes harmful when '*states merely damage each other's budgets, without creation of economic activity being at issue, but rather for artificial cross-border shifts of activities, and causing a tax loss for the whole*'.[215]

To be more specific, from a legal perspective, there is no stand-alone element that distinguishes good tax competition from bad tax competition. One possible reference is the standards developed by the EU and the OECD. A tax practice becomes bad because it violates the EU and OECD standards. Without these standards, there would be no way to qualify a tax regime as part of bad or good tax competition. Even so, the idea behind setting standards for harmful tax competition stems from the effects of tax competition. Thus, if tax competition decreases another state's tax revenues, it looks *prima facie* bad. But if there is no such effect, i.e. a decrease of tax revenues, tax competition is harmless and falls within the general framework of other competitions that countries engage in all the time.

With this understanding, the decrease of other states' tax revenues is at the heart of the driving force for regulating tax competition. Thus, tax competition is good as long as it does not poach other states' tax bases. In other words, tax competition is part of state sovereignty, which includes the freedom of each state to design its own tax system in consideration of its primary interest aimed at satisfying the public needs. The diversity of countries, naturally and politico-economically, leads to an understanding that countries are not alike. Consequently, no one should force a country to have a tax system that is similar to another country's tax system. This freedom to design a competitive tax system remains good as long as it only affects the internal affairs of the designing country. However, when the effects escalate beyond the

[212] Lampreave (n 72) p. 6; Webb (n 75) p. 801; Biswas (n 143) p. 121.
[213] Lampreave (n 72) p. 8.
[214] OECD 1998 Report (n 11) p. 16; Oguttu, International tax competition (n 82) p. 294; Pinto, Tax competition (n 2) p. 1.
[215] OECD BEPS Action 5 (n 205) p. 21; Gribnau, Integrity of Tax System (n 164) p. 12.

designing country and negatively affect other countries that played no role in designing the underlying system, tax competition becomes bad.

In summary, without undermining the dynamisms of tax competition as a concept, the real problem with tax competition is the unfair erosion of other countries' tax bases. Thus, good tax competition refers to a country using its sovereign rights to design a tax system that is competitive to attract and retain genuine investment or tax base without breaching regional and/or international rules and regulations on fair sharing of the international tax base. In contrast, bad tax competition refers to the abuse of a country's sovereign rights to set strategic policies that erode the tax base of other countries while protecting its own tax base, in violation of rules and regulations set at the regional and/or international level on fair sharing of the international tax base.

To change the subject a bit, lawyers are interested in and attentive to discussions about (harmful) tax competition. This gives rise to determine the specific concern of lawyers in tax competition, which is the subject of the next sub-section.

2.4.3. What is the main concern of lawyers in tax competition?

The concern of lawyers in the study of harmful tax competition relates to taxing rights. In fact, the concern of lawyers is quite different from the concern of economists. The economists' concern relates to competition for movement, i.e. the attraction of productive investment along with the race to zero, i.e. the eventual fall to zero.[216] In contrast, the legal reasoning behind the lawyers' concern is that countries are perfectly entitled under existing international norms to choose their own tax rates, even if 'choosing' can sometimes amount to 'following'. Thus, in studying tax competition, lawyers seek to determine the fair sharing, i.e. an equitable allocation of taxing rights.

In general, in studying tax competition, lawyers refer to the OECD developments on harmful tax competition,[217] coupled with the EU developments on the same subject. In short, the issue is about competition to '*have income reported in a particular country*' and the problem arises when this occurs without an associated movement of production.[218] In other words, the concern of lawyers is whether the sharing of taxing rights is fair or unfair. However, given the

[216] Calich (n 30) p. 60.
[217] Id., pp. 41-42.
[218] R Griffith and A Klemm, 'What Has Been the Tax Competition Experience of the Last 20 Years' (2004) The Institute for Fiscal Studies WP04/05, p. 4.

complexity of the concept of fairness, the concern of lawyers in tax competition matters can be simplified as a matter of standards and concepts that can draw the line between acceptable and unacceptable practices in the sharing of taxing rights. In other words, the main concern is the determination of permissible versus prohibited tax competition, two aspects that each relate in one way or another to harmless tax competition as opposed to harmful tax competition.

Conclusion of chapter two

This chapter provided a panoramic view of tax competition. It began with an understanding of the main features of tax competition. In this context, it discussed the definitions of tax competition and harmful tax competition. Then, it presented two rival views on the origin of tax competition. One view sees tax competition as a natural phenomenon based on its long existence, while the other view sees tax competition as a human creation, dominated mainly by a process of retaliation. This was followed by a detailed account of the impact of globalization on increasing tax competition.

This provided a basis for moving into one of the fundamental parts of the chapter, namely the principles and practice of tax competition. The focus was on the rivalries between the two main accepted principles, namely state tax sovereignty and freedom of competition. The interactions and mutual influence of the two were also highlighted. This was followed by a discussion of the global practices of tax competition.

Considering the interactions with other disciplines in the study of tax competition such as economics, public finance, and politics, two important schools of economic thought were highlighted. Here, emphasis was placed on the race to public poverty school of thought and the taming of the Leviathan school of thought. This preceded the highlights of the normative perspectives of tax competition. This was considered through the role of regional integration on tax competition and the development of international standards on the subject. Then, the focus was on finding the boundaries between bad and good tax competition. This point focused on the need to search for the boundaries, and what these boundaries are, before taking a look at the main concern of lawyers in tax competition.

It is worth noting that the discussions on the principles underlying the field of tax competition are endless. The same applies to tax competition, the scope of which is large. This suggests that the issues pertaining to the subject of the present chapter can never be exhausted. Nevertheless, the key elements, including the principles, practices, and theories that underlie

the field of tax competition, have been fairly dealt with. This was done without a focus on any particular jurisdiction. The next chapter focuses on Rwandan law.

3 OVERVIEW OF FAVORABLE TAX MEASURES UNDER RWANDAN LAW

This chapter is based on an assumption that countries are inherently engaged in constant competitions, including competition to attract investment. To attract investment, countries use a variety of methods to create an investment-friendly environment. Some methods are tax-related, others are not. The use of tax measures leads to the game of tax competition, which happens when countries offer favorable tax measures for two purposes. One purpose is to attract investors from other jurisdictions to flow into their jurisdiction. The other purpose is to keep domestic investors from leaving the jurisdiction. As previously mentioned, a tax measure may result not only from laws, but also from regulations and administrative practices. Thus, the tax measures discussed herein include statutes, administrative regulations and practices.

This chapter focuses on Rwandan law. As stated above, tax competition is based on the use of favorable tax measures. Even so, not all favorable tax measures are harmful. This is the premise of the current chapter, which identifies the favorable tax measures that exist under Rwandan law. The focus is on two fundamental laws that greatly impact business taxation in Rwanda: the income tax law of 2018[1] and the law on investment promotion and facilitation of 2021.[2]

The objective of this chapter is not to classify all favorable tax measures as harmful. Equally, it does not determine whether a particular favorable tax measure is harmful. That determination is made in chapter six. This justifies the use of the term 'favorable tax measure' as a neutral term, to avoid any bias concerning the harmfulness *vel non* of the tax measure.

That being the case, this chapter begins with benchmarking exercise, i.e. providing the criteria that determine whether a measure is a favorable tax measure. It then presents a brief historical development of Rwanda's tax competitiveness. Then, it analyzes Rwanda's favorable tax measures in the income tax law of 2018 and the investment law of 2021. Following that, it discusses favorable tax measures that are in regulatory and administrative practices.

[1] Law No. 016/2018 of 13/04/2018 establishing taxes on income, *O.G.* No. 16 of 16/04/2018.
[2] Law No. 006/2021 of 05/02/2021 on investment promotion and facilitation, *O.G.* No. 04 *bis* of 08/02/2021.

3.1. Benchmark of favorable tax measures

This section establishes the criteria that determine whether a particular tax measure is favorable or not. The concern of this section is to answer the question 'why can a particular tax measure, among others, be considered as favorable?'. The relevance of this question is based on the consequential effects of a favorable tax measure. Indeed, a favorable tax measure is potentially harmful. A tax measure is potentially harmful if it appears to meet the criteria of harmful tax practices, but it has not yet been determined to be actually harmful. At this level, the measure in question is only suspected, i.e. considered potentially harmful, but not yet confirmed as to whether or not it is actually harmful.

In this consideration, the research herein is based on two premises. The first is the premise that (harmful) tax competition is a global phenomenon. Thus, it is probable that Rwanda, like many other countries in the world, may be engaged in (harmful) tax competition. The first section of the first chapter introduced this premise and the fourth subsection of the second section of chapter two discusses it in detail. The second premise is based on NGOs' reports that Rwanda is highly engaged in (harmful) tax competition. This premise was also introduced in the first section of the first chapter.

Under these two premises, some tax measures under Rwandan law intuitively appear as favorable tax measures. This couples with the fact that favorable tax measures are impulsively characterized by differential and preferential treatment of certain taxpayers. In other words, some taxpayers are treated differently and preferentially. Therefore, differential and preferential treatments are the benchmarks or determinants of whether a particular tax measure is favorable. Thus, a tax measure that exhibits the two benchmarks is suspected of constituting harmful tax competition. These two benchmarks are respectively described below.

3.1.1. Differential treatment

A tax measure is favorable if it provides differential treatment, i.e. treats taxpayers differently. Differential treatment requires that the tax administration departs from the generally applicable tax standard of taxing all equally, to give special treatment to a particular taxpayer or class of taxpayers. Thus, for a tax measure to be considered favorable, reference must be made to the standard tax rate or standard tax base. In this respect, a favorable tax measure occurs when there is a reduction in the effective tax rate or a narrowing of the tax base.

Thus, in order to assess whether a particular tax measure is favorable, two steps are necessary. The first step is to determine the generally applicable tax rate or tax base. The second step is to determine if there is a deviation from the generally applicable tax rate or tax base for a particular taxpayer or class of taxpayers. Under this view, reductions in general tax rates or tax bases, even if they look advantageous, are not favorable tax measures. This further implies that a situation of favorable tax measures occurs when among taxpayers whose tax rate or tax base should actually be the same, differences are found based on preferential treatment of some of them, as described below.

3.1.2. Preferential treatment

The second benchmark of favorable tax measures is preferential treatment. This arises as a consequence of differential treatment. Preferential treatment consists of lowering tax rates or narrowing tax bases, thereby mitigating or minimizing the tax liability of a particular taxpayer. In this context, preferential treatment favors one or more taxpayers. In both cases, the beneficiaries may be determined, or determinable, by using a set of criteria.

Thus, the preferential treatment results from the government's deviation from the general tax system. In other words, the differential treatment coupled with the preferential treatment result in the difference between the amount of tax paid and the tax that would have been paid had the favorable measure not existed. It is this reduction in the tax payable that encourages business activity to gravitate to a particular country. In this context, the favorable tax measures create a comparative tax advantage, the purpose of which is to attract investors from other jurisdictions to the offering jurisdiction.

From the above, the two benchmarks are closely intertwined. Moreover, they are cumulative. Therefore, favorable tax measures herein discussed include any legislation, regulation, or administrative practice with the above characteristics, namely differentially and preferably treating the benefiting taxpayer compared to the generally applied system. Such measures are discussed in detail in the third and fourth sections. Before doing so, the section below provides a brief historical evolution of Rwanda's tax competitiveness.

3.2. Historical development of Rwanda's tax competitiveness

Since the 1980s, Rwanda has been improving its tax system to create a more business-friendly tax climate. This improvement can be seen through the changes that have occurred in the legal and institutional framework.

Beginning with the institutional framework, in 1998 the Government of Rwanda created the Rwanda Investment Promotion Agency (RIPA), with a mandate to act as a one-stop center to promote local and foreign private investment.[3] The law creating RIPA contained tax advantages such as exemption or payment of single flat fee import duties, investment allowances, and deductions.[4] In 2000, the mandate of RIPA was expanded to include export promotion and its name was changed to Rwanda Investment and Export Promotion Agency (RIEPA). This was replaced in 2008 by Rwanda Development Board (RDB).[5]

Regarding the legal framework, over the last thirty years, Rwanda enacted several laws aimed at promoting investments through tax-friendly measures. Apart from a few legal provisions providing for tax exemptions in previous income tax laws, the history of business-friendly tax measures in Rwanda started with the enactment of law No. 21/87 of 05/08/1987 establishing an investment code. Next came law No. 43/90 of 01/10/1990 on the promotion of exports and the law No. 05/2011 of 21/03/2011 on special economic zones.

In 2005, two major laws with investment-related provisions were enacted. One was law No. 26/2005 of 17/12/2005 relating to investment and export promotion and facilitation. This law contained some advantages and incentives for investors, such as imports exempted from customs duties, investment allowances, deductions, discounts, and tax holidays.[6] The other was law No. 16/2005 of 18/08/2005 on direct taxes on income, which contained several favorable tax measures. The 2005 investment law was replaced in 2015, and again in 2021, while the 2005 income tax law was replaced in 2018.

In view of the above, tax-friendly measures in Rwanda are currently spread across several laws: the income tax law, the law on investment promotion and facilitation, the laws on special economic zones, etc. While the latter law falls outside the scope of this book,[7] a detailed examination of the favorable tax measures in the first two laws is carried out below.

[3] Law No. 14/98 of 18/12/1998 establishing the Rwanda Investment Promotion Agency.
[4] Id., art 29 and 30.
[5] Organic Law No. 53/2008 of 02/09/2008 establishing Rwanda Development Board (RDB) and determining its responsibilities, organization and functioning, *O.G.* No. Special of 05/09/2008.
[6] Law No. 26/2005 of 17/12/2005 relating to investment and export promotion and facilitation, art. 18 and Annex.
[7] Special economic zones are considered *prima facie* not harmful tax competition. See M F Nouwen, *Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition* (Ph.D Thesis, UVA 2020), p. 276.

3.3. Legislative favorable tax measures

This section is limited to the current income tax law and the investment law. The current Rwandan income tax law dates from 2018 and applies to four types of income-related taxes, namely PIT, CIT, WHT, and capital gains tax.[8] It offers a number of favorable tax measures such as tax holidays, tax discounts, and tax exemptions. Taking the income tax law as a baseline, the 2021 law on investment promotion and facilitation also provides favorable tax measures, which are intended to benefit registered investors, i.e. those investors holding investment certificates.[9] Registered investors are distinguished from ordinary investors, which are any natural or legal persons who invest in Rwanda.[10]

Both laws taken together provide to investors several favorable tax measures. Such measures include, but are not limited to, preferential CIT rates, tax holidays, tax exemptions, and profit tax discounts. The two laws also provide for other favorable tax measures but whose impact is minimal in the context of this study. Such are, for instance, the exemption from paying property tax for five years for specialized innovation park and specialized industrial park developers,[11] incentives for startups,[12] incentives for the mining sector,[13] preferential tax incentives for film industry,[14] preferential tax incentives for philanthropic investors,[15] etc. The following sub-sections describe the most favorable tax measures.

3.3.1. Preferential tax rates

Under Rwandan law, several preferential CIT rates exist. These include a PTR of zero percent (0%), a PTR of three percent (3%), a PTR of fifteen percent (15%), reduced PTRs to export investments, and preferential WHT rates of 0%, 5%, and 10%. The following paragraphs discuss those PTRs, starting with the PTR of 0%.

In terms of Annex I of the investment law, a PTR of 0% is given to an international company that has its headquarters or a regional office in Rwanda upon fulfilling the following requirements:

[8] Income Tax Law (n 2) art. 2.
[9] Investment Law (n 2) art. $2(41^0)$.
[10] Id., art. $2(29^0)$.
[11] Id., Annex XIII.
[12] Id., Annex XIV.
[13] Id., Annex XVI.
[14] Id., Annex XVII.
[15] Id., Annex III.

> (a) investing in Rwanda at least ten million USD, (b) providing employment and training to Rwandans, (c) conducting international financial transactions equivalent to at least five million USD a year for commercial operations through a licensed commercial bank in Rwanda, (d) being well established in the sector within which it operates (e) spending the equivalent of at least two million USD per year in Rwanda, (f) setting up actual and effective administration and coordination of operations in Rwanda and performing at least 3 of the preferred services.[16]

The same law enumerates the preferred services as including the procurement of raw materials, components or finished products; strategic planning and business development; marketing and sales promotion planning; information and data management services; treasury management services; research and development work; training and personnel management; and other shared services.[17]

From the statutory language, one could easily think that the PTR of 0% only applies to foreigners. However, the term 'international company' is assimilated to an international commercial entity in the law, which includes any business company that owns or controls production or service facilities beyond its home country,[18] regardless of whether it originates abroad or in Rwanda. In other words, the company may be a Rwandan resident or not; what matters is whether it conducts business operations internationally. Thus, only locally operating companies are excluded to benefit from the PTR of 0%.

In addition, the law is unclear as to whether the above-mentioned conditions are cumulative or whether the fulfillment of one is enough to qualify the international company as a beneficiary of the PTR of 0%. Arguably, the absence of the word 'or' would lead to a conclusion that they are cumulative. However, given the diversity of the requirements, it makes sense to conclude that they are not cumulative.

The second favorable tax rate is that of 3%. Upon fulfilling the requirements set forth by the law, a PTR of 3% is available to five categories of investment: a registered investor licensed to operate as a pure holding company, a special purpose vehicle registered for investment purpose, a registered investor licensed as a collective investment scheme, foreign-sourced trading income of a registered investor operating as global trading or paper trading, and

[16] Id., Annex I.
[17] Ibid.
[18] Id., art. 2 (27^0)

foreign-sourced royalties of a registered investor operating as an intellectual property company.[19]

The third favorable tax rate is that of 15% which is given to a registered investor, who:[20] (a) undertakes an energy-related activity like energy generation, transmission and distribution from peat, solar, geothermal, hydro, biomass, methane and wind but excludes an investor with an engineering procurement contract executed on behalf of the GoR; (b) invests in the transport of goods and related activities whose business is operating a fleet of at least five trucks registered in the investor's name, each with a capacity of at least 20 tons; (c) invests in mass transportation of passengers with a fleet of at least 10 buses, each with a capacity of at least 25 seats; (d) invests in manufacturing in the sectors of textiles and apparels, electronics, IT equipment, large scale agriculture, processing of wood, glass and ceramics, mining and agriculture equipment; (e) invests in ICT involving service, manufacturing or assembly but excluding ICT retail, wholesale trade as well as ICT repair industries and telecommunications; (f) establishes an innovation research and development facility and ICT innovation sector; (g) operates as fund management entity, collective investment scheme, wealth management services, financial advisory, family office services, fund administrator, financial technology, captive insurance scheme, private bank, mortgage finance, finance lease, asset-backed securities, reinsurance, trust and corporate service; (h) invests in the construction of affordable houses; (i) invests in electric mobility; (j) invests in adventure tourism and agriculture tourism; (k) invests in any other priority economic sector as may be determined by an Order of the minister of finance.

Unlike the 0% PTR that requires the investor to operate internationally, the 15% PTR does not impose this requirement. More than that, in contrast to several conditions for an investor to benefit PTRs of 0% and 3%, for the PTR of 15%, the law only enumerates the areas of investment without imposing any further condition.

The above-described 0%, 3%, and 15% PTRs are favorable tax measures in the sense that they deviate from the generally applicable standard tax rate of 30% and provide a major reduction in taxes for qualifying companies. Thus, they satisfy the differential treatment benchmark. The effect of the 0% PTR is to allow a company to operate tax-free, i.e. a reduction

[19] Id., Annex II.
[20] Id., Annex IV.

of 100%, while the effect of the 3% and 15% PTRs is a substantial reduction of the tax payable by 90% and 50% respectively.

The law on investment also gives a preferential CIT rate to export investments.[21] Two PTRs are possible: 25% for a registered investor who exports between 30% and 50% of the total turnover, and 15% for a registered investor who exports at least 50% of the total turnover. The law limits PTRs for export investments to a maximum of five years and does not apply to the exportation of unprocessed minerals, tea, and coffee without value addition.[22] The PTRs to export investments are favorable tax measures because of their deviation from the generally applicable tax rates. Thus, they meet the differential and preferential treatment benchmarks.

The investment law also provides for preferential WHT tax rates of 0%, 5%, and 10%. A preferential WHT rate of 0% applies to dividends, interests, and royalties paid to an investor who benefits from a preferential CIT rate of 3% and 15%.[23] A preferential WHT rate of 5% applies to dividends and interest income paid to an investor with a company listed on Rwanda Stock Exchange.[24] A preferential WHT rate of 10% applies to specialized innovation parks and specialized industrial park developers on foreign loans interest, dividends, royalties, and management and technical service fees.[25] These preferential WHT are favorable and deviate the generally applicable rates. They, therefore, pass the diferential and preferential treatment benchmarks.

Thus, the tax rates discussed above are both preferential and differential. They also meet the two benchmarks and qualify as favorable tax measures, and are, therefore, potentially harmful. In addition to PTRs, other favorable tax measures are available under Rwandan law, such as tax holidays.

[21] Id., Annex V.
[22] Id., Annex V(2) and (3).
[23] Id., Annex X.
[24] Id., Annex XI.
[25] Id., Annex XII.

3.3.2. Tax holidays

From a general perspective, tax holidays have been in use a long time ago, basically to entice FDI.[26] In Rwanda, tax holidays appear in the income tax law and the investment law, as discussed below.

3.3.2.1. Tax holidays in the Rwandan income tax law

Under Rwandan income tax law, tax holidays are provided for in article 47. This article states that companies and cooperatives licensed to carry out micro-finance activities benefit from a tax holiday of five years from their approval date. During this period, their CIT rate is 0%. At the end of the initial five-year period, the law offers the possibility of another five-year renewal upon fulfilling the conditions set out by an Order of the minister of finance. At the time of writing this book, that ministerial order was still in a draft form.

Under article 47 of the income tax law, a tax holiday is automatically granted once the activities of company or cooperative are approved to be of a micro-finance nature. Under Rwandan law, micro-finance service providers typically serve a clientele that is not usually served by banks and ordinary financial institutions.[27]

In consideration of the benchmarks set at the beginning of this chapter, tax holidays offered to micro-finance institutions are favorable tax measures in the sense that they offer differential treatment to a particular class of taxpayers through diverging from the generally applicable tax rate. The beneficiaries would otherwise pay the standard CIT of 30%. However, they benefit from the deviation and spend five years, or even ten, paying the CIT at 0%, i.e enjoying a preferential tax benefit of 100%. The difference in applicable tax rates is significant, and the tax holiday reduces or eliminates the tax payable for the entire tax holiday period. Therefore, the fulfillment of both benchmarks makes the tax holidays under the income tax law qualify as favorable tax measures, and therefore potentially harmful.

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[26] J M Mintz, 'Corporate tax holidays and investment' (1990) *The World Bank Economic Review* 4(1), p. 81; M R Fahmi, *Analyzing the Relationship between Tax Holiday and Foreign Direct Investment in Indonesia* (Msc. Thesis, Ritsumeikanasia Pacific Univ. 2012), p. 46; T Kinda, 'The Quest for Non-Resource-Based FDI: Do Taxes Matter?' (2014) IMF WP/14/15, p. 3 <https://www.imf.org/external/pubs/ft/wp/2014/wp1415.pdf> accessed 20/09/2019.

[27] Law No. 40/2008 of 26/08/2008 establishing the organization of Microfinance activities, *O.G.* No. 13 of 30/03/2009, art. 2(11^0).

3.3.2.2. Tax holidays in the Rwandan investment law

The Rwandan investment law also provides for tax holidays. This law offers tax holidays of up to seven years maximum to an investor who fully invests an equivalent of at least 50 million USD and contributes at least 30% of that investment as equity in the priority sectors, excluding private equity and venture capital.[28] Here, three cumulative conditions are required, namely, the amount invested, the percentage of equity, and the sector of investment. The concerned priority sectors of investment are:

> Energy projects producing at least 25 megawatts excluding an investor with an engineering procurement contract executed on behalf of the GoR and fuel produced energy; manufacturing; tourism; health; ICT involving manufacturing, assembly and service but excluding communication, ICT retail and wholesale trade as well as ICT repair and telecommunications companies; export-related investment projects; other priority economic sector as may be determined by an Order of the Minister of finance.[29]

Apart from the tax holidays of seven years, the law on investment promotion and facilitation has the same generosity as the income tax law which offers tax holidays of up to five years renewable to micro-finance institutions.[30] In addition, a tax holiday of up to five years is available to specialized innovation parks and specialized industrial park developers.[31]

The tax holidays offered by the investment law fulfill the two benchmarks to be identified as favorable tax measures. In each case, the beneficiary pays CIT at a rate of 0%, which obviously deviates from the generally applicable tax rate of 30%, i.e. constituting a differential treatment. In turn, because the tax holidays lower by 100% the applicable tax, they completely eliminate the CIT during the period of the tax holiday, which is very favorable for benefiting companies. Therefore, the benefiting taxpayer is preferentially treated. Thus, the tax holidays offered by the investment law are potentially harmful. Besides tax holidays, tax exemptions also appear favorable as discussed below.

3.3.3. Tax exemptions

The Rwandan income tax law exempts three types of income from tax. First, income from agricultural or livestock activities is exempt up to an annual turnover of twelve million Rwandan

[28] Investment Law (n 2) Annex VIII.
[29] Ibid.
[30] Id., Annex IX(2).
[31] Id., Annex IX.

francs.[32] If the annual turnover is higher than that, the exemption is limited to the first twelve million Rwandan francs. The second tax exemption applies to capital gains from the transfer of shares on the capital market as well as units of collective investment schemes.[33] Third, the Development Bank of Rwanda, the Agaciro Development Fund Corporate Trust, and the Business Development Fund Limited are exempt from the payment of the CIT.[34] For these three entities, the tax exemption is for an unlimited period of time and without any threshold or other limitation.

To benefit from a tax exemption, the taxpayer must fall within the scope of one of the three categories mentioned above. If applicable, the tax exemption results in imposing CIT at a rate of 0%, which differs from the standard CIT payable. The effect is a 100% minimization of the tax that would otherwise be owed. Tax exemptions, therefore, constitute obvious preferential treatment. Because they meet the two benchmarks, tax exemptions are favorable tax measures and look potentially harmful.

Elaborating further on the legislative favorable tax measures, another measure that falls within this category is the profit tax discount, as discussed in the next paragraphs.

3.3.4. Profit tax discount

In Rwanda, profit tax discounts are provided for in article 49(2) of the income tax law. In terms of this article, companies that are newly listed on the capital market enjoy a tax discount for the mere fact of selling on the capital market. This benefit is granted for five years.[35] There are three discount levels depending on the number of company shares sold to the public: a 10% discount if the company sells at least 40% of its shares to the public, a 5% discount if the company sells at least 30% of its shares to the public, and a 2% discount if the company sells at least 20% of its shares to the public.[36] Compared to the standard CIT rate of 30%,[37] a newly listed company in the capital market pays the CIT at the discounted rates of 20%, 25%, or 28%, if the shares it sold to the public are respectively 40%, 30%, and 20%. This is, therefore, an evident deviation from the generally applied tax rates and benefits to the taxpayer. In other

[32] Income Tax Law (n 2) art. 21.
[33] Id., art. 39.
[34] Id., art. 46.
[35] Id., art. 49(2).
[36] Ibid.
[37] Id., para. 1.

words, the benefiting taxpayer is differently and preferentially treated. Thus, this measure is favorable and appears potentially harmful.

Beyond the legislative favorable tax measures, it is also important to consider administrative practices that amount to favorable tax measures. Such practices include tax rulings, advance pricing agreements, and tax settlements as detailed in the next section.

3.4. Favorable tax measures through administrative practices

From a general perspective, besides laws that provide for favorable tax measures, the government or tax administration may also use their regulatory and administrative practices to create favorable tax measures. Such administrative practices include tax rulings, tax agreements, and tax settlements. Through these, the tax administration deliberately customizes a legal provision and tailors it to a particular taxpayer(s) in order to place that taxpayer in a privileged situation. The result becomes a provision of differential and preferential treatment that deviates from generally applicable norms. The Rwandan situation with respect to the three is detailed below.

3.4.1. Tax rulings

From a general perspective, a tax ruling refers to an administrative advice, information, statement, or agreement that a tax administration provides to (or between) a taxpayer about the tax consequences of a particular future transaction and upon which the taxpayer is entitled to rely.[38] The purpose of tax rulings is to provide the taxpayer with certainty as to how the tax administration shall apply a particular tax provision to a particular transaction, and they can be public or private.[39]

In their original nature, tax rulings are not meant to favor specific taxpayers. However, they are sometimes used to serve as a channel through which a taxpayer can benefit from lower tax rates compared to standard rates, thus, becoming a tool of tax competition.[40] Examples include, but are not limited to, failure to clearly specify or make public the conditions associated

[38] C Biz, 'Countering Tax Avoidance at the EU Level after 'Luxleaks' A History of Tax Rulings, Transparency and BEPS: Base Erosion Profit Shifting or Bending European Prospective Solutions? (2015) *DPTI* XII(4), p. 1038; OECD, *Glossary of Tax Terms* <www.oecd.org/ctp/glossaryoftaxterms.htm> accessed 07/02/2019.
[39] L V Faulhaber, 'The Trouble with Tax Competition: From Practice to Theory' (2018) *Tax L.Rev.* 71(311), p. 333; F Cachia, 'Analyzing the European Commission's Final Decisions on Apple, Starbucks, Amazon and Fiat Finance & Trade' (2017) *EC T.Rev.* 1, p. 23.
[40] Faulhaber, Ibid.

with the awarding of tax rulings, or the conditions for their amendment or repeal.[41] Using tax rulings for tax competition happens mainly in cases of private rulings that are not published.[42]

Under Rwandan law, the RRA frequently uses public tax rulings. In contrast, private rulings are infrequent. This situation is similar to most developing countries where the practice of private rulings is very low.[43] This low use of private rulings in developing countries is generally due to a variety of reasons, including mistrust between tax administrations and taxpayers.[44] Insufficient technical capacity to manage the private rulings is also another reason.

With particular regard to Rwanda's public rulings, since the adoption of the current income tax law in 2018, the RRA CG has issued a number of public rulings. Examples include, but are not limited to, the CG's public ruling issued on 29/08/2018 on article 60(3) of the income tax law; the CG's public ruling of 12/02/2019 on article $15(7^0)$ of the income tax law, and the CG's public ruling of 29/08/2018 on article $26(9^0)$ of the income tax law.

As stated earlier, the purpose of a tax ruling is to clarify a statutory tax provision. The power to issue tax rulings is vested with the tax administration, which then becomes able to provide an official interpretation of the statute and guides the taxpayer(s) as to how the tax administration will apply a particular tax law. Even so, sometimes that may be departed from and that power becomes customized for a ruling to create a favorable tax measure, deliberately done by the tax administration.

This research has not uncovered any tax ruling in Rwanda that qualifies as a favorable tax measure. Even so, it is worth mentioning article 9(1) of the tax procedures law[45] which gives the CG the authority to issue public and private rulings. This provision requires the RRA to publish public tax rulings 'through a nationwide media'. This raises three questions. First, why did the legislature only require publication of public rulings and not private rulings? Second, the phrase 'nationwide media' is not definite and can open the door to subjective interpretation. Third, the method of publication prescribed by the legislature is not calculated to reach the taxpayers because one media is practically insufficient to reach the public. Rather, the rulings should be published in the official gazette to formalize the information to the public. Moreover,

[41] Biz (n 38) p. 1040.
[42] Faulhaber (n 39) p. 333.
[43] I J Mosquera Valderrama, 'Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative' (2018) *BFIT* 72(3), p. 6.
[44] Ibid.
[45] Law No. 026/2019 of 18/09/2019 on tax procedures, *O.G.* No. special of 10/10/2019.

to provide the broadest notice to the public, the RRA should simultaneously publish the rulings in different nationwide media alongside private mails of taxpayers. Article 9(2) of the law on tax procedures also authorizes the RRA CG to make rules for issuing advance tax rulings. It is unfortunate that at the time of writing this book such rules were still waited for.

3.4.2. Tax agreements

Tax agreements here refer to advance pricing agreements (APA). An APA is an advance agreement between the tax administration and a taxpayer who transacts with a related person. Through an APA, the tax administration and the taxpayer agree on the transfer pricing method for upcoming sales, normally over a fixed period of time.[46] APAs are useful in resolving an actual or potential dispute about the transfer price between related parties, and have the potential to reduce future costs of litigation, thus benefiting both the taxpayer and the tax administration.[47] The mutual benefit, among other reasons, justify their frequent use, in developed countries. In contrast, in most developing countries, African countries included, the use of APAs is not yet widespread.[48] Some reasons may include limited regulation of transfer pricing coupled with the technicalities that are associated with transfer pricing matters.

Focusing particularly on Rwanda, in contrast to other African countries that do not have transfer pricing laws,[49] the Rwandan legislature thought of transfer pricing for the first time in 2005. Currently, transfer pricing is governed by article 33 of the income tax law, which requires that transfer pricing of transactions between related persons conform to the arm's length principle. Consequently, the taxpayer must be able to show through documentation to the tax administration that the price between related parties is the same as the price would be between unrelated parties. Failing to do so, the law empowers the tax administration to adjust the transaction prices. The modalities and details of transfer prices adjustments are governed by a ministerial order.[50]

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[46] OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, OECD Publishing, p. 23; B J Arnold, *International Tax Primer* (3rd edn, Kluwer Law International 2016), p. 209; Biz (n 38) p. 1041; Mosquera Valderrama, Output Legitimacy (n 43) p. 5.

[47] C P Kumar, 'Advance Pricing Arrangement, Transfer Pricing and MNCs: The Implications for Foreign Investment in India' (2007) p. 2 (https://ssrn.com/abstract=1773176, accessed 24/08/2018); B J Arnold and M J McIntyre, *International Tax Primer* (2nd edn, Wolters Kluwer 2002), p. 58.

[48] Mosquera Valderrama, Output Legitimacy (n 43) p. 6.

[49] A Waris, 'Taxing Intra-Company Transfers: The Law and its Application in Rwanda' (2013) *BFIT* 67(12), p. 5.

[50] Ministerial Order No. 003/20/10/TC of 11/12/2020 establishing general rules on transfer pricing, *O.G.* No. 40 of 14/12/2020.

Despite the existence of legal provisions on transfer pricing, the application of transfer pricing rules in Rwanda remains problematic. One cause is the fact that the law was enacted merely to complete the Rwandan tax laws rather than because of any misuse of international transfer pricing or recognition of a need for such rules.[51] This situation appears unusual and different from other countries where tax legislation is usually enacted to address a discovered problem.[52]

Although, from a general perspective, APAs can be used to attract internationally mobile capital by favoring a taxpayer or class of taxpayers, therefore becoming a part of harmful tax competition. This happens when the transfer price is not determined at arm's length. In such cases, the tax administration purposely gives a taxpayer or class of taxpayers a differential and preferential treatment in determining transfer prices. Although possible, this research has not uncovered any APA nor an APA-related case in Rwanda, which resulted into an absence of an APA that offers differential and/or preferential treatment.

3.4.3. Tax settlements

Tax settlements are another part of a tax system that can result in differential and preferential treatment of some taxpayers. Ordinarily, tax settlements occur when the tax administration and the taxpayer agree to settle a dispute out of court. Under Rwandan law, tax settlements are specifically provided for by article 52 of the law on tax procedures. According to this article, if a taxpayer is dissatisfied with the decision from the CG during an administrative appeal, the taxpayer may request to settle the matter amicably.[53] Article 3(7) of the amicable settlement rules[54] limits the taxpayer to only one request for amicable settlement. According to article 53 of the law on tax procedures, if the parties cannot resolve the dispute amicably, the taxpayer may file a case in court no later than thirty days from the date on which the parties failed to reach an amicable solution. The amicable settlement is an option for the taxpayer who, immediate to an administrative appeal, can opt to refer the case to the competent court. Referring the matter to the court remains possible if at the end of the amicable settlement no

[51] Waris (n 49) p. 6.
[52] Ibid.
[53] Tax Procedures Law (n 45) art. 52.
[54] Commissioner General Rules No. 001/2014 of 01/11/2014 determining the modalities of amicable settlement of tax issues, *O.G.* No. 45 of 10/11/2014.

agreement is reached.[55] Similarly, amicable settlement remains an option after the case is in court but before the court delivers the judgment.[56]

The law remains silent about the CG's ability to accept or refuse an amicable settlement once requested by the taxpayer. Part of the answer, the rules on amicable settlement declare *de facto* inadmissible a request on a case that the CG earlier rejected its appeal 'for reasons provided by the law'.[57] Indeed, if the Commissioner's reasons to reject the taxpayer's appeal were based on a sound interpretation of the law, there would be no reason for the CG to settle the case. However, the rules remain silent on other grounds that can motivate the inadmissibility of the request. Thus, the use of the term 'request' may be viewed as entitling the CG with the right to accept or to refuse the settlement request depending on the circumstances, which may include the best interest of the Revenue Authority.

From a practical perspective, numerous tax disputes are settled amicably.[58] An example of this is the case of MTN Rwanda Ltd v. RRA. This case started when RRA charged MTN Rwanda Ltd VAT on imported services from foreign companies. Dissatisfied with the RRA's decision, MTN Rwanda Ltd filed the case in court. On 05/12/2013, the Court ruled in favor of MTN Rwanda Ltd.[59] The RRA appealed the decision, but later withdrew its appeal for reasons not known to the public, other than the apparent fact that the parties settled amicably.

The details of that settlement are not in public domain and limited information is known to the public. Nevertheless, it is worth noting a few elements in relation to the settlement practices using that example. The first is how the RRA determines the settlement amount in a particular case. This determination is critical because, to a certain extent, a settlement could be viewed as relieving a taxpayer from paying a portion of the tax. If viewed in that way, it would risk looking like a case of favorable tax measure, thus, potentially harmful. Second, one can question the RRA's rationale during the amicable settlement process. Ordinarily, all tax disputes begin with an administrative appeal before they reach a court. During the administrative appeal, the RRA has the opportunity to accept a certain amount of tax, but does not. Why then accept that amount at some point later? As in the above case, it is very likely that MTN Rwanda Ltd,

[55] Tax Procedures Law (n 45) art. 53.
[56] Amicable settlement rules (n 54) art. 3(4) and art. 5(2).
[57] Id., art. 3(6).
[58] For instance, in the 2018/19 fiscal year, the RRA received 93 requests for amicable settlement, which was a decrease of 41.9% from the 160 requests it received in 2017/18 fiscal year. See RRA, 'Annual Activity Report 2018/19' (Oct. 2019) p. 43 <https://rra.gov.rw/fileadmin/user_upload/rra_annual_activity_report_2018-19.pdf> accessed 11/02/2020.
[59] MTN Rwanda Ltd v. RRA, RCOM 0710/13/TC/NYGE, Nyarugenge Commercial Court, 05/12/2013.

having won the case at the first level, accepted to settle out of court because the settlement outcome was in its favor compared to the first court's outcome. All those questions raise suspicions on the objectivity and/or subjectivity of amicable settlements. In summary, a tax settlement can be a favorable tax measure, especially if it is deliberately done to reduce the tax that would otherwise be owed.

Conclusion of chapter three

The aim of this chapter was to provide a non-exhaustive summary of the favorable tax measures available under Rwandan law. The starting point was the question of the benchmarks that can determine whether a tax measure is favorable. Two indicators were identified. One is the differential treatment from the general tax system with the application of tax rates and/or tax bases that deviate from what generally applies. The second is whether the effect of that difference is a preferential treatment resulting from a lower level of taxation, i.e., the minimization of the tax payable that benefits the taxpayer.

Focusing on Rwanda's current tax system, this chapter examined the available favorable tax measures in the income tax law and the law on investment promotion and facilitation. From those two laws, four measures were identified: PTRs, tax holidays, tax exemptions, and profit tax discounts. In addition, regulatory and administrative practices also provide favorable tax measures. Three such measures were identified: tax rulings, tax agreements, and tax settlements.

One reason to summarize favorable tax measures under Rwandan law is their innate proximity to harmful tax practices. This chapter has not distinguished whether the identified favorable tax measures are actually harmful or not. This task is saved for chapter six, which focuses on testing each of the identified measures to conclude whether or not they are actually harmful. At this point, the exercise was a mere identification of such measures.

Because of the established relationship between favorable tax measures and harmful tax competition, coupled with the latter's global nature, it is necessary to examine a variety of initiatives undertaken by other countries. Reference to the EU and OECD initiatives is helpful in the study of harmful tax competition. Indeed, some of the Rwandan measures that have been filtered out as potentially harmful are similar to some measures that have been assessed by the EU and/or the OECD. Therefore, the next chapter discusses the approaches of these two organizations to harmful tax practices.

4 OECD AND EU APPROACHES TO HARMFUL TAX PRACTICES

Because of the negative consequences associated with harmful tax practices, it is agreed-upon that they should be avoided as much as possible. Such negative consequences include undermining the integrity and fairness of tax systems, discouraging tax compliance, and shifting the tax burden to less mobile tax bases.[60] In response to these negative consequences, strategic measures have been developed globally, aimed to combat harmful tax practices. Many institutions and organizations have also united to curb harmful tax practices. For example, the OECD and the EU are constantly engaged in developing measures to curb harmful tax practices. Their efforts are the subject of this chapter.

The aim of this chapter is to provide an overview of the OECD's and EU's assessments of harmful tax practices. It begins with the OECD works against harmful tax practices, with a focus on the 1998 Report on harmful tax competition and other reports that followed. It then analyses the EU's approaches to harmful tax practices, followed by a comparison of the factors of harmful tax competition between the two institutions. The chapter ends with an examination of the OECD and EU contributions to the study of harmful tax practices and their merits and demerits for developing countries.

4.1. OECD 1998 Report on harmful tax competition

As part of its mandate to address international economic issues, the OECD has undertaken several works in the field of international taxation and has studied many tax topics, including harmful tax competition. The OECD's preoccupation with harmful tax competition began in the early 1970s with its works on tax havens.[61] Its works continued with the 1998 Project and were recently expanded with the 2013 BEPS Project. The focus of this section is on the 1998 Report on harmful tax competition. In this respect, the following paragraphs discuss the 1998 Report itself, its praise and criticism, the reports that followed it, and the key factors developed by the OECD to identify tax havens and HPTRs.

[60] OECD (1998), *Harmful Tax Competition: An Emerging Global Issue*, OECD Publishing, p. 16; A W Oguttu, 'Tax Base Erosion and Profit Shifting in Africa: Africa's Response to the OECD BEPS Action Plan' (2016) ICTD WP 54, p. 9 <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/12802/ICTD_WP54.pdf> accessed 24/10/2019.

[61] A P Morriss and L Moberg, 'Cartelizing Taxes: Understanding the OECD's Campaign against Harmful Tax Competition' (2012) *CJTL* 4(1), p. 33.

4.1.1. OECD 1998 Report in brief

The 1998 OECD Report is the result of a project that began in May 1996.[62] The project was completed in January 1998, and the OECD Council endorsed it in April 1998.[63] The project's main objective was to develop a better global understanding of harmful tax practices.[64] It was triggered by concerns about the emergence of harmful tax competition between countries that use tax schemes to attract financial and mobile activities, leading to risks of trade and investment distortions along with the erosion of national tax bases.[65] Considering tax base erosion as a threat to tax revenues, tax sovereignty, and tax fairness,[66] the project's goal was:

> To develop a better understanding of how tax havens and harmful preferential tax regimes 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.[67]

The project was based on the fact that countries' tax bases were at risk of being eroded. In this regard, it was said that:

> Governments cannot stand back while their tax bases are eroded through the actions of countries which offer taxpayers ways to exploit tax havens and preferential regimes to reduce the tax that would otherwise have been payable.[68]

Thus, the 1998 OECD Report identified six problems caused by harmful tax competition, namely:

> (1) distortion of the financial, and, indirectly real investment flows; (2) undermining the integrity and fairness of tax structures; (3) discouraging compliance by all taxpayers; (4) re-shaping the desired level and mix of taxes and public spending; (5) causing undesired shifts of the tax burden to less mobile tax bases, such as labor, property, and consumption; and (6) increasing the administrative costs and compliance burdens on tax authorities and taxpayers.[69]

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[62] M Littlewood, 'Tax Competition: Harmful to Whom?' (2004) *MichJIntlL* 26(1), p. 417.
[63] Id., p. 419.
[64] J G Salinas, 'The OECD Tax Competition Initiative: A Critique of its Merits in the Global Marketplace' (2003) *Hous.J.Int'lL.* 25(3), p. 539; H M Liebman, W Heyvaert and V Oyen, 'Countering Harmful Tax Practices: BEPS Action 5 and EU Initiatives – Past Progress, Current Status and Prospects' (2016) *Euro.Tax.*, p. 102.
[65] Communiqué issued by G7 Heads of State at their 1996 Lyon Summit, in OECD 1998 Report (n 60) p. 7.
[66] Oguttu, BEPS in Africa (n 60) p. 6.
[67] OECD 1998 Report (n 60) p. 8; F Boulogne, 'Reviewing the OECD's and the EU's Assessment of Singapore's Development and Expansion Incentive' (2019) SMU Sch. of Accountancy Research Paper 7(1), p. 12 <http://dx.doi.org/10.2139/ssrn.3349404> accessed 14/08/2019.
[68] OECD 1998 Report, Id., p. 37.
[69] Id., p. 16.

The report also elaborated on the components of harmful tax practices, namely tax havens and HPTRs. It also identified the factors that determine whether a regime is harmful or not.

The Report's geographic scope was worldwide with respect to tax havens and OECD members' territories with respect to HPTRs.[70] Even so, the Report encouraged non-OECD members to embrace the OECD's campaign against HPTRs.[71] This makes the geographic scope of application wider in the cases of tax havens than in the cases of HPTRs. This difference is partly due to the weight given to the fight against tax havens compared to HPTRs. Indeed, tax havens look worse than HPTRs.

Regarding the scope *ratione materiae*, the 1998 OECD Report covers only '*geographically mobile activities, such as financial and other service activities, including the provision of intangibles*'.[72] The Report considers the location of financial and other service activities as the top problems or consequences of harmful tax practices.[73] In contrast, tax measures that favor manufacturing activities and tax measures in relation to indirect taxation are outside the scope of the 1998 OECD Report.[74] Similarly, the OECD, through the Forum on Harmful Tax Practices, has continued to exclude non-geographically mobile activities, whose risk of base erosion is low.[75]

Moreover, a PTR given to promote activity in a particular economic sector, even if it includes geographically mobile activities, is not harmful as long as it is not ring-fenced.[76] That is, if the primary objective of a particular regime is not to aggressively bid for other countries' tax bases, the regime is not harmful.[77] Thus, the OECD's main objective is not and has not been

[70] Id., p. 37; I Calich, *The Impact of Globalization on the Position of Developing Countries in the International Tax System* (Ph.D Thesis, LSE 2011), p. 64; J Englisch and A Yevgenyeva, 'The Upgraded Strategy against Harmful Tax Practices under the BEPS Action Plan' (2013) *British L.Rev.* 5, p. 626.
[71] OECD 1998 Report (n 60) p. 37; OECD (2004), *Consolidated Application Note in Applying the 1998 Report to Preferential Tax Regimes*, OECD Publishing, p. 20 [OECD CAN].
[72] OECD CAN, ibid; C Pinto, 'EU and OECD to Fight Harmful Tax Competition: Has the Right Path Been Undertaken?' (1998) *Intertax* 26(12), p. 390; R S Avi-Yonah, 'Bridging the North/South Divide: International Redistribution and Tax Competition' (2004) *MichJIntlL* 26, p. 385; H J Ault, 'Tax Competition and Tax Cooperation: A Survey and Reassessment' in J Monsenego and J Bjuvberg (eds), *International Taxation in a Changing Landscape* (Wolters Kluwer 2019), p. 2.
[73] OECD 1998 Report (n 60) p. 8.
[74] Pinto, EU and OECD (n 72) p. 390; Ayi-Yonah, Bridging the north/south divide (n 72) p. 385.
[75] OECD (2019), *Harmful Tax Practices – 2018 Progress Report on Preferential Regimes: Inclusive Framework on BEPS Action 5*, OECD Publishing, p. 13; W Gilmore, 'The OECD, Harmful Tax Competition and Tax Havens: Towards an Understanding of the International Legal Context' (2001) *Commonwealth Law Bulletin* 27(1), p. 551.
[76] OECD CAN (n 71) p. 20.
[77] Englisch and Yevgenyeva (n 70) p. 626.

to discourage countries to introduce or maintain PTRs.[78] Indeed, tax regimes are not a problem as long as they are not ring-fenced.

Separate from this, but closely related, is the OECD's that harmful tax competition negatively affects global welfare. Thus, the OECD believes that eliminating harmful tax competition would contribute positively to global welfare.[79] This view justifies the OECD's efforts in adjusting tax rates by restraining countries from lowering their rates as well as encouraging low-tax jurisdictions to raise their rates.[80]

Nevertheless, the OECD's focus was not on statutory tax rates, but on low effective tax rates. This focus justifies the OECD's consideration of transparency and effective EoI as important tools in the fight against harmful tax regimes.[81] Even though, transparency and the right to privacy are at odds with each other. The same is true for EoI vis-à-vis state tax sovereignty. Such issues and other criticisms were raised against the 1998 OECD Report. However, it also received some praise.

4.1.2. Praise and criticism of the 1998 OECD Report

The 1998 OECD Report was highly divisive,[82] with ups and downs,[83] and extremely controversial[84] with two diverging views: success (praise) and failure (criticisms).[85] Both are discussed below.

4.1.2.1. Praise

In general, and not surprisingly, the project was widely supported and welcomed by the OECD members. This is quite understandable given that the Project was commissioned by a group of powerful countries, all members of the OECD. Indeed, one trigger of the project is a communiqué issued by the G7 Heads of State at the 1996 Lyon Summit. The communiqué stated:

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[78] OECD CAN (n 71) p. 20 and 24; S Bond et al., *Corporate Tax Harmonization in Europe: A Guide to the Debate* (2000) The Institute for Fiscal Studies, London, p. 62 <www.ifs.org.uk/comms/r63.pdf> accessed 24/08/2019; L B Samuels and D C Kolb, 'The OECD Initiative: Harmful Tax Practices and Tax Havens' (2001) *Taxes* 79(231), p. 232.
[79] OECD 1998 Report (n 60) p. 16.
[80] Morriss and Moberg (n 61) p. 1.
[81] Samuels and Kolb (n 78) p. 234.
[82] Salinas (n 64) p. 552.
[83] Morriss and Moberg (n 61) p. 62.
[84] M Orlov, 'The Concept of Tax Haven: A Legal Analysis' (2004) *Intertax* 32(2), p. 104; B J Arnold, *International Tax Primer* (3rd edn, Kluwer Law International 2016), p. 185.
[85] R S Avi-Yonah, 'The OECD Harmful Tax Competition Report: A Tenth Anniversary Retrospective' (2009) *BrookJIntlL* 34(3), p. 783.

> Finally, globalization is creating new challenges in the field of tax policy. Tax schemes aimed at attracting financial and other geographically mobile activities can create harmful tax competition between states, carrying risks of distorting trade and investment and could lead to the erosion of national tax bases. We strongly urge the OECD to vigorously pursue its work in this field, aimed at establishing a multilateral approach under which countries could operate individually and collectively to limit the extent of these practices.[86]

Although not all OECD members are part of the G7, the fact that all G7 members are members of the OECD is significant to the OECD's dominance. In this sense, it has been said that, historically, the G7 always influences the OECD.[87] This close relationship between the OECD and the G7 was also seen in a meeting of OECD ministers and G7 Heads of State held in 1997, before the publication of the Report, where the importance of tackling harmful tax competition was reiterated.[88]

After the Report was published in 1998, it received numerous praise. For example, following its 15th recommendation, the Forum on Harmful Tax Practices was established to monitor further harmful tax practices. This Forum is praised for coordinating and furthering knowledge in the fight against harmful tax practices.[89] It is also believed that, if the OECD had not put pressure on tax havens, many of the OECD citizens would have transferred their funds to tax havens.[90]

The 1998 OECD Report is also praised for being the first to identify the problems of tax havens and HPTRs.[91] It also provided the basis for the international community to develop the rules of the international tax game, such as the rules on effective EoI and transparency.[92] In addition, the 1998 OECD Project has been described as a reasonable response[93] and is

[86] S Jogarajan and M Stewart, 'Harmful Tax Competition: Defeat or Victory?' (2007) *Austl.Tax.F.* 22, p. 5; K van Raad, *Materials on International & EU Tax Law* (13th edn, International Tax Center 2013), p. 1309; OECD, Confidential draft Recommendation on Counteracting Harmful Tax Competition, C(98)17 (17 Feb. 1998), p. 3, <https://one.oecd.org/document/C(98)17/en/pdf> accessed 29/08/2021.
[87] Morriss and Moberg (n 61) p. 41.
[88] OECD 1998 Report (n 60) p. 7; Littlewood (n 62) p. 418.
[89] H M Liebman, W Heyvaert and V Oyen, 'Countering Harmful Tax Practices: BEPS Action 5 and EU Initiatives – Past Progress, Current Status and Prospects' (2016) *Euro.Tax.*, p. 103.
[90] Avi-Yonah, OECD HTC Report (n 85) p. 792.
[91] Id., p. 783.
[92] Orlov (n 84) p. 104 and 108.
[93] Orlov, Id. p. 95; Samuels and Kolb (n 78) p. 255; A Townsend, 'The Global Schoolyard Bully: The Organization for Economic Cooperation and Development's Coercive Efforts to Control Tax Competition' (2001) *FordhamInt'lL.J.* 25(1), p. 234; A W Oguttu, *Curbing Offshore Tax Avoidance: The Case of South African Companies and Trusts* (Ph.D Thesis, UNISA 2007), p. 32 and 43.

considered having gained the status of soft law.[94] The OECD was also commended for having played a leading role among other international initiatives, and its work was lauded as a proper, direct onslaught on tax havens[95] and a general assault on tax competition.[96]

Moreover, the OECD project on harmful tax competition played an important role in waking up the world that noticed harmful tax competition as a serious issue. In this context, the OECD openly fought against harmful tax practices and laid down factors to determine whether a regime is harmful. Another achievement of the Report is that the Forum on Harmful Tax Practices review processes have abolished or amended some harmful tax practices. Not only that, but the Forum on Harmful Tax Practices review processes might have aborted some embryonic harmful tax practices. In addition, the OECD project has sparked academic discussions on harmful tax practices, which have contributed to research on the topic. However, although the OECD project gained widespread support, it also received some criticisms as detailed below.

4.1.2.2. Criticisms

Considering its origins, the OECD project on tax competition is said to have been designed primarily to satisfy the interests and benefits of the G7 and other like-minded OECD members.[97] Similarly, the project has been accused of manipulation by the high-tax OECD members.[98] Connected to that, the Report was seen as a way for high-tax jurisdictions to eliminate competition from low-tax jurisdictions by forcing them to raise their tax rates.[99] However, the OECD categorically objected to that allegation and insisted that it had no intention to impose

[94] J McLaren, 'The OECD's Harmful Tax Competition Project: Is it International Tax Law' (2009) *Austl.Tax.F.* 24, p. 436 and 452.
[95] Orlov (n 84) p. 95; Oguttu, Curbing Offshore Tax Avoidance (n 93) p. 32 and 43.
[96] Townsend (n 93) p. 234.
[97] Littlewood (n 62) p. 418 and 442; Calich (n 70) p. 67.
[98] Morriss and Moberg (n 61) p. 3; R Sanders, 'The Fight against Fiscal Colonialism: The OECD and Small Jurisdictions' (2002) *The Round Table* 365, p. 330; A F Abbott and D R Burton, 'Apple, State Aids, Tax Competition, and the Rule of Law' (2017) *Backgrounder* 3204, p. 8.
[99] Samuels and Kolb (n 78) p. 254.

tax rates on sovereign states or to prescribe how a tax system should be structured.[100] Rather, it emphasized the promotion of an environment of free and fair tax competition.[101]

The 1998 OECD report was also criticized for not gaining support from some of its members, as both Switzerland and Luxembourg opposed it. Their opposition was mainly due to their economic reliance on their secrecy reputation built on confidentiality, which could be jeopardized if they committed to the 1998 OECD report.[102] Not only these two countries, but also the US gave no support, even though they signed it.

Indeed, some Americans, despite being a member of the OECD and the G7, voiced their criticisms mostly in the name of protecting tax sovereignty. They argued that the OECD has no right to dictate tax policy to sovereign nations and saw the OECD's acts as a threat and encroachment to countries' fiscal sovereignty to determine their own tax affairs.[103] Similarly, some members of the US Congress expressed negative views about the OECD report, and called it a major threat to national sovereignty.[104] The US officially recognized that the OECD Project's aim was to harmonize world tax systems and declared its defiance to that aim.[105] More specifically, the US Secretary of the Treasury stated:

> The United States does not support efforts to dictate to any country what its own tax rates or tax system should be, and will not participate in any initiative to harmonize world tax systems ….[106]

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[100] OECD (2001), The OECD's Project on Harmful Tax Practices: The 2001 Progress Report, OECD Publications, p. 4; OECD (2004), The OECD's Project on Harmful Tax Practices: The 2004 Progress Report, OECD Publications, p. 4; OECD (2006), The OECD's Project on Harmful Tax Practices: The 2006 Progress Report, OECD Publications, p. 3; OECD (2015), *Countering Harmful Tax Practices More Effectively Taking into Account Transparency and Substance: Action 5 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 14; R M Hammer and J Owens, 'OECD: Promoting Tax Competition' (2001) *Int'lT.Rev.* 12(5), p. 46; D Mitchell, 'Between the Lines: Havens can wait' (2002) *Foreign Policy* 131, p. 71; P Lampreave, 'Fiscal Competitiveness versus Harmful Tax Competition in the European Union' (2011) *BFIT* 65(6), p. 5.

[101] OECD 2001 progress report, Ibid.

[102] Morriss and Moberg (n 61) p. 47; Sanders (n 98) p. 330; J Owens and R McDonell, 'Inter-agency Cooperation and Good Tax Governance in Africa: An Overview' in J Owens et al. (ed.), *Inter-agency Cooperation and Good Tax Governance in Africa* (PULP 2017), p. 3.

[103] Owens and McDonell, Ibid.; D M Ring, 'What's at Stake in the Sovereignty Debate: International Tax and the Nation-State' (2008) *Va.J.Int'Ll.* 49(1), p. 27; G Nicodème, 'On Recent Developments in Fighting Harmful Tax Practices' (2009) *Nat'l Tax J.* 62(4), p. 763.

[104] Ring, Id., pp. 192-93.

[105] A Hishikawa, 'The Death of Tax Havens' (2002) *BCInt'l&CompLRev.* 25(389), p. 412; P O'Neil, 'Commentary: Confronting OECD's 'Harmful' Tax Approach' *The Washington Times* (11/05/2001), A17 <www.uniset.ca/microstates/oneill.pdf> accessed 25/08/2019; US Department of the Treasury, 'Treasury Secretary O'Neill Statement on OECD Tax Havens', 10/05/2001 PO-366 <www.treasury.gov/press-center/press-releases/Pages/po366.aspx> accessed 17/04/2020.

[106] O'Neil, ibid; US Department, ibid.

To a greater or lesser extent, the lack of support from the three countries could be associated in one way or another with the fact that they also engage in behavior similar to that condemned by the OECD. This gave rise to another criticism of the OECD, which condemns the behavior of some countries while its members engage in the same behavior. An example of this is the US, which is considered by some to be the world's largest tax haven, as several of its states, such as Delaware, Nevada, and Wyoming, are known for offering secret services and favorable tax treatment to non-resident foreigners.[107]

The OECD has also been criticized and accused of attempting to form a system of global tax cartels in which countries would all tax at the same rate and in the same way, which would be a disaster for taxpayers.[108] However, the OECD has on several occasions denied any intention to promote tax harmonization, and has contended that there is no reason for two or more countries to have the same level of taxation.[109] Moreover, the OECD project against harmful tax competition has been seen as a form of neo-colonialism by the world's wealthiest countries, attempting to dictate their will to powerless poor nations, bludgeoning them into submission.[110] This was further described as, if successful, a kind of forced concession of autonomy and a subversive attack on the sovereignty of poor nations.[111]

Another criticism of the OECD Report is its failure to adequately explicate the problem of tax competition, alongside other non-determinant elements such as a low-tax rate.[112] On this account, the 1998 Report was criticized for its vagueness in not specifying what a nominal tax

[107] Morriss and Moberg (n 61) p. 44; Mitchell (n 100) p. 71; R A Johnson, 'Why Harmful Tax Practices will Continue after Developing Nations Pay: A Critique of the OECD's Initiative Against Harmful Tax Competition' (2006) *BCThirdWorldL.J.* 26(2), p. 365.
[108] Abbott and Burton (n 98) p. 1; K Carlson, 'When Cows Have Wings: An Analysis of the OECD's Tax Haven Work as it Relates to Favor, Sovereignty and Privacy' (2002) *J.MarshallL.Rev.* 35(163), pp. 174-75.
[109] OECD 1998 Report (n 60) p. 5 and 15; OECD (2000), Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices, Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, OECD Publications, p. 5; Samuels and Kolb (n 78) p. 235; W S Clark, 'Tax Incentives for Foreign Direct Investment: Empirical Evidence on Effects and Alternative Policy Options' (2000) *CTJ/RFC* 48(4), p. 1175; J M Mintz and M Smart, 'Recent Developments in Tax Coordination: A Panel Discussion by Bev Dahlby, Robert Henry, Michael Keen, and David E. Wildasin' (2000) *CTJ/RFC* 48(2), p. 401.
[110] Sanders (n 98) p. 326; Arnold (n 84) p. 185; J Dabner, 'The Legacy of the OECD's Harmful Tax Practices Initiative: Implications for Australia and Vanuatu' (2004) *APJT* 8(4), p. 77; B Maurer, 'From the Revenue Rule to Soft Law and Back Again: The Consequences for 'Society' of the Social Governance of International Tax Competition' in F V Benda-Beckmann, K V Benda-Beckmann and J Eckert (eds), *Rules of Law and Laws of Ruling: On the Governance of Law* (Ashgate Publishing 2009), p. 226.
[111] Morriss and Moberg (n 61) p. 3; W B Vlcek, *Small States and the Challenge of Sovereignty: Commonwealth Caribbean Offshore Financial Centers and Tax Competition*, (Ph.D Thesis, Univ.London 2006), p. 135.
[112] W B Barker, 'Optimal International Taxation and Tax Competition: Overcoming the Contractions' (2002) *Nw.J.Int'lL. & Bus.* 22(161), p. 170.

rate is or an exact figure or range of low-tax rates that qualify as harmful tax competition.[113] In response, the OECD clarified that there is no explicit or implicit general minimum effective tax rate below which it would constitute harmful tax competition.[114] Nevertheless, the lack of an exact explanation was considered crucial, considering that the Report identifies a low-tax rate as the most important element to qualify a regime as a tax haven or HPTR.[115]

By the same token, the lack of substantial economic activities was qualified as not determinative.[116] The OECD has largely accepted this and in its 2001 progress report dropped the criterion of requiring substantial activity for the reason of being difficult to find out when and whether local activities are substantial.[117] The 1998 OECD report was also criticized for failing to define what harmful tax competition is. This was described as a case of 'confusion and puzzle'.[118]

Furthermore, the OECD Report was criticized for talking about base erosion as a result of harmful tax practices without providing numerical evidence on the alleged erosion. In this regard, it was described as 'unfortunate' that the OECD does not provide numerical data to bolster the claim of tax base erosion.[119] It seems that the OECD anticipated this criticism by mentioning the unavailability of data as a limitation.[120] However, this excuse does not invalidate the criticism.

Another criticism concerns the scope of application of the 1998 OECD Report. In the Report, the OECD itself extends its scope to include its members, non-members, and their dependencies.[121] Although the OECD justifies its extension on the basis of the global nature of tax competition,[122] extending the scope to a non-member sovereign country may violate state

[113] Salinas (n 64) p. 555; Townsend (n 93) p. 239.
[114] OECD 2018 Progress report (n 75) p. 20.
[115] OECD 1998 Report (n 60) p. 21-22 and 25; OECD 2001 progress report (n 100) p. 5; Littlewood (n 62) p. 424; M F Ambrosanio and M S Caroppo, 'Eliminating Harmful Tax Practices in Tax Havens: Defensive Measures by Major EU Countries and Tax Haven Reforms' (2005) *CTJ/RFC* 53(3), p. 689.
[116] Salinas (n 64) p. 555.
[117] OECD 2001 progress report (n 100) p. 10; C Pinto, *Tax Competition and EU Law* (Ph.D Thesis, UVA 2002), p. 226; J Akhtar and V Grondona (2019), 'Tax Haven Listing in Multiple Hues: Blind, Winking or Conniving?', South Centre Research Papers 94, p. 5 <https://southcentre.int/wp-content/uploads/2019/04/RP94_Tax-Haven-Listing-in-Multiple-Hues-Blind-Winking-or-Conniving_EN.pdf> accessed 16/05/2019.
[118] Pinto, Id., p. 217.
[119] R S Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State' (2000) *HarvLRev* 113(7), p. 1597.
[120] OECD 1998 Report (n 60) p. 17.
[121] Id., p. 8.
[122] Salinas (n 64) p. 548.

sovereignty.[123] This consideration motivated to call the OECD's actions as tyrannical.[124] In this context, it is worth noting that the OECD itself was skeptical that non-members would disagree with its report.[125] In addition to issues of sovereignty violation, it was claimed that the EoI and transparency also violate privacy rights.[126]

Another criticism of the 1998 OECD Report concerned its enforcement mechanisms. Without a legally established legal order with legal enforcement mechanisms, the OECD used the strategy of blacklisting combined with coordinated threats of sanctions, as a way of coercing states that engage in harmful tax practices to adopt compliant behavior.[127] This enforcement mechanism has been negatively labeled with words and phrases such as 'naming and shaming', 'stigmatizating', 'threatening', 'coercing', etc.[128]

Despite these criticisms, the OECD Report on harmful tax competition has generally gained success worldwide, and it is frequently referred to in the regulation of tax competition. Following this Report, the OECD's works continued through the Forum on Harmful Tax Practices, whose progress reports are discussed below.

4.1.3. OECD progress reports and BEPS Project

The OECD's work on harmful tax practices did not end with the 1998 Report. It continued with further reports, called progress reports. In this context, two years after the 1998 Report, the OECD published a report on progress in identifying and eliminating harmful tax practices.[129] This Progress Report was a follow-up to the 1998 Report's recommendations to establish a forum to review jurisdictions with harmful tax competition features in order to counter their proliferation. That Report identified 35 jurisdictions as tax havens,[130] and 47 jurisdictions as HPTRs.[131] The Report itself mentioned that it was not definitive and called upon the named jurisdictions to make a public political commitment to avoid being listed as uncooperative

[123] Carlson (n 108) p. 177; McLaren, OECD's Harmful Tax Competition (n 94) p. 450; Samuels and Kolb (n 78) p. 255; Orlov (n 84) p. 95.
[124] Hishikawa (n 105) p. 416.
[125] OECD 1998 Report (n 60) p. 10
[126] Samuels and Kolb (n 78) p. 254.
[127] Johnson (n 107) p. 354; Akhtar and Grondona (n 117) p. 28.
[128] Johnson, Id., p. 357; Bond et al. (n 78) p. 63; Sanders (n 98) p. 338; R Palan, 'Tax Havens under Attack' (2013) *The World Today* 69(3), p. 46.
[129] OECD 2000 progress report (n 109); H J Ault, 'Reflections on the Role of the OECD in Developing International Tax Norms' (2009) *BrookJIntlL* 34(3), p. 772.
[130] OECD 2000 progress report, Id., p. 17.
[131] Id., pp. 12-14.

jurisdictions.[132] The details of the commitment were set out in a 2000 MoU and included mainly issues of transparency and EoI.[133]

In 2001, the OECD published another progress report.[134] Unlike the 2000 Report, which had set the deadline for the next review at 31 July 2001,[135] the 2001 report extended the new deadline to 28 February 2002.[136] The extension was intended to give the reviewed jurisdictions sufficient time to comply with their commitments. The 2001 report also revised the criteria for identifying tax havens, by dropping the 'no substantial activity requirement' due to its limited practical significance.[137]

The next progress report was published in 2004.[138] Refering to the list of tax havens and HPTRs in the 2000 Report, the 2004 Report reviewed the progress of each identified jurisdiction. The Report concluded that there had been abolishment or process of abolishment in 18 regimes, amendment in 14 regimes, and 13 regimes were found not harmful.[139]

A similar process was carried out again with the 2006 report.[140] This Report showed that of the potentially harmful regimes identified in 2000, 20 had been abolished, 13 had been amended, 13 had been reviewed as not harmful, and only one had been reviewed harmful.[141] The 2006 Report also found that three regimes had been introduced after 2000, but were found not harmful.[142]

It is worth noting that the OECD's work on progress reports slowed down after 2006,[143] but did not stop completely. For example, the OECD published further progress reports in 2017 and 2018.[144] Moreover, the slowdown was interrupted in 2013 when the OECD, together with the G20, embarked on a homologous but broader project on BEPS. Motivated by the need to

[132] Id., p. 6.
[133] Pinto, Tax competition (n 117) p. 222.
[134] OECD 2001 progress report (n 100).
[135] OECD 2000 progress report (n 109) p. 18, 24, 25, 29 and 30
[136] OECD 2001 progress report (n 100) p. 10 and 11.
[137] Ibid., p. 10; Ault (n 129) p. 770.
[138] OECD 2004 progress report (n 100).
[139] Id., pp. 6-9.
[140] OECD 2006 progress report (n 100).
[141] Id., p. 5.
[142] Id., p. 6.
[143] Liebman, Heyvaert and Oyen (n 89) p. 103.
[144] OECD (2017), *Harmful Tax Practices – 2017 Progress Report on Preferential Regimes: Inclusive Framework on BEPS Action 5*, OECD Publishing; OECD 2018 Progress Report (n 75).

align the place of taxable profits with the location of economic activity and value creation,[145] the BEPS project's report was released on 5 October 2015 with a plan of fifteen actions to be implemented at different levels by OECD members and non-members.

Action five of the fifteen actions is about tackling harmful tax practices more effectively. The intent of this Action was stated as follows:

> To counter harmful tax practices with respect to geographically mobile activities such as financial and other service activities, including the provision of intangibles... that unfairly erode the tax bases of other countries, potentially distorting the location of capital and services.[146]

This Action aims to address harmful tax practices more effectively, including tax havens, HPTRs, and highly favorable aggressive tax rulings.[147] In doing so, the OECD reiterated its concerns as:

> Revamping the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on requiring substantial activity for any preferential regime. [148]

Although new, the BEPS Action 5 does not stand as a replacement for the OECD reports on harmful tax practices. Rather, it stands as a continuation, and both complement each other. In this respect, BEPS Action 5 has been seen as an attempt to revive the OECD reports on harmful tax practices, whose value is not lost.[149] The use of words such as 'revamp', 'priority', and 'renewed focus' was also interpreted as reinforcing the 1998 OECD Report on harmful tax competition.[150] In this regard, the completion lies in the focus on intangibles, such as the

[145] OECD BEPS Action 5 (n 100) p. 3; UNECA, 'Base Erosion and Profit Shifting in Africa: Reforms to Facilitate Improved Taxation of Multinational Enterprises' (2018) p. VI; A W Oguttu, 'International tax competition, Harmful tax practices and the 'Race to the bottom': a special focus on unstrategic tax incentives in Africa' (2018) *CILJSA* 51(3), p. 298; C Panayi, 'The Globalization of Tax Good Governance' (2018) SMU Sch. of Accountancy Research Paper 6(1), p. 1 <http://dx.doi.org/10.2139/ssrn.3104977> accessed 01/04/2020; I J Mosquera Valderrama, D Lesage and W Lips, *Tax and Development: The Link between International Taxation, The Base Erosion Profit Shifting Project and The 2030 Sustainable Development Agenda* (2018) UNU WP Series W-2018/4, p. 3 <http://cris.unu.edu/sites/cris.unu.edu/files/W-2018-4.pdf> accessed 06/12/2019.
[146] OECD BEPS Action 5 (n 100) p. 11 and 13.
[147] Liebman, Heyvaert and Oyen (n 89) pp. 102-03.
[148] Ibid.; OECD BEPS Action 5 (n 100) p. 9 and 13; OECD, Background Brief: Inclusive Framework on BEPS, Jan. 2017, p. 19.
[149] OECD BEPS Action 5, Ibid; Boulogne (n 67) p. 16; Y Brauner, 'What the BEPS?' (2014) *Fla.Tax.Rev.* 16(2), p. 76.
[150] Boulogne, Id., p. 17.

intellectual property regimes and rulings along with the emphasis on transparency, EoI, and the substantial activity requirement.

Still regarding BEPS Action 5, while recognizing the role of intellectual property industries for economic growth and development, the OECD insists on the freedom of countries to fiscally incentivize research and development (R&D) activities in respect of the Forum on Harmful Tax Practices' principles.[151] Thus, part of ensuring that intellectual property rights, which are highly volatile in nature, comply with the substantial economic presence requirement factor, along with halting the use of patent boxes to harmfully compete, the nexus approach has been preferred over the value creation and transfer pricing approaches.[152] The nexus approach seeks to ensure that an intellectual property regime's benefits are proportional to real and concrete R&D activities that have an actual link with the intellectual property derived income benefiting the preferential treatment.[153]

It is also worth noting that all the fifteen actions are not equal in terms of implementation. Four of them, including Action five, have been raised to the level of minimum standards. The four minimum standards form what is called the BEPS Inclusive Framework. The Framework aims at a global inclusion of all interested non-OECD members in the implemention of the minimum standards on an equal footing with the members.[154] Here, 'interested' means a commitment by explicit agreement to comply with the minimum standards, including the requirements of Action 5.

The call to join the BEPS Inclusive Framework was launched in 2016. As of August 2021, 139 countries have joined the Inclusive Framework.[155] Among them, only one, namely Kenya, was from the EAC,[156] which shows the general reluctance of EAC Partner States to join. Some reasons for the reluctance may be: First, informed participation in the Inclusive Framework requires countries to have a sophisticated knowledge of international tax law. Most, if not all, EAC Partner States, have a limited number of qualified staff capable of handling

[151] OECD BEPS Action 5 (n 100) p. 28.
[152] Ibid.
[153] Id., p. 29; Liebman, Heyvaert and Oyen (n 89) p. 103; I Zammit, 'Centralized Intellectual Property Business Models: Tax Implications of EU Patent Box Regimes' (2015) *BFIT*, p. 544; D Fabris, 'To Open or to Close the Box: Patent Box Regimes in the EU between R&D Incentives and Harmful Tax Practices' (2019) *Amsterdam Law Forum* 11(1), p. 45 and 50.
[154] UNECA (n 145) p. 19; OECD Inclusive framework brief (n 148) p. 7; Mosquera Valderrama, Lesage, and Lips (n 145) p. 6.
[155] OECD, Members of the OECD/G20 Inclusive Framework on BEPS <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf> accessed 30/07/2021.
[156] Ibid.

Inclusive Framework matters at an international standard. Second, there may be a lack of trust in the effectiveness of participation in the Inclusive Framework. This could be due to reliance on powerful African countries to express their interests first, thereby pushing others to follow the lead. Such additional participation would show unity on common interests. It can also be explained by the fear that the framework will end up not being inclusive at all. Third, some countries may fear that participation in the Inclusive Framework may require giving up some systems for intra-EAC tax competition. Fourth, a lack of understanding of the BEPS Project may fuel reluctance to join. Fifth, joining the Inclusive Framework requires payment of an annual membership fee,[157] which may be a burden, especially if the country does not understand the benefits of joining the Inclusive Framework. These worries couple with the real challenges that face developing countries that have already joined the Inclusive Framework.[158]

Back to the 1998 OECD Project on harmful tax competition, two constitutive elements have been laid out as detailed below.

4.1.4. Components of harmful tax practices

The 1998 OECD Report on harmful tax competition identified two components of harmful tax competition, namely tax havens and HPTRs.[159] Thus, to understand harmful tax practices, it is necessary to understand each component.

4.1.4.1. Tax havens

The OECD's work on tax havens began before the 1998 project. More than a decade before this project, the OECD issued a report in 1987 on measures to prevent the abuses of tax havens and another on the abuse of bank secrecy.[160] At that time, however, tax havens issues were not

[157] OECD Inclusive framework brief (n 148) p. 8.
[158] See details in 6.5.2.
[159] OECD 2018 Progress Report (n 75) p. 41; OECD 1998 Report (n 60) p. 7; Littlewood (n 62) p. 413 and 419; Jogarajan and Stewart (n 86) p. 8; J McLaren, *Will Tax Havens Survive in the New International Legal Environment?* (Ph.D Thesis, RMIT Univ. 2010), p. 91; Fabris (n 153) p. 47; D S Smit, *Freedom of Investment between EU and non-EU Member States and its Impact on Corporate Income Tax Systems within the European Union* (Ph.D Thesis, Tilburg Univ. 2011), p. 195; M Seeruthun-Kowalczyk, *Hard Law and Soft Law Interactions in EU Corporate Tax Regulation: Exploration and Lessons for the Future* (Ph.D Thesis, Edinburgh Univ. 2011), p. 195; M Wróblewska, 'Harmful Tax Competition in a Globalized World: Does the World Trade Organization Deal with this Issue?' (2016) *Studia Iuridica* 1, p. 17; J B Kiprotich, *Income Tax in the East African Community: A Case for Harmonization and Consolidation of Policy and Law with a Focus on Corporate Income Taxation* (Ph.D Thesis, UoN 2016), p. 52; H Gribnau, 'The Integrity of the Tax System after BEPS: A Shared Responsibility' (2017) *ELR* 1, p. 20;
[160] Morriss and Moberg (n 61) p. 38; Orlov (n 84) p. 106; M C Webb, 'Defining the boundaries of legitimate state practice: Norms, transnational actors and the OECD's project on harmful tax competition' (2004) *Review of international political economy* 11(4), p. 798.

associated with harmful tax competition. It is the 1998 OECD Report that described tax havens as a component of harmful tax practices.

Despite their long existence, the definition of tax havens is still technically problematic.[161] Indeed, tax haven has been described as a controversial fluid concept with no standard or consensus on what it means.[162] Moreover, the development of a universally accepted definition has been found to be practically impossible.[163] Consequently, the absence of an official or agreed-upon definition of tax havens has led to a divergence in the listing of tax havens.[164] Even so, some attempts have been made to describe tax havens.

Broadly considered, tax havens are referred to as the territories where tax competition is fiercest.[165] Tax havens also refer to countries with the lowest tax rates designed to attract financial services and profit reallocation from high-tax countries.[166] Tax havens also seek to attract foreign capital without seeking real investment, and are characterized by lenient tax laws and high-level secrecy for investors, low or zero CIT rate, bank secrecy laws and no restrictions on financial transactions.[167]

In addition, tax havens refer to jurisdictions that facilitate non-residents, individuals or corporations, to avoid taxes that they would otherwise have to pay in their resident

[161] OECD 1998 Report (n 60) p. 20 and 22; van Raad (n 86) p. 1314; Boulogne (n 67) p. 13; Gilmore (n 75) p. 550; T V Addison, 'Shooting Blanks: The War on Tax Havens' (2009) *Ind.J.Glob.Leg.Stud.* 16(2), p. 705; G Tobin and K Walsh, 'What Makes a Country a Tax Haven? An Assessment of International Standards Shows Why Ireland Is Not a Tax Haven' (2013) *Economic and Social Review* 44(3), p. 402-03; O Stasiunaityte, *Tax Havens: Friends or Foes?*, (Master Thesis, CBS 2014), p. 34; J G Gravelle, 'Tax Havens: International Tax Avoidance and Evasion' (2015) CRS Report, p. 3 <www.globaltaxjustice.org/sites/default/files/Tax-Havens-Jane-Gravelle.pdf> accessed 17/05/2019.

[162] Calich (n 70) p. 63; P Repyeuski, *Free Zones in the Commonwealth of Independent States: A Proposed Regulatory Model*, (Ph.D Thesis, Manchester Univ. 2008), p. 78; D Dharmapala, 'What Problems and Opportunities are Created by Tax Havens?' (2008) *Oxford Review of Economic Policy* 24(4), p. 662; A Sanni, 'Sovereign Rights of Tax Havens and the Charge of Harmful Tax Competition' (2011) <www.thesait.org.za/news/96869/Sovereign-Rights-Of-Tax-Havens-And-The-Charge-Of-Harmful-Tax-Competition.htm> accessed 30/07/2019.

[163] Orlov (n 84) p. 96.

[164] Tobin and Walsh (n 161) p. 402-03.

[165] R Teather, 'The Benefits of Tax Competition' (2006) IEA Hobart Paper No. 153, p. 62 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=878438> accessed 03/08/2019.

[166] B Persaud, 'The OECD Harmful Tax Competition Policy: A Major Issue for Small States', in R Biswas (ed), *International Tax Competition: Globalization and Fiscal Sovereignty* (Commonwealth Secretariat 2002), p. 17; R J Jr Hines, 'How Serious is the Problem of Base Erosion and Profit Shifting?' (2014) *CTJ/RFC* 62(2), p. 445.

[167] Addison (n 161) p. 706; Nicodème (n 103) p. 758; L Eden and R T Kudrle, 'Tax Havens: Renegade States in the International Tax Regime?' (2005) *Law & Policy* 27(1), p. 101; P Genschel and T Rixen, 'Settling and Unsettling the Transnational Legal Order of International Taxation', in T C Halliday and G Shaffer (eds), *Transnational Legal Orders* (CUP 2015), p. 168; Akhtar and Grondona (n 117) p. 28.

jurisdictions.[168] This reference seems complete as it encompasses most of the main characteristics of tax havens. These have been attempted to by the OECD as factors identifying tax havens.

Without actually defining what a tax haven is, the OECD has established the following four factors to determine whether a particular jurisdiction is a tax haven:

> (a) having no or only nominal taxes either in general or in special circumstances for non-residents, (b) having laws and/or administrative rules and/or practices which prevent the effective exchange of relevant information with other governments on taxpayers benefiting from the low or no tax jurisdictions, (c) lack of transparency, and (d) absence of any requirement for substantial activity.[169]

Among the four factors, the most important factor and a necessary minimum condition is 'no or only nominal taxes'.[170] The OECD refers to this factor as the gateway criterion,[171] i.e. the starting point for identifying tax havens.[172] This consideration explains why tax havens are sometimes simply defined as territories with nil or very low tax rates. In other words, the non-imposition of an income tax or only a nominal income tax is widely accepted as the most important characteristic of tax havens.[173] In this regard, most writings, academic or otherwise, include zero or low-tax rate as one of tax havens' characteristics.[174]

By the same token, tax havens are often considered synonymous with offshore financial centers[175] or bank secrecy jurisdictions.[176] However, a tax haven is far more than these two terms. For example, one characteristic of a tax haven is that it has, among other things, bank

[168] OECD 2000 progress report (n 109) p. 10; van Raad (n 86) p. 1314; Orlov (n 84) p. 105; Littlewood (n 62) p. 414; Carlson (n 108) p. 165; G M Melo, 'Taxation in the Global Arena: Preventing the Erosion of National Tax Bases or Impinging on Territorial Sovereignty (A Critique of the OECD'S Report: Harmful Tax Competition: An Emerging Global Issue)' (2000) *Pace International L.Rev.* 12(183), p. 185; M Hearson, 'Developing Countries' Role in International Tax Cooperation' (2017), p. 12 <www.g24.org/wp-content/uploads/2017/07/Developing-Countries-Role-in-International-Tax-Cooperation.pdf> accessed 31/08/2018).
[169] OECD 1998 Report (n 60) p. 22.
[170] Id., p. 21; Samuels and Kolb (n 78) p. 235; Calich (n 70) p. 60; Ambrosanio and Caroppo (n 115) p. 689.
[171] OECD 2001 progress report (n 100) p. 5; Pinto, Tax competition (n 117) p. 226; Calich (n 70) p. 63.
[172] OECD 1998 Report (n 60) p. 22; OECD 2001 progress report, ibid.
[173] Littlewood (n 62) p. 420 and 460.
[174] Akhtar and Grondona (n 117) p. 5.
[175] Id., p. 1; Barker (n 112) p. 177.
[176] Oguttu, Curbing Offshore Tax Avoidance (n 93) p. 23; G Schjelderup et al., 'Tax Havens and Development: Status, Analyses and Measures' (2009) Official Norwegian Reports, p. 15 <www.regjeringen.no/contentassets/0a903cdd09fc423ab21f43c3504f466a/en-gb/pdfs/nou200920090019000en_pdfs.pdf> accessed 17/11/2017.

secrecy. It would, therefore, not be correct to consider one constitutive element as synonymous with the whole set of elements.

Still in relation to tax havens' features, the OECD, as well as the UN, largely regard tax havens as a threat.[177] This is due to their appeal to wealthy corporations and individuals to avoid paying taxes in their countries of residence.[178] Indeed, tax havens provide such taxpayers with locations to hold their passive investments, record their paper profits, and shield their affairs and bank accounts from their home tax authorities.[179] Consequently, tax havens actively erode the tax base of other countries and are unwilling to fight harmful tax competition.[180] Tax havens are also accused of causing fiscal degradation and the race to the bottom.[181] It is in this context that tax havens have developed a bad reputation.

The tax havens' reputation test was developed as a result of the 1987 OECD Report, which asked the question '*Does the country or territory offer itself or is it recognized as a tax haven?*' to identify tax havens.[182] In this question, the phrase 'recognized as' is interpreted to mean that tax havens are identifying by the jurisdiction's reputation and nothing else. This means that the recognition of tax havens is not a question of objective factors but rather a subjective personal consideration. This subjective approach was noted in the Report submitted by the Special Counsel for international taxation to the US Commissioner of Internal Revenue as follows:

> The term 'tax haven' may also be defined by a 'smell' or reputation test: a country is a tax haven if it looks like one and if it is considered to be one by those who care. Many

[177] Eighth Meeting of the Ad Hoc Group of Experts on International Cooperation in Tax Matters: Report of the Secretary General, U.N. ESCOR, 1998 Sess., 8th mtg, Agenda Item 13(d), T 2-3, U.N. Doc. E/1998/100 (1998) cited in Carlson (n 108) p. 187.
[178] OECD 1998 Report (n 60) p. 20 and 22; van Raad (n 86) p. 1315; Akhtar and Grondona (n 117) p. 1; Pinto, EU and OECD (n 72) p. 391; Calich (n 70) p. 63; Boulogne (n 67) p. 13.
[179] OECD 1998 Report, Id., p. 22.
[180] Pinto, EU and OECD (n 72) p. 391; T Rixen, 'Taxation and Cooperation: International Action against Harmful Tax Competition', in S A Schirm (ed), *Globalization: State of the Art and Perspectives* (Routledge 2007), p. 72-73; A Sanni, 'Sovereign Rights of Tax Havens and the Charge of Harmful Tax Competition' (2011) <www.thesait.org.za/news/96869/Sovereign-Rights-Of-Tax-Havens-And-The-Charge-Of-Harmful-Tax-Competition.htm> accessed 30/07/2019.
[181] Sanni, ibid.
[182] Boulogne (n 67) p. 13.

> publications identified jurisdictions as tax havens, and the same jurisdictions generally appear on all of the lists.[183]

In the same vein, the former German finance minister Waigel applied the 'smell' test when asked what harmful tax competition is and replied, '*Precisely, I don't know, but when I see it, I recognize it.*'[184] In his response, he extended the reputation test beyond tax havens to broadly encompass harmful tax competition.

The twin component of tax havens in a set of harmful tax practices is the HPTR. The OECD has also provided details on it, and scholars have widely elaborated on it too.

4.1.4.2. Harmful preferential tax regimes

As noted earlier, tax havens together with HPTRs, constitute harmful tax practices. Like it did for tax havens, the OECD has not provided a definition of HPTR. Again, as it did for tax havens, the OECD has set out factors to determine whether a regime is a HPTR. These factors are grouped into two categories.

The first category consists of four factors, which the OECD refers to as 'key factors', namely:

> (a) low or zero effective tax rate on specified kinds of income such as movable sources of income, (b) ring-fencing from the domestic economy, (c) lack of transparency, and (d) no effective exchange of information with other governments.[185]

The second category consists of eight factors that the OECD refers to as other factors. These factors play a support role to the key factors.[186] They are:

> (a) an artificial definition of the tax base, (b) failure to adhere to international transfer pricing principles, (c) exemption of foreign source income from residence-country taxation, (d) negotiable tax rates or tax bases, (e) existence of secrecy provisions, (f) access

[183] R A Gordon, Tax Havens and their Use by United States Taxpayers: An Overview (1981) A Report to the Commissioner of Internal Revenue, the Assistant Attorney General (Tax Division) and the Assistant Secretary of the Treasury (Tax Policy), p. 14.
[184] R A Sommerhalder, 'Harmful Tax Competition or Harmful Tax Harmonization' (1999) *EC T.Rev.* 8(4) p. 247 cited in Barker (n 112) p. 171.
[185] OECD 1998 Report (n 60) pp. 26-30; Joint Committee on Taxation, *Background, Summary and Implications of the OECD/G20 Base Erosion and Profit Shifting Project*, JCX-139-15, Nov. 2015, p. 18; OECD 2018 Progress Report (n 75) pp. 40-41.
[186] van Raad (n 86) p. 1320; OECD 2018 Progress Report, Id., p. 52.

> to a wide network of tax treaties, (g) promotion of the regime as a tax minimization vehicle, and (h) encouragement by the regime of purely tax-driven operations or arrangements.[187]

Among these factors, the OECD considers 'low or zero effective tax rate' as the gateway criterion[188] and necessary starting point.[189] However, to assess whether a jurisdiction has a HPTR, the four factors are overall taken into consideration and, if relevant, the other eight factors are also considered.[190] This means that the tax rate factor alone is not enough to conclude that a preferential regime is harmful.[191] Rather, to qualify as a HPTR, it is necessary for a regime to have a low or zero effective tax rate plus one or more other key factors.[192]

From the above factors established by the OECD to characterize tax havens and HPTRs, it becomes apparent that the two are closely related. In fact, they both share two of their four key indicators, namely lack of transparency and lack of effective EoI. Moreover, tax havens and HPTRs have in common the facilitation of tax minimization, and both involve ring-fencing.

Even though close, they are distinct. The main distinguishing element between tax havens and HPTRs has been elaborated as follows:

> Tax havens have no interest in preventing the race to the bottom, are actively contributing in the tax base erosion of other countries and are unlikely to cooperate in curbing harmful tax competition, whereas countries with harmful preferential regimes may have a significant amount of revenues which are at risk, therefore have an interest in eliminating harmful tax competition on a concerted action.[193]

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[187] OECD 1998 Report (n 60) pp. 30-34; OECD 2018 Progress Report, Id., pp. 40-41; Joint committee on taxation (n 185) p. 18; van Raad, Id., p. 1320-1322; Littlewood (n 62) pp. 423-24; Liebman, Heyvaert and Oyen (n 89) pp. 102-03.

[188] OECD 2001 progress report (n 100) p. 5; OECD BEPS Action 5 (n 100) p. 23; OECD 2018 Progress Report, Id., p. 43; Pinto, Tax competition (n 117) p. 226; K Dirix, 'Harmful Tax Competition: Six Belgian Tax Incentives under the Microscope' (2013) *EC T.Rev.* 5, p. 236.

[189] OECD 2018 Progress Report, Id., pp. 13-14; Littlewood (n 62) p. 424; OECD 1998 Report (n 60) p. 25; Samuels and Kolb (n 78) p. 237; Ault (n 72) p. 2.

[190] OECD BEPS Action 5 (n 100) p. 23; Littlewood, Id., p. 424.

[191] OECD 2018 Progress Report (n 75) pp. 13-14; Dirix (n 188) p. 236; Ault (n 72) p. 3.

[192] OECD 1998 Report (n 60) p. 26; OECD BEPS Action 5 (n 100) p. 23; Ault, Id., p. 2; F Wishlade, 'When Policy Worlds Collide: Tax Competition, State Aid, and Regional Economic Development in the EU' (2012) *Journal of European Integration* 34(6), p. 589.

[193] OECD 1998 Report, Id., para. 43; van Raad (n 86) pp. 1314-15; Boulogne (n 67) p. 12; Genschel and Rixen (n 167) p. 174; B J Arnold and M J McIntyre, *International Tax Primer* (2nd edn, Wolters Kluwer 2002), p. 139 and 141; N Nikolakakis, *The International Legal Ramifications of the OECD's Harmful Tax Competition Crusade* (LL.M Thesis, McGill Univ. 2006), p. 59.

Another difference is that the terms 'tax haven' refer to a jurisdiction, while the terms 'harmful preferential tax regime' refer to a system. Thus, the presence of common and distinguishing factors motivates additional details below.

4.1.5. OECD's key factors and their interpretation

Among the OECD's key factors to determine whether a jurisdiction has harmful tax practices, some are common to tax havens and HPTRs while others are not, as described below.

4.1.5.1. Two common factors

The OECD uses two common factors to identify tax havens and HPTRs. These factors are a lack of transparency and a lack of effective EoI. Not only are these common factors for harmful tax practices, but they also characterize sound tax policies.[194] These factors are key in determining whether a tax practice is harmful and attract much attention in the fight against harmful tax practices.[195]

The purpose of the transparency requirement is two-fold. One, it addresses the need for clear conditions of equal treatment and application among similarly situated taxpayers through open and consistent application of law.[196] Two, is to ensure that the home tax administration has the necessary information on the taxpayer's situation.[197] These two are respectively referred to as the internal context and external context of transparency.[198]

Lack of transparency is a broad concept[199] and some of its indicators relate to the design and/or administration[200] of the tax system's legislative and/or administrative provisions. Examples of lack of transparency include favorable application of laws and regulations, negotiable tax provisions, subjective favorable administrative rulings, and deliberate lax audits.[201] Other examples indicating non-transparency include non-publication of administrative practices on transfer pricing, unclear rules, inconsistent application of rules, and

[194] A Christians, 'Sovereignty, Taxation and Social Contract' (2009) *Minn.J.Int'lL.* 18(1), p. 124.
[195] Seeruthun-Kowalczyk (n 159) p. 196; Calich (n 70) p. 68; Repyeuski (n 162) p. 149.
[196] OECD 2001 progress report (n 100) p. 5; Boulogne (n 67) p. 53.
[197] OECD 2001 progress report, ibid.; Boulogne, ibid.
[198] Englisch and Yevgenyeva (n 70) p. 632.
[199] Ault (n 72) p. 2.
[200] OECD 2018 Progress Report (n 75) p. 14; OECD (2011), 'The OECD's Project on Harmful Tax Practices Consolidated Application Note Guidance in Applying the 1998 Report to Preferential Tax Regimes', in *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions*, 2nd edn, OECD Publishing, p. 211.
[201] OECD CAN (n 71) p. 10 and 29; OECD 1998 Report (n 60) p. 28; Sanders (n 98) p. 327; van Raad (n 86) p. 1316 and 1319; Pinto, Tax competition (n 117) p. 218; Samuels and Kolb (n 78) p. 236.

administrative discretion to apply rules departing from the normal and proper application of the legislation.[202] A regime that offers the possibility to negotiate the tax burden, i.e. negotiable tax rate or tax base, is also an indicator of non-transparency.[203] Secrecy laws and the prevention of effective EoI also show a lack of transparency.[204]

Thus, to ensure the transparency of a regime, the OECD recommends eliminating secret advance rulings and negotiable tax rates and tax bases.[205] Similarly, the OECD recommends that jurisdictions properly maintain information on their preferential regimes and publish the prerequisites for a taxpayer to benefit from favorable tax measures.[206] An example of a jurisdiction that did not follow those recommendations is Singapore, which has been criticized for failing to publish the conditions required to be granted a Development and Expansion Incentive (DEI) certificate alongside the Minister's discretion to grant such certificates.[207]

Furthermore, the OECD recommends that jurisdictions, through regulations and actual practices, audit, and file financial accounts in accordance with generally accepted accounting standards that require keeping accurate and reliable accounting books and records, beneficial ownership information, and the like.[208] Exceptions to the record-keeping requirement are cases of *de minimis* transactions or *de minimis* entities, i.e. those engaged solely in local activities with no foreign element, such as foreign ownership, beneficiaries, or management.[209]

As far as the lack of effective EoI is concerned, this refers to the EoI between tax administrations on taxpayers benefiting from favorable tax measures. The lack of EoI is a powerful indicator and a common technique of tax competition.[210] In this respect, a regime which does not enter into EoI agreements appears *prima facie* harmful.[211]

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[202] OECD CAN, Id., p. 41.
[203] OECD 2018 Progress Report (n 75) p. 52.
[204] OECD Handbook on Tax Transparency (n 200) p. 211.
[205] Carlson (n 108) p. 168; Pinto, Tax competition (n 117) pp. 226-227.
[206] Carlson, Ibid; Pinto, Tax competition, Ibid; OECD Handbook on Tax Transparency (n 200) p. 214.
[207] Boulogne (n 67) p. 42.
[208] OECD 2001 progress report (n 100) p. 11; OECD CAN (n 71) p. 10-12; Pinto, Tax competition (n 117) p. 227; OECD Handbook on Tax Transparency (n 200) p. 215; OECD (2013), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Republic of Korea 2013: Phase 1 + Phase 2, incorporating Phase 2 ratings, OECD Publishing, p. 57 <http://dx.doi.org/10.1787/9789264205802-en> accessed 22/04/2020.
[209] OECD 2001 progress report, ibid.; Pinto, ibid.
[210] Sanders (n 98) p. 328; Ring, Sovereignty Debate (n 103) p. 21.
[211] P Baker (2004), 'The World-Wide Response to the Harmful Tax Competition Campaigns', *GITC Review*, 3(2), p. 16.

Like the lack of transparency, the lack of EoI results from the design of the tax regime or its administration.[212] Examples include, but are not limited to, favorable application of laws and regulations, negotiable tax provisions, and secrecy laws.[213] Secrecy laws prevent the transfer of information for tax purposes,[214] and are thus a typical case of lack of EoI. A lack of effective EoI also results in the inability of other tax administrations to effectively enforce their tax rules.[215]

Thus, to ensure effective EoI, banking secrecy laws should be abolished and tax authorities should have access to financial information on beneficial owners, if need be in collaboration with banks and financial institutions.[216] To this end, legal mechanisms, in the form of bilateral or multilateral agreements, as well as administrative measures, are necessary to ensure the confidentiality of the information exchanged.[217]

Besides the two common factors mentioned above, harmful tax practices are identified by other factors that are specific to each component, as elaborated on below.

4.1.5.2. Specific factors to tax havens

Besides the lack of transparency and effective EoI, the OECD has identified other factors to determine whether a particular jurisdiction is a tax haven. These other factors are: no or only nominal taxes and the absence of substantial activities.

Starting with no or only nominal taxes, the situation occurs because the tax rate itself is very low or it results from the way the tax base is defined.[218] Even so, the OECD has made it clear that each sovereign jurisdiction has the right to determine its tax rates and tax base.[219] The 1998 OECD Report further clarified that there is no explicit nor implicit general minimum effective tax rate below which would be considered as engaging in harmful tax competition.[220]

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[212] OECD CAN (n 71) p. 10.
[213] Ibid.; OECD 2018 Progress Report (n 75) p. 52.
[214] Pinto, Tax competition (n 117) p. 218.
[215] OECD 2018 Progress Report (n 75) p. 14.
[216] Pinto, Tax competition (n 117) p. 227.
[217] OECD CAN (n 71) p. 14.
[218] OECD 1998 Report (n 60) Para. 61; OECD CAN (n 71) p. 6; Boulogne (n 67) p. 14; Sanders (n 98) p. 327; Salinas (n 64) p. 540.
[219] OECD 2001 progress report (n 100) p. 7.
[220] OECD 2018 Progress Report (n 75) p. 20; K B Brown, 'Harmful Tax Competition: The OECD View' (1999) *GeoW.J.Int'lL.&Econ.* 32(2), p. 316.

Moreover, the no or only nominal tax factor is important in identifying tax havens. It is the starting point, i.e. an opening factor labeled as gateway, although not the sole factor to determine whether a particular jurisdiction is a tax haven.[221] In this regard, it is necessary to combine the factor of no or only nominal taxes with one or more other factors. One is the substantial activity requirement.

Regarding the requirement of substantial activities, it has been opined that without the requirement for substantial activity, it becomes blatant that the regime is aimed at attracting investments which are purely tax-driven.[222] This would imply that the country's purpose is to attract mobile business activities at the expense of other countries.[223] This explains why the OECD excludes from harmful tax practices the tax advantages that are given to attract manufacturing and real activities such as plants, buildings, and equipment.[224]

As noted above, besides the two specific factors that add to the common factors to characterize tax havens, HPTRs have two specific factors too. These are the subject of the following paragraphs.

4.1.5.3. Specific factors to harmful preferential tax regimes

Similar but slightly different to the no or only nominal tax rate criterion of tax havens, HPTRs are identified by the criterion of no or low effective tax rate, among others. The OECD recommends that no or low effective tax rate be assessed with other informative factors, such as an artificial definition of the tax base, a negotiable tax rate or tax base, and non-compliance with international transfer pricing principles.[225]

The no or low effective tax rate factor is very important in identifying HPTRs. It is the principal or starting point, i.e. a gateway factor, to the extent that its combination with just one other factor suffices to qualify a regime as harmful.[226] Yet, its presence alone is not sufficient

[221] OECD 2000 progress report (n 109) p. 10; OECD 2001 progress report (n 100) p. 5; van Raad (n 86) p. 1316; Arnold and McIntyre (n 193) p. 139; Seeruthun-Kowalczyk (n 159) p. 196; McLaren, Will Tax Havens Survive (n 159) p. 5; Nicodème (n 103) p. 757; OECD, Confidential draft Recommendation (n 86) p. 5.
[222] OECD 2001 progress report, Ibid; van Raad (n 86) p. 1316; Carlson (n 108) p. 166; Pinto, Tax competition (n 117) p. 162; Dirix (n 188) p. 235.
[223] Pinto, ibid.
[224] OECD 1998 Report (n 60) p. 8; Carlson (n 108) p. 165; Samuels and Kolb (n 78) p. 234; Pinto, EU and OECD (n 72) p. 390; Wilde, Tax Competition within the EU (n 142) p. 28; Baker (n 211) p. 16.
[225] OECD 2018 Progress Report (n 75) pp. 51-52.
[226] OECD 1998 Report (n 60) p. 21, 25, and 26; OECD 2001 progress report (n 100) p. 5; Sanders (n 98) p. 327; Wishlade (n 192) p. 589; Englisch and Yevgenyeva (n 70) p. 627; OECD BEPS Action 5 (n 100) p. 23; Littlewood

to qualify the regime as harmful, and harmful tax competition does not simply mean no or low-taxes.[227] It, therefore, requires consideration of other factors, among which is ring-fencing.

Ring-fencing occurs when favorable tax measures are limited to foreigners (non-residents), i.e. discriminate against and exclude residents. For this reason, there is no ring-fencing if a measure, even if favorable, is available to both residents and non-residents.[228] There are several ways in which a regime may be ring-fenced. Examples include, but are not limited to, restricting favorable tax measures to non-residents, excluding residents, limiting the measure to international transactions, and prohibiting the benefiting taxpayers from accessing domestic markets.[229] All these are summarized as (a) explicit or implicit exclusion of residents from benefiting from the favorable tax measures, and (b) explicit or implicit prohibition of the benefiting enterprises from accessing the domestic markets.[230]

From the above, there are three types of ring-fencing: explicit ring-fencing, implicit ring-fencing, and *de facto* ring-fencing. Explicit ring-fencing occurs when a regime explicitly excludes residents through a law.[231] Implicit ring-fencing occurs when the law does not explicitly exclude residents, but administrative or legal barriers inhibit residents from taking advantage of the regime.[232] This occurs when a country develops criteria to restrict benefits to non-residents or foreign transactions or activities.[233] An example of implicit ring-fencing is the requirement for the regime beneficiaries to transact only in foreign currency.[234] However, if the foreign currency is in general circulation to the extent that residents have access to it, the regime is not ring-fenced.[235]

A regime becomes *de facto* ring-fenced if there is neither an administrative nor a legal barrier to residents, but in practice no or only a small percentage of residents benefit from the

(n 62) p. 424; Samuels and Kolb (n 78) p. 235 and 237; Ambrosanio and Caroppo (n 115) p. 689; Seeruthun-Kowalczyk (n 159) p. 196.
[227] OECD CAN (n 71) p. 6; Ault (n 129) p. 766; Repyeuski (n 162) p. 149; D Deák, 'Illegal State Aid and Harmful Tax Competition: The Case of Hungary' (2002) *Society and Economy* 24(1), p. 26.
[228] OECD CAN, Id., p. 23 and 27.
[229] Id., p. 20; Sanders (n 98) p. 338; Dirix (n 188) p. 234; Nikolakakis (n 193) p. 65.
[230] OECD 1998 Report (n 60) para. 62; OECD CAN (n 71) p. 22, 26, and 27; OECD 2018 Progress Report (n 75) p. 14 and 53; Boulogne (n 67) p. 14; Englisch and Yevgenyeva (n 70) p. 629; Sanders (n 98) p. 327; Barker (n 112) p. 176.
[231] OECD 2018 Progress Report, Id., p. 54.
[232] Ibid.
[233] OECD CAN (n 71) p. 22.
[234] Id., p. 24; OECD 2018 Progress Report (n 75) p. 56.
[235] OECD 2018 Progress Report, ibid.

regime.[236] On the point of *de facto* ring-fencing, the absence of residents in the preferred sector does not make the regime ring-fenced as long as there are no restrictive legal measures. This means that a regime is not ring-fenced if domestic companies qualify for preferential regime, but in practice do not take advantage of it.[237]

It is worth noting that ring-fencing is central to the issue of harmful tax competition. The OECD, the EU, and scholars have singled out ring-fencing as particularly noxious.[238] This is because ring-fencing intends to erode other jurisdictions' tax bases and interferes with their fiscal policies.[239] A continued practice of ring-fencing also invites other countries to do the same, which fuels more harmful tax competition.

All in all, the OECD's work to curb harmful tax practices is colossal. Due to the global nature of tax competition, the OECD is not alone on the front line. Other organizations are also engaged in the fight against harmful tax practices, one is the EU.

4.2. EU Code of Conduct on business taxation

Like the OECD, European Union, one of the world's strongest regional organizations, has played and continues to play an important role in regulating harmful tax practices. Harmful tax practices have traditionally been discussed in EU forums of politicians and academics[240] with a focus on the EU territory. However, for one reason or another, including the importance of the developed tools and political influence, the works of the EU in this area has also reached and influenced other jurisdictions that are not EU members. The Code of Conduct illustrates the EU's prominent role in this area.

On 1 December 1997, the ECOFIN Council of the European Union agreed on a package of measures to tackle harmful tax competition. The package comprised three components, namely the Code of Conduct on business taxation, the measures to eliminate distortions in the taxation of capital income, and the measures to eliminate WHT on cross-border interest and royalty payments between companies. Among the three, the Code of Conduct is key in terms of harmful tax competition, which justifies its focus in this book. In sequence, the main aspects of the Code of Conduct are presented below. Thereafter follows a presentation on the two tests

[236] Id., p. 54.
[237] Id., pp. 54-55.
[238] D C Elkins, 'The Merits of Tax Competition in a Globalized Economy' (2006) *Indiana LJ* 91(3), p. 947.
[239] OECD CAN (n 71) p. 20; Elkins, Id., p. 915.
[240] L Cerioni, 'Harmful Tax Competition Revisited: Why not a Purely Legal Perspective under EC Law?' (2005) *Euro.Tax.*, p. 267.

that are extensively referred to in the Code, namely the derogation test and the location test. Afterward, come the details on the Code's criteria of harmful tax competition.

4.2.1. Key aspects of the EU Code of Conduct

The Code of Conduct on business taxation has some key aspects that need to be highlighted. These are the Code's scope of application, its political nature, its success, and its failure to define harmful tax competition.

Starting with the Code's scope of application, the Code's application *ratione materiae* concerns business taxation and excludes individual and indirect taxation.[241] It does so with regard to laws, regulations, and administrative practices.[242] Regarding its coverage *ratione loci*, the Code of Conduct applies to EU Member States, their dependencies and associated territories.[243] Thus, any jurisdiction which falls out of that scope is not covered by the Code of Conduct. Even so, the Code contains a call to promote its principles in third countries.[244] The use of the term 'promotion' means that the EU does not expect non-member states to respect the Code in the same way as members, but encourages non-members to follow it. To this end, the EU uses blacklisting as a strategy to compel third countries to comply with European standards on tax good governance,[245] including harmful tax competition matters.

The Code's nature is not legal; it is rather a non-legally binding instrument.[246] This means that a member's failure to follow the Code is not actionable before the Court of Justice

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[241] EU Code of Conduct 1997: Conclusions of the ECOFIN Council meeting of 1/12/1997 concerning taxation policy DOC 98/C2/01, *OJEC* (6.1.98), C 2/3; Pinto, Tax competition (n 117) p. 160; Pinto, EU and OECD (n 72) p. 389 and 392; R Szudoczky and J L van de Streek, 'Revisiting the Dutch Interest Box under the EU State Aid Rules and the Code of Conduct: When a 'Disparity' is Selective and Harmful' (2010) *Intertax* 38(5), p. 274; M F Nouwen, *Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition* (Ph.D Thesis, UVA 2020), p. 111 and 410.

[242] EU Code of Conduct, ibid.; Pinto, EU and OECD, Id., p. 389; Wishlade (n 192) p. 588; Ambrosanio and Caroppo (n 115) p. 691; C Biz, 'Countering Tax Avoidance at the EU Level after 'Luxleaks' A History of Tax Rulings, Transparency and BEPS: Base Erosion Profit Shifting or Bending European Prospective Solutions? (2015) *DPTI* XII(4), p. 1042; P Boria, *Taxation in European Union* (2nd edn, Springer 2017), p. 169; E Traversa and P M Sabbadini, 'State Aid Policy and the Fight against Harmful Tax Competition in the Internal Market: Tax Policy Disguise', in W Haslener, G Kofler and A Rust (eds), *EU Tax Law and Policy in the 21st Century* (Kluwer Law International 2017), p. 110; R Snoeij, *International Tax Aspects of Sovereign Wealth Investors: A Source State Perspective*, (Ph.D Thesis, EUR 2018), p. 121.

[243] EU Code of Conduct, Id., C 2/5; EU Com., Communication from the Commission to the Council, The European Parliament and the European Economic and Social Committee on Promoting Good Governance in Tax Matters, COM(2009) 201, 28/04/2009, p. 8.

[244] EU Code of Conduct, ibid.; EU Com. Communication on good governance in tax matters, ibid.

[245] Nouwen (n 241) pp. 101-102.

[246] Bond et al. (n 78) p. X and 58; Pinto, EU and OECD (n 72) p. 389 and 406; Wilde, Tax Competition within the EU (n 142) p. 28; Harris and Olivier (n 158) p. 110; Biz (n 242) p. 1043; Radaelli, CoC against HTC (n 14) p. 513 and 521; Devereux (n 35) p. 632; G Meussen, 'The EU-fight against Harmful Tax Competition: Future Developments' (2002) *EC T.Rev.* p. 158; S Drezgić, 'Harmful Tax Competition in the EU with Reference to

of the European Union (CJEU). Indeed, the Code itself acknowledges that it is politically oriented. In the preamble, the Code mentions that it is a political commitment and does not affect the Member States' rights and obligations.[247] This makes it a political instrument rather than a legal one.[248] Its non-binding legal nature is also implicit in the title itself, which refers to guidelines intended to inform the conduct of members, without the intention of creating legal obligations.

The Code's non-binding nature is criticized as a major weakness in the fight against harmful tax competition.[249] The absence of legally binding force is also counted among the drawbacks of the Code.[250] This is true because the success of the Code's implementation relies only on the political will of the Member States, and not on legal enforcement.

However, there is also a view that the non-binding nature of the Code is not a weakness, but rather a strength. The Code's soft approach has been commented upon as successful and it has been said to have reached where hard approaches have failed to reach.[251] Indeed, the Code has been taken seriously and has been largely complied with.[252] One driving force lies in its

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Croatia' (2005) *Journal of Economics and Business* 23(1), p. 80; B I Bai, 'The Code of Conduct and the EU Corporate Tax Regime: Voluntary Coordination without Harmonization' (2008) *Journal of International and Area Studies* 15(2), p. 115 and 119; M Nouwen, 'Highlights & Insights on European Taxation: Growth-friendly tax policies in Member States and better Tax Coordination in the EU' (2012) H&I 2012/2.3, p. 7 <file:///C:/Users/HP/Downloads/H&I2012-2-3.pdf> accessed 02/04/2020); S Douma, 'BEPS and European Union Law' (2017) *Cahiers de Droits Fiscal International* 102(a), p. 5; M Nouwen and P J Wattel, 'Tax Competition and the Code of Conduct for Business Taxation' in P J Wattel, O Marres, and H Vermeulen (eds), *European Tax Law* (7th edn, Wolters Kluwer 2019), p. 931.

[247] EU Code of Conduct (n 241) C 2/5.

[248] Wróblewska (n 159) p. 18; Ambrosanio and Caroppo (n 115) p. 691; Drezgić (n 246) p. 83; Boria (n 242) p. 168 and 170; Smit (n 159) p. 181; Snoeij (n 242) p. 121; Szudoczky and van de Streek (n 241) p. 274; Wishlade (n 192) p. 587; H Gribnau, 'Soft Law and Taxation: EU and International Aspects' (2008) *Legisprudence* 2(2), p. 67 and 83; B J M Terra and P J Wattel, *European Tax Law* (5th edn, Kluwer 2008), p. 111; M Nouwen, 'Highlights & Insights on European Taxation: Report from the Code of Conduct Group, Abuse, Third States, Double non-taxation, Interest on profit participating loans' (2012) H&I 2012/2.1, p. 5 <file:///C:/Users/HP/Downloads/H&I2012-2-1.pdf> accessed 02/04/2020; P J Wattel, 'Forum: Interaction of State Aid, Free Movement, Policy Competition and Abuse Control in Direct Tax Matters' (2013) *WTJ*, p. 135 and 143; E Traversa and A Flamini, 'Fighting Harmful Tax Competition through EU State Aid Law: Will the Hardening of Soft Law Suffice' (2015) *EStAL* 3, p. 326; V Moutarlier, 'Reforming the Code of Conduct for Business Taxation in the New Tax Competition Environment', in I Richelle, W Schön, and E Traversa (eds), *State Aid Law and Business Taxation* (Springer 2016), p. 77; M Nouwen, 'The European Code of Conduct Group Becomes Increasingly Important in the Fight against Tax Avoidance: More Openness and Transparency is Necessary' (2017) *Intertax* 45(2), p. 139; A Beckers, 'The Creeping Juridification of the Code of Conduct for Business Taxation: How EU Codes of Conduct Become Hard Law' (2018) *YEL* 37(1), p. 579 and 581; Nouwen (n 241) p. 44, 45, 406.

[249] Pinto, Tax competition (n 117) p. 164; Pinto, EU and OECD (n 72) p. 389.

[250] Pinto, Tax competition, Id., p. 304.

[251] Gribnau, Soft law and taxation (n 248) p. 83; Beckers (n 248) p. 580; Nouwen and Wattel (n 246) p. 929; Nouwen (n 241) p. 44, 406.

[252] Gribnau, Id., p. 84; P Dietsch, *Catching Capital: The Ethics of Tax Competition* (OUP 2015), p. 116.

dissuasive effect that encourages jurisdictions to comply with it to avoid being listed as non-cooperative jurisdictions.[253] Moreover, thanks to the members' peer pressure,[254] the Code scored long-standing effectiveness in addressing tax competition within the EU.[255] In this respect, the Code served its purpose well, as its implementation abolished some harmful measures along with holding back others.[256] This also confirms the extent to which the Code has been taken seriously and complied with.

Regarding the definition of harmful tax competition, the Council of the EU, like the OECD, did not define harmful tax competition. This has also been raised as a criticism of the Code.[257] Still like the OECD, the EU in the Code of Conduct focused on the criteria of harmful tax competition. The guiding element has been the tax measure's ability to significantly affect, or potentially affect, the location of business activity, as a result of significantly lowering the level of taxation compared to the levels that generally apply in the Member States.[258] In this view, the conclusive element in determining whether the measure is harmful is the purpose of the measure, which is to influence the location of business activity, in other words, to attract business activity. Thus, if a measure is adopted, but it is not likely to influence the location of the business, that measure is *prima facie* harmless. The business location is determined using the location test, while lowering the level of taxation is determined using the derogation test.[259] The two tests are detailed below.

4.2.2. Location test and derogation test

The Code refers to the location test and derogation test and the two have been further developed in the literature. With regard to the location test, the Code is concerned with the measures that

[253] CEU, The EU list of non-cooperative jurisdictions for tax purposes, FISC 345 ECOFIN 1088, 15429/17, 5/12/2017, *OJEU*, Vol. 60, 19.12.2017, C 483/13.
[254] EU Com., *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*, Communication from the Commission to the European Parliament and the Council, COM(2015) 302 final {SWD(2015) 121 final}, 17/06/2015, p. 14; Gribnau, Soft law and taxation (n 248) p. 67; Terra and Wattel (n 248) p. 112; Wilde, Tax Competition within the EU (n 142) p. 28; H Gribnau, 'Improving the Legitimacy of Soft Law in EU Tax Law' (2007) *Intertax* 35(1), p. 30.
[255] EU Com. Communication on a fair and efficient Corporate Tax System, Id., p. 3; Wilde, Ibid; F G Morina, 'The Legal Aspect of the Tax Competition in EU: Case of Kosovo' (2019) *Sriwijaya L.Rev.* 3(1) p. 3.
[256] Wilde, Ibid; Snoeij (n 242) p. 121; Smit (n 159) p. 184.
[257] Pinto, Tax competition (n 117) p. 165.
[258] EU Code of Conduct (n 241) C 2/3; Traversa and Flamini (n 248) pp. 325-26; Nouwen and Wattel (n 246) p. 932-33; M Nouwen, 'The Gathering Momentum of International and Supranational Action against Aggressive Tax Planning and Harmful Tax Competition: The State of Play of recent Work of the OECD and European Union' (2013) *Euro.Tax.* 53(10), p. 12.
[259] Wattel (n 248) p. 136.

significantly affect, or may affect, the location of business activities.[260] The COCG confirms this in its Agreed Guidance[261] and in its assessment report on the Belgian notional interest deduction (NID) regime (BE018).[262] The phrase 'significantly affect' means that the measure must have sufficient weight to influence the business location. This means that a tax measure that cannot affect the business location falls outside the scope of the Code of Conduct. For example, in Portugal's NID regime assessment, the COCG held the regime was outside the scope of the Code of Conduct as it could not significantly affect the business location.[263] Similarly, if the measure's effect is minimal, it also falls outside the scope of the Code of Conduct.[264] The COCG applied the same thinking to Poland's 15% CIT rate for small and start-up taxpayers.[265] With respect to small taxpayers, the COCG stated that although the measure resulted in a significantly lower effective tax rate, it did not pass the gateway criterion because, when applied to small companies, it could not affect '*in a significant way the location of business activity in the Community*.'[266]

In the same vein, business location is the key element that determines the measure's effect or potential effect. The measure must either affect the location of the business or must have the potential to do so. Nevertheless, it is difficult to prove that the measure has influenced the business location considering a variety of other factors that may come into play. That is why consideration of the potential effect on business location is important to palliate the challenges of demonstrating an actual effect on business location.

Regarding the derogation test, the Code refers to it by stating:

[260] EU Code of Conduct (n 241) C2/3; Pinto, EU and OECD (n 72) p. 389; Englisch and Yevgenyeva (n 70) p. 636; Wishlade (n 192) p. 588; Ambrosanio and Caroppo (n 115) p. 691; Moutarlier (n 248) p. 78; Wattel (n 248) p. 136; EU Com. Communication on good governance in tax matters (n 243) p. 6; Boria (n 242) p. 169; P J Wattel, 'Comparing Criteria: State Aid, Free Movement, Harmful Tax Competition and Market Distorting Disparities', in I Richelle, W Schön, and E Traversa (ed.), *State Aid Law and Business Taxation* (Springer, 2016), p. 63.
[261] CEU, Agreed Guidance by the Code of Conduct Group (business taxation): 1998-2018, FISC 44 ECOFIN 75, 5814/4/18 REV 4, 20/12/2018, p. 16.
[262] CEU, Report on COCG assessment of Belgium's NID regime (BE018), 14364/18 ADD 1, FISC 481 ECOFIN 1059, 20/11/2018, p. 39.
[263] CEU, Report on COCG assessment of Portugal's NID regime (PT018), 14364/18 ADD 8, FISC 481 ECOFIN 1059, 20/11/2018, p. 16.
[264] Seeruthun-Kowalczyk (n 159) p. 170.
[265] CEU, Report on COCG assessment of Poland's 15% CIT rate for small taxpayers (PL006), 14364/18 ADD 7, FISC 481 ECOFIN 1059, 20/11/2018, pp. 2-4.
[266] Ibid.

> Tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this Code. [267]

Thus, derogation refers to a deviation from the general level of taxation in the country.[268] Derogating the generally applicable tax rate to give a lower effective level of taxation has been set by the Code as a gateway criterion, the presence of which gives a green light to evaluate other criteria, while the opposite puts a stop to further inquiry. In other words, if the gateway criterion is present, the regime is regarded as potentially harmful. This has been reiterated in several assessments carried out by COCG, whose reports state that deviating from the ordinary applicable rate to offer a significantly lower rate makes up a 'potentially harmful' situation. Examples include, but are not limited to, Malta's NID regime,[269] France's new intellectual property regime,[270] Cost Rica's manufacturing activities under the Free Zones regime,[271] Cyprus' NID regime,[272] Malta's patent box regime,[273] Belize's fiscal incentives act,[274] Belize's commercial free zones,[275] and Mongolia's remote areas regime.[276]

Although a lower level of taxation is a key indicator, it is not sufficient on its own. In this regard, the Code lists five criteria to consider before concluding whether a measure is harmful.

4.2.3. The Code's five criteria and their interpretation

The measures in the Code of Conduct have three purposes: reduction of market distortions, prevention of excessive tax revenue losses, and development of tax structures in a more

[267] EU Code of Conduct (n 241) C 2/3.
[268] Ibid; Wattel (n 248) p. 136; Ambrosanio and Caroppo (n 115) p. 691.
[269] CEU, Report on COCG assessment of Malta's NID regime (MT014), 14364/18 ADD 6, FISC 481 ECOFIN 1059, 20/11/2018, p. 16.
[270] CEU, Report on COCG assessment of France's new IP regime (FR054), 9652/19 ADD 2, FISC 274 ECOFIN 515, 27/05/2019, p. 15.
[271] CEU, Report on COCG assessment of Costa Rica's manufacturing activities under the Free Zones regime (CR002), 9652/19 ADD 8, FISC 274 ECOFIN 515, 27/05/2019, p. 3.
[272] CEU, Report on COCG assessment of Cyprus' NID regime (CY020), 9652/19 ADD 1, FISC 274 ECOFIN 515, 27/05/2019, p. 21.
[273] CEU, Report on COCG assessment of Malta's patent box regime (MT015), 14114/19 ADD 1, FISC 444 ECOFIN 1005, 25/11/2019, p. 16.
[274] CEU, Report on COCG assessment of Belize's fiscal incentives act (BZ003), 14114/19 ADD 4, FISC 444 ECOFIN 1005, 25/11/2019, p. 2.
[275] CEU, Report on COCG assessment of Belize's commercial free zone (BZ005), 14114/19 ADD 6, FISC 444 ECOFIN 1005, 25/11/2019, p. 2.
[276] CEU, Report on COCG assessment of Mongolia's remote areas regime (MN002), 14114/19 ADD 8, FISC 444 ECOFIN 1005, 25/11/2019, p. 2.

employment-friendly way.[277] In this context, the Code has elaborated five criteria to determine whether a tax competition regime is harmful. These are:

> (1) whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents; or (2) whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base; or (3) whether advantages are granted without any real economic activity or substantial economic presence; or (4) whether the rules for profit determination in respect of activities within a multinational group of companies depart from internationally accepted principles, notably the rules agreed upon within the OECD; or (5) whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.[278]

The above factors are summarized as lower level of taxation, ring-fencing, lack of substantial activity, lack of arm's length dealing, and lack of transparency.[279] Accordingly, a measure becomes harmful if it grants a significantly lower level of taxation and is ring-fenced, does not respect the arm's length principle, lacks substantial activity, or lacks transparency.

Regarding the list of criteria, the Code is silent on whether the list is exhaustive. Even so, the plain language of the Code shows that it is not, a view which is shared by scholars.[280] Indeed, the Code's use of the words '*inter alia*', i.e. among other things, directly preceding the list of criteria constructs an assumption that the list includes only examples of criteria to determine if a tax measure is harmful.

In addition to the criteria for determining harmful tax competition, the Code introduced and applied standstill and rollback clauses. The two clauses have been described as key features of the Code.[281] The standstill clause prevents Member States from introducing new harmful measures.[282] The rollback clause compels Member States to review, amend, and dismantle existing harmful measures or their harmful features as soon as possible.[283] Thus, the prohibition to Member States is three-fold: refrain from introducing a new harmful tax measure, refrain

[277] EU Code of Conduct (n 241) C 2/1.
[278] EU Code of Conduct, Id., C 2/3; Seeruthun-Kowalczyk (n 159) p. 172.
[279] Terra and Wattel (n 248) p. 112.
[280] Szudoczky and van de Streek (n 241) p. 275; Nouwen and Wattel (n 246) p. 933; Nouwen (n 241) p. 109 and 123.
[281] COCG Agreed Guidance (n 261) pp. 31-32.
[282] EU Code of Conduct (n 241) C 2/4; Lampreave (n 100) p. 8; A C Santos and C M Lopes, 'Tax Sovereignty, Tax Competition and the Base Erosion and Profit Shifting Concept of Permanent Establishment' (2016) *EC T.Rev.* 5/6, p. 300.
[283] COCG Agreed Guidance (n 261) pp. 31-32; EU Code of Conduct (n 241) C 2/4; Lampreave, ibid; Santos and Lopes, Ibid; Bai (n 246) p. 119.

from broadening the scope of an existing harmful tax measure, and refrain from replacing a measure that contains harmful features.[284]

Getting back, the Code's five criteria to determine harmful tax competition are detailed below, starting with the gateway criterion, i.e. the lower level of taxation criterion.

4.2.3.1. Lower level of taxation

Under the EU Code of Conduct, an effective lower level of taxation is a key factor to assess the harmfulness of a regime. It has been described as 'a significantly lower effective level of taxation than those levels which generally apply', including the payment of no tax at all or zero taxation.[285] On several occasions, the COCG assessed measures that, in benefit of some taxpayers, fully or partially exempt or reduce the tax rates from the rates that generally apply as providing a significantly lower level of taxation.[286] This means that a favorable tax measure that does not lead to a lower level of taxation, is excluded from harmful tax measures. Equally, general low-tax rates, i.e. applicable to all taxpayers, are excluded from the Code's interest.[287] In other words, the Code is not concerned with the overall rate or level of CIT in Member States. Rather, it is concerned with measures that substantially reduce the level of tax payable compared to the usual level of taxation in the concerned state.[288] The lower level may be by virtue of the nominal tax rate or the tax base or any other relevant factor.[289]

This criterion is very important in determining whether a regime is potentially harmful. It is described as a defining character, major identifier, major indicator, gateway criterion, initial

[284] COCG Agreed Guidance, Id. p. 7; Pinto, Tax competition (n 117) p. 220; Bond et al. (n 78) p. 58; Boria (n 242) p. 169; Drezgić (n 246) pp. 87-88; Moutarlier (n 248) p. 78.
[285] EU Code of Conduct (n 241) C 2/3 para. B; Teather, The Benefits of Tax Competition (n 165) p. 135; Bond et al. (n 78) p. 55; H Nijkamp, 'EU Stands up to Harmful Regimes' (2001) *Int'lT.Rev.* 12(3), p. 35.
[286] CEU, Outcome of proceedings on COCG assessment of Morocco's Offshore holding companies regime (MA005), 7549/19 FISC 195, 15/03/2019, p. 3; CEU, Outcome of proceedings on COCG assessment of Morocco's Offshore banks regime (MA004), 7548/19 FISC 194, 15/03/2019, p. 3; CEU, Outcome of proceedings on COCG assessment of Dominica's Offshore banking regime (DM002), 7520/19 FISC 185, 15/03/2019, p. 3; CEU, Outcome of proceedings on COCG assessment of Panama's Foreign-owned call centers regime (PA005), 15117/18 FISC 520 ECOFIN 1164, 04/12/2018; CEU, Outcome of proceedings on COCG assessment of Armenia's governmentally approved projects outside Armenia (AM002), 12772/18 FISC 392 ECOFIN 871, 04/10/2018, p. 3.
[287] Smit (n 159) p. 181.
[288] Seeruthun-Kowalczyk (n 159) p. 170; Bond et al. (n 78) p. 55; Genschel, Kemmerling and Seils (n 140) p. 587; O Pastukhov, 'Counteracting Harmful Tax Competition in the European Union' (2010) *Sw.JIL* 16, p. 162.
[289] CEU, The EU list of non-cooperative jurisdictions for tax purposes - Letters seeking commitment on the replacement by some jurisdictions of HPTR with measures of similar effect, FISC 95 ECOFIN 98, 5981/19, 1/02/2019, p. 7 and 22.

criterion, etc.[290] Nevertheless, it is not determinative on its own; it must be combined with at least one other factor to qualify a regime as harmful. One factor with which the gateway criterion can be combined to create a harmful tax regime is ring-fencing, which is discussed in the next paragraphs.

4.2.3.2. Ring-fencing

Criteria 1 and 2 of the Code of Conduct are about ring-fencing. This is a mechanism designed to protect one's own tax base from the consequences of tax competition. The departing point is the difference in treatment between domestic companies and foreign companies or companies owned by non-residents or companies that do not have any link with the domestic market. With ring-fencing, foreign investors are favorably treated compared to domestic investors by offering tax advantages to foreign investors but not to domestic investors.[291] In this respect, to eliminate ring-fencing, the COCG recommends closing the favorable tax measure or extend it to residents.[292]

The key element in ring-fencing is the distinction between residents and non-residents in terms of the measure's advantage. This explains why the COCG's Agreed Guidance recognizes as ring-fencing those situations where the measure's beneficiaries are only non-residents.[293] Domestic companies with foreign shareholding are also classified as non-residents.[294] Prohibiting benefiting companies from trading in the local currency is also a characteristic of ring-fencing.[295]

Following the above, under the Code of Conduct, ring-fencing has two aspects, and each aspect can be *de jure* or *de facto*. The first aspect of ring-fencing is when the advantage is granted only to non-residents or to transactions carried out with non-residents. That is, the measure is only open to, and can only be accessed, by non-residents, while residents are

[290] EU 2017 List of non-cooperative jurisdictions (n 253) p. 32; Barker (n 112) p. 170; Calich (n 70) p. 60 and 63; W Bratton and J A McCahery, 'Tax Coordination and Tax Competition in the European Union: Evaluating the Code of Conduct on Business Taxation' (2001) *CMLRev.* 38, p. 685; Nouwen (n 241) p. 108 and 109; Snoeij (n 242), p. 121.
[291] Baker (n 211) p. 176; Rixen (n 180) p. 73.
[292] CEU, Outcome of Proceedings on COCG Standstill review process on Luxembourg's draft law relating to the tax regime for intellectual property (LU017), 10931/18 FISC 299 ECOFIN 715, 6/07/2018, p. 14.
[293] COCG Agreed Guidance (n 261) p. 118.
[294] Ibid.
[295] Barker (n 112) p. 176.

excluded from the measure either *de jure* or *de facto*. Under the EU Code of Conduct, this is criterion 1.

Criterion 1 of the EU Code of Conduct contains two elements. The first element, criterion 1a, is whether the measure is by law and/or regulation, exclusively available to non-residents or to transactions with non-residents.[296] If this is the case, it is a *de jure* ring-fencing and is determined using literal interpretation. The second element, criterion 1b, is *de facto* ring-fencing, which happens when the advantage is not explicitly granted to non-residents by law or regulation, but is in practice enjoyed only or almost only or mainly by non-residents or for transactions with non-residents.[297] This is determined using statistical data, and the measure qualifies as harmful if all or nearly all or most of the beneficiaries, taxpayers or transactions, are non-residents.[298] Examples of the *de facto* ring-fencing include measures that restrict access to the local market, or are restricted to a specific business license, or to activities that are undertaken only by non-residents.[299]

The second aspect, which is criterion 2 of the EU Code, is where the advantages are ring-fenced from the domestic market. In this context, an assessment is done to determine whether the advantages are ring-fenced from the domestic market so that they do not affect the national tax base.[300] Like criterion 1, criterion 2 is also sub-divided into two, namely criterion 2a on *de jure* interpretation and criterion 2b on *de facto* analysis.[301] The COCG has noted that

[296] COCG Agreed Guidance (n 261) p. 117; EU 2017 List of non-cooperative jurisdictions (n 253) C 483/22; COCG assessment of Belgium BE018 (n 262) p. 32; COCG assessment of Poland PL006 (n 265) p. 4; CEU, Report on COCG assessment of Slovakia's patent box regimes (SK007), 14364/18 ADD 9, FISC 481 ECOFIN 1059, 20/11/2018, p. 9; CEU, Report on COCG assessment of Poland's IP regimes (PL012), 9652/19 ADD 5, FISC 274 ECOFIN 515, 27/05/2019, p. 24; CEU, Report on COCG assessment of Italy's NID regime (IT019), 14364/18 ADD 4, FISC 481 ECOFIN 1059, 20/11/2018, p. 19; COCG assessment of Cyprus CY020 (n 272) p. 21; CEU, Outcome of proceedings on Code of Conduct (Business Taxation) – Scoping paper on criterion 2.2 of the EU listing exercise, 10421/18, FISC 274 ECOFIN 657, AR/mf DG G2B, 22/06/2018, p. 17.

[297] COCG Agreed Guidance (n 261) 118; EU 2017 List of non-cooperative jurisdictions, ibid.; COCG assessment of Belgium BE018 (n 262) 32; COCG assessment of Italy IT019, ibid.; COCG assessment of Cyprus CY020, *Ibid*; COCG assessment of Poland PL006 (n 265) p. 5; COCG assessment of Poland PL012 (n 296) 17; COCG assessment of Slovakia SK007 (n 296) p. 9; Scoping Paper on criterion 2.2, Id., p. 18.

[298] EU 2017 List of non-cooperative jurisdictions, ibid; COCG assessment of Belgium BE018, ibid; COCG assessment of Poland PL006 (n 265) p. 5; COCG assessment of Slovakia SK007 (n 296) p. 9; COCG assessment of Poland PL012 (n 296) p. 17; COCG assessment of Italy IT019, ibid.; COCG assessment of Cyprus CY020, Id., p. 22.

[299] COCG Agreed Guidance (n 261) p. 118.

[300] COCG assessment of Belgium BE018 (n 262) 32; COCG assessment of Poland PL006 (n 265) p. 5; COCG assessment of Slovakia SK007 (n 296) p. 9; COCG assessment of Cyprus CY020 (n 272) p. 21.

[301] COCG assessment of Belgium BE018, Ibid.; COCG assessment of Poland PL006, ibid; COCG assessment of Slovakia SK007, ibid.; COCG assessment of Cyprus CY020, ibid.

measures that satisfy criterion 1 also satisfy criterion 2 in most cases, which motivates the application of the analogy.[302]

For clarification, the COCG considered several regimes not ring-fenced because the regimes apply to both residents and non-residents. For example, Poland's 15% CIT rate for small taxpayers was found not ring-fenced. That decision was due to the measure's availability to small taxpayers with sales revenues not exceeding 1,200,000 euros; taxpayers who start a business activity for that tax year; and foreign companies' permanent establishments that fulfill those conditions.[303] Thus, there was no *de jure* exclusion of residents or transactions with residents.

By the same token, the COCG decided that Poland's intellectual property regime was not *de jure* ring-fenced because of the measure's applicability to all taxpayers who create, develop, or improve the qualified intellectual property rights as part of their R&D activity, while *de facto* application was deferred due to a lack of complete information.[304] The COCG also decided the Slovak intellectual property regime was not *de jure* ring-fenced because the tax measure was available to all taxpayers with qualifying intellectual property assets.[305] Similarly, the COCG concluded the Italian NID not *de jure* ring-fenced because of its availability to all companies based in Italy without restriction in terms of shareholding or business sector.[306] The COCG also found it not *de facto* ring-fenced because the regime was predominantly used by residents.[307] Other examples include, but are not limited to, the cases of Vietnam's export processing zones, Saint Lucia's free trade zones regime, Mauritius' partial exemption regime, Dominica's general incentive regime, and Antigua and Barbuda's free trade and special economic zone.[308]

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[302] COCG assessment of Belgium BE018, ibid; COCG assessment of Poland PL006, ibid; COCG assessment of Slovakia SK007, ibid; COCG assessment of Costa Rica CR002 (n 271) 3; CEU, Outcome of proceedings on COCG assessment of Mauritius' Partial exemption regime (MU010), 13208/19, FISC 396, 16/10/2019, p. 3.
[303] COCG assessment of Poland PL006, Id., pp. 4-5.
[304] Ibid.
[305] COCG assessment of Slovakia SK007 (n 296) p. 9.
[306] COCG assessment of Italy IT019 (n 296) p. 19.
[307] Ibid.
[308] CEU, Outcome of proceedings on COCG assessment of Vietnam's export processing zones (VN001), 12775/18 FISC 395 ECOFIN 874, 04/10/2018, p. 3; CEU, Outcome of proceedings on COCG assessment of Saint Lucia's Free Trade Zones regime (LC003), 7546/19 FISC 192, 15/03/2019, p. 1; COCG assessment of Mauritius MU010 (n 302) p. 2; CEU, Outcome of proceedings on COCG assessment of Dominica's General incentive under the Fiscal Incentives Act - FIA regime (DM003), 7521/19 FISC 186, 15/03/2019, p. 2; CEU, Outcome of proceedings on COCG assessment of Antigua and Barbuda's Free trade and special economic zone (FTZ) regime (AG003), 7416/20 FISC 83, 30/04/2020, p. 3.

In contrast to the above regimes, the COCG found some other regimes to be harmful based on their ring-fencing character that discriminates against residents and/or domestic markets. For instance, the COCG found the Cyprus' NID regime not *de jure* ring-fencing under criterion 1a, deferred for the criterion 1b, but ring-fencing under criterion 2. This was explained as '*the fact that the taxpayer benefit from a higher interest rate from foreign investment means the full advantages of this measure are ring-fenced from the domestic market.*'[309] The COCG also qualified harmful the Costa Rica's manufacturing activities under the Free Zone regime simply because the law excluded resident companies from companies that the regime beneficiaries could transact with.[310]

In the same vein, the COCG found Cook Islands' overseas insurance regime *de jure* ring-fenced under criterion 1 because it targeted foreign-owned enterprises, therefore granting advantages only to foreign companies and also *de facto* ring-fenced under criterion 2 because by targeting foreigners, the advantages became ring-fenced from the domestic market, without affecting the national tax base.[311] Similarly, the COCG found Tunisia's export promotion incentives regime ring-fenced under criterion 2 because its holiday's reduction applies only to profits from exports, i.e. realized outside the domestic market.[312] Other examples of regimes concluded ring-fenced because of targeting non-residents or foreign markets include Malaysia' headquarters, Korea's free trade/economic zones, Grenada's export processing, Grenada's international trusts, and Saint Vincent and Grenadine's international trusts.[313] Other examples are Saint Kitts and Nevis' offshore companies, Korea's foreign investment zone, Belize's EPZ enterprises, Antigua and Barbuda's international business corporations, Hong Kong's offshore private equity, Hong Kong's offshore funds, Morocco's offshore holding companies, Morocco's offshore banks, Aruba's transparency, Dominica's offshore banking, Tunisia'

[309] COCG assessment of Cyprus CY020 (n 272) p. 22.
[310] COCG assessment of Costa Rica CR002 (n 271) p. 3.
[311] CEU, Report on COCG assessment of Cook Islands' Overseas insurance regime (CK003), 9652/19 ADD 7, FISC 274 ECOFIN 515, 27/05/2019, p. 5.
[312] CEU, Outcome of proceedings on COCG assessment of Tunisia's Export promotion incentives regime (TN001), 7550/19 FISC 196, 15/03/2019, p. 4.
[313] CEU, Outcome of proceedings on COCG assessment of Korea's Free Trade/Economic Zone – FTEZ regime (KR002), 7524/19 FISC 189, 15/03/2019, p. 3; CEU, Outcome of proceedings on COCG assessment of Malaysia's Headquarters (or principal hub) regime (MY012), 10267/19 FISC 289, 12/06/2019, p. 3; CEU, Outcome of proceedings on COCG assessment of Grenada's Export Processing regime (GD006), 7469/19 FISC 178, 14/03/2019, p. 4; CEU, Outcome of proceedings on COCG assessment of Grenada's International Trusts regime (GD004), 7467/19 FISC 176, 14/03/2019, p. 3; CEU, Outcome of proceedings on COCG assessment of Saint Vincent and the Grenadine's International Trusts regime (VC002), 7564/19 FISC 201, 15/03/2019, p. 2.

offshore financial services, Panama's foreign-owned call centers, Morocco's coordination centers, and Armenia's governmentally approved projects.[314]

Additionally, it is evident that the hard-core element in the ring-fencing criterion is the intent. This makes sense because, in setting up a favorable tax measure, the intent is '*to attract additional tax base from other states without negatively affecting the domestic tax revenues.*'[315] Thus, the element of the country's intent is of great importance with respect to ring-fencing. This means that, setting favorable tax rates is generally accepted unless if it is done to poach other states' tax bases, in which case, it becomes problematic and bad. One scholar explained it as follows:

> A country may legitimately adopt whatever tax rate it deems appropriate; may impose different tax rates on different types of income; and may even refrain from taxing certain types of income, but once it does so, it must apply those rates across the board to residents and non-residents alike.[316]

Furthermore, under the EU order, great weight is given to ring-fencing as the primary criterion to distinguish bad tax competition from good tax competition. For illustration, Saint Lucia's exemption of foreign income regime was assessed and found harmful because it was ring-fenced, although it was not harmful when measured against other criteria.[317] In the same vein, ring-fencing was described as an important sign and most qualifying element of harmful tax competition.[318] Equally, ring-fencing is described as a predatory form of tax competition, which

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[314] CEU, Outcome of proceedings on COCG assessment of Saint Kitts and Nevis' Offshore companies regime (KN001), 7522/19 FISC 187, 15/03/2019, pp. 4-5; CEU, Outcome of proceedings on COCG assessment of Korea's Foreign investment zone regime (KR001), 7523/19 FISC 188, 15/03/2019, p. 3 and 5; CEU, Outcome of proceedings on COCG assessment of Belize's Export Processing Zones: EPZ enterprises regime (BZ002), 7615/19 FISC 203, 18/03/2019, p. 8; CEU, Outcome of proceedings on COCG assessment of Antigua and Barbuda's International business corporations regime (AG001), 7461/19 FISC 170, 14/03/2019, p. 3; CEU, Outcome of proceedings on COCG assessment of Hong Kong's Offshore private equity regime (HK003), 7516/19 FISC 181, 15/03/2019, p. 3; CEU, Outcome of proceedings on COCG assessment of Hong Kong's Offshore funds regime (HK002), 7470/19 FISC 179, 14/03/2019, p. 3; COCG assessment of Morocco MA005 (n 286) p. 2; COCG assessment of Morocco MA004 (n 286) 2; CEU, Outcome of proceedings on COCG assessment of Aruba's Transparency regime (AW013), 9646/19 FISC 273, 22/05/2019, 3; COCG assessment of Dominica DM002 (n 286) p. 2-3; CEU, Outcome of proceedings on COCG assessment of Tunisia's Offshore financial services regime (TN002), 7560/19 FISC 197, 15/03/2019, p. 2; COCG assessment of Panama PA005 (n 286) p. 2; CEU, Outcome of proceedings on COCG assessment of Morocco's Coordination centers regime (MA001), 7547/19 FISC 193, 15/03/2019, p. 2; COCG assessment of Armenia AM002 (n 286) p. 3.

[315] J Hey, 'Tax Competition in Europe: The German Perspective' (EATLP Conference, Lausanne, 2002), p. 7 <www.eatlp.org/uploads/Members/Germany02.pdf> accessed 13/08/2019.

[316] Elkins (n 238) p. 915.

[317] CEU, Letters seeking commitment FISC 95 ECOFIN 98 (n 289) p. 6 and 24.

[318] Hey (n 315) p. 7; Deák (n 227) p. 31; Elkins (n 238) p. 947; V Sobotková, 'Revisiting the Debate on Harmful Tax Competition in the European Union' (2012) *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis* 36(4), p. 345; Nouwen (n 241) p. 127.

attempts to get profits at the expense of other countries' treasuries, and from its ability to instigate the race to the bottom that ends up with detrimental repercussions for all.[319] Nevertheless, other criteria, such as the requirement for economic substance, are also taken into account in determining harmfulness.

4.2.3.3. Lack of substantial activity requirement

Another criterion in the Code is the requirement for substantial activity. The COCG refers to it as criterion 3. It assesses whether a measure grants advantages without there being any actual economic activity and/or substantial economic presence in the country granting the advantage. The COCG has concluded in several assessments that the absence of substantial activity makes the measure harmful.[320] This criterion has two aspects: the real economic activity and the substantial economic presence. The first aspect refers to the nature of the activity, while the second aspect refers to the factual manifestations of the activity.[321]

According to the Code, a measure that is granted without requiring the beneficiary to engage in real economic activity and/or have a substantial economic presence is harmful.[322] This was the COCG's position in the case of the Cook Islands overseas insurance regime.[323] In contrast, a measure that requires economic activity or substantial economic presence through job creation is not regarded harmful. To satisfy this criterion, Member States are required to avoid granting advantages to companies with no real economic activity or presence, such as so-called letter-box companies and/or artificial arrangements.[324]

By the same token, the COCG directs the consideration of the following elements when assessing this criterion: '*adequate level of employees, adequate level of annual expenditure,*

[319] Elkins, Id., p. 909 and 915; Pinto, EU and OECD (n 72) p. 393.
[320] CEU, Outcome of proceedings on COCG assessment of Dominica's International business company – IBC regime (DM001), 7519/19 FISC 184, 15/03/2019, p. 5; CEU, Outcome of proceedings on COCG assessment of Liechtenstein's Tax exempt corporate income regime (LI001), 12773/18 FISC 393 ECOFIN 872, 04/10/2018, p. 5; CEU, Outcome of proceedings on COCG assessment of Grenada's International companies regime (GD001), 7464/19 FISC 173, 14/03/2019, p. 4; COCG assessment of Aruba AW013 (n 314) 5; COCG assessment of Antigua and Barbuda AG001 (n 314) 4; COCG assessment of Tunisia TN002 (n 314) 4; COCG assessment of Dominica DM002 (n 286) 4; COCG assessment of Armenia AM002 (n 286) 4.
[321] EU 2017 List of non-cooperative jurisdictions (n 253) C 483/23; Scoping Paper on criterion 2.2 (n 296) p. 19; Nouwen (n 241) p. 133.
[322] Hey (n 315) p. 7.
[323] Ibid.
[324] Beckers (n 248) p. 579.

physical offices and premises, and investments or relevant types of activities.'[325] To determine what adequate level of employees is, the COCG considers the average number of employees, employees' full-time versus part-time status, employees' qualifications in relation to the nature of activity, quantitative and qualitative aspects of management and administration,[326] etc. An example of the application of this is Saint Lucia that was assumed to satisfy the substance requirement based on its legislative requirement for international business companies benefiting the tax exemption to have '*an adequate number of employees with the necessary level of qualifications and experience, an adequate amount of operating expenses, and an adequate amount of investment and capital that is commensurate with the type and level of company's activity*'.[327]

In the same vein, the real economic activity is *a priori* assumed satisfied for regimes that grant tax benefits to manufacturing and/or production activities; activities that are not highly mobile; investment in tangible assets such as buildings, construction, technical equipment and facilities;[328] etc. For such activities, worries to attract mobile tax base are reduced, and the regime does not *a priori* raise concern regarding a lack of substantial economic activity.[329] This is because manufacturing and production activities require tangible assets for long-term investment, such as buildings, equipment, and other technical facilities.[330]

The requirement of real economic activity and/or substantial economic presence aims to halt fictitious residences, i.e. legal residencies that differ from the physical places of investment.[331] Through a nexus test, it is verified if there is an adequate link, *de jure* or *de facto*, between the measure and the benefiting taxpayer who must undertake income-generating activities.[332] Thus, if a company benefiting from a favorable tax measure does not have a substantial economic presence, it shows that the company has decided to invest only to benefit

[325] COCG Agreed Guidance (n 261) p. 119 and 128; EU 2017 List of non-cooperative jurisdictions (n 253) C 483/23; Scoping Paper on criterion 2.2 (n 296) p. 19; CEU, Letters seeking commitment FISC 95 ECOFIN 98 (n 289) p. 23.
[326] COCG Agreed Guidance, Id., p. 129; Scoping Paper on criterion 2.2, Id., p. 3.
[327] CEU, Letters seeking commitment FISC 95 ECOFIN 98 (n 289) 23.
[328] Id., p. 126.
[329] Ibid; COCG assessment of Costa Rica CR002 (n 271) 5; Nouwen (n 241) p. 137.
[330] CEU, Letters seeking commitment FISC 95 ECOFIN 98 (n 289) 126.
[331] Webb (n 160) p. 802.
[332] COCG assessment of Belgium BE018 (n 262) p. 33; CEU, Outcome of proceedings on COCG assessment of Liechtenstein's Interest deduction on equity / NID regime (LI003), 12774/18 FISC 394 ECOFIN 873, 04/10/2018, p. 3; Nouwen (n 241) p. 135 and 410.

from the favorable tax measures.[333] It may also show that the country that offers the favorable tax measures did so to attract mobile business activities to the detriment of other states' tax bases.[334] This highlights the importance of the requirement of real economic activity or substantial economic presence.

On many occasions, the COCG has used the element of economic substance with great effect. For example, the UAE and Vanuatu were listed as non-cooperative jurisdictions because of their arrangements designed to attract profits without real economic substance.[335] Similarly, Mauritius' partial exemption regime was found clean on other criteria, but identified as not meeting the economic substance criterion and the overall assessment was harmful.[336]

Apart from the substance criterion, another criterion in the Code to determine the harmfulness of a measure is the failure to comply with the arm's length principle. This criterion is also referred to as failure to comply with the OECD rules on profit determination, as detailed below.

4.2.3.4. Non-compliance with OECD rules on profit determination

The Code of Conduct criterion 4 assesses whether the rules on profit determination within multinational companies comply with internationally accepted principles. The purpose of this criterion is to prevent multinationals from engaging in transfer mis-pricing in order to shift profits to low-tax jurisdictions.[337] In this respect, the Code of Conduct expressly relies on the OECD rules. Thus, if a measure complies with these rules, it does not qualify as harmful. In contrast, if it is not compliant, it qualifies as harmful. For example, the COCG Agreed Guidance mentions that it is harmful for parent companies if the profit determination is done other than in accordance with the OECD Transfer Pricing Guidelines.[338] Thus, the EU Code of Conduct has explicitly endorsed the OECD guidelines on transfer pricing.

Examples of COCG assessments on this criterion include the Italian NID regime. The COCG concluded that it complied with criterion 4, because '*the measure does not contain such*

[333] Pinto, Tax competition (n 117) p. 162.
[334] Ibid; Dirix (n 188) p. 235.
[335] CEU, The EU list of non-cooperative jurisdictions for tax purposes (2019/C 176/03), *OJEU*, 22/05/2019, C 176/3.
[336] COCG assessment of Mauritius MU010 (n 302) p. 6 and 9.
[337] Scoping Paper on criterion 2.2 (n 296) p. 21.
[338] COCG Agreed Guidance (n 261) p. 10.

elements that would be relevant from the point of view of internationally accepted principles.'[339] In contrast, the COCG found regimes with a fixed CIT at a lump sum amount not in line with the OECD's internationally accepted principles and, therefore, not in compliance with criterion 4 of the EU Code of Conduct.[340] These examples show the extent to which the COCG relies on the OECD transfer pricing rules in assessing whether a regime is harmful.

The particular focus on profit determination within multinational companies can be justified by the fact that in controlled transactions, companies can manipulate their profits to minimize the amount of tax payable. This is not the case in uncontrolled transactions where prices are determined by market conditions. This gives rise to the need to look more closely at the determination of profits within multinationals. Nevertheless, other criteria, such as the transparency requirement, are also relevant in determining whether a regime is harmful, as discussed below.

4.2.3.5. Lack of transparency

Criterion 5 in assessing the harmfulness of favorable tax regimes relates to transparency. The criterion of transparency aims to promote equality between taxpayers in similar situations. Thus, a lack of transparency is a serious indicator of harmful tax competition.[341] The importance of this criterion has been explained in two ways. First, a lack of transparency can occur because of unpublished or secret rulings.[342] Second, a lack of transparency may result from administrative practices that go beyond the interpretation of tax legislation and exercise discretion in tax treatment in favor of certain taxpayers or certain transactions.[343] Tax burden negotiability, lax recovery, and relaxation of the legal provisions at the administrative level in a non-transparent way also leads to a lack of transparency.[344] In brief, lack of transparency includes tax measures that are not transparent, as well as non-transparent administrative relaxation of legal provisions in favor of a particular taxpayer.

The COCG Agreed Guidance states that a measure is *prima facie* not transparent if the details of its existence, scope, and conditions are not published.[345] The COCG has provided

[339] COCG assessment of Italy IT019 (n 296) p. 23.
[340] COCG assessment of Morocco MA004 (n 286) 4; COCG assessment of Morocco MA005 (n 286) p. 4.
[341] EU Com. Communication on a fair and efficient Corporate Tax System (n 254) p. 12; Boulogne (n 67) p. 53.
[342] Pinto, Tax competition (n 117) p. 162.
[343] Ibid.
[344] EU Code of Conduct (n 241) C 2/3; Nouwen and Wattel (n 246) 933.
[345] COCG Agreed Guidance (n 261) p. 8.

some guidance to improve transparency and ensure compliance with criterion 5. An example of such guidance is the incorporation of tax rulings in public legislation or public administration guidelines.[346] The procedures and conditions underlying rulings should also be embedded in a transparent, i.e. publicly accessible, legal, and administrative framework.[347] If it is a ruling that may have horizontal application, it should be published or reflected in a guidance document or otherwise made publicly available.[348] In addition, the COCG emphasized in several assessments that, for a measure to be transparent, all preconditions thereto pertaining must be clearly set out in publicly available laws, decrees, regulations, or the like.[349]

For example, in applying the transparency criterion, the COCG assessed Costa Rica's manufacturing activities under the Free Zones regime and concluded that the measure was not harmful under criterion 5 because it was '*fully set out and published in the relevant legislation and the practice does not involve any administrative discretion*.'[350] The COCG reached a similar conclusion when assessing Liechtenstein's CIT exempt and Mauritius' partial exemption regime.[351] In contrast, the COCG found Cook Islands' Development Projects regime not transparent because it granted benefits based on '*the opinion of the Collector*.'[352] The COCG also came to the same conclusion about Singapore's DEI regime which did not publish the conditions thereto prevailing along with the Minister's discretion in granting the certificate.[353]

The above criteria have often been used by the COCG to assess domestic tax regimes. Such assessments are referred to as one-country issues and have been labeled as quasi-case law or pseudo-case law.[354] Besides, other works of the COCG include two-country issues comprising common policies development (quasi or pseudo-legislation), and third-country issues comprising dialogue with non-EU countries on the possible application of the Code's

[346] Id., p. 22.
[347] CEU, Report from COCG to ECOFIN Council on 08/06/2010, 10033/10, FISC 47, 25/05/2010, p. 11; A Semeta, 'Competitive Tax Policy and Tax Competition in the EU' (2011) Speech/11/712, 2nd Taxation Forum of Diario Economico/OTOC, p. 4 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_712> accessed 14/08/2019.
[348] Semeta, ibid.
[349] COCG assessment of Poland PL006 (n 265) p. 7; COCG assessment of Costa Rica CR002 (n 271) p. 4; COCG assessment of Liechtenstein LI001 (n 320) p. 8; COCG assessment of Mauritius MU010 (n 302) p. 4; COCG assessment of Morocco MA001 (n 314) 5; CEU, Outcome of proceedings on COCG assessment of Aruba's Special zone San Nicolas regime (AW012), 7518/19 FISC 183, 15/03/2019, p. 5.
[350] COCG assessment of Costa Rica CR002, ibid.
[351] COCG assessment of Liechtenstein LI001 (n 320) p. 8; COCG assessment of Mauritius MU010 (n 302) p. 4.
[352] CEU, Outcome of proceedings on COCG assessment of Cook Islands' Development Projects regime (CK006), 7422/20 FISC 88, 30/04/2020, p. 5.
[353] Boulogne (n 67) p. 42.
[354] Nouwen (n 248) p. 140.

criteria.[355] Activities regarding two country-issues aim to develop coordinated tax policies. In this context, a number of topics have been discussed so far, such as common tax ruling policies; information exchange on cross-border rulings; EU-inbound (gatekeeper problem) i.e. participation exemption for payments (dividends) made by a non-EU company in a low-tax jurisdiction to an EU company; EU-outbound profit transfers (reverse gatekeeper problem) about the payments (dividends) made by an EU company to a non-EU company; hybrid mismatches; hybrid entities; and transfer pricing.[356] On the issues of transfer pricing and mismatches, alignment approaches were suggested. On transfer pricing, it was said that transfer prices should be aligned with actual value creation, while on mismatches '*no exemption should be given on payments that are deductible by the foreign borrower*'.[357] Nevertheless, the discussions have been held on whether these topics are part of harmful tax competition. This is the case, for example, with international financial hybrid mismatches, where opinions are divided.[358]

That being the case, the purpose of the previous paragraph was to showcase the progress and other activities of the COCG. Although relevant, this book focuses on one-country issues (quasi-case law). Not only because it is the COCG's most-known working area,[359] but also because of this book's concern, which is to assess the Rwandan favorable tax measures using the EAC, EU, and OECD approaches, and not to discuss the broader issues of harmful tax competition.

Returning to the Code of conduct, its criterion 4 refers extensively to the OECD rules on transfer pricing. That shows the extent to which the EU Code criteria are in harmony with the OECD factors on harmful tax competition. That harmony, among other things, is the basis of the following comparative section.

4.3. The EU Code criteria vis-a-vis the OECD factors

To a large extent, there is an interface between the OECD factors and the EU criteria on harmful tax competition. Notwithstanding some differences, the criteria established by both are almost

[355] Ibid.; Nouwen and Wattel (n 246) p. 932.
[356] Nouwen (n 248) p. 141-43; Nouwen and Wattel, Id., p. 939; Nouwen (n 258) p. 11; Nouwen (n 241) p. 321, 327, 334, 350-352.
[357] Nouwen (n 258) p. 16-17; Nouwen (n 248) p. 144.
[358] Nouwen (n 248) p. 139.
[359] Nouwen (n 258) p. 11; Nouwen and Wattel (n 246) p. 934; Nouwen (n 241) p. 107 and 157.

identical or similar in many respects.[360] The extent of their similarity is not surprising, considering that the membership of the two organizations largely overlaps. The 1998 OECD Report also acknowledged the broad compatibility between the two.[361] The similarity is brought about by the convergence of the same tax message. However, there are also divergences between the two. The following paragraphs elaborate on the points of convergence and divergence between the two.

4.3.1. Points of convergence

The first point of similarity between the OECD factors and the EU criteria is the common criteria that are applied by both institutions to determine the harmfulness of a measure. In fact, most of the factors are broadly the same and interrelate in many ways.[362] Such similar factors are ring-fencing, absence of substantial activity, and lack of transparency. The two organizations also place a similar emphasis on ring-fencing[363] and both have declared that a low general tax rate alone does not constitute harmful tax competition.[364] The EU criterion on rules departing from internationally accepted principles when determining profits in respect of activities within a multinational group is also similar to the OECD second category factor on failure to adhere to international transfer pricing principles. On this point, the EU has even confirmed the application of OECD rules on profit determination in respect of activities within MNCs and the COCG has often relied on OECD assessments.[365] The EU Code of Conduct's gateway criterion of a significantly lower level of taxation also resembles the OECD's main factors of no or only nominal tax rates for tax havens and zero or low effective tax rate for HPTRs.

[360] Santos and Lopes (n 282) p. 300; Wróblewska (n 159) p. 18; F Heitmüller and I J Mosquera Valderrama, 'Special Economic Zones facing the Challenges of International Taxation: BEPS Action 5, EU Code of Conduct, and the Future' (2021) *JIEL* 24, p. 481.
[361] OECD 1998 Report (n 60) p. 11.
[362] Pinto, Tax competition (n 117) p. 233; Boulogne (n 67) p. 26; L V Faulhaber, 'The Trouble with Tax Competition: From Practice to Theory' (2018) *Tax L.Rev.* 71(311), p. 329.
[363] Elkins (n 238) p. 914; A Haupt and W Peters, 'Restricting Preferential Tax Regimes to Avoid Harmful Tax Competition' (2005) *Reg.Sci.Ur.Econ.* 35, p. 494.
[364] Bond et al. (n 78) p. 55 and 62; Seeruthun-Kowalczyk (n 159) p. 170; P Genschel, A Kemmerling and E Seils, 'Accelerating Downhill: How the EU Shapes Corporate Tax Competition in the Single Market' (2011) *JCMS* 49(3), p. 587.
[365] EU Code of Conduct (n 241) C2/3; COCG assessment of Hong Kong HK002 (n 314) p. 3; COCG assessment of Hong Kong's Offshore private equity regime HK003 (n 314) p. 3; CEU, Outcome of proceedings on COCG assessment of Curacao's Manufacturing activities under the eZone regime (CW005), 7423/20 FISC 89, 30/04/2020, p. 3.

The influence on business location enshrined in the EU Code of Conduct[366] is also recognized by the OECD, which considers a regime harmful if its primary motivation is the location of business activity.[367] The enforcement mechanism of both organizations is also the same, as they both rely on political pressure.[368] Furthermore, they both apply to a range of harmful tax measures as these may be provided for in legislation, regulations, and administrative practices.[369] Also, both organizations have advocated for a broader application of their principles beyond their respective members.[370]

From the above, the compatibility, reinforcement, and complementarity of the EU Code of Conduct and the OECD Guidelines is clear. Indeed, the two organizations work in a complementary manner[371] and have been described as '*brothers in arms on the harmful tax competition battlefield*'[372] with mutually compatible reinforcement.[373] Even so, each organization remains independent in the interpretation and application of its instruments,[374] alongside other differences.

4.3.2. Points of divergence

One divergence between the 1998 OECD Report and the EU Code of Conduct concerns their scope of application. While the EU Code applies to business activities in general, the OECD Report is limited to geographically mobile activities such as financial and other service activities.[375] This means that the EU Code has a wider scope *ratione materiae* than the scope of application of the 1998 OECD Report. There is also a difference in geographical scope of application. While some states belong to both organizations, others belong to only one or the other. Thus, the *ratione loci* scope of application of the 1998 OECD Report is wider than the scope of application of the EU Code of Conduct.

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[366] EU Code of Conduct, ibid.
[367] OECD 1998 Report (n 60) p. 35.
[368] Wishlade (n 192) p. 589.
[369] Ambrosanio and Caroppo (n 115) p. 691; L A Mello, *Tax Competition and the Case of Bank Secrecy Rules: New Trends in International Tax Law* (SJD Dissertation, Univ.Michigan 2012), pp. 25-26.
[370] EU Code of Conduct (n 241) C 2/5; OECD 1998 Report (n 60) p. 8, 10, and 25.
[371] Heitmüller and Mosquera Valderrama (n 360), p. 482.
[372] Gribnau, Soft law and taxation (n 248) p. 68.
[373] Pinto, Tax competition (n 117) p. 233; OECD 1998 Report (n 60) p. 11; Englisch and Yevgenyeva (n 70) p. 636; Wishlade (n 192) p. 588; Boulogne (n 67) p. 26.
[374] OECD 1998 Report, ibid. p. 11
[375] OECD 1998 Report, Id., preamble and p. 11; Lampreave (n 100) p. 8; Boulogne (n 67) p. 26; Wishlade (n 192) p. 588; Barker (n 112) p. 169; Ayi-Yonah, Bridging the north/south divide (n 72) p. 385; Drezgić (n 246) p. 83; Dirix (n 188) p. 234; Biz (n 242) p. 1054; Nicodème (n 103) p. 758.

Beyond the difference in scope of application, the two also diverge on the implementation of the harmful factors. The OECD addresses harmful tax competition issues by separating tax havens from HPTRs, which is not the case for the EU. In addition, some factors set by the OECD are not mentioned among the EU criteria. One example is EoI, which carries great weight for the OECD but not listed among the EU criteria. Nevertheless, the EU takes EoI into account when listing non-cooperative jurisdictions.[376]

All in all, both organizations are committed to the fight against harmful tax competition. In this respect, the two organizations have contributed to the global effort to curb harmful tax practices as discussed below.

4.4. OECD and EU contributions in regulating harmful tax practices

Considered globally, the OECD and the EU play a significant role in regulating harmful tax practices. The two organizations have been very active in the fight against harmful tax competition.[377] The two are also considered as the main champions against harmful tax competition, and their proposals have generated serious emotions and debates.[378] The next paragraphs provide an insight into the role of the two organizations.

4.4.1. OECD contribution in regulating harmful tax practices

The OECD's contribution to the regulation of harmful tax practices is both great and commendable. Most of the issues pertaining to harmful tax practices increased after this organization's report in 1998. This report has played a key role in making the world aware of the problems caused by harmful tax practices. It is also a major achievement as it is the first attempt to curb harmful tax competition[379] by providing a regulatory framework to analyze whether a jurisdiction is engaging in harmful tax practices.[380]

More importantly, pursuant to the 1998 Project on harmful tax competition, the OECD established and implemented a forum on harmful tax practices tasked with providing consistent assessments of tax havens and HPTRs. In this context, the Forum on Harmful Tax Practices

[376] EU 2019 List of non-cooperative jurisdictions (n 335) C 176/2.
[377] McLaren, Will Tax Havens Survive (n 159) p. 89.
[378] Baker (n 211) p. 2; Barker (n 112) p. 171.
[379] R S Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State' (2000) *HarvLRev* 113(7), p. 1662.
[380] Wróblewska (n 159) p. 17.

published several reports on tax havens and HPTRs. The publication of these reports has been followed by political pressure on the named jurisdictions to stop their harmful tax practices.

Another contribution of the OECD is that it clarified that not all preferential tax regimes are bad.[381] For example, the OECD explained that a preferential tax regime can cause little harm to another country and is justified as long as it provides substantial benefits to the host country.[382] The OECD also clarified that there is no general minimum effective tax rate below which a regime can be harmful.[383] Similarly, the OECD clarified that it neither prevents nor discourages countries from providing preferential tax regimes.[384] These clarifications were necessary and are most noteworthy.

In addition, the OECD has produced many important documents. Among them is the landmark Model Tax Agreement on Exchange of Information in Tax Matters.[385] Another significant document resulted from the OECD's joint efforts with the G20: a report on BEPS. Of the 15 actions of the BEPS project, Action 5 is about tackling harmful tax practices, extending the OECD's role in combating harmful tax practices. Those OECD contributions, while not exhaustive, show the OECD's influence in the area of harmful tax practices. The same applies to the contribution of the EU, whose role is highlighted below.

4.4.2. EU contribution in regulating harmful tax practices

The EU has contributed to the regulation of harmful tax practices. With its 1997 Code of Conduct, the EU became the first governmental body to formulate measures against harmful tax competition.[386] Initially, the target was its members, members' dependents and associated territories. However, due to the EU's global political influence, its rules and policies have influence beyond its territorial jurisdiction.

Indeed, the EU expressed its intention to go beyond its jurisdiction and reach out to other jurisdictions. The EU Code of Conduct calls for its broad adoption beyond the EU territory.[387]

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[381] Lampreave (n 100) p. 8.
[382] Ibid.
[383] Ring, Sovereignty Debate (n 103) p. 23; Bond et al. (n 78) p. 62; OECD, Confidential draft Recommendation (n 86) p. 5.
[384] OECD CAN (n 71) p. 20 and 24; Samuels and Kolb (n 78) p. 232.
[385] H G Petersen (ed), 'Tax Systems and Tax Harmonization in the East African Community' (2010) Report for the GTZ and the General Secretariat of the EAC, p. 23.
[386] T Katsushima, 'Harmful Tax Competition' (1999) *Intertax* 27(11), p. 396.
[387] EU Code of Conduct (n 241) C 2/5; EU Com. Communication on good governance in tax matters (n 243) p. 26.

One reason was to dismantle preferential tax regimes worldwide by creating a level playing field seeking at discouraging relocation of mobile business activities outside the EU.[388] As long as the principle of state sovereignty is not violated, countries outside EU territory are free to adopt the principles embodied in the Code of Conduct. For instance, the EAC draft Code of Conduct imitates *mutatis mutandis* the EU Code of Conduct.

By the same token, the EU established the COCG to assess and monitor compliance with the Code of Conduct,[389] which has played a significant role in slowing down harmful tax competition in the EU and beyond. As a result, harmful tax practices in the EU are restrained compared to other jurisdictions. In this respect, the Code of Conduct has been a major step forward in the fight against harmful tax competition.[390] Furthermore, despite being an extremely difficult task,[391] EU initiatives against harmful tax competition gained success as EU Member States effectively complied with the Code of conduct,[392] alongside dismantling many preferential tax regimes within the EU and internationally.[393] One tool to achieve that is the use of the lists of non-cooperative jurisdictions. Even though, the establishment of these lists is controversially discussed as flawed due to their unilateral and discriminatory characters. The European Parliament itself issued a Resolution commending the positive impact of the lists, but regretting that the lists are confusing and ineffective, alongside the lists' focus on third countries,[394] more specifically developing countries.

4.5. Merits and demerits of EU and OECD standards for developing countries

The previous section outlined the key contributions of the EU and OECD to regulating harmful tax competition. Taking into account the scope of the study,[395] which is not to evaluate the EU and OECD standards, to explore their possible application to developing countries such as

[388] Nouwen (n 241) p. 35, 90, 96, 103, 409.
[389] CEU Conclusions of 9 March 1998 concerning the establishment of the Code of Conduct Group (business taxation) 98/C 99/1, *OJEC* (1.4.98) C 99/1.
[390] Gribnau, Soft law and taxation (n 248) p. 81; Moutarlier (n 248) p. 81.
[391] Pinto, Tax competition (n 117) p. 230.
[392] CEU, Report from COCG to ECOFIN Council on Code of Conduct, 9655/06 FISC 73 CS/lv DG G I, 19/05/2006, p. 37; Szudoczky and van de Streek (n 241) p. 274; P Dietsch and T Rixen, 'Tax Competition and Global Background Justice' (2014) *The Journal of Political Philosophy* 22(2), p. 170; K M Diaw and J Gorter, 'Harmful Tax Practices: To Brook or to Ban?' (2002-3) *Public Finance Analysis* 59(2), p. 250.
[393] Nouwen (n 241) p. 17, 60, 288.
[394] European Parliament Resolution of 21 January 2021 on reforming the EU list of tax havens (2020/2863(RSP)) P9_TA(2021)0022 <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0022_EN.html> accessed 03/07/2021; European Parliament press release 'EU tax haven blacklist not catching worst offenders' <https://www.europarl.europa.eu/news/en/press-room/20201208IPR93318/eu-tax-haven-blacklist-not-catching-worst-offenders> accessed 03/07/2021.
[395] See 1.4.

Rwanda, this section discusses the merits and demerits of the EU and OECD standards from the perspective of developing countries.

Starting with the merits, the EU has pioneered the regulation of harmful tax competition at the regional level, while the OECD has done the same at the organizational level. Since most developing countries are grouped in regional organizations, the EU and the OECD can serve as models for developing countries on how to regulate tax competition at both the regional and organizational levels. Not only that, but also the OECD's continuous fight against harmful tax competition proves how countries can achieve some goals through international organizations.[396] That can serve as a good lesson for developing countries to fight against harmful tax competition through regional organizations. Developing countries' regional organizations can also follow *mutatis mutandis* the models developed by the EU and OECD. Apart from the criticism that developed countries impose their policies on sovereign developing countries, another merit is that the works of the EU and OECD have, in one way or another, slowed down harmful tax competition in developing countries. This is possible on two accounts: either by adopting some of the policies developed by the EU and OECD, or by fearing the political sanctions that the EU and/or OECD can impose.

As for the demerits, a major demerit is the inapplicability of some EU and OECD standards to the situation of developing countries due to several factors. One is the difference in interests between developing countries, which are capital-importers and EU and OECD members, which are developed countries and capital exporters. In this context, the concern of EU and OECD members is mainly about profit shifting and other forms of aggressive tax planning, while the main concern of developing countries is investment attraction. With this dichotomy, there is a risk that pure adoption of EU and OECD standards by developing countries would lead to a huge loss of FDI, which would make the situation of developing countries, which are capital importers, difficult. The technical complexity to understand and apply EU and OECD standards is also another demerit for developing countries, which generally face a shortage of competent personnel to deal with complex international tax matters.[397] Another demerit relates to the fact that developed countries, through the EU and OECD, seek to impose policies developed in the interest of developed countries on developing

[396] Morriss and Moberg (n 61) p. 63.
[397] I Burgers and I J Mosquera Valderrama, 'Corporate Taxation and BEPS: A Fair Slice for Developing Countries' (2017) *ELR* 10(1), p. 32.

countries without giving an opportunity to participate in prior discussions.[398] For example, the EU and OECD have developed a culture of blacklisting and shaming jurisdictions, mostly from developing countries, that do not abide by and/or comply with their rules. This is practically a good case of fiscal imperialism through which the EU and OECD, in order to protect their interests, impose the tax rules they have developed on developing countries. Nevertheless, developing countries can learn some lessons from the EU and OECD works on harmful tax competition, as discussed in section four of chapter seven.

Conclusion of chapter four

This chapter summarized different approaches taken by the OECD and the EU to tackle harmful tax practices. The chapter started with the OECD, by examining its role, focusing on the 1998 Report on harmful tax practices, followed by the progress reports and the recent 2015 report on the BEPS Project, Action five on harmful tax practices. The OECD's efforts are commendable for having identified the elements of harmful tax practices, namely tax havens and HPTRs. These components have been widely agreed upon and are now widely used in the study of harmful tax practices. The criteria formulated by the OECD to identify tax havens and HPTRs are also widely used to determine the harmfulness of tax practices worldwide.

Regarding the EU, it published a Code of Conduct on business taxation, which is an effective tool for its members to regulate harmful tax practices. The Code has been widely embraced by EU members and its usefulness has been widely recognized. Similarly, due to the Union's significant political influence, its instruments are referred to worldwide when harmful tax practices are at stake. Moreover, COCG assessment reports have played a significant role in promoting the regulation of harmful tax competition. For this reason, for example, a joint consideration of chapter three and chapter four leads to the use of some of the COCG assessments and OECD evaluation reports to assess Rwanda's regimes in chapter six.

In summary, the issue of harmful tax practices has attracted the attention of many around the world. This chapter has focused on the OECD and EU approaches to dealing with harmful tax practices. Given membership of the OECD and the EU, it is not surprising that their approaches reflect the perspective of developed countries, which may differ from the perspective of developing countries. The perspective of the latter can be seen in the approaches

[398] Morriss and Moberg (n 61) p. 62.

of the regional organizations of these countries. In this respect, and in line with the main focus of this book, the EAC serves as a good case study.

5 EAC's APPROACH TO HARMFUL TAX PRACTICES

In terms of article 79 of the Treaty establishing the EAC, the Partner States have undertaken to harmonize and rationalize investment incentives in order to promote the Community as a single investment area, while avoiding double taxation.[1] Article 83 of the Treaty requires the Partner States' commitment to adjust their fiscal policies for the purpose of removing tax distortions.[2] These Treaty provisions show the extent to which the EAC Partner States are willing to advance with tax integration as part of full regional integration. Tax integration constitutes a significant step in addressing harmful tax practices at the regional level. In this sense, the adoption of Community rules on tax competition is key to building a Community free of harmful tax competition.

This chapter provides a general picture of the current situation of the EAC with respect to harmful tax competition. It does so by considering both theoretical and practical aspects. In this context, a general picture of the EAC's engagement in this process is first given by highlighting some indicators of the EAC Partner States' engagement in harmful tax competition. This is followed by a look at the EAC tax competition agenda, including an overview of the EAC tax harmonization approach with a focus on the draft Code of Conduct against harmful tax competition. Thereafter follows a brief comparison between the EAC and EU approaches to harmful tax competition. The chapter concludes with a reflection on the general contribution of the EAC to the regulation of harmful tax practices.

5.1. State of play of tax competition in the EAC

It is generally accepted that (harmful) tax competition is a global phenomenon. This implies its existence in all parts of the world, including the East Africa. Its existence in the EAC has been noted in several reports that show how the EAC Partner States are racing to the bottom.[3] These reports are mainly from the international organizations and NGOs.[4] To give examples, the 2006

[1] Treaty for the Establishment of the East African Community (As amended on 14/12/2006 and 20/08/2007), art. 80(1)(f) and (h).
[2] Id., art. 83(2)(c) and (e).
[3] J B Kiprotich, *Income Tax in the East African Community: A Case for Harmonization and Consolidation of Policy and Law with a Focus on Corporate Income Taxation* (Ph.D Thesis, UoN 2016), p. 170; P O Ochieng, *Assessing the Relevance of Tax Incentives on Investments in Kenya's Export Processing Zones: In Support of Equitable Sharing of Tax Burdens*, (LL.M Thesis, UoN 2016), pp. 70-71.
[4] IMF, 'Kenya, Uganda and United Republic of Tanzania: Selected Issues' (2008) IMF Country Report No. 08/353, p. 6 and 8 <www.imf.org/external/pubs/ft/scr/2008/cr08353.pdf> accessed 14/05/2019; TJN & ActionAid, 'Tax

IMF report noted the prevailing attitude of the EAC Partner States to expand tax competition through investment tax incentives.[5] In line with the IMF, Tax Justice Network Africa (TJNA) in collaboration with ActionAid International published a report in 2012 mentioning that Partner States were engaging in harmful race to the bottom.[6] In 2011, IPAR published a report noting unfair tax competition among EAC states.[7] All these reports describe (harmful) tax competition as one of the serious problems in the EAC as a regional community.

Other features of harmful tax competition also exist in the Partner States. Examples include the existence of zero or low effective tax rates, artificial definition of the tax base, lack of transparency, lack of EoI, secrecy provisions, and non-adherence to the internationally accepted principles on transfer pricing.[8] The desire to eliminate harmful tax competition and bring about fair tax competition as expressed in the draft Code of Conduct[9] also evidences acknowledgement of harmful tax competition in the EAC.

Introspectively, the EAC itself classifies harmful tax competition as one of the priority issues of the Community. In this context, the Community's legislative assembly warned against the increasing offer of tax incentives by Partner States, each vying to attract as many foreign investors as possible.[10] The same report also confirms the EAC Council's awareness of the problem of harmful tax competition.[11] In a 2009 meeting, the EAC Sectoral Council on Trade, Industry, Finance, and Investment noted the need to remain internationally competitive at the same time recognizing that tax competition can lead to harmful tax practices and unfair competition among members.[12]

The existence of harmful tax competition in the EAC is caused by several factors. One is the unwillingness of Partner States to relinquish their fiscal sovereignty.[13] This is evident

Incentives for Investors: Investment for Growth or Harmful Taxes?' (2011) Policy Brief on Impact of Tax Incentives in Rwanda, p. 1; P Abbott et al., 'East African Taxation Project: Rwanda Country Case Study' (2011) IPAR, p. 12.

[5] IMF, Id., p. 8.

[6] TJN & ActionAid, Tax Competition in EAC (n 4), p. iv and 4.

[7] Abbott et al., East African Taxation Project (n 4) p. 12.

[8] Kiprotich (n 3) p. 170.

[9] B C Kagyenda, 'Development of an EAC Model Agreement for the Avoidance of Double Taxation and an EAC Code of Conduct against Harmful Tax Competition', Final Report, EAC Secretariat – GIZ EAC Tax Harmonization Project, Arusha, Preamble.

[10] EAC, 2nd Meeting of the 1st Session of the 3rd East African Legislative Assembly, Oral Answers to Priority Questions, Question: EALA/PQ/OA/3/06/2012, Nairobi, 13/09/2012, p. 10.

[11] Id., p. 11.

[12] Abbott et al., East African Taxation Project (n 4) p. 14.

[13] Kiprotich (n 3) p. 170.

from many Community initiatives that are launched, but remain ineffective for a long time without any official or valid justification. This is the case, for example, of the EAC Code of Conduct on harmful tax competition, whose proposal was tabled in 2011 but has not been adopted to date. Other reasons include the lack of adequate human resources capable of dealing with harmful tax competition issues, and a low level of information and knowledge about the impact of harmful tax competition.[14] Besides, an economic imbalance between Partner States also adds a reluctance in the fight against harmful tax competition in the Community. Indeed, the divergence of economic situations affects the divergence of economic interests, with subsequent diversity on harmful tax competition considerations.

More than that, there is a persistent trend within the EAC of not distinguishing tax competition from harmful tax competition. This is the case with the aforementioned reports that automatically portray the use of tax incentives for tax competition as harmful tax competition.[15] A common element in these reports is the calculation of the tax revenues foregone due to tax incentives,[16] from which harmfulness is inferred. That is why one of their recommendations has been the removal of all tax incentives to FDI through a coordinated approach engaging all EAC Partner States.[17] This approach is critical because it undermines the need for Partner States to remain internationally competitive. That approach also completely ignores the need for good tax competition, which is beneficial to both the country and the general taxpayer.

In spite of the noted alleged harmful tax practices, the Community goals are different to that. In general, the EAC aims to have a community free of harmful tax competition. In this regard, the EAC approaches on the matter are summarized in the Community's tax harmonization approach and the draft Code of Conduct.

5.2. The EAC tax competition agenda

In matters of harmful tax competition in the EAC, two agendas are currently available. One is the tax harmonization approach and the second is the commissioned study that resulted in a

[14] Id., p. 172.
[15] IMF (n 4) p. 6 and 8; TJN & ActionAid, Tax Competition in EAC (n 4) p. 1; Abbott et al., East African Taxation Project (n 4) p. 12.
[16] Abbott et al., East African Taxation Project, Id., p. 28; TJN & ActionAid, Tax Competition in EAC, Id., p. 10; Ochieng (n 3) pp. 70-71.
[17] TJN & ActionAid, Tax Competition in EAC, Id., p. 18.

proposal for a Code of Conduct against harmful tax competition in the EAC. The two are discussed in detail in the next paragraphs.

5.2.1. The EAC tax harmonization approach

One part of regional integration is economic integration, and this cannot be achieved without tax integration.[18] Thus said, regional integration depends on tax integration as a regional integration remains unattainable until fiscal integration is achieved.[19] Tax integration is also widely associated with the restriction of tax competition, besides the fact that it is considered as its minimizing force. Indeed, if each state runs its own national tax incentives, harmful tax competition becomes more fueled.[20] In this regard, tax harmonization is relatively seen as a rational approach to overcome that.[21]

Following the above, on different occasions, tax harmonization in the EAC has been considered as a strategy to eliminate harmful tax competition within the Community. This reflects the general trend in the EAC and can basically be traced in the Community's governing legal instruments. The first EAC legal instrument with provisions against tax competition is the EAC Treaty. This contains several provisions aimed at harmonizing tax systems in the Community. In particular, in article 75 of the Treaty, the Partner States have agreed not to impose new duties and taxes or increase existing ones on products traded within the EAC. Under the same provision, the Partner States have also agreed to refrain from enacting legislation or applying administrative measures that could directly or indirectly discriminate against the same or like products of other Partner States.[22] This is a standstill clause, which provides a good starting point for the harmonization of tax practices in the Community.

Similarly, article 79 of the Treaty provides for the Partner States' commitment to ensure the development of the industrial sector. To this end, the Partner States committed to harmonize and rationalize investment incentives within the Community, including those relating to the taxation of industries, in particular those using local materials and labor, with a view of

[18] A T Marinho & C N Mutava, 'Tax Integration within the East African Community: A Partial Model for Regional Integration in Africa',p. 2<https://pdfs.semanticscholar.org/3cd7/ce5b507d7a04acd640dfb37401d6aebc33f6.pdf> accessed 27/03/2020.
[19] Ibid.
[20] H G Petersen (ed), 'Tax Systems and Tax Harmonization in the East African Community' (2010) Report for the GTZ and the General Secretariat of the EAC, p. 91.
[21] Ibid.
[22] EAC Treaty (n 1) art. 75(4) and (6).

promoting the Community as a single investment area.[23] Similarly, article 85 of the Treaty expresses the Partner States' commitment to harmonize the taxation of capital market transactions.[24]

In a like manner, article 82 of the Treaty underlines the Partner States' commitment to cooperate in monetary and fiscal matters. To this end, they undertake to remove obstacles to the free movement of goods, services, and capital within the Community.[25] Article 83 of the EAC Treaty also provides for harmonization of monetary and fiscal policies. Under this provision, the EAC Partner States undertake to adjust their fiscal policies […] in order to ensure monetary stability and the achievement of sustainable economic growth.[26] Furthermore, the EAC Partner States undertake to harmonize their tax policies with a view of removing tax distortions in order to bring about a more efficient allocation of resources within the Community.[27]

To harmonize tax policies, coupled with the implementation of article 75 of the Treaty on the creation of the EAC Customs Union, the Partner States adopted the East African Community Customs Management Act in 2004, and it was last amended on 8 December 2008. This Customs Union is regulated by a Protocol, the roots of which are enshrined in article 75 of the Treaty. To a large extent, the Customs Union contributes to pulling the EAC Partner States closer and reduces the divergence between them.

From the above, it is evident that the EAC focuses largely on tax harmonization to build a community free from harmful tax competition. More so, the EAC associates tax harmonization with harmful tax competition, in one way or another. For example, the EAC Legislative Assembly mentions the discussions on the Code of Conduct against harmful tax competition among the processes undertaken towards tax harmonization.[28] Tax harmonization has also been described as capable of addressing many fiscal issues in the Community, including the possibility of eliminating harmful tax competition.[29] This has been especially true of the harmonization of CIT and more specifically the tax incentives thereto pertaining.[30] In this context, it has been suggested, *inter alia*, that minimum tax rates should be set in order to avoid

[23] Id., art. 80(1)(f).
[24] Id., art. 85(1)(c).
[25] Id., art. 82(1)(c).
[26] Id., art. 83(2)(c).
[27] Id., art. 83(2)(e).
[28] EALA (n 10) p. 12.
[29] Kiprotich (n 3) pp. 23-24 and 26.
[30] Id., p. 87.

harmful tax competition.[31] However, this approach would not be effective due to economic differences between the EAC Partner States and would rather have detrimental effects.

Moreover, most of the proposed approaches show further the state of confusion between tax competition and harmful tax competition in the EAC. This contention is based on the fact that minimum tax rates alone are not sufficient to address harmful tax competition. The introduction of minimum tax rates may also lead to misunderstandings between Partner States, which have different economic levels and comparative competitive advantage factors. Not only this, but also the general international competitiveness of the EAC Partner States could be seriously jeopardized. Therefore, a more holistic approach needs to be taken.

Moreover, tax harmonization may relatively be the most far reaching step in the general fight against harmful tax competition. However, without undermining its role, it is not sufficient in itself, given its main concern, which is the approximation of comparable tax bases and rates. In this context, comparable does not mean equal, but rather, sufficiently in line each to an extent of not causing large distortions. This is therefore not sufficient, which justifies the necessity of other measures.

In this sense, the EAC commissioned a study which, as a result, proposed a Code of Conduct against harmful tax competition in the Community. This study represents another aspect of the EAC agenda in the fight against harmful tax competition and reflects the EAC view in terms of inhibiting harmful tax practices.

5.2.2. Draft Code of Conduct against harmful tax competition

The EAC, with the support of the German Agency for International Cooperation (GIZ), commissioned a study on harmful tax competition in the Community. This study ended in 2011 with a proposal for a draft Code of Conduct against harmful tax competition in the EAC. Even before that time, in 2006, the IMF report had proposed the introduction of a Code of Conduct in the EAC to establish a transparent rule-based system of investment incentives.[32] The current draft Code has been appreciated and commented as an important initiative.[33] While this is correct and worthy of approval, the fact that this draft has not been adopted after ten years, as of 2021, sends the message that the issue of harmful tax competition is not really taken

[31] Id., p. 105.
[32] IMF (n 4) p. 4, 6, and 17.
[33] Kiprotich (n 3) p. 171.

seriously. Therefore, this draft remains a proposal until now and is not legally binding, nor has it any political influence.

Following on, the question is how long it will remain in the drawer? This is a serious matter, because a draft which is not adopted remains ineffective. More than that, the EAC's failure to adopt the proposal shows the low priority that the Partner States attach to the issue of harmful tax practices. In the same vein, it may show the political will of the Partner States to continue to engage in tax competition. Thus, a step towards eliminating harmful tax practices would therefore be the adoption of the EAC Code of Conduct against harmful tax competition as a robust legal instrument. Although still a draft, some key features of the Code are worth highlighting.

5.2.2.1. Key features of the draft Code

In the preamble, the draft Code acknowledges the positive effects of fair tax competition, and thus, supports the international competitiveness of the EAC Partner States. Conversely, it condemns harmful tax competition and advocates its elimination in favor of fair tax competition. The preamble to the Code also sets out its nature as a political commitment that does not affect the rights and obligations of Partner States as set out in the Treaty. However, this nature is vexed by the same draft *in fine,* which establishes the Code as an agreement to be signed by the representatives of the Partner States. The reference to an 'agreement' between the Partner States, makes it look somewhat different and signals that it is a binding convention. The Code's objective is explicitly stated: the elimination of harmful tax practices in the Community. The Code is expected to come into force once published in the EAC Gazette.

The draft Code is commendable as it defines harmful tax competition, as well as harmful tax effects and harmful tax practices. Article one of the draft Code defines harmful tax competition as:

> The competition created within an economic block as a result of preferential tax regimes that offer tax advantages to particular entities at the detriment of other entities operating within the same country or other countries thereby putting the other entities in a less competitive position.[34]

Apparently, this article defines tax competition not between states, but between companies. This is induced from what is mentioned as effect of harmful tax competition. According to that

[34] Draft Code of Conduct against Harmful Tax Competition in the East African Community, art. 1(d).

definition, the effect of harmful tax competition is to place favored businesses in a privileged position while placing other businesses in a less competitive position. The definition clarifies that the entities may be located in the same country or in different countries, which clearly indicates that the competition in question is between business entities and not between countries. Thus, the definition in the draft EAC Code seems to define something else, much closer to state aid or subsidies, but not harmful tax competition.

The definition of harmful tax effect in the draft Code is also problematic. The draft Code defines harmful tax effect as the '*negative spill over to other countries that arise from the harmful preferential tax regimes.*'[35] This definition confuses HPTRs with harmful tax practices. A benchmark here is the OECD structure of harmful tax practices, which consists of tax havens and HPTRs. The consideration of the draft Code's definition would mean that tax havens do not generate harmful tax effects. This would mean that only HPTRs produce harmful tax effects, which is incorrect. Indeed, tax havens actually produce the most harmful effects.

Article 1(f) of the draft Code defines harmful tax practices as:

> Tax measures by tax havens and/or preferential tax regimes that affect the location of financial and other services activities, erode the tax base of other countries, distort trade and investment patterns and undermine the fairness, neutrality and the broad social acceptance of systems.

Although not as highly critical as previous definitions, the draft Code's definition of harmful tax practices is specific in many respects, but also open to criticism. On the positive side, it includes some elements of harmful tax practices, such as tax havens. It also includes the generally recognized consequences of harmful tax practices, such as tax base erosion, trade distortion, and unfairness. The draft Code also explicitly requires that harmful tax practices 'affect the location of financial and other services activities'.[36] On the negative side, however, the definition is not specific that the preferential tax regimes must be harmful. This means that the qualifying word 'harmful' should have been added to the phrase 'preferential tax regime' to fall within the scope of harmful tax practices.

Moreover, the definition of harmful tax practices does not encompass all elements of harmful tax practices. To be more specific, it does not mention some key elements that characterize harmful tax practices, such as ring-fencing, lack of transparency, lack of EoI, and

[35] Id., art. 1(e).
[36] Id., art. 1(f).

lack of substantial activity requirement. Yet, these three elements are fundamental in determining harmful tax practices. In addition, contrary to the OECD, which uses harmful tax competition interchangeably with harmful tax practices, the draft Code distinguishes the two terms and defines each as a separate concept.

Beyond the definitions, the scope of the draft Code is also problematic. According to the draft Code, it is intended to apply to 'each tax of every description' collected by the tax administration of each Partner State.[37] This description is too broad, as some taxes are not related to harmful tax practices. These are, for example, the tax on land and other immovable properties, the tax on consumption, and the tax on labor. Some other taxes are also meaningless to lower the tax burden, due to their *de minimis* impact. This is the case, for example, with the trading license tax, which, in Rwanda, ranges between 4,000 Frw (less than 4 USD) and 250,000 Frw (approximately 250 USD) per year.[38] This is a very small amount to have a significant effect in terms of business location or tax base erosion. The overly broad scope of the draft Code, if adopted the way it is, risks to negatively impact its effectiveness.

Interestingly, the draft Code provides for standstill and rollback clauses. The standstill clause appears in the first paragraph of article 3 while the rollback clause appears in the second paragraph of the same article. Another interesting element of the draft Code is the provision on transparency and EoI. With respect to transparency, it clearly states that administrative practices that are not transparent, or are inconsistent with, or negate or nullify statutory laws, should be considered as harmful.[39] Regarding EoI, the draft Code requires Partner States to comply with article 27 of the EAC DTA.[40] Referring to the EAC DTA is reasoned as it avoids the overlap of legal texts, which in turn limits the risk of contradictions.

Partner States are also required under the draft Code to review bank secrecy laws in accordance with internationally accepted principles, with reference to the OECD and UN.[41] Failure to do so constitutes harmful tax practice.[42] Government permissions to negotiate tax rates or bases are also deemed harmful.[43] Partner States are also urged to agree on uniform

[37] Id., art. 2(1).
[38] Law No. 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities, *O.G.* No. 44 of 29/10/2018, Annex.
[39] EAC draft Code of Conduct (n 34) art. 4(1).
[40] Id., art. 5(2).
[41] Id., art. 6.
[42] Ibid.
[43] Id., art. 7(1).

transfer pricing rules and incorporate them into domestic tax laws along with using the EAC Model Convention when entering into a tax treaty with a third country.[44] In addition, the draft Code recognizes two types of tax rulings, namely private tax rulings and general tax rulings.

Besides, the draft Code contains a provision on state aid and subsidies.[45] This provision is out of place because the matters relating to state aid and subsidies are governed by other EAC instruments, such as the Protocol on Common Market, the Competition Act, Customs Union Protocol, and Customs Union Regulations.[46] This is another consequence of the aforementioned incorrect definition of harmful tax competition, combined with the persistent confusion between tax competition *per se* and harmful tax competition, as well as the confusion between competition between companies and competition between states. In this sense, article 13 of the draft Code enumerates several models and harmonizations that must be undertaken to ensure effective tax rates. These include VAT, income tax, and excise taxes. That long list is a consequence of the broad scope of the draft Code, which goes beyond the area of harmful tax competition to include other aspects that are normally not substantially related to harmful tax competition.

In addition, the draft Code provides for a broad geographical extension so that the Code can reach third countries as far as possible.[47] It also provides for the procedure to assess the harmfulness through reviews, and the establishment of a committee by the Council to assess harmful tax measures.[48] The draft Code also contains some provisions on transparency and EoI as explained below.

5.2.2.2. Provisions on transparency and exchange of information

In the proposed EAC Code of Conduct, transparency is enshrined in article four. This article states that administrative practices that are not transparent, or that are inconsistent with or negate

[44] Id., art. 8 and 11.
[45] Id., art. 12.
[46] EAC, Protocol on the Establishment of the East African Community Common Market, art. 34(1) and (2) [EAC CMP]; EAC, the East African Community Competition Act, 2006, sec. 14, 15, 16, 17, 22, 24, 37, 42(1), 44, and 46; EAC, the Protocol on the establishment of the East African Community Customs Union 2004, art. 1; EAC, the East African Community Customs Union (Subsidies and countervailing measures) Regulations, 2006, Regulation 7(1).
[47] EAC Draft Code of Conduct (n 34) art. 15.
[48] Id., art. 17 and 20.

or nullify statutory laws, are harmful.[49] The same provision requires transparency in all tax administration procedures, which must be clear to all stakeholders.[50]

Transparency is also set as a standard of EoI.[51] In addition, the draft Code advocates the publication of all tax rulings, i.e. private tax rulings and general tax rulings, as part of their transparent administration.[52] To this end, article 10(9) of the draft Code describes a lengthy procedure that includes submission modalities such as the use of the prescribed form, the submission timeframe, the pre-screening process to verify compliance with the checklist, the substantive review process, meetings with the ruling specialists, notification of the decision, and the issuance and publication of the ruling.[53]

Like the EU Code of Conduct, the draft Code requires the Partner States to inform each other of existing and proposed tax measures that may fall within the scope of the Code.[54] This requirement is intended to ensure transparency and openness between the Partner States.

In addition to transparency, the draft Code also requires EoI. On this account, article 5 of the draft Code requires Partner States' commitment to exchange information where it is foreseeably relevant to the administration and enforcement of national tax laws.[55] In this regard, the draft Code requires Partner States to comply with article 27 of the EAC DTA on EoI.

The EAC DTA was signed on 30 November 2010 as an agreement between the EAC Partner States to avoid double taxation and prevent fiscal evasion with respect to taxes on income. Article 30(1) of the EAC DTA states that it shall enter into force on the date of the last notification of the ratification process in accordance with the respective domestic procedures of the members. So far, only three states, namely Kenya, Rwanda, and Uganda, have ratified it.

Although not yet in force, pending all Partner States' ratifications, article 27 of the EAC DTA provides for the EoI between the Partner States. Further to that, article 5(10) of the draft Code requires Partner States to review their laws and ensure they are consistent with the internationally accepted principles on the EoI.

[49] Id., art. 4(2).
[50] Id., art. 4(1).
[51] Id., art. 5(1).
[52] Id., art. 10(6).
[53] Id., art. 10(9).
[54] Id., art. 16.
[55] Id., art. 10(1).

Besides the above key features, the draft Code contains some elements that are very similar to the EU Code of Conduct. For this reason, a brief comparison between the two might be interesting.

5.3. Comparison between EAC and EU Codes of conduct

To tackle harmful tax practices, the EU adopted a package including a Code of Conduct on business taxation. With a similar objective, the EAC started a process that led to a draft Code of Conduct against harmful tax competition. The two Codes are similar in some respects, but also different in others. This section compares the two Codes of Conduct against harmful tax practices by highlighting the similarities and differences.

5.3.1. Similarities between the two codes

On various occasions, scholars have encouraged the EAC to learn and borrow from the success stories of the EU, as the EU is seen as a model for the development of EAC regional integration.[56] In this regard, the draft EAC Code of Conduct against harmful tax competition is modeled on the EU Code of Conduct. Thus, the EAC draft Code is similar to the EU Code of Conduct in several respects.

As to the similarities, both organizations use the terms 'Code of Conduct'. Notwithstanding the fact that the EAC draft Code, *in fine*, sets itself as an agreement, both Codes explicitly declare themselves as non-legally binding instruments. Both also share the same genesis, which is the existence of intra-community harmful tax competition through which member states compete and, thereby harm each other. The objective of the two organizations is also the same: tackling harmful tax practices. The two codes also acknowledge the benefit of good tax competition as opposed to harmful tax competition. They also have some common clauses, such as the standstill and rollback clauses. The content of the two clauses is *verbatim* identical in both Codes. Both codes also provide for a review process and geographic extension beyond their respective members. In addition, both emphasize the importance of transparency and EoI.

[56] Marinho and Mutava (n 18) p. 11; A Titus, 'Fiscal Federalism and the EAC: The Way Forward' (2014) *ILJTBE* 1(1), p. 1; E Ugirashebuja, J E Ruhangisa, T Ottervanger and A Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2017), p. ix; J Otieno-Odek, 'Law of Regional Integration: A Case Study of the East African Community', in J Döveling, H I Majamba, R F Oppong and U Wanitzek (ed), *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities* (LawAfrica Publishing 2018), p. 41.

Regarding transparency and EoI, the EU Code of Conduct identifies transparency as a key element in determining whether a regime is actually harmful. In this respect, the EU Code interprets a lack of transparency broadly to include legal provisions that are relaxed at an administrative level in a non-transparent manner.[57] The EU Code also compels the Member States to inform each other of existing and proposed measures that may fall within the scope of harmful tax practices.[58] This shows the extent to which the two elements are crucial in relation to harmful tax practices under the EU Code of Conduct. Similarly, the draft EAC Code details transparency and EoI as important elements in the fight against harmful tax practices. However, despite the many similarities, the two Codes also have some differences.

5.3.2. Differences between the two codes

First and foremost, the EU Code has already been adopted, has been in use, and is producing beneficial effects, whereas the EAC Code remains a draft without any impact. Closely related to this, is that the EU Code of Conduct is widely accepted in the EU and largely supported by political peer pressure. It is unlikely to expect that the EAC draft Code, even if eventually adopted, will receive comparable acceptance and political support. This fear is justified by the consistently low level of political will that characterizes the EAC Partner States in some of the community initiatives.

Indeed, political will is key to the success of regional integration, while its absence is fatal.[59] It is therefore absurd that in the EAC, decision making almost fully lies with the governments of the Partner States instead of the EAC.[60] This results in a weak Community that appears strong only on paper through Acts that are in force in theory, but have no practical enforcement.[61] Despite many contributing factors, an important one is the fact that the Partner States are not yet acquainted with surrendering their sovereignty to the Community. Indeed, the EAC Partner States are bound by their individual nationalism and are more attached to their respective national concerns.

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[57] EU Code of Conduct 1997: Conclusions of the ECOFIN Council meeting of 1/12/1997 concerning taxation policy DOC 98/C2/01, *OJEC* (6.1.98) C 2/3.
[58] Id., C2/4.
[59] Otieno-Odek (n 56) p. 30.
[60] W Masinde and C O Omolo, 'The Road to East African Integration', in E Ugirashebuja, J E Ruhangisa, T Ottervanger and A Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2017), p. 20.
[61] Id., p. 18.

Back to the differences, some elements of the EAC draft Code are explicitly different from the EU Code of Conduct. For example, the two have different scopes of application. The EU Code applies to business taxation, while the EAC draft Code applies to each tax of every description collected by the Revenue Authority of a Partner State. This means that the scope of the draft EAC Code is much broader than the scope of the EU Code. Similarly, the draft EAC Code goes beyond the area of harmful tax competition to cover other areas, such as state aid and subsidies, which is not the case with the EU Code. The draft EAC Code is also much more detailed compared to the EU Code. Lastly, the EAC draft Code ends up presenting itself as an agreement to be signed by the representatives of the EAC Partner States, which is not the case with the EU Code which was issued as a Council Resolution.

Nevertheless, the initiative that led to the drafting of the Code of Conduct in the EAC is, more or less, commendable. The next section discusses the possible contribution of the EAC in the fight against harmful tax competition.

5.4. EAC's contribution to the regulation of harmful tax practices

The EAC's contribution to regulating harmful tax practices is relatively limited and controversial. As developed below, the regulation of harmful tax practices in the EAC is almost non-existent if viewed *stricto sensu*. The few elements that do exist can be viewed in the context of tax harmonization and other provisions aimed at developing a common market.

Under EAC law, the Common Market is enshrined in article 2(2) of the EAC Treaty, which provides for the establishment of the Customs Union and the Common Market as transitional stages and integral parts of full integration.[62] To firm up these provisions, article 76 of the Treaty provides for a Protocol establishing the Common Market and sets out its details. This Protocol was signed on 20 November 2009 and came into force on 1 July 2010 after ratification by all EAC Partner States.

The Protocol provides for five freedoms in relation to the Common Market, namely freedom of goods, persons, labor, services, and capital.[63] In addition, the Protocol provides for two rights, namely the right of establishment and the right of residence.[64] Article 32 of the

[62] EAC Treaty (n 1) art. 5(2).
[63] EAC CMP (n 46) art. 2(4).
[64] Ibid.

Protocol focuses on the progressive harmonization of tax policies and laws in order to eliminate tax distortions and facilitate the free movement of goods, services, and capital.

With regard to tax harmonization in the EAC, it is evident that the Treaty and Common Market Protocol converge. Nevertheless, the implementation of the Protocol and other Community instruments is questionable. This raises controversies about the role of the EAC in tackling harmful tax competition, which can be viewed optimistically and pessimistically as discussed below.

5.4.1. Optimistic view

Despite the above criticisms, the EAC has so far made some positive progress in regulating harmful tax competition. First, the explicit provisions of the EAC Treaty on tax harmonization are useful tools to relatively counteract harmful tax practices. Indeed, in the view of approximation of laws, if the EAC achieves tax harmonization, there would be a reduction in tax law differences, which would reduce differences in the definition of tax bases, tax rates, tax deductions, etc. Even so, approximation does not mean equality and tax differences would not be completely eliminated, which creates the necessity for other instruments to curb harmful tax competition.

Another step taken by the EAC on harmful tax practices is the draft Code of Conduct. Although not yet adopted, this draft has some notable merits. For example, the draft Code contains standstill and rollback clauses. It also provides for review processes to eliminate harmful tax practices in EAC Partner States. The draft Code also emphasizes that lack of transparency and EoI constitute harmful tax practices. Not only these examples, but also the existence of the draft Code is a major step forward in recognizing the harmful effects of harmful tax competition and the need for the Community to address it.

However, without underestimating the efforts mentioned above, the EAC still has much work to do on harmful tax practices. For example, tax systems in the EAC Partner States are domestically confined, with very few regionally coordinated efforts. This leads to disparate tax systems, where each Partner State uses its unilateral tax sovereignty to attract investment in complete disregard of the others. It is against this background that a harmonization process such as the common market may fuel tax competition instead of reducing it. This leads to a pessimistic view, which is described below.

5.4.2. Pessimistic view

The EAC is struggling to achieve a common market. To this end, the Treaty, complemented by the Common Market Protocol, provides some guiding principles. The realization of the Common Market, coupled with the fully operational Customs Union, grants each Partner State's access to the entire EAC market. Without a coordinated approach of favorable tax measures, EAC Partner States might be tempted to increase their favorable tax measures to attract foreign investors.[65] Left unchecked, a Partner State could engage in harmful tax practices that will end up harming all Partner States.[66]

Thus, the Common Market may run the risk of negatively encouraging tax competition in the sense that some companies may take advantage of the Common Market to plan their tax schemes. For example, with the right of establishment, an undertaking can choose to establish itself in a country that offers the most favorable tax measures, as the undertaking will access other Partner States' markets without jurisdictional barriers.

In the same vein, the fact that tax bases are defined differently by each Partner State also fuels tax competition. With the removal of market barriers, as advocated by the Common Market establishment, an undertaking is able to access the entire EAC market. Therefore, the business location becomes determined by the level of tax payable in terms of tax bases and tax rates.[67] Of course, other factors play a role, but tax factors play the most significant role.

Conclusion of chapter five

Starting with the recognition of regional initiatives against harmful tax competition, this chapter focused on the EAC. The chapter summarized the approaches that are in use by the EAC to tackle harmful tax competition. The aim was to describe the regulatory aspects as well as the practical ones.

As indicated in several reports by international organizations and NGOs, the existence of harmful tax competition among EAC Partner States is axiomatic. To a large extent, each EAC Partner State is trying its best to attract more foreign investors to its own territory, in total disregard of the harm this may cause to other Community members. In this struggle to attract investment, Community laws are ignored.

[65] IMF (n 4) p. 5.
[66] Ibid.
[67] Marinho and Mutava (n 18) p. 11.

Nevertheless, based on the Community's objectives, the EAC has sought to create a legal environment whose effective application can partially curb harmful tax competition. At the forefront is the EAC Treaty, which contains several provisions aimed at the harmonization of laws, including tax laws. The Treaty is supplemented by other legally binding instruments such as the EAC Customs Management Act, the EAC Competition Act, the EAC Competition Regulations, and the EAC Common Market Protocol. In addition, a Code of Conduct against harmful tax competition in the EAC has been drafted but is not yet in force.

With regard to the Code of Conduct, it is praiseworthy that the EAC emulated the EU and started the process that led to a draft Code of Conduct. However, it is unfortunate that, unlike the EU, low political will in the EAC has impeded the adoption of the draft Code. Moreover, the draft Code appears to be overly ambitious, attempting to regulate more than is actually necessary. More on this contention, alongside corrective proposals, are discussed in chapter seven, specifically in the second sub-section of section two.

In summary, EAC programs against harmful tax practices exist in theory but not in practice. This is evidenced by several elements. One is the fact that the EAC Partner States have so far retained their full sovereignty. Consequently, each EAC Partner State has its own laws, with no coordination, and each runs its own preferential tax regimes. Second is the fact that the draft Code has remained in draft form for a very long time, and has still not been adopted, which reflects the Partner States' very low political will to curb harmful tax competition in the Community.

Nevertheless, harmful tax competition is a global problem that needs to be studied beyond a limited jurisdiction to include references from other jurisdictions. This is the approach taken in the next chapter, which assesses Rwanda's regime of favorable tax measures. The main reference is, of course, to the EAC law. However, reference is also made to other significant works, particularly to fill the gaps identified in the EAC law.

6 DISSECTING THE RWANDAN REGIME OF FAVORABLE TAX MEASURES

This chapter evaluates the Rwandan favorable tax measures. It does so aiming at answering the third research question on the status (harmful or harmless) of Rwanda's favorable tax measures. Considering that EAC plays virtually no role in regulating harmful tax competition, EU criteria and OECD factors are widely referred to.

With this in mind, the chapter starts with highlighting the assessment criteria. It then analyzes the measures identified as favorable tax measures in chapter three. For each measure, legislative or regulatory, the analysis concludes whether the measure is harmful or not, or whether it contains a harmful aspect. Rwanda's situation is then assessed in terms of EoI. This factor is assessed independently, because its practice largely relates to the whole system rather than a single separate measure. Towards the conclusion, there is a brief look at the OECD's GloBE proposal and its potential impact on Rwanda amidst other developing countries. The consideration of the GloBE proposal in this chapter is justified by its likelihood to change the behavior of taxpayers and jurisdictions,[1] including Rwanda, once implemented.

6.1. Benchmarking

This section identifies the factors used herein to evaluate the Rwandan favorable tax measures. It begins justifying the benchmarking references. It then describes in detail the benchmarks selected and ends setting out the guiding principles of the evaluation.

6.1.1. Justification of benchmarking

Given the binding nature of the EAC law on Rwanda, it would be ideal to assess Rwandan practices against the EAC criteria. However, these have not yet been formally established, neither legally nor politically. The only reference there is the draft Code of Conduct. However, this is a draft that has not yet been adopted by any Community organ, which, therefore, limits its effect. The current situation in the EAC therefore compels a reference to the EU and OECD factors for the purpose of clarification, coupled with other justifications detailed in the first chapter. In summary, the reference to the EU and OECD is justified by the global nature of tax

[1] A Riccardi, 'Implementing a (Global?) Minimum Corporate Income Tax: An Assessment of the so-called 'Pillar Two' from the Perspective of Developing Countries' (2021) *Nordic Journal on Law and Society* 4(1), p. 11; A P Dourado, 'The Global Anti-Base Erosion Proposal (GloBE) in Pillar II', (2020) *Intertax* 48(2) p. 154.

competition combined with the progress made by the two organizations in curbing harmful tax competition.

Starting with the EU, the 1997 Code of Conduct urged the Union's Member States to promote its practice outside the EU.[2] In this respect, many regimes outside the EU have been evaluated, such as the Mauritius' partial exemption system,[3] Costa Rica's manufacturing activities under the Free Zones regime,[4] Seychelles' exemption of foreign income regime,[5] Malaysia's manufacturing under the Pioneer status regime,[6] Mongolia's remote areas regime,[7] and Vietnam's disadvantaged areas regime[8]. In the same vein, it has been a custom for the EU lists of non-cooperative jurisdictions to include non-EU jurisdictions.[9]

The same is true for the OECD, whose 1998 Report on harmful tax competition addresses harmful tax practices in OECD members and non-members and their dependencies.[10] It is in this context that the OECD continuously listed non-members as tax havens and HPTRs.

Moreover, the EAC draft Code largely imitates the EU Code of Conduct. Hence, reference to the EU criteria, which in turn are highly compatible with the OECD factors, tempers the paucity of the EAC law in this matter.

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[2] EU Code of Conduct 1997: Conclusions of the ECOFIN Council meeting of 1/12/1997 concerning taxation policy DOC 98/C2/01, *OJEC* (6.1.98) C 2/5.

[3] CEU, The EU list of non-cooperative jurisdictions for tax purposes - Letters seeking commitment on the replacement by some jurisdictions of HPTR with measures of similar effect, FISC 95 ECOFIN 98, 5981/19, 1/02/2019.

[4] CEU, Report on COCG assessment of Costa Rica's manufacturing activities under the Free Zones regime (CR002), 9652/19 ADD 8, FISC 274 ECOFIN 515, 27/05/2019.

[5] CEU, Letters seeking commitment FISC 95 ECOFIN 98 (n 3).

[6] CEU, Report on COCG assessment of Malaysia's manufacturing regime under the Pioneer status regime (high technology) (MY016), 9652/19 ADD 10 FISC 274 ECOFIN 515, 27/05/2019, p. 2.

[7] CEU, Report on COCG assessment of Mongolia's remote areas regime (MN002), 14114/19 ADD 8, FISC 444 ECOFIN 1005, 25/11/2019, p. 2.

[8] CEU, Report on COCG assessment of Vietnam's Disadvantaged areas regime (VN005), 14114/19 ADD 10 FISC 444 ECOFIN 1005, 25/11/2019, p. 2.

[9] CEU, The EU list of non-cooperative jurisdictions for tax purposes: Report by the COCG suggesting amendments, *OJEU* (2018/C 191), 5/06/2018; CEU, The EU list of non-cooperative jurisdictions for tax purposes: Report by the COCG suggesting amendments, *OJEU* (2018/C 403), 9/11/2018; CEU, The EU list of non-cooperative jurisdictions for tax purposes: Report by the COCG suggesting amendments, *OJEU* (2018/C 441), 7/12/2018; CEU, The EU revised list of non-cooperative jurisdictions for tax purposes, *OJEU* (2019/C 114), 26/03/2019; CEU, The EU list of non-cooperative jurisdictions for tax purposes, *OJEU* (2019/C 210), 21/06/2019; CEU, The EU list of non-cooperative jurisdictions for tax purposes: Report by the COCG on de-listing and endorsement of a guidance note, *OJEU* (2019/C 351), 17/10/2019; CEU, The EU revised list of non-cooperative jurisdictions for tax purposes, *OJEU* (2020/C 64), 27/02/2020.

[10] OECD (1998), *Harmful Tax Competition: An Emerging Global Issue*, OECD Publishing, p. 3.

6.1.2. Benchmarks

Taking into account the above justifications, and considering the factors established by the EU, OECD, and EAC (draft Code of Conduct), the assessment of the Rwandan favorable tax measures herein refers to five criteria. These are low effective tax rate, ring-fencing, transparency, substantial economic activity, and adhesion to the internationally agreed-upon principles on transfer pricing. Each of these five criteria is considered either because it is common to the EU, OECD, and EAC, or because it is relevant to the qualification of harmful tax practices, as highlighted below.

Starting with the significantly lower effective tax rate, this is explicitly provided for in the EU Code of Conduct as a provision of a significantly lower level of taxation than that which generally applies, including zero taxation.[11] In the OECD framework, this criterion is referred to as no or only nominal taxes in the case of the tax havens[12] and low or zero effective tax rate in the case of HPTRs.[13] In the EAC draft Code, it is referred to as a provision of a significantly lower effective level of taxation, compared to the generally applicable levels in the partner states, including zero taxation.[14]

The ring-fencing criterion as provided for in the EU Code distinguishes two criteria: one is when the tax benefits are granted only to non-residents or in relation to transactions with non-residents, and the other is when the tax benefits are ring-fenced from the domestic market, in a way that they do not affect the national tax base.[15] Under the OECD, this criterion is mentioned as ring-fencing from the domestic economy in the case of HPTRs[16] and having no or only nominal taxes for non-residents in the case of tax havens.[17] The EAC draft Code does not explicitly mention ring-fencing among the elements that can be used to qualify a regime as harmful.

[11] EU Code of Conduct (n 2) C 2/3 para. B
[12] OECD 1998 Report (n 10) p. 22.
[13] Id., pp. 26-30; Joint Committee on Taxation, *Background, Summary and Implications of the OECD/G20 Base Erosion and Profit Shifting Project*, JCX-139-15, Nov. 2015, p. 18.
[14] Draft Code of Conduct against Harmful Tax Competition in the East African Community, art. 13.
[15] EU Code of Conduct (n 2) C 2/3.
[16] OECD 1998 Report (n 10) p. 27; Joint Committee on Taxation (n 13) p. 18.
[17] OECD 1998 Report (n 10) p. 23.

The transparency criterion is expressly mentioned in the criteria laid down by the EU, OECD, and EAC (draft Code).[18] With respect to the substantial economic activity criterion, under the EU it is defined as granting advantage with no real economic activity or substantial economic presence.[19] Under the OECD, it is defined as the absence of any requirement for substantial activity for tax havens,[20] and the encouragement of purely tax-driven operations or arrangements for HPTRs.[21] The draft EAC Code of Conduct does not explicitly mention this criterion.

Regarding the criterion of compliance with internationally agreed-upon principles on transfer pricing, this is set as such under the OECD factors of HPTRs,[22] while the EU Code mentions that the concern is about the transfer pricing rules as agreed within the OECD.[23] In the draft EAC Code, this criterion is referred to as transfer pricing rules, and calls on Partner States to adopt uniform transfer pricing rules with the arm's length principle.[24] Besides these criteria, several closely related principles need to be set forth before starting the evaluation exercise.

6.1.3. Guiding principles

The evaluation in this chapter follows some guiding principles. First, as in the EU and OECD cases, this chapter considers a favorable tax regime as the gateway criterion.[25] The gateway

[18] OECD 1998 Report, Id. p. 22 and 26-30; EU Code of Conduct (n 2) C 2/3; EAC Draft Code of Conduct (n 14) art. 4; Joint Committee on Taxation (n 13) p. 18.
[19] EU Code of Conduct, Ibid.
[20] OECD 1998 Report (n 10) p. 22.
[21] Id., p. 34; D Fabris, 'To Open or to Close the Box: Patent Box Regimes in the EU between R&D Incentives and Harmful Tax Practices' (2019) *Amsterdam Law Forum* 11(1), p. 48.
[22] Id., pp. 26-30; Joint Committee on Taxation (n 13) p. 18.
[23] EU Code of Conduct (n 2) C 2/3.
[24] EAC Draft Code of Conduct (n 14) art. 22.
[25] OECD 1998 Report (n 10) p. 21, 22 and 25; CEU, Letters seeking commitment FISC 95 ECOFIN 98 (n 3) pp. 6, 7, 16 and 22; OECD (2001), The OECD's Project on Harmful Tax Practices: The 2001 Progress Report, OECD Publications, p. 5; OECD (2004), *Consolidated Application Note in Applying the 1998 Report to Preferential Tax Regimes*, OECD Publishing, p. 6; OECD (2015), *Countering Harmful Tax Practices More Effectively Taking into Account Transparency and Substance: Action 5 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 23; OECD (2017), *Harmful Tax Practices – 2017 Progress Report on Preferential Regimes: Inclusive Framework on BEPS Action 5*, OECD Publishing, p. 29; CEU, Report on COCG assessment of Slovakia's patent box regimes (SK007), 14364/18 ADD 9, FISC 481 ECOFIN 1059, 20/11/2018, p. 8; CEU, Report on COCG assessment of Cook Islands' Overseas insurance regime (CK003), 9652/19 ADD 7, FISC 274 ECOFIN 515, 27/05/2019, p. 4; CEU, Report on COCG assessment of Costa Rica's manufacturing activities under the Free Zones regime (CR002), 9652/19 ADD 8, FISC 274 ECOFIN 515, 27/05/2019, p. 3; L B Samuels and D C Kolb, 'The OECD Initiative: Harmful Tax Practices and Tax Havens' (2001) *Taxes* 79(231), p. 235 and 237; C Pinto, *Tax Competition and EU Law* (Ph.D Thesis, UVA 2002), p. 226; W B Barker, 'Optimal International Taxation and Tax Competition: Overcoming the Contractions' (2002) *Nw.J.Int'lL. & Bus.* 22(161), p. 170; Littlewood, 'Tax Competition: Harmful to Whom?' (2004) *MichJIntlL* 26(1), p. 424; M F Ambrosanio and M S Caroppo, 'Eliminating Harmful Tax Practices in Tax Havens: Defensive Measures by Major EU Countries and Tax Haven Reforms' (2005) *CTJ/RFC* 53(3), p. 689; O Pastukhov, 'Counteracting Harmful Tax Competition in

criterion consists of the provision of a significantly lower, i.e. low or zero, effective tax level compared to the generally applicable tax level. This aspect makes the measure appear special, as it deviates from the general tax system,[26] and therefore, appears 'potentially harmful'.[27] However, it is important to note that this criterion alone is not enough to consider the regime as harmful.[28] Its combination with one or more other factors is necessary.

Second, neither the OECD nor the EU have discouraged countries to provide favorable tax regimes to certain activities, even if they are geographically mobile.[29] Similarly, the application of favorable general tax rates, i.e. applicable to all taxpayers, is fair and acceptable, even if the rate is low.[30] For example, Ireland's general tax rate of 12.5% on trading income established in 2003 could not be labeled harmful because of its general application to both resident and non-residents.[31] This proves that harmful tax competition does not simply mean no tax or low tax.[32] This consideration leads to the role of the gateway criterion, which is to qualify the measure as potentially harmful and give the green light to evaluate other factors.[33] This

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the European Union' (2010) *Sw.JIL* 16, p. 162; I Calich, *The Impact of Globalization on the Position of Developing Countries in the International Tax System* (Ph.D Thesis, LSE 2011), p. 60 and 63; P J Wattel, 'Forum: Interaction of State Aid, Free Movement, Policy Competition and Abuse Control in Direct Tax Matters' (2013) *WTJ*, p. 136.

[26] C Pinto, 'EU and OECD to Fight Harmful Tax Competition: Has the Right Path Been Undertaken?' (1998) *Intertax* 26(12), p. 395.

[27] CEU, Report on COCG assessment of Malta's NID regime (MT014), 14364/18 ADD 6, FISC 481 ECOFIN 1059, 20/11/2018, p. 16; CEU, Report on COCG assessment of France's new IP regime (FR054), 9652/19 ADD 2, FISC 274 ECOFIN 515, 27/05/2019, p. 15; COCG assessment of Costa Rica CR002 (n 25) p. 3; CEU, Report on COCG assessment of Cyprus' NID regime (CY020), 9652/19 ADD 1, FISC 274 ECOFIN 515, 27/05/2019, p. 21.

[28] OECD 1998 Report (n 10) p. 26; OECD CAN (n 25) p. 6; OECD BEPS Action 5 (n 25) p. 23; Littlewood (n 25) p. 424.

[29] OECD CAN, Id., p. 20 and 24; S Bond et al., *Corporate Tax Harmonization in Europe: A Guide to the Debate* (2000) The Institute for Fiscal Studies, London, p. 59 <www.ifs.org.uk/comms/r63.pdf> accessed 24/08/2019; M Seeruthun-Kowalczyk, *Hard Law and Soft Law Interactions in EU Corporate Tax Regulation: Exploration and Lessons for the Future*, (Ph.D Thesis, Edinburgh Univ. 2011), p. 170; P Genschel, A Kemmerling and E Seils, 'Accelerating Downhill: How the EU Shapes Corporate Tax Competition in the Single Market' (2011) *JCMS* 49(3), p. 587.

[30] Bond et al., ibid.; J Hey, 'Tax Competition in Europe: The German Perspective' (EATLP Conference, Lausanne, 2002), p. 7 <www.eatlp.org/uploads/Members/Germany02.pdf> accessed 13/08/2019; P Baker (2004), 'The World-Wide Response to the Harmful Tax Competition Campaigns', *GITC Review*, 3(2) p. 13; H J Ault, 'Reflections on the Role of the OECD in Developing International Tax Norms' (2009) *BrookJIntlL* 34(3), p. 766; A Semeta, 'Competitive Tax Policy and Tax Competition in the EU' (2011) Speech/11/712, 2nd Taxation Forum of Diario Economico/OTOC, p. 4 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_712> accessed 14/08/2019.

[31] Pinto, EU and OECD (n 26) p. 393.

[32] D Deák, 'Illegal State Aid and Harmful Tax Competition: The Case of Hungary' (2002) *Society and Economy* 24(1), p. 26.

[33] OECD CAN (n 25) p. 30; COCG assessment of Costa Rica CR002 (n 25) p. 3.

means that failure to meet the gateway criterion implies an absence of a need to evaluate other criteria. This chapter relies on that too.

Third, the OECD recommends not to focus on only one factor, but to make an overall balanced assessment of all factors.[34] In a like manner, the EU approach does not view assessment as an exact science and distinguishes between a tax measure that is wholly harmful and a tax measure that may have some harmful aspects.[35] Both approaches are taken up here. This means that each measure is assessed and then a conclusion is drawn as to whether it is not harmful, or whether it is fully harmful, or whether harmfulness applies only to some aspects.

6.2. Analysis of the legislative favorable tax measures

From the Rwandan legislative arsenal, four tax measures were identified as favorable in chapter three. These are the PTRs, the tax holidays, the tax exemptions, and the profit tax discounts. In the next paragraphs, each measure is subjected to a test to determine whether and to what extent it could be harmful.

6.2.1. Preferential tax rates

Under Rwandan law, several PTRs are available and their evaluation is the subject of this sub-section. Starting with the preferential CIT rate of 0%, this is granted under the terms and conditions of Annex I of investment law. Ahead of evaluation, the mere fact of departing from 30% to pay 0% results in a preferential difference of 100%. Therefore, the measure meets the gateway criterion of providing a lower level of taxation, which gives a green light to evaluate it for other criteria.

With respect to the ring-fencing criterion, the measure is only open to international companies with headquarters or regional offices in Rwanda. The law defines an international company as one that owns or controls production or service facilities in one or more countries other than its home country.[36] This means that a company can only be considered international, if it operates in more than one country. The law does not exclude international companies with Rwanda as their home country from benefiting from the PTR of 0%. In other words, a Rwandan

[34] OECD 1998 Report (n 10) p. 25; Pastukhov (n 25) p. 162; OECD, Confidential draft Recommendation on Counteracting Harmful Tax Competition, C(98)17 (17 Feb. 1998), p. 5, <https://one.oecd.org/document/C(98)17/en/pdf> accessed 29/08/2021.
[35] CEU, Agreed Guidance by the Code of Conduct Group (business taxation): 1998-2018, FISC 44 ECOFIN 75, 5814/4/18 REV 4, 20/12/2018, p. 14.
[36] Law No. 006/2021 of 05/02/2021 on investment promotion and facilitation, *O.G.* No. 04 *bis* of 08/02/2021, art. 2(27^0).

company, with headquarters in Rwanda, operating internationally, falls within the scope of the measure. Moreover, the law does not distinguish resident from non-resident shareholders, and nothing explicitly shows that non-domiciled entities or markets are targeted or that resident companies or markets are excluded.[37]

On this particular subject, the COCG evaluated as ring-fenced those measures that are limited to international companies which are exclusively foreign-owned i.e. in which shares cannot be held by a resident or domiciled person.[38] Even more, as the COCG mentioned in several assessments,[39] the absence of a rule preventing domestic taxpayers from benefiting from the measure or a rule excluding domestic transactions from the measure makes a measure appearing not ring-fenced. In contrast, some regimes that grant benefits to international companies on the condition that they do not conduct business in the regime's territory or with residents there, or own immovable property there, have been considered ring-fenced by the COCG.[40] It is important to note that Rwandan law does not prohibit an international company, as part of benefits eligibility, to do business within Rwanda or to do business with a resident or to own interest in a real property in Rwanda. Due to all these elements, the measure is not *de*

[37] CEU, Outcome of proceedings on COCG assessment of Liechtenstein's Interest deduction on equity / NID regime (LI003), 12774/18 FISC 394 ECOFIN 873, 04/10/2018, p. 3; CEU, Outcome of proceedings on COCG assessment of Dominica's International business company: IBC regime (DM001), 7519/19 FISC 184, 15/03/2019, p. 5; CEU, Outcome of proceedings on COCG assessment of Grenada's Fiscal incentive regime (GD005), 7468/19 FISC 177, 14/03/2019, p. 1; CEU, Report on COCG assessment of Italy's NID regime (IT019), 14364/18 ADD 4, FISC 481 ECOFIN 1059, 20/11/2018, pp. 18-19.

[38] CEU, Outcome of proceedings on COCG assessment of Cook Islands' International companies regime (CK001), 7418/20 FISC 85, 30/04/2020, p. 4; CEU, Outcome of proceedings on COCG assessment of Cook Islands' International insurance companies regime (CK002), 7419/20 FISC 86, 30/04/2020, p. 4; CEU, Outcome of proceedings on COCG assessment of Cook Islands' Captive insurance companies regime (CK004), 7420/20 FISC 87, 30/04/2020, p. 3.

[39] COCG assessment of Slovakia SK007 (n 25) p. 9; CEU, Outcome of proceedings on COCG assessment of Dominica's General incentive under the Fiscal Incentives Act - FIA regime (DM003), 7521/19 FISC 186, 15/03/2019, p. 2; CEU, Outcome of proceedings on COCG assessment of Belize's International business company regime (BZ001), 14204/19 FISC 449, 15/11/2019, p. 4; CEU, Outcome of proceedings on COCG assessment of Belize's Export Processing Zones: EPZ enterprises regime (BZ002), 7615/19 FISC 203, 18/03/2019, p. 2 and 7; CEU, Outcome of proceedings on COCG assessment of Morocco's Offshore banks regime (MA004), 7548/19 FISC 194, 15/03/2019, pp. 3-4; COCG assessment of Vietnam VN005 (n 8) p. 2.

[40] CEU, Outcome of proceedings on COCG assessment of Saint Lucia's International business companies - IBC regime (LC001), 7525/19 FISC 190, 15/03/2019, p. 4; CEU, Outcome of proceedings on COCG assessment of Saint Vincent and Grenadines' International business companies - IBC regime (VC001), 7563/19 FISC 200, 15/03/2019, p. 3; COCG assessment of Dominica DM001 (n 37) pp. 3-4; CEU, Outcome of proceedings on COCG assessment of Grenada's International companies regime (GD001), 7464/19 FISC 173, 14/03/2019, pp. 3-4; COCG assessment of Belize BZ001, Id., p. 4; COCG assessment of Costa Rica CR002 (n 25) p. 4; CEU, Outcome of proceedings on COCG assessment of Turkey's Regional headquarters regime (TR004), 7561/19 FISC 198, 15/03/2019, p. 3; CEU, Outcome of proceedings on COCG assessment of Antigua and Barbuda's International business corporations regime (AG001), 7461/19 FISC 170, 14/03/2019, p. 3; CEU, Outcome of proceedings on COCG assessment of Saint Lucia's International trusts regime (LC002), 7545/19 FISC 191, 15/03/2019, p. 2; CEU, Outcome of proceedings on COCG assessment of Cabo Verde's International financial institution regime (CV002), 7463/19 FISC 172, 14/03/2019, pp. 3-4; COCG assessment of Cook Islands CK002 (n 38) p. 4.

jure ring-fenced while *de facto* ring-fencing can only be decided on the basis of the statistical data, unfortunately unavailable, of the benefiting companies and their respective residences.

As regards the transparency criterion, the PTR of 0% sets out the conditions that the beneficiary must fulfil. The measure and its conditions are laid down in a law which has been officially published in the official gazette. This, therefore, responds to the transparency requirement of having the measure and its (pre-)conditions fully set out, defined, and published in the relevant legislation, such as publicly available laws, decrees, regulations, and the like.[41] Thus, the measure is publicly known, and therefore, transparent.

However, what is not clear about this measure is the timeframe to benefit from a PTR. The law is silent on this, which opens the door to administrative discretion. Involvement in any administrative discretion violates transparency,[42] and implies a harmful aspect. The concern here can be two-fold: either the administration can issue a time frame that is not provided for in the law, thus enjoying a high degree of power or it can do so in a discriminatory manner. Therefore, this measure is transparent in all aspects, except the aspect of time frame, which makes this component harmful.

Having real economic activity and substantial economic presence is evidenced by the legal conditions such as having headquarters or a regional office in Rwanda, the minimum threshold required for investment in Rwanda, the provision of employment and training to Rwandans, and setting up actual and effective administration and coordination of operations in Rwanda. The three indicators of the substantial economic presence requirement, namely, an adequate number of employees, an adequate amount of operating expenses, and an adequate amount of investment and capital,[43] are each met in this particular case respectively by the requirement to employ and train Rwandans, to spend at least two million USD per year in Rwanda, and to invest at least ten million USD in Rwanda.[44] With reference to the COCG assessments that concluded that a measure satisfies the criterion 3 if it expressly requires real

[41] CEU, Report on COCG assessment of Poland's 15% CIT rate for small taxpayers (PL006), 14364/18 ADD 7, FISC 481 ECOFIN 1059, 20/11/2018, p. 7; COCG assessment of Cook Island CK003 (n 25) p. 6; COCG assessment of Costa Rica CR002 (n 25) p. 4; COCG assessment of Belize BZ001, Id., p. 7.
[42] COCG assessment of Cook Island CK003, ibid.
[43] CEU, Letters seeking commitment FISC 95 ECOFIN 98 (n 3) p. 23; CEU, Outcome of proceedings on COCG assessment of Mauritius' Manufacturing activities under the Freeport zone regime (MU012), 13209/19 FISC 397, 16/10/2019, p. 3.
[44] Investment Law (n 36) Annex I (b), (e), and (a).

economic activity or substantial economic presence such as employment requirements,[45] the second and third requirements are adequate enough. However, the first requirement relating to employment and training of Rwandans must be determined or at least determinable, to ensure that its 'adequate' level is not left to administrative discretion. The fulfilment of these conditions thus entails an adequate *de jure* and *de facto* link between the activity carried out and the PTR benefits.[46] Thus, the measure is not harmful with respect to this criterion, pending the details on the adequate employment and training of Rwandans.

In summary, the PTR of 0% is not harmful except for two aspects. The first aspect is the lack of indication of the timeframe to benefit from a PTR, which is then not transparent. The second aspect is the lack of details on the provision of employment and training to Rwandans, which lessens the fulfilment of the substantial economic presence requirement.

Regarding the preferential CIT rate of 3%, this measure provides a preferential difference of 90%. It, therefore, satisfies the gateway criterion, which gives the green light to evaluate it for other criteria. In terms of Annex II of the investment law, one income that is preferably taxed is a foreign-sourced trading income of a registered investor operating as a global trading or paper trading.[47] Regardless the conditions to fulfill, this measure appears *prima facie* harmful in several respects. By targeting foreign-sourced income, it excludes the domestic market. The measure is, therefore, ring-fenced as concluded by the COCG in regard to the measures that do not affect the national tax base.[48] The substantial economic presence requirement is also problematic because the beneficiary must operate as a global trading or paper trading company, whose tax bases are likely movable, thereby increasing the harmfulness risk. Therefore, apart from the relevance of the legal conditions to be fulfilled, such as turnover and expenditure threshold, an office and the directors' residences and meetings, and regardless of whether the measure meets the transparency criterion and complies with the OECD rules on

[45] CEU, Outcome of proceedings on COCG assessment of Cabo Verde's International business centers regime (CV001), 7462/19 FISC 171, 14/03/2019, p. 2; CEU, Outcome of proceedings on COCG assessment of Taiwan's Free Trade Zone regime (TW001), 7562/19 FISC 199, 15/03/2019, p. 4; CEU, Outcome of proceedings on COCG assessment of Panama's Foreign-owned call centers regime (PA005), 15117/18 FISC 520 ECOFIN 1164, 04/12/2018, p. 5; CEU, Letters seeking commitment FISC 95 ECOFIN 98 (n 3) p. 23.
[46] COCG Agreed Guidance (n 35) p. 129.
[47] Investment Law (n 36) Annex II(4^0).
[48] CEU, Outcome of proceedings on COCG assessment of Belize's foreign source income exemption (BZ006), 7417/20 FISC 84, 30/04/2020, p. 6; CEU, COCG assessment of Seychelles' exemption of foreign income regime (SC011), 2019; CEU, COCG assessment of Saint Lucia's exemption of foreign income regime (LC005), FISC 95 ECOFIN 98, 5981/19, 01/02/2019, p. 22.

profit determination, this measure is *prima facie* harmful. The same analysis applies *mutatis mutandis* to Annex II(1^0) on pure holding companies and Annex II(5^0) on foreign-sourced royalties of a registered investor operating as an intellectual property company.

Regarding the preferential CIT rate of 15%, the preferential difference is 50%. In several assessments, the COCG concluded similar tax deductions as providing a lower level of taxation.[49] Therefore, this measure meets the gateway criterion, which gives the green light to evaluate it for other criteria. According to the letter of the law, this measure is open to all registered investors: residents or non-residents. The measure is therefore not *de jure* ring-fenced in terms of criterion 1. The beneficiaries of the 15% PTR are also not restricted to access the local market, which makes the measure not ring-fenced in terms of criterion 2.

As regards the transparency criterion, the measure is transparent since it is provided for in a law that has been published in the official gazette, i.e. publicly available. However, as elaborated on earlier for the preferential CIT rate of 0%, this measure does not indicate for how long a person can benefit from it. This silence of the law is not transparent because it can open space for administrative discretion, which makes this temporal aspect harmful.

As for the requirement of real economic activity and substantial economic presence, this, like the 0% PTR, is evidenced by the conditions attached to the measure. These are, for example, the requirement to operate the operations of energy generation, transmission, and distribution; to operate in transport and have a fleet of five trucks or ten buses; to invest in manufacturing, to invest in ICT services, manufacturing or assembly; to establish innovation research and development facilities; the building of low-cost housing; to invest in electric mobility, and tourism. All of these conditions, except the item on financial services, are real activity-related and not usually highly mobile activities, therefore, posing less threat. Thus, considering that under the OECD and EU contexts, tax measures aimed at attracting non-highly mobile activities such as manufacturing, production, tangible assets, and real activities do not *a*

[49] COCG assessment of Belize BZ001 (n 39) p. 3; COCG assessment of Dominica DM001 (n 37) p. 3; COCG assessment of Grenada GD001 (n 40) p. 3; COCG assessment of Costa Rica CR002 (n 25) p. 3; CEU, Outcome of proceedings on COCG assessment of Turkey's Regional headquarters regime (TR004), 7561/19 FISC 198, 15/03/2019, p. 3.

priori raise too many concerns of constituting harmful tax practices,[50] this measure appears *prima facie* not harmful with respect to this particular criterion.

Therefore, considering the overall assessment of all criteria alongside the consideration of each aspect individually, as advocated by the OECD and the EU,[51] the combination of the above elements concludes that the 15% PTR is not harmful, with the exception of some aspects.

In support of the above evaluation, the PTRs are not considered harmful if they are granted equally to all taxpayers.[52] In several cases, the COCG has concluded some measures not harmful despite providing PTRs. One example is Poland's 15% CIT rate for small taxpayers and start-up taxpayers. This rate was introduced in 2017 and Poland explains its objectives as seeking to

> Accelerate growth and development and create favorable conditions for increasing entrepreneurship, especially for young people, for whom obtaining outside financing for business activity is often a significant barrier […] with a less competitive position than large companies.[53]

The COCG evaluated this measure and concluded that it was not harmful in respect of small taxpayers.[54] On this point, the COCG found that the rate of 15% for the measure beneficiaries instead of 19% of the general system makes a difference of 4% i.e. a preference of 21%. The measure was qualified to contain a significantly lower rate than the generally applicable rate. Nevertheless, the measure did not pass the gateway criterion as it was applied to small companies that cannot affect '*in a significant way the location of business activity in the*

[50] OECD 1998 Report (n 10) p. 8; COCG Agreed Guidance (n 35) p. 129; CEU, Outcome of proceedings on Code of Conduct (Business Taxation): Scoping paper on criterion 2.2 of the EU listing exercise, 10421/18, FISC 274 ECOFIN 657, AR/mf DG G2B, 22/06/2018, p. 3; CEU, Outcome of proceedings on COCG assessment of Barbados' Fiscal incentives regime (BB008), 7676/19 FISC 205, 19/03/2019, p. 4; COCG assessment of Costa Rica CR002 (n 25) p. 5; COCG assessment of Taiwan TW001 (n 45) p. 4; CEU, COCG assessment of Belize BZ002 (n 39) p. 3; COCG assessment of Dominica DM003 (n 39) p. 2; Samuels and Kolb (n 25) p. 234; K Carlson, 'When Cows Have Wings: An Analysis of the OECD's Tax Haven Work as it Relates to Favor, Sovereignty and Privacy' (2002) *J.MarshallL.Rev.* 35(163), p. 165.

[51] OECD 1998 Report, Id., p. 25; COCG Agreed Guidance (n 35) p. 14; Pastukhov (n 25) p. 162.

[52] T Rixen, 'Taxation and Cooperation: International Action against Harmful Tax Competition', in S A Schirm (ed), *Globalization: State of the Art and Perspectives* (Routledge 2007), p. 72.

[53] COCG assessment of Poland PL006 (n 41) p. 1.

[54] Id., pp. 2-4.

Community'.[55] Poland later reduced the rate again from 15% to 9%, and the COCG's overall assessment did not change.[56]

Smilarly, the COCG assessed Slovakia's patent box regimes and concluded that the effective tax rate of 10.5% makes a 50% lower rate than the ordinary tax rate of 21%, therefore, qualified as significantly lower than the rate that generally applies, thus potentially harmful.[57] However, the measure was not qualified as overall harmful because other criteria concluded negatively.[58] The same was true for Poland's PTR of 5% for corporate income derived from intellectual property in lieu of 19%.[59] This measure provides a rate that is significantly lower than the rate that generally applies, which makes it potentially harmful.[60] However, the absence of a legal provision under Polish law which restricts the benefits to non-residents, makes the qualifying residents eligible to benefit from the measure.[61] Consequently, the measure was considered not ring-fenced. In view of this and other elements, the measure was judged not harmful.[62]

Among the other measures that the COCG found not harmful despite offering a significantly lower level of taxation compared to the generally applicable rates, was Italy's regime. Under Italy's NID, the rate was 1.6% for 2017 and 1.5% for 2018, which is significantly lower compared to the general rate of 24%.[63] Nevertheless, the measure's applicability and availability to '*all entities based in Italy without any restriction in terms of shareholding (resident or non-resident shareholders) or in terms of business sector*' makes it not *de jure* ring-fenced.[64] This coupled with the fact that the measure was predominantly benefited from by Italian-owned companies, i.e. residents, at a level of 96%, made the measure not *de facto* ring-fenced, and it qualified overall as not harmful after considering other criteria too.[65]

[55] Ibid.
[56] CEU, Report on COCG assessment of Poland's 9% CIT for taxpayers with revenues not exceeding EUR 1.2 million (PL010), 9652/19 ADD 4, FISC 274 ECOFIN 515, 27/05/2019, p. 1.
[57] COCG assessment of Slovakia SK007 (n 25) p. 8.
[58] Id., p. 14.
[59] COCG assessment of Slovakia SK007 (n 25) pp. 16-24.
[60] CEU, Report on COCG assessment of Poland's IP regimes (PL012), 9652/19 ADD 5, FISC 274 ECOFIN 515, 27/05/2019, p. 16.
[61] Id., p. 17.
[62] Id., p. 24.
[63] COCG assessment of Italy IT019 (n 37) pp. 18-19.
[64] Id., p. 19.
[65] Ibid.

All the above examples show the extent to which the mere fact of having a lower rate, such as in the case of the PTR of 0% and 15% under Rwandan law, is not in itself sufficient to conclude that a measure is harmful. As much as other criteria are not conclusive, in particular the ring-fencing criterion, the measure will not be considered harmful despite offering lower rates.

Another preferential CIT rate is offered to export investments.[66] A registered investor exporting between 30% and 50% of the total turnover pays CIT at a rate of 25%, i.e. a preferential difference of 16.6%, while a registered investor exporting at least 50% of the total turnover pays CIT at a rate of 15% i.e. a preferential difference of 50%. As the COCG has noted in several assessments,[67] similar differences provide a lower level of taxation. Thus, the measure meets the gateway criterion and needs to be evaluated with respect to other criteria. The law does not distinguish residents from non-residents, which makes it not *de jure* ring-fenced on criterion 1.

Regarding ring-fencing criterion 2, the requirement to export at least 30% of the total turnover of goods and services leads to a theoretical equilibrium, since the remaining 70% is presumably accessible on the domestic market. In theory, this equilibrium would not be a major concern since the domestic market can be accessed equally, or even more than the international market. In practice, however, this seems very unlikely. The literal interpretation of the law is that exporting 30% as minimum, caps access to the domestic markets at 70%. This cap means that the percentage available in the domestic market is 70% and cannot be more than that. Thus, a scenario where 90% is exported while only 10% is traded locally would be fine with the legal requirement while the opposite would not be fine. Hence, even if *de jure* aspect seems less problematic, *de facto* analysis can easily prove the measure more problematic. Unfortunately, this research has not uncovered enough data to actually conclude on this *de facto* aspect. With respect to the particular aspect of capping the domestic sales, the COCG concluded as ring-fenced Curacao's manufacturing activities under its eZone regime because of capping the domestic sales at 25%.[68] In light of this analysis, the requirement to export at least 50% of total

[66] Investment Law (n 36) Annex V.
[67] COCG assessment of Belize BZ001 (n 39) p. 3; COCG assessment of Dominica DM001 (n 37) p. 3; COCG assessment of Grenada GD001 (n 40) p. 3; COCG assessment of Costa Rica CR002 (n 25) p. 3; CEU, Outcome of proceedings on COCG assessment of Turkey's Regional headquarters regime (TR004), 7561/19 FISC 198, 15/03/2019, p. 3.
[68] CEU, Outcome of proceedings on COCG assessment of Curacao's Manufacturing activities under the eZone regime (CW005), 7423/20 FISC 89, 30/04/2020, p. 3.

turnover to benefit from a PTR of 15% is likely ring-fenced because access to the domestic market is minimized compared to the foreign market. Thus, in both cases, the export requirement makes the measure likely ring-fenced in terms of access to the domestic market, which makes the measure likely ring-fenced in terms of criterion 2. Apart from that, the law does not provide for any other condition, which makes it difficult to evaluate the measure's satisfaction with regard to the substantial economic presence requirement, transparency, and compliance with the OECD rules on profit determination. The overall evaluation therefore concludes that this measure is *prima facie* harmful.

Regarding the preferential WHT rates of 0%, 5%, and 10%, the measures meet the gateway criterion by offering a lower level of taxation than the level that generally applies. It is worth noting that under EU law, extensive discussions exist on the extent to which no or low WHT can lead to harmful tax competition. Some scholars doubt whether WHTs are really problematic in terms of harmful tax practices.[69] Although on temporal hold as a common position is not yet achieved,[70] the COCG assessed several regimes which grant no or low WHT among other advantages. In such assessments, the COCG concluded that no or low WHT pass the gateway criterion,[71] and some measures were concluded harmful in consideration of the overall criteria.[72] Under Rwandan law, the preferential WHTs are given to investors who already benefit from other favorable measures.[73] Thus, in light of the COCG assessments and the unconcluded discussions under EU law, the author proposes application by analogy of the conclusions reached out while assessing the harmfulness of other favorable tax measures that the concerned investor is benefiting from.[74] In the next paragraphs, the tax holidays are evaluated.

[69] M Nouwen and P J Wattel, 'Tax Competition and the Code of Conduct for Business Taxation' in P J Wattel, O Marres, and H Vermeulen (eds), *European Tax Law* (7th edn, Wolters Kluwer 2019), p. 944; M F Nouwen, *Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition* (Ph.D Thesis, UVA 2020), pp. 327-328, 330.
[70] Nouwen and Wattel, Ibid., p. 944; Nouwen, Id., p. 332.
[71] CEU, Outcome of proceedings on COCG assessment of Morocco's FTZs regime (MA003), 7427/20 FISC 93, 30/04/2020, p. 6; CEU, Outcome of proceedings on COCG assessment of Saint Kitts and Nevis' Offshore companies regime (KN001), 7522/19 FISC 187, 15/03/2019, p. 1, 2 and 5.
[72] COCG assessment KN001, Id., p. 7; CEU, Outcome of proceedings on COCG assessment of Tunisia's Offshore financial services regime (TN002), 7560/19 FISC 197, 15/03/2019.
[73] The preferential WHT of 0% is given to an investor already benefiting from a preferential CIT of 15% and 3%. The preferential WHT of 5% is given to an investor who invests in a company already exempted from capital gains tax and benefits from a discount on profit tax, while a preferential WHT of 10% is given to an investor already benefiting from five years tax holiday.
[74] Ibid.

6.2.2. Tax holidays

As described in chapter three, tax holidays, under Rwandan law, fall into two categories: tax holidays of five years, renewable, and tax holidays of up to seven years.[75] The next paragraphs examine the five-year tax holidays, then the seven-year tax holidays.

The five-year tax holidays are granted to institutions running micro-finance activities, and to developers of specialized innovation parks and specialized industrial parks. During the five-year period, renewable upon fulfilling the conditions, the beneficiary company pays CIT at a rate of 0%. It is evident that this rate is preferential and derogates from the standard CIT rate of 30%. Thus, taking into account COCG's analysis on Poland's Investment zone regime which grants to new investments a tax holiday of 10 to 15 years,[76] as well as several similar regimes,[77] the measure offers a significantly lower level of taxation, therefore, the gateway criterion is met. However, as previously mentioned, satisfying the gateway criterion alone is not sufficient to qualify a measure as harmful.[78] Even so, if it is decided the gateway criterion exists, it leads to assessing the other criteria.

Regarding the ring-fencing criterion, the letter of both income tax law and investment law opens up the tax holiday to any entity which fulfills the conditions. There is no distinction between residents and non-residents. Equally, from the letter of the law, nothing shows that the beneficiaries of tax holidays are restricted from accessing the domestic market. In the specific case of micro-finance activities, they do not appear to target non-residents because of their apparent low impact to affect the location of the business. The COCG held a similar reasoning in the case of Poland's 15% CIT rate for small taxpayers and start-up taxpayers.[79] Therefore, this measure is not ring-fenced for both aspects, i.e. *de jure* and *de facto*, and is therefore not harmful with regard to this criterion.

[75] Law No. 016/2018 of 13/04/2018 establishing taxes on income, *O.G.* No. 16 of 16/04/2018, art. 47; Investment Law (n 36) Annex IX and VIII.
[76] CEU, Report on COCG assessment of Poland's Investment zone regime (PL013), FISC 444 ECOFIN 1005, 14114/19 ADD 3, 25/11/2019, pp. 14-15.
[77] COCG assessment of Barbados BB008 (n 50) p. 3; CEU, Outcome of proceedings on COCG assessment of Tunisia's Export promotion incentives regime (TN001), 7550/19 FISC 196, 15/03/2019, p. 3; CEU, Outcome of proceedings on COCG assessment of Korea's Foreign investment zone regime (KR001), 7523/19 FISC 188, 15/03/2019, p. 4; COCG assessment of Belize BZ002 (n 39) p. 7.
[78] OECD 1998 Report (n 10) p. 25; OECD CAN (n 25) p. 6; Pastukhov (n 25) p. 162.
[79] COCG assessment of Poland PL006 (n 41) pp. 2-4.

Concerning the transparency aspect, the tax holidays of five years look transparent. This is because they are embodied in legislation that has been officially published in the official gazette, which makes it publicly available, and does not involve any administrative discretion. The conditions for renewal, for micro-finances, are not yet gazetted but they will be established by ministerial order, which shall be published in the official gazette. The precaution here is to avoid among the conditions any kind of discretionary power to approve the renewal, failure of which may lead to non-transparence and thus be harmful as concluded in some of the COCG assessments.[80] In addition, companies benefiting from tax holidays are required to submit their financial statements with the tax administration every year.[81] Although not expressly mentioned in the law, this requirement, in one way or another, affects the satisfaction of the substantial economic presence requirement. For developers of specialized innovation parks and specialized industrial parks, their tax bases are not highly mobile, and therefore pose less threat because their tax bases have a limited possibility to move from one jurisdiction to another. This measure is, therefore, not harmful in relation to two aspects of transparency and the substantial economic presence requirement.

In summary, the consideration of all criteria as applied to tax holidays of five years concludes that the measure is not clean on the criterion of the lower level of taxation but is clean to other criteria. Thus, an overall assessment qualifies the tax holidays of five years as not harmful.

Concerning the seven-year tax holidays, these are granted to registered investors who fulfill the conditions set out in Annex VIII of the investment law. The benefiting registered investors pay the CIT rate of 0% during seven years. Deviating from 30% standard CIT rate to 0% shows an obvious preferential treatment of 100%. This constitutes a lower level of taxation compared to the generally applicable level of taxation.[82] This means that the gateway criterion is met, which justifies the need to look at other criteria.

On the ring-fencing criterion, the preferential treatment is, by the letter of the law, open to any registered investor who fulfills the conditions. Literally interpreted, the registered investor can be a resident or a non-resident. This, therefore, implies that the measure is *de jure*

[80] COCG assessment of Barbados BB008 (n 50) p. 4; CEU, Outcome of proceedings on COCG assessment of Grenada's International insurance regime (GD003), 7466/19 FISC 175, 14/03/2019, p. 3.
[81] Income Tax Law (n 75) art. 47(3).
[82] Wattel (n 25) p. 136.

not ring-fenced. Similarly, there is no indication that the measure could be *de facto* ring-fenced. At this point, this measure is, more or less, comparable to Singapore's DEI, which has been assessed as potentially harmful by providing significantly lower effective tax rates of 5% or 10%, but not ring-fenced by being open to all residents and non-residents.[83] In addition, when assessing Poland's Investment zone regime, the COCG held that the majority of the conditions attached to the regime are not ring-fenced, therefore, the measure could not be taken as entirely ring-fenced.[84] The conditions for benefiting from the tax holiday are also set out in the law, which is published and accessible to any taxpayer, which makes the measure transparent. Thus, the tax holidays of seven years are not harmful under both criteria of transparency and ring-fencing.

The fulfillment of the requirement for the economic substance is also seen in several conditions that must be met by the measure's beneficiary. One condition is that the beneficiary must be a registered investor. Among the requirements to obtain the registration certificate are the market survey, the projected technology and knowledge transfer, the project environmental impact assessment, the projected number of employees and categories of employment.[85] As mentioned in the COCG Agreed Guidance, when assessing the substantial economic presence requirement some elements to consider are the '*adequate level of employees, adequate level of annual expenditure, physical offices and premises, and investments or relevant types of activities*'.[86] In this regard, the conditions for obtaining an investment registration certificate, which is a prerequisite to benefit from a tax holiday of seven years, are sufficient to evidence substantial economic presence. Moreover, this measure is limited to certain activities such as energy production, manufacturing, tourism, health, ICT manufacturing and assembly, and exports. These activities are linked in one way or another to industrial and manufacturing activities, which are inherently less threatening as they are presumed to have *de facto* substance.[87] Therefore, this measure satisfies the criterion of the real economic activity and the substantial economic presence requirement.

[83] F Boulogne, 'Reviewing the OECD's and the EU's Assessment of Singapore's Development and Expansion Incentive' (2019) SMU Sch. of Accountancy Research Paper 7(1), p. 42 and 50 <http://dx.doi.org/10.2139/ssrn.3349404> accessed 14/08/2019.
[84] COCG assessment of Poland PL013 (n 76) pp. 16-17.
[85] Investment Law (n 36) art. 17.
[86] COCG Agreed Guidance (n 35) p. 119; CEU, Letters seeking commitment FISC 95 ECOFIN 98 (n 3) p. 23.
[87] COCG Agreed Guidance, Id., p. 129; Scoping Paper on criterion 2.2 (n 50) p. 3; COCG assessment of Barbados BB008 (n 50) p. 4; COCG assessment of Taiwan TW001 (n 45) p. 4; COCG assessment of Belize BZ002 (n 39) p. 3; CEU, Outcome of proceedings on COCG assessment of Morocco's Export enterprises regime (MA002), 7426/20 FISC 92, 30/04/2020, p. 3; COCG assessment of Morocco MA003 (n 71) p. 3.

In respect of the above, the tax holiday of seven years, although providing a lower level of taxation, is clean under other criteria. Therefore, the overall conclusion for this measure is that it is not harmful.

6.2.3. Tax exemptions

Under Rwandan law, there are three categories of tax exemptions: exemption for income from agricultural or livestock activities whose annual turnover is less than 12,000,000 Frw; exemption from capital gains tax for the transfer of shares on the capital market; and CIT exemption for the Development Bank of Rwanda, Agaciro Development Fund Corporate Trust, and the Business Development Fund limited. Below, each of these three exemptions is analyzed to determine whether there is a harmful aspect.

Ahead of attempting to analyze each exemption measure, it is worth noting that the exemption regimes generally meet the gateway criterion. This has been confirmed in several exemption measures assessed by the COCG such as Mauritius' partial exemption regime, Grenada's offshore banking regime, Dominica's general incentive regime, Korea's foreign investment zone regime, and Belize's export processing zones.[88] The COCG also noted that tax exemption *per se* does not contradict internationally accepted principles regarding OECD transfer pricing rules.[89] These two conclusions apply to the three exemption regimes analyzed below.

Starting with the tax exemption for income from agricultural or livestock activities whose annual turnover is less than 12,000,000 Frw, this measure does not appear to be harmful in light of many elements. With respect to the gateway criterion, it is true that the exemption provides for a lower level of taxation to the extent of 100%. However, the measure is not *de jure* ring-fenced as it makes no distinction between residents and non-residents. It is also difficult to think of a *de facto* targeting non-residents given the limited importance of the exempted activities, namely agricultural activities in Rwanda. *A contrario*, the exempted

[88] CEU, Outcome of proceedings on COCG assessment of Mauritius' Partial exemption regime (MU010), 13208/19, FISC 396, 16/10/2019, p. 2; CEU, Outcome of proceedings on COCG assessment of Grenada's Offshore banking regime GD002, 7465/19 FISC 174, 14/03/2019, p. 3; COCG assessment of Dominica DM003 (n 39) p. 2; COCG assessment of Korea KR001 (n 77) p. 4; COCG assessment of Belize BZ002 (n 39) p. 7; CEU, COCG assessment of Belize (BZ006) (n 48), p. 5.

[89] CEU, Outcome of proceedings on COCG assessment of Armenia's governmentally approved projects outside Armenia (AM002), 12772/18 FISC 392 ECOFIN 871, 04/10/2018, p. 4; CEU, Outcome of proceedings on COCG assessment of Dominica's Offshore banking regime (DM002), 7520/19 FISC 185, 15/03/2019, p. 4; COCG assessment of Armenia AM001, Id. pp. 3-5; CEU, Outcome of proceedings on COCG assessment of Maldives' Reduced tax rate regime (MV001), 7428/20 FISC 94, 30/04/2020, p. 6.

activities are mainly carried out by residents, who mostly live in the village and cultivate at small scale levels.

Moreover, it is obvious that this exemption's risk to establish offshore arrangements is very limited. This thinking is guided by the COCG reasoning when assessing Palau's 4% tax rate to all businesses. The COCG said that the measure is not ring-fenced because it applies to all business but also that it is about a '*small economy with a very small financial sector, with modest link with cross-border activities, which makes it to stand with a very limited risk of offshore structures.*'[90]

In the same vein, the situation can be further viewed through the lens of *de minimis* transactions. In the area of harmful tax competition, a *de minimis* factor has been applied as an exception applicable to some situations that would normally qualify as harmful but are not due to their minimal impact. For example, with respect to transparency, the OECD requires drawing, auditing, and filing the companies' financial accounts in accordance with generally accepted accounting standards.[91] However, it accepts exceptions to this for *de minimis* transactions or for the entities that are exclusively local with no foreign element, such as foreign ownership, beneficiaries, or management.[92]

For this reason, the exemption of agricultural activities whose annual turnover is equal to or less than 12,000,000 Frw is a typical case of *de minimis* transactions. The *de minimis* transactions nature in this situation is justified by some particular characteristics of agricultural activities in Rwanda, including the fact that Rwanda is an agricultural society. Indeed, many Rwandans live in rural areas and the agricultural sector occupies a large percentage of manpower.[93] People in this sector essentially engage in subsistence farming with limited economic objectives. The agricultural sector also relies on the rain in addition to traditional farming practices using manual hand hoes.

[90] CEU, COCG Report to the Council: Endorsement, FISC 481 ECOFIN 1059, 14364/18 ADD 15, 20/11/2018, pp. 1-2.
[91] OECD 2001 progress report (n 25) p. 11; Pinto, Tax competition (n 25) p. 227.
[92] OECD 2001 progress report, ibid.; Pinto, ibid.
[93] A Heshmati and D Sekanabo, 'Introduction to the Rwanda Economy', in A Heshmati (ed), *Rwanda Handbook of Economic and Social Policy* (JIBS and UR 2018), p. 43; D Malunda 'Rwanda Case Study on Economic Transformation' (2012) Report for the African Centre for Economic Transformation, IPAR, p. 43.

Moreover, under the EU Code of Conduct, a measure that does not or may not affect, in a significant way, the location of business activity is not concerned by the Code.[94] In view of the above, and taking into account the above description of Rwandan agriculture, it is difficult to imagine an investor who may locate a business just to benefit from an exemption for an amount that is little as 12,000,000 Frw.[95] Moreover, as decided in the case of the Italian NID regime, the availability of the measure to all companies is assessed *de jure* not harmful while a predominant use by the residents results in it being *de facto* not harmful,[96] which typically applies to the Rwandan agricultural income exemption.

Not only that, but also the nature of the exempted activity proves the fulfillment of the real economic activity requirement. The COCG held similar reasoning when assessing Vietnam's disadvantaged areas regime in which it concluded that the covered activities are related to agriculture, aquaculture, and forestry, sectors that inherently require a physical presence.[97] Therefore, the measure was clean for criterion 3 on the substantial presence requirement. The measure also satisfies the transparency requirement since its conditions are clearly set out in legislation, officially published in the official gazette, which does not open any loophole for discretion.

Thus, the measure is not harmful with respect to ring-fencing, transparency and the requirement of real economic activity. The measure's overall evaluation, therefore, concludes that it is not harmful.

Concerning an exemption from capital gains tax for the transfer of shares on the capital market, it is evident that there is a deviation from the generally applicable tax rate. This means that the gateway criterion is met, which entails the need to evaluate other criteria. According to the wording of the law, there is no distinction between residents and non-residents, which makes the measure *de jure* not harmful. Similarly, there is no indication that the measure in practice targets non-residents to conclude *de facto* ring-fencing. Moreover, the COCG, while assessing Slovakia's exemption of capital gains, motivated that the fact of undertaking, managing, and

[94] EU Code of Conduct (n 2) C2/3; COCG Agreed Guidance (n 35) p. 16; COCG assessment of Poland PL006 (n 41) pp. 2-4; CEU, Report on COCG assessment of Belgium's NID regime (BE018), 14364/18 ADD 1, FISC 481 ECOFIN 1059, 20/11/2018, p. 39.
[95] Approximately equivalent to 12,000 USD by August 2021 Central Bank rates reference.
[96] COCG assessment of Italy IT019 (n 37) p. 19.
[97] COCG assessment of Vietnam VN005 (n 8) p. 2.

bearing the risks associated with the ownership of shares or interest in a particular jurisdiction entails that the regime is not ring-fenced.[98] The same is true here for the Rwandan case.

The conditions to benefit from the measure are fully set out in the published legislation, which makes the measure publicly available, and therefore, transparent. The substantial economic presence requirement is also met since the condition to benefit from the measure is to trade the shares on the capital market, which implies undertaking, managing, and bearing the risks associated with trading on the Rwandan capital market.

This measure, therefore, is concluded to be not harmful. In support of this conclusion, reference can be made to one scholar who stated that '*no one has suggested that there is any requirement to tax capital in order to be non-harmful, so regimes that do not tax capital are certainly within the acceptable parameters*'.[99] So, the Rwandan exemption of the capital gains tax for transfer of shares on the capital market stays unharmful as long as there are no forms of capital that are taxed while other forms are exempted.

Regarding the CIT exemption for companies such as the Development Bank of Rwanda, Agaciro Development Fund Corporate Trust, and Business Development Fund limited, despite granting a lower tax level, it is *prima facie* evident that this measure is not harmful for several reasons. First of all, these are quasi state-owned enterprises whose mandate is primarily to contribute to national development. This, therefore, takes away any doubt about the possibility of ring-fencing, both *de jure* or *de facto*, considering that the three benefiting companies are Rwandan residents. The measure's conditions are also established by law and the nature of the activities of the three entities justifies their economic presence in Rwanda. Therefore, the measure satisfies the requirement in relation to ring-fencing, transparency and substantial economic activity, which, *prima facie*, leads to the conclusion that the measure is not harmful.

From the preceding paragraphs, it becomes apparent that the three exemption regimes, apart from providing a lower level of taxation compared to the generally applicable rate, are not ring-fenced. They are also transparent and meet the economic substance requirement. A combination of all these elements confirms the overall conclusion that none of them is harmful.

[98] CEU, Report on COCG assessment of Slovakia's exemption of capital gains (SK008), 14364/18 ADD 10 FISC 481 ECOFIN 1059, 20/11/2018, p. 1.
[99] Baker (n 30) p. 15.

6.2.4. Profit tax discounts

Profit tax discounts are provided for in article 49(2) of the income tax law. From the standard tax rate of 30%, that article provides for a discount of 2%, 5%, and 10%. In other words, the benefiting taxpayers pay a CIT at a rate of 28%, 25%, and 20%,[100] i.e. the preferential differences of 6.6%, 16.6%, and 33.3%. The reduction in the CIT rate makes up a preferential treatment and is potentially harmful.[101] This means the gateway criterion is met.

Contrary to regimes assessed by the COCG as harmful because of limiting the discounts to transactions carried out with non-residents and not available to domestic transactions,[102] the measure under study applies to all companies listed on the capital market without distinguishing residents from non-residents. The measure is, therefore, *de jure* not ring-fenced. Of the ten companies currently listed on Rwanda Stock Exchange, seven are Rwandan residents while two are east African residents.[103] The latter are also equated to domestic residents in light of article 2(16^0) of the investment law. Thus, as reasoned in the Italian NID regime,[104] this measure is mainly used by residents, which makes it *de facto* not ring-fenced.

The conditions for benefiting from the discount are laid down in the law, which has been published in the official gazette and does not involve any administrative discretion neither at the time of granting the advantage nor when implementing the advantage. This, therefore, makes the measure transparent. The beneficiary must also be listed on the Rwandan Stock Exchange, which ensures the measure meets the economic substance criterion. Thus, the overall evaluation concludes that this measure is not harmful.

The evaluation of the profit tax discounts closes the evaluation of the legislative favorable tax measures. The next sub-section analyzes regulatory and administrative tax practices.

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[100] Income Tax Law (n 75) art. 49(2).
[101] CEU, Report on COCG assessment of Cabo Verde's Incentives for Internationalization (CV004), FISC 444 ECOFIN 1005, 14114/19 ADD 7, 25/11/2019, p. 2; COCG assessment of Vietnam VN005 (n 8) p. 2; CEU, Outcome of proceedings on COCG assessment of Armenia's Reduced tax rate for large exporters (AM001), 12771/18 FISC 391 ECOFIN 870, 04/10/2018, p. 3.
[102] COCG assessment of Maldives MV001 (n 89) p. 5.
[103] Rwanda Stock Exchange, 'Listed companies' <https://rse.rw/product-and-services/Listed-Companies/> accessed 30/06/2021.
[104] COCG assessment of Italy IT019 (n 37) p. 19.

6.3. Analysis of the regulatory and administrative tax practices

As described in chapter three, the concerned practices are the tax rulings, the advance pricing agreements, and the tax settlements. Each of the three is assessed below to determine whether it is harmful and to what extent it is in either case.

6.3.1. Tax rulings

Under Rwandan law, most, if not all, tax rulings have general application and are issued as public rulings. This research has uncovered no tax ruling with an individual application. In addition, the research has found no ruling that meets the gateway criterion. Under the COCG evaluation procedures, if the gateway criterion is not satisfied, there is no interest to evaluate other criteria.[105] That would be the case here. However, there is no restriction to elaborate on other criteria for research purposes. Notwithstanding that, some criteria are automatically dropped out. This is the case with ring-fencing, because if a measure does not provide a low level of taxation, it becomes impossible to target non-residents. The requirement for economic substance also falls away. However, something can be said about transparency.

As noted earlier, the current publication of public rulings through a nationwide media is not sufficient enough to inform the public, and some rulings may remain unknown to the public. In addition, limiting publication to public rulings is also problematic because of the possibility of using the private rulings, hardly known if unpublished, to confer tax benefits. This may be possible if the rulings are negotiated, which spontaneously makes them not transparent.[106] However, these discussions are not sufficient to qualify the public rulings as harmful, as much as there is no evidence that limited publication results in limiting the benefit. Thus, to qualify the tax rulings as part of harmful tax practices would not be tenable. Even so, the harmful aspect in relation to their publication should be noted.

6.3.2. Advance pricing agreements

As far as the Rwandan practice of APAs is concerned, the low application of transfer pricing rules, despite their theoretical existence, leads to a failure to find an APA under Rwandan law

[105] CEU, Report on COCG assessment of Palau under criterion 2.2, 14364/18 ADD 15, FISC 481 ECOFIN 1059, 20/11/2018, p. 4.
[106] OECD 2001 progress report (n 25) p. 5; CEU, on COCG assessment of Switzerland's Circular Number 8 of the Federal Tax Administration on principal structures (principal regime) (CH004), 13205/19, FISC 393, 16/10/2019, p. 4.

that amounts to a low level of taxation. If one does exist, that would have been a starting point for assessing other criteria.

Besides, Rwanda is commended for having initiated the rules on transfer pricing in 2005. Even if theoretical achievements are far from practical achievements, this is at least a positive step as good theories aspire to good practices. Indeed, the COCG regards having or adding a provision on transfer pricing based on the arm's length principle along with compliance with international accounting standards, as part of complying with criterion 4 of the EU Code of Conduct.[107] More than that, the OECD Consolidated Application Note mentions the arm's length principle, set out in article 9 of the OECD Model Tax Convention, as the basis of international transfer pricing principles.[108] In this regard, the Rwandan law is meritorious for having embraced the same principle. This is stated in article 33 of the income tax law on transfer pricing between related persons, which states that '*Related persons involved in controlled transactions must have documents justifying that their prices are applied according to arm's length principle*'.[109] Failure to do so, the transaction as structured by the taxpayer may be disregarded and the RRA reserves the right to adjust the transaction prices with reference to the general rules on transfer pricing.[110] Even though, despite that regulation, the practice is still low and an attempt to assess the (un)harmfulness of APAs in Rwanda remains limited by the lack of practical cases, which compels reservation to decide.

6.3.3. Tax settlements

Regarding the tax settlements, while not many cases amicably settled are in the public domain, one case that can be questioned for its transparency is the case between the RRA and MTN Rwanda Ltd. As described earlier in chapter three, this case was amicably settled and the appeal was withdrawn from the court. The reasons that pushed the RRA to opt for an amicable settlement have not yet been made public. This compels a reserved commentary as full factual details are not available to assess the criteria such as ring-fencing and economic substance requirement. Nevertheless, benefiting from a lower level of taxation is a very likely motive to

[107] OECD 2001 progress report (n 25). 5; CEU, Report on COCG assessment of Jordan's Free zone regime (JO001), 7517/19, FISC 182, 15/03/2019, p. 3; COCG assessment of Cabo Verde CV001 (n 45) p. 3; CEU, Letters seeking commitment FISC 95 ECOFIN 98 (n 3) p. 24; CEU, Outcome of proceedings on COCG assessment of Saint Kitts and Nevis' Fiscal incentive Act regime (KN002), 7425/20 FISC 91, 30/04/2020, p. 3.
[108] OECD CAN (n 25) p. 30.
[109] See also the Ministerial Order No. 003/20/10/TC of 11/12/2020 establishing general rules on transfer pricing, *O.G.* No. 40 of 14/12/2020, art. 8(1).
[110] Income Tax Law (n 75) art. 33(2); Id., art. 7.

have led the taxpayer in this particular case to accept an out of court settlement after winning the case at the first level.

Moreover, the situation itself raises suspicions about the transparency of the transaction. The current situation of amicable tax settlement rules largely shows the potential of being or becoming harmful. Under Rwandan tax procedure law, a taxpayer who is not satisfied with a decision of the tax administration has the right to initiate a court action. For such taxpayers, it is mandatory to make an administrative appeal before initiating the court proceedings.[111] In the author's view, the RRA should consider and exhaust all possible avenues of redress at this stage and if necessary revise its decision. This means that the law provides the tax administration with an opportunity to review and re-examine the correctness and accuracy of its decision. Therefore, the decision from this stage should be regarded as final, on the side of the tax administration, and it should stick to it. Thus, a subsequent revision raises suspicion of favors unless the administrative appeal was not properly conducted or if the tax administration can first admit the mistakes it made in the previous procedures.

Therefore, with reservation due to too few publicly available cases, the practice of tax settlement is substantially questionable, especially with regard to the transparency and the lower level of taxation criteria. The latter criterion is particularly evident in the above case.

An overall analysis of regulatory and administrative practices shows that assessment is limited due to various information that is not publicly known. The lack of information itself is problematic and presents a serious suspicion that the administration may be engaged in discretionary practices. In fact, lack of information means the measures' details are not known to the public, which makes it not transparent. It is worth mentioning that, from the EU Code of Conduct point of view, several non-transparent measures concluded harmful.[112] Of course other criteria are also taken into consideration and, although problematic, a lack of information alone does not automatically mean harmfulness. In some COCG assessments, the lack of complete

[111] Law No. 026/2019 of 18/09/2019 on tax procedures, *O.G.* No. special of 10/10/2019, art. 48.
[112] COCG assessment of Saint Lucia LC002 (n 40) p. 3; CEU, Outcome of proceedings on COCG assessment of Saint Lucia's Free Trade Zones regime (LC003), 7546/19 FISC 192, 15/03/2019, p. 4; COCG assessment of Tunisia TN001 (n 77) p. 5; COCG assessment of Tunisia TN002 (n 72) p. 4; COCG assessment of Panama PA005 (n 45) p. 5; COCG assessment of Korea KR001 (n 77) p. 6; CEU, Outcome of proceedings on COCG assessment of Korea's Free Trade/Economic Zone – FTEZ regime (KR002), 7524/19 FISC 189, 15/03/2019, p. 3; CEU, Outcome of proceedings on COCG assessment of Cook Islands' Development Projects regime (CK006), 7422/20 FISC 88, 30/04/2020, p. 5; COCG assessment of Barbados BB008 (n 50) p. 4; COCG assessment of Armenia AM002 (n 89) p. 5.

information resulted in deferring the assessment to another time.[113] For the cases at hand, the limited information could be construed as constituting harmful tax practices or a cause for deferment. For research purpose, the author preferred going beyond that and provide analytical comments.

Besides favorable tax measures, harmful tax competition is widely associated with the EoI. This appears on the list of OECD factors, but not on the list of EU Code of Conduct. This dichotomy, among other reasons such as the fact that it is not pertaining to a particular measure, but to the whole system, justifies its stand-alone analysis, which is the subject of the next section.

6.4. Quid Rwanda's exchange of information?

The effective EoI criterion is recognized by the EAC draft Code,[114] highlighted among the OECD factors for both tax havens and HPTRs,[115] while the EU Code of Conduct is silent. Even so, the EU takes into consideration the EoI when listing non-cooperative jurisdictions,[116] which indicates its acceptance as a factor to qualify harmful tax competition regimes.

In brief, jurisdictions with harmful tax practices generally have laws and administrative practices that create an environment of secrecy about information relating to the taxpayers who benefit from the preferential tax regime.[117] In essence, this refers to an unwillingness to share information on tax matters, essentially by denying access to banking and other financial information.[118] In such circumstances, secrecy rules circumvent EoI [119] and allow taxpayers to hide information and activities from the tax authorities.[120]

In the matters of harmful tax competition, EoI is an important element. To some extent, the proper EoI is believed to be enough to eliminate harmful tax competition.[121] Its importance was also set in stone when listing non-cooperative jurisdictions. For example, Dominica

[113] COCG assessment of Poland PL006 (n 265) pp. 4-5; COCG assessment of Cyprus CY020 (n 272) p. 22.
[114] EAC Draft Code of Conduct (n 14) art. 5.
[115] OECD 1998 Report (n 10) pp. 22 and 26-30; Joint Committee on Taxation (n 13) p. 18.
[116] CEU, The EU list of non-cooperative jurisdictions for tax purposes (2019/C 176/03), *OJEU*, 22/05/2019, C 176/2.
[117] K van Raad, *Materials on International & EU Tax Law* (13th edn, International Tax Center 2013), p. 1316 and 1319.
[118] Ambrosanio and Caroppo (n 25) p. 689.
[119] OECD CAN (n 25) p. 10.
[120] Samuels and Kolb (n 25) p. 236.
[121] L V Faulhaber, 'The Trouble with Tax Competition: From Practice to Theory' (2018) *Tax L.Rev.* 71(311), p. 333.

appeared on the EU list of non-cooperative jurisdictions because it '*does not apply any automatic exchange of financial information*'.[122] This example, among others, proves to what extent the effective EoI is valued.

Under Rwandan income tax law and investment law, there is no legal provision that explicitly prevents the effective exchange of relevant information with other governments. Nevertheless, the engagement in bilateral or multilateral agreements in relation to EoI is not well developed. Only a very few examples in this respect are available. This is the case of article 26 of the DTA between Rwanda and Belgium, article 25 of the DTA between Rwanda and the Republic of South Africa, article 25 of the DTA between Rwanda and the Bailiwick of Jersey, article 25 of the DTA between Rwanda and Mauritius, and article 27 of the DTA between the EAC Partner States. These provisions set out the EoI in tax matters as part of the parties' obligations.

Separately, but closely related, the OECD Development Centre has recently admitted Rwanda.[123] It is expected that membership in this Centre will help Rwanda to improve many aspects in the area of taxation. In parallel, Rwanda has become a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes.[124] Launched by the OECD as a global inclusive framework for an enhanced EoI for tax purposes,[125] it was initially named the Forum on Harmful Tax Practices with a mandate to monitor and review jurisdictions with preferential tax regimes.[126] In 2009, it was reformed to adopt the current name of Global Forum on Transparency and Exchange of Information for Tax Purposes.[127] Its current aim is to ensure the implementation of the international standards of international cooperation in tax matters, namely the standards of transparency and EoI.[128]

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[122] EU List of non-cooperative jurisdictions 2019 (n 116) C 176/2.
[123] OECD Secretary General letter AG/2019.182.pb to Rwanda Minister of Foreign Affairs and International Cooperation (9/05/2019).
[124] OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes <www.oecd.org/tax/transparency/about-the-global-forum/members/> accessed 24/03/2020.
[125] A Christians and S Shay, 'Assessing BEPS: Origins, Standards, and Responses' (2017) *Cahiers de Droit Fiscal International* 102(A), p. 22.
[126] OECD 2017 Progress Report (n 25) p. 11.
[127] OECD Council Decision, Establishing the Global Forum on Transparency and Exchange of Information for Tax Purposes, C(2009)122/Final of 25/09/2009; J Englisch and A Yevgenyeva, 'The Upgraded Strategy against Harmful Tax Practices under the BEPS Action Plan' (2013) *British L.Rev.* 5, p. 627; A Christians and L van Apeldoorn, 'The OECD Inclusive Framework' (2018) *BFIT*, p. 9.
[128] Boulogne (n 83) p. 11; L A Mello, *Tax Competition and the Case of Bank Secrecy Rules: New Trends in International Tax Law* (SJD Dissertation, Univ.Michigan 2012), p. 44; H J Ault, 'Tax Competition and Tax

In addition, Rwanda is participating in the Induction Program of Global Forum. Launched in 2015 to mentor developing countries in terms of exchange of tax information, one mission of the Induction Program is to '*ensure a rapid and effective global implementation of the standards of transparency and exchange of information for tax purposes*'.[129] Rwanda has been part of this program since 2017, along with other 11 African countries. On 11 August 2021, Rwanda also joined the OECD's Multilateral Convention on Mutual Administrative Assistance in Tax Matters,[130] a Convention developed jointly by the OECD and EU to tackle tax evasion and avoidance.

The above-mentioned accession to the OECD programs shows the good progress Rwanda has made in improving its EoI practices. It is particularly commendable that Rwanda is the first EAC Partner State to join the OECD Development Centre. Rwanda's participation in the Global Forum Induction Program is also commendable. Even more commendable is its accession to Global Forum. Although early to analyze this topic, the progress within this Forum membership indicates a willingness to prioritize the exchange of tax information.

Another positive element about EoI, is the fact that Rwandan law requires companies to submit their annual accounts and tax returns to the RDB's Registrar General Office every year.[131] The same obligation applies to foreign companies operating in Rwanda.[132] Companies are also required to have their financial statements and tax returns audited and certified every year by an independent qualified professional approved and licensed by the RRA.[133] However, the obligation only applies to companies whose annual turnover exceeds 600 million Rwf.[134] The register of companies' shareholders, including their particulars and changes in the last ten years, must also be kept and the public can access it from the Office of the Registrar General.[135] On this point, one may validly argue that keeping the records for ten years is in line with the

Cooperation: A Survey and Reassessment' in J Monsenego and J Bjuvberg (eds), *International Taxation in a Changing Landscape* (Wolters Kluwer 2019), p. 6.

[129] Boulogne, Id., p. 11; OECD Council Decision (n 127) p. 2.

[130] OECD, 'Maldives, Papua New Guinea and Rwanda join multilateral Convention to tackle tax evasion and avoidance' <https://www.oecd.org/tax/exchange-of-tax-information/maldives-papua-new-guinea-and-rwanda-join-multilateral-convention-to-tackle-tax-evasion-and-avoidance.htm> accessed on 14/08/2021.

[131] Law No. 007/2021 of 05/02/2021 governing companies, *O.G.* No. 04 *ter* of 08/02/2021, art. 141-143.

[132] Id., art. 252, 253, and 255.

[133] Income Tax Law (n 75) art. 13(3); Ministerial Order No. 004/19/10/TC of 29/04/2019 determining the annual turnover required for certification of financial statements, *O.G.* No. 18 of 06/05/2019, art. 1(1).

[134] Approximately equivalent to 600,000 USD by August 2021 Central Bank rates reference.

[135] Company Law (n 131) art. 114 and 278.

OECD recommendations to retain them for five years or more as a reasonable period.[136] Similarly, it is worth noting that the OECD generally commends companies' annual general audit requirements and a public register of companies' shareholders, as part of the positive elements in regard to the EoI.[137] In relation to these two points, it is true that Rwanda scores positively when considered from both the legislative and practical perspective.

Furthermore, contrary to Morocco and Antigua and Barbuda that have been considered dissuasive by the OECD assessments for not putting in place regular oversight programs to monitor the compliance of the obligations in relation to companies' ownership and identity information as well as the enforcement powers thereto related,[138] the Rwandan situation in that regard stands quite good. This is substantiated by article 291 of the company law, which permits the Registrar General to seek a court order compelling a company to comply with any requirement in the company law including the company ownership and identification information. The law also empowers the Registrar General to investigate any domestic or foreign company with a branch in Rwanda[139] and if need be the administrative and/or judicial sanctioning regime may apply.[140]

In summary, one would praise Rwanda's efforts in the matters of exchange of tax information. However, considering that most, if not all, initiatives are still in their infancy, it is too early to assess whether Rwanda is effectively engaged in the EoI practices. Even so, a consideration of intent would conclude positively. But notwithstanding all the above discussions, the introduction of a global minimum tax rate may have a significant impact on the situation of Rwanda.

[136] OECD (2011), 'The OECD's Project on Harmful Tax Practices Consolidated Application Note Guidance in Applying the 1998 Report to Preferential Tax Regimes', in *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions*, 2nd edn, OECD Publishing, p. 215.
[137] OECD 1998 Report (n 10) p. 30.
[138] OECD (2014), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Antigua and Barbuda 2014: Phase 2: Implementation of the Standard in Practice, OECD Publishing, pp. 34-35 <http://dx.doi.org/10.1787/9789264217492-en> accessed 21/04/2020; OECD (2016), Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Morocco 2016: Phase 2: Implementation of the Standard in Practice, OECD Publishing, p. 61 <http://dx.doi.org/10.1787/9789264261044-en> accessed 21/04/2020.
[139] Company Law (n 131) art. 292-298.
[140] Id., art. 325-353.

6.5. A tour d'horizon of the OECD's GloBE and its impact on Rwanda

Towards the end of the last decade, new discussions on the global minimum tax rate have emerged in international tax law. In the centre of the discussions are the OECD's Global Anti-Base Erosion (GloBE) Proposal, also known as Pillar Two, and the recent US Proposal on the minimum tax rate.

The US Proposal aims to build a fairer tax system by reducing profit shifting, establishing a level playing field between US MNCs headquartered in the US and those headquartered abroad, and ending the race to the bottom.[141] Though subject of criticisms, the G7 agreement of 5 June 2021 to support the global minimum tax proposal shows that several rich countries may be on the same page as the US on the global minimum tax rate. Moreover, the US proposal is related to the OECD's GloBE proposal in that both aim to introduce a global minimum corporate tax rate to discourage MNCs from shifting their profits to low-tax jurisdictions.

Recognizing the US tax sovereignty to design its tax system, coupled with this book's scope, this section focuses on the GloBE proposal. The section begins with a brief introduction of GloBE and then discusses its potential impact on tax competition. The comments are structured around some reflection questions such as: Will GloBE eliminate both harmful and good tax competition? What impact will the introduction of GloBE have on harmful tax competition in Rwanda? How might GloBE affect Rwanda's approach to tax competition? etc.

Following other works against harmful tax competition, the OECD released several blueprint documents in 2019 on the project to address the tax challenges arising from the digitalization of the economy.[142] These documents include the Program of Work, the Public Consultation Document on GloBE (Pillar Two), the Report on Pillar Two Blueprint, etc.[143] The

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[141] US Department of the Treasury, 'The Made in America Tax Plan', April 2021, p. 1, <https://home.treasury.gov/system/files/136/MadeInAmericaTaxPlan_Report.pdf> accessed 10/05/2021; M F de Wilde, 'The Biden Administration's 'Made in America Tax Plan' through the Eyes of a Dutch tax lawyer', p. 2, <http://dx.doi.org/10.2139/ssrn.3831556> accessed 14/05/2021.

[142] OECD (2019), *Global Anti-Base Erosion Proposal (GloBE) – Pillar Two*, Public consultation document 8 Nov. – 2 Dec. 2019, OECD Publishing, p. 3, <https://www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.pdf>, accessed 03/05/2021.

[143] OECD (2019), *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, OECD Publishing, <https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf> accessed 12/06/2021; OECD (2019), *Addressing the Tax Challenges of the Digitalisation of the Economy*, Public consultation document 13 Feb. - 6 Mar. 2019, <https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf> accessed 12/06/2021; OECD (2020), *Tax Challenges Arising from Digitalisation: Report on Pillar Two Blueprint*, OECD Publishing,

Project developments are underway. On 1 July 2021, the Inclusive Framework, regardless the diversity in interests,[144] reached an agreement on the global minimum tax rate of 15%, while a detailed implementation plan is expected to be published by October 2021, with an expectation to bring Pillar Two into law in 2022 and become effective in 2023.[145] The project is divided into two pillars: Pillar one, which addresses the allocation of taxing rights between jurisdictions, and Pillar Two (GloBE), which adresses the remaining BEPS issues by addressing MNCs profit shifting to low-tax jurisdictions.[146] Pillar Two focuses on two inter-related domestic rules, namely an income inclusion rule and a tax on base eroding payments rule.[147] The two proposed rules have a common element: they target an income or payment that is not taxed or is taxed below a minimum rate.

Indeed, GloBE is explained as broadly aiming to address the remaining BEPS challenges relating to profit shifting to no or low-tax jurisdictions by ensuring that MNCs are taxed at a minimum rate.[148] This can be done by giving home jurisdictions the right to tax back where host

<https://www.oecd-ilibrary.org/docserver/abb4c3d1-en.pdf?expires=1624538476&id=id&accname=guest&checksum=26E30AF2D2928B1E2B41D9FF7F9089AB> accessed 12/06/2021.

[144] R Mason, 'The 2021 Compromise' (2021) *Tax Notes Federal* 172, p. 573.

[145] OECD, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy', p. 1, 4 and 5 <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf> accessed 02/07/2021.

[146] OECD GloBE Public Consultation Document (n 142), p. 3; L Eden, 'Taxing Multinationals: The GloBE Proposal for a Global Minimum Tax' (2020) *Tax Mgt Int'l J.* 49(1), p. 1; Riccardi (n 1) p. 3; Dourado (n 1) p. 153; Joint Committee on Taxation 'US International Tax Policy: Overview and Analysis', JCX-16R-21, 19 April 2021, p. 29, <https://www.jct.gov/publications/2021/jcx-16r-21/> accessed 10/05/2021; N Noked, 'Defense of Primary Taxing Rights' (2021) *Virginia Tax Review* 40(2), p. 344; N Noked, 'From Tax Competition to Subsidy Competition' (2020) *U.Pa.J.Int.lL.*42(2), p. 467; F Heitmüller and I J Mosquera Valderrama, 'Special Economic Zones facing the Challenges of International Taxation: BEPS Action 5, EU Code of Conduct, and the Future' (2021) *JIEL* 24, p. 487; B da Silva, 'Taxing Digital Economy: A Critical View around the GloBE (Pillar Two)' (2020) *FLC* 15(2), p. 113.

[147] OECD, Id., pp. 5-6; Dourado, Id., p. 152; OECD Public consultation document Feb./Mar. 2019 (n 143) p. 25; OECD Programme of Work (n 143) p. 26; ATAF, 'Opinion on the Inclusive Framework Pillar One and Pillar Two proposals to address the tax challenges arising from the digitalisation of the economy' p. 5 <https://events.ataftax.org/index.php?page=documents&func=view&document_id=44> accessed 25/07/2021; M P Devereux, 'The OECD Global Anti-Base Erosion (GloBE) Proposal' (January 2020), p. 1, <https://www.sbs.ox.ac.uk/sites/default/files/2020-02/OECD_GloBE_proposal_report_2020.pdf> accessed 08/06/2021; L Parada, 'Taxing somewhere, no matter where: what is the GLoBE proposal really about' (02/09/2020) <https://mnetax.com/taxing-somewhere-no-matter-where-what-is-the-globe-proposal-really-about-39996>, accessed 02/09/2021.

[148] OECD GloBE Public Consultation Document (n 142), p. 6; OECD Programme of Work, Id., p. 25; OECD (2020), OECD/G20 Inclusive Framework on BEPS Progress Report Jul. 2019 – Jul. 2020, OECD Publishing, p. 57; Riccardi (n 1) p. 11; Heitmüller and Mosquera Valderrama (n 146) p. 487; ESTCFMEI, *Briefing for the Ministers on Taxing the Digital Economy and the Global Tax Debate* (2020), p. 8, <https://au.int/sites/default/files/newsevents/workingdocuments/39572-wd-briefing_paper_on_global_tax_debate_for_1st_extraordinary_stc.pdf> accessed 14/06/2021; European Parliament Resolution of 18 Dec. 2019 on Fair Taxation in a Digitilized and Globalized Economy: BEPS 2.0,

jurisdictions have not sufficiently exercised the primary taxing right or have otherwise taxed below the minimum effective tax rate.[149] This is intended to reduce the interest in profit shifting alongside establishing a floor for tax competition between jurisdictions.[150] However, the focus on the minimum tax rate does not put aside jurisdictions' rights and freedom to determine their own tax regimes, including having low or no CIT.[151] In recognition of this freedom, GloBE adds that jurisdictions should exercise this right and freedom with due regard to other jurisdictions' rights.[152]

The OECD's GloBE is at an early stage. Nevertheless, it has already received support and criticism. On the one hand, there are views that the idea of global minimum tax rate is inadequate and dangerous for developing countries.[153] Although the OECD describes GloBE as a continuation of BEPS, scholars believe that GloBE goes far beyond the original BEPS,[154] which did not see the low-tax rate as *per se* problematic.[155] Scholars also criticize GloBE's potential impact on tax sovereignty and the allocation of taxing rights,[156] alongside describing it as complex to implement,[157] and a hasty political proposal that favors advanced economies and disadvantages emerging economies.[158] Moreover, scholars criticize that GloBE aims at addressing the problems arising from the digitalized economy, but goes beyond that to address broader issues.[159] Furthermore, there is a risk that if GloBE does not become fully global, it will

2019/2901(RSP), *OJEU* (29/06/2021), 2021/C 255/19; A Harpaz, 'Taxation of the Digital Economy: Adapting a Twentieth-Century Tax System to a Twenty-First-Century Economy' (2021) *YaleJInt'lL* 46(1), p. 76.

[149] OECD Programme of Work, Id., p. 6; OECD (2020), OECD/G20 IF BEPS Progress Report, Ibid.; OECD Public consultation document Feb./Mar. 2019 (n 143) p. 24; Noked (n 146) p. 358; Heitmüller and Mosquera Valderrama, Ibid; Noked (n 146) p. 467; Parada (n 147); European Parliament Resolution, Ibid.

[150] OECD GloBE Public Consultation Document (n 142), p. 6; Heitmüller and Mosquera Valderrama, Ibid; Harpaz (n 148) p. 76.

[151] OECD Programme of Work (n 143) p. 25; OECD Public consultation document Feb./Mar. 2019 (n 143) p. 24; Riccardi (n 1) p. 24; Devereux (n 147) p. 14; Eden (n 146) p. 2; P Pistone et al., 'The OECD Public Consultation Document 'Global Anti-Base Erosion (GloBE) Proposal – Pillar Two': An Assessment' (2019), p. 4, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3644238> accessed 09/06/2021; The Taxation Institute of Hong Kong, 'The OECD's Public Consultation Document on Addressing the Tax Challenges of the Digitalisation of the Economy' (2019), p. 2, <https://www.oecd.org/tax/beps/public-comments-received-on-the-possible-solutions-to-the-tax-challenges-of-digitalisation.htm> accessed 12/06/2021.

[152] OECD Programme of Work, Ibid.

[153] Riccardi (n 1) p. 10.

[154] Ibid; Eden (n 146) p. 7; da Silva (n 146) p. 119.

[155] Eden, Ibid.; Devereux (n 147) p. 1 and 6; Riccardi (n 1) p. 11; da Silva, Ibid.; Parada (n 147).

[156] Riccardi, Id., p. 10 and 29; Devereux, Id., p. 2; Noked (n 146) p. 369; da Silva, Id., p. 121 and 123; Harpaz (n 148) p. 77.

[157] Riccardi, Id., p. 10; Noked, Id., p. 368; S Piciotto *et al.*, 'For a Better GLOBE: A Minimum Effective Tax Rate for Multinationals' (2021) *Tax Notes International* 101, p. 864; M Hearson, 'Corporate Tax Negotiations at the OECD: What's at Stake for Developing Countries in 2020?' (2020), ICTD Summary Brief No. 20, pp. 1-2, <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15100/ICTD_SummaryBrief_20_Online.pdf?sequence=3&isAllowed=y> accessed 14/06/2021; Devereux, Id., p. 12; da Silva, Id., p. 140.

[158] Riccardi, Id., p. 4; Piciotto *et al.*, Ibid.

[159] The Taxation Institute of Hong Kong (n 151) p. 1; Noked (n 146) p. 471.

not be able to achieve its goals, and will likely encourage MNCs to relocate their headquarters to jurisdictions that are not party to GloBE.[160] This is probably possible in light of traditional tax sovereignty, a principle that is explicitly recognized by GloBE, which does not mandatorily require Inclusive Framework members to adopt GloBE rules, let alone non-members.[161]

On the other hand, scholars see GloBE as a real global game-changer in corporate taxation[162] that will restore nations' tax sovereignty and limit unilateral uncoordinated actions that enable profit shifting and cause harmful race to the bottom.[163] The global minimum tax rate is also seen as a timely response that will change the behavior of taxpayers and jurisdictions[164] and shield developing countries from pressure to provide inefficient incentives.[165] Although, this understanding is controversial among tax policy stakeholders in developing countries, some of them consider low rates and special regimes relevant for FDI attraction.[166] GloBE is still a blueprint, and it is early to adequately assess it. However, as discussed below, its implementation is likely to affect tax competition, particularly in developing countries such as Rwanda.

6.5.1. Impact of GloBE on tax competition

As mentioned above, GloBE aims to introduce a global minimum tax rate. The mere fact of focusing on the minimum tax rate, which is the key element of tax competition, suffices to predict the impact of GloBE on the global situation of tax competition. Moreover, GloBE will potentially have positive and negative effects on tax revenue and tax treaties.[167] However, opinions on the plausible positive or negative impact of GloBE on tax competition are so far divided.

On the one hand, there is a positive expectation that GloBE will reduce profit shifting and limit harmful tax competition. Indeed, a global minimum tax rate would put a floor to tax

[160] Devereux (n 147) p. 2 and 10.
[161] OECD Statement (n 145) p. 3.
[162] D W Blum, 'The Proposal for a Global Minimum Tax: Comeback of Residence Taxation in the Digital Era?: Comment on Can GILTI + BEAT = GLOBE?' (2019) *Intertax* 47(5), p. 522; Hearson (n 157) pp. 1-2.
[163] OECD Programme of Work (n 143), p. 25; OECD Public consultation document Feb./Mar. 2019 (n 143) p. 24; Devereux (n 147) p. 8.
[164] OECD Programme of Work, Id., p. 26; OECD GloBE Public Consultation Document (n 142), p. 6; Riccardi (n 1) p. 11; Dourado (n 1) p. 154.
[165] OECD Programme of Work, Ibid.; OECD GloBE Public Consultation Document (n 142), p. 7; Hearson (n 157) p. 9.
[166] Heitmüller and Mosquera Valderrama (n 146), p. 481.
[167] Pistone et al. (n 151) p. 5.

competition.[168] However, this could be challenged by the possibility of competition through tax base reduction.

On the other hand, GloBE may affect the economic development of some countries. Developing countries are most at risk, for several reasons. First, there is a risk that GloBE will lead to an unfair redistribution of taxing rights, as a disproportionate share of tax revenues could benefit the richest headquarters countries. Second, most developing countries use low tax rates to attract FDI efficiently. It is obvious that GloBe will affect these policies and developing countries may no longer be able to attract strategic investments.[169] If this happens, GloBE will become a reflection of existing global power structures in which developed countries shape international tax policies tailored to their interests. GloBE also risks concentrating global wealth in the hands of developed economies and increasing the dependence of developing countries. Indeed, as long as the favorable tax measures are not harmful, developing countries should be allowed to use them. Moreover, despite the rationale of GloBE to combat profit shifting, reduce tax competition, and prevent uncoordinated anti-avoidance measures,[170] the design of GloBE appears attractive for capital exporters (residence jurisdictions) but not capital importers (source jurisdictions). In these lenses, GloBE looks negative for developing countries. Moreover, some features of GloBE may be very difficult for developing countries to implement.[171] Thus, despite being an almost-accomplished deal, developing countries, Rwanda included, should be cautious to adopt the GloBE proposal.

Furthermore, there is a risk that GloBE project will have a reverse effect. Indeed, one trigger of the global minimum tax rate is the spillover effects of low-tax policies on other countries in terms of revenue reduction. The target of GloBE is the spillover effect from low-tax jurisdictions, mainly developing and small size jurisdictions, to developed economies. It is unfortunate that the minimum tax rate risks to have the same spillover effect, but in reverse order, i.e. from developed economies to developing economies. Indeed, while high-tax jurisdictions are troubled by the spillover effects of low-tax jurisdictions, with GloBE it will be the other way around: low-tax jurisdictions will be troubled by the policies of high-tax jurisdictions. In other words, GloBE is a simple model of coordinated tax competition through

[168] Noked (n 146) p. 345; da Silva (n 146) p. 120.
[169] The Taxation Institute of Hong Kong (n 151) p. 2.
[170] Parada (n 147).
[171] South Centre, 'Assessment of the Two-Pillar Aproach to Address the Tax Challenges arising from the Digitalization of the Economy: An Outline of Positions Favorable to Developing Countries' (2020) p. 15 <https://www.southcentre.int/wp-content/uploads/2020/12/Assessment-of-the-Two-Pillar-Approach-to-Address-the-Tax-Challenges-Arising-from-the-Digitalization-of-the-Economy-reduced.pdf> accessed 26/07/2021.

which developed countries unnecessarily compete with developing countries. Whether or not that coordinated tax competition is harmful will be a subject of discussion after GloBE is implemented.

With GloBE, there is also a danger that a race to the minimum tax rate will replace a race to the bottom. Indeed, if the OECD expects low-tax jurisdictions to respond by raising domestic effective tax rates,[172] there should be a parallel prediction that high-tax jurisdictions will lower their domestic effective tax rates. In other words, if the 15% minimum tax rate proposal is adopted, there is a risk that GloBE will spark a race to the minimum rate because several jurisdictions have CIT rates higher than the expected global minimum rate. For instance, statutory CIT rates in many African countries vary between 28% and 35%, while the standard CIT rate is 30% in the EAC, with the exception of South Sudan, where it is 35%, and Kenya, which charges 37.5% for non-residents.[173] In that scenario, the global minimum rate may end up becoming the global maximum rate, as the race to the minimum rate risks to have dangerous effects like the race to the bottom.[174]

In brief, if GloBE is successfully implemented, it will limit tax competition.[175] If the limited tax competition is only the bad tax competition, the overall result of GloBE will be an increase in global welfare. However, GloBE will also force countries to abandon their low-tax policies, even if they are based on sound policies to attract real investment that does not result in artificial profit shifting.[176] Thus, given that lower tax levels do not always mean harmful tax competition, GloBE runs the great risk of eliminating not only bad tax competition but also good tax competition.

6.5.2. Impact of GloBE on Rwanda

GloBE aims to be implemented globally. If this goal is achieved, GloBE will affect many countries,[177] and every jurisdiction will be affected in one way or another. Without denying a

[172] Noked (n 146) p. 356.
[173] ATAF (n 147) p. 5; EAC, 'EAC Tax Matrices' <https://www.eac.int/financial/eac-tax-matrices/income-tax-corporates> accessed 28/06/2021.
[174] South Centre (n 171) p. 19; ICRICT, 'Taxing Multinationals: ICRICT calls for an ambitious global minimum tax to stop the harmful race to the bottom' 09/12/2019 <https://www.icrict.com/press-release/2019/12/9/m9fwnyj7krhupqbasqygn9kkx9msai> accessed 26/07/2021.
[175] Hearson (n 157) p. 9.
[176] Noked (n 146) p. 369; Pistone et al. (n 151) p. 5.
[177] N Noked, Id., p. 353.

potential positive impact of GloBE on developed countries, there are several concerns for developing countries, Rwanda included.

The focus on developing countries is due to the fact that GloBE is spearheaded by the G7 and G20, which leads to the assumption that GloBE is being developed primarily in the interest of developed countries. With this assumption, GloBE will chiefly benefit rich countries which at the same time are high-tax countries.[178] This assumption leads to the suggestion that the interests of developed (capital exporters) and developing countries (capital importers) diverge, and so do the benefits of GloBE. Thus, it is likely that the impact of GloBE will be positive on developed countries and negative on emerging countries.

This assumption is based on several factors. First, there is no one size that fits all and the minimum tax rate cannot be a panacea. If GloBE is pushed by capital-exporting countries, home of MNCs, because they believe that GloBE is in their best interest, it does not necessarily mean that GloBE is also in the best interest of developing countries that import capitals and host MNCs.[179] Second, to achieve a relative legitimacy, GloBE has been associated with the Inclusive Framework. However, the interests among the members are certainly divided.[180] Indeed, the participation of developing countries in Inclusive Framework raises skepticisms[181] and is questionable as it does not properly address the concerns of developing countries regarding the allocation of taxing rights.[182] In fact, even if some developing countries participate in Inclusive Framework, their participation is very small, silent, and not equal to others.[183] For example, of the 212 public consultation comments received by the OECD on the GloBE proposal, very few were from developing countries.[184] This weak participation is due to several factors, such as the OECD's fast decision-making process, the complex and highly technical

[178] Mason (n 144) p. 572; S Fung, 'The Questionable Legitimacy of the OECD/G20 BEPS Project' (2017) *ELR* 10(2), p. 80.
[179] Riccardi (n 1) p. 6.
[180] R Mason, 'The Transformation of International Tax' (2020) *The American Journal of International Law* 114(3), p. 383.
[181] S A Rocha, 'The Other Side of BEPS: 'Imperial Taxation' and 'International Tax Imperialism', in S A Rocha and A Christians, *Tax Sovereignty in the BEPS Era* (Wolters Kluwer 2017), p. 183.
[182] I J Mosquera Valderrama, 'Global Tax Governance in the G20 and the OECD: What can be done?' (12/03/2019) <https://globtaxgov.weblog.leidenuniv.nl/2019/03/12/global-tax-governance-in-the-g20-and-the-oecd-what-can-be-done/> accessed 25/07/2021.
[183] 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' (2020), ICTD WP No. 115, p. 3, 7, 12-13, <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15853/ICTD_WP115.pdf?sequence=9> accessed 14/06/2021.
[184] OECD, 'Comments received on public consultation document', <https://www.oecd.org/tax/beps/public-comments-received-on-the-possible-solutions-to-the-tax-challenges-of-digitalisation.htm> accessed 12/06/2021.

intensive discussions, developing countries' limited technical capacity, their lack of financial resources to participate in all activities, the lack of organized caucuses to negotiate common positions, the disjuncture between technical and political aspects, an excessive representation of developed countries versus a limited representation of developing countries, etc.[185] Consequently, developing countries are limited to promote their interests within the Inclusive Framework[186] as their role therein is very weak with voices that are insufficiently heard. Moreover, some developing countries joined Inclusive Framework not because of genuine enthusiasm but because of the EU's blacklisting coercion or a need to benefit from EU technical assistance.[187] Third, GloBE is too complex for developing countries to administer.[188]

With the focus on Rwanda and due to the global nature of tax competition, the adoption of GloBE is likely to influence Rwanda's approach to tax competition. Indeed, if GloBE is successfully implemented, it will likely change the behavior of jurisdictions and taxpayers.[189] However, it should be noted that the change in taxpayers' behavior is not fully granted because the taxpayers' behavior is not only influenced by tax rates, but by several factors, fiscal and non-fiscal.[190] Even though, if that happens, it is obvious that the change in taxpayers' behavior, who may feel discouraged to invest in Rwanda, will lead to a loss of FDI, which will affect the socio-economic performance of the country.

Leaving aside that pessimistic view, there is also an optimistic view. In addressing the BEPS challenges, it is optimistic that Pillar Two may address the BEPS failure to adequately protect developing countries' tax bases from artificial profit shifting.[191] With that in mind, coupled with GloBE's advocacy to shield developing countries from granting inefficient favorable tax measures due to other countries' pressure, Rwanda could benefit from GloBE. This could be through the OECD Induction Program in which Rwanda participates. However, this is subject to a prior assessment of the inefficiency of Rwanda's favorable tax measures.

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[185] Christensen, Hearson, and Randriamanalina, (n 183) p. 7; OECD/G20 IF BEPS Progress Report (n 148) p. 7 and 9; Hearson (n 157) p. 4. South Centre (n 171) p. 10; Mason (n 180) p. 383.
[186] South Centre, Ibid.
[187] Christensen, Hearson, and Randriamanalina, Ibid.; Hearson, Id., p. 3.
[188] Hearson, Id., p. 2.
[189] OECD GloBE Public Consultation Document (n 142), p. 6; OECD Programme of Work, Id., p. 26; Dourado (n 1) p. 154; Riccardi (n 1) p. 11.
[190] Riccardi, Id., p. 25.
[191] ATAF (n 147) p. 4.

Regardless of which view prevails, Rwanda may need to bring its policies in line with GloBE, by either dropping some favorable tax measures or making appropriate adjustments. For example, the logic of GloBE contrasts with the logic of tax sparing clauses in tax treaties[192] and if GloBE is successful, there is a risk that tax sparing clauses will become obsolete. If this happens, Rwanda will have to revise its few existing tax treaties. This will affect, for example, article 24 of the DTA between Rwanda and the UAE, article 23 of the DTA between Rwanda and Mauritius, and article 22 of the DTA between Rwanda and the Bailiwick of Jersey. Moreover, the adoption of the GloBE will inevitably compel developing countries to re-design their tax systems in order to remain attractive while complying with the GloBE. Similar is the case with Rwanda, whose sovereignty will be affected in one way or another. For all these reasons, it is apparent that the adoption of the GloBE will affect the situation of harmful tax competition in Rwanda.

Conclusion of chapter six

The main theme of this chapter was to assess the favorable tax measures available under Rwandan law using a variety of factors that characterize harmful tax practices. The first exercise was to determine the factors that should be used in evaluating the Rwandan regimes. Given the similarities between the EAC draft Code and the EU Code, coupled with the complementary progress made by EU and OECD in regulating harmful tax competition, five criteria were selected. In addition to their relevance, the selected criteria are, in one way or another, common to the EU, OECD and EAC (draft Code). These criteria are the provision of a lower level of taxation, ring-fencing, lack of transparency, lack of economic substance requirement, and compliance with internationally agreed transfer pricing principles.

Each measure identified in chapter three as a legislative favorable tax measure was analyzed in reference to the above criteria to reach a conclusion on whether it is harmful. A similar exercise was then carried out in relation to the regulatory and administrative practices identified as favorable tax measures in chapter three.

The analysis conducted herein has shown that, out of ten legislative measures, two are *prima facie* harmful,[193] six are not harmful,[194] while two measures are not harmful but contains

[192] Heitmüller and Mosquera Valderrama (n 146) p. 488.
[193] 3% PTR and PTR to export investment (see 6.2.1).
[194] Five years tax holidays (see 6.2.2); seven years tax holidays (see 6.2.2); exemption to agricultural products (see 6.2.3); capital gains tax exemption (see 6.2.3); exemptions to the Development Bank of Rwanda, Agaciro

harmful aspects.[195] Regarding the regulatory and administrative tax practices, out of three, one measure was assessed as not harmful but contains a harmful aspect,[196] while two measures[197] could not be assessed due to a lack of sufficient information, which makes them run a risk of harmfulness.

In addition, the Rwandan system was assessed in terms of EoI. This was motivated by the role of EoI in the practice of harmful tax competition and the importance given to it by the OECD, EU, and EAC. It has been shown that this practice is at a low level in Rwanda. Nevertheless, Rwanda has been commended for the steps it has taken to join the OECD Development Centre and the Global Forum. Other practices such as compulsory filling of annual accounts and returns, auditing, and certification of financial statements and tax returns, publication of companies' shareholdings, etc were also praised as adding value to transparency. Therefore, for this factor, the evaluation concluded not harmful pending further advancement. Following that, the chapter then briefly discussed the recently introduced discussions on global minimum tax rates and predicated the impact this could have on tax competition in general and specifically on Rwanda.

The conclusions in this chapter have been reached out using the elements developed by the EU and OECD. A closer look has been on the EAC draft Code too. Nevertheless, and without undermining the norms developed by the EU and OECD, some questions remain unanswered. This becomes even more complicated when one takes a closer look at the discussions on how to distinguish harmful tax practices from the competitiveness of national tax systems. This becomes even more complicated when one looks at the same problem from the general perspective centred on poaching other countries' tax bases, as discussed in 2.4.2. Moreover, that couples with the difficulties raised by the application of the EU Code of Conduct criteria, which looks more like a '*political and diplomatic exercise than a scientific or a judicial one*.[198] The same is also true of the application of the OECD factors. Although the EU and OECD standards make an important and laudable contribution to slowing down harmful tax practices, they have not yet succeeded in completely eliminating these practices. The application of EU and OECD standards to the Rwandan situation has also shown that it is

Development Fund Corporate Trust, and Business Development Fund (see 6.2.3); and profit tax discounts (see 6.2.4).
[195] 0% PTR and 15% PTR (see 6.2.1).
[196] Tax rulings (see 6.3.1).
[197] APAs (see 6.3.2) and tax settlements (see 6.3.3).
[198] Nouwen and Wattel (n 69) p. 934; Nouwen (n 69) p. 20, 107, 109.

possible to extend them to the situation of developing countries, but with limitations. Such limitations are related to the fact that EU and OECD norms have not completely eliminated harmful tax practices in developed countries, let alone in developing countries.

In summary, the chapter concludes that Rwanda is sovereignly engaged in tax competition like other countries. The extent to which Rwanda's tax practices are harmful or not is twofold. On the one hand, Rwanda cannot be said to have harmful tax practices in the absence of pseudo-binding standards, legal or political, which Rwanda is obliged to comply with. Against this approach, it would be useful to ask why EU and OECD standards cannot be relevant to such an analysis and conclusion. Possibly, yes, they can be relevant. However, EU and OECD standards are not universally agreed upon; they are not universally binding, legally nor politically; and Rwanda is not a member of the EU nor OECD. On the other hand however, with reference to existing international norms on harmful tax competition, if used for academic and scientific analysis, the Rwandan law contains some tax measures that amount to harmful tax practices, either entirely or partially. Thus, to build a system free of harmful tax aspects, a variety of possible solutions can be tabled. This is the subject of the next chapter, which is focusing on some proposals to clean up the harmful tax aspects of the Rwandan tax legal system.

7 REMEDIES TOWARDS A NON-HARMFUL TAX SYSTEM

This chapter compiles the proposals to address the issues raised in the previous chapters. It aims to answer one of the focal research questions about the design of a model for Rwanda, which is free from harmful tax practices. The rationale stems from the previous chapter which focused on the analysis of Rwanda's favorable tax measures. The objective was to identify the harmful tax competition issues that may exist under Rwandan law. This chapter offers solutions to the harmful tax aspects identified in the previous chapters. It does so in recognition of the ultimate research objective of legal scholarship, namely 'what' and 'how' the law should be be.[1] It suggests how the provisions on the identified harmful tax aspects should be formulated to eliminate their harmful aspects. Moreover, based on the principle of tax sovereignty, each country remains free to design its tax system as far as internationally accepted standards are not violated.[2] The same approach forms a cornerstone of this chapter, which considers Rwanda to be entirely free to design its tax system as long as it remains within the parameters of internationally accepted principles.

The proposals made in this chapter are two-fold. Some proposals are unilateral while others are multilateral. While unilateral measures can be taken by Rwanda within the framework of its sovereignty, multilateral measures must be taken at the EAC level. The development of multilateral proposals is based on the international nature of harmful tax competition, the responses to which privilege multilateral actions over unilateral action.[3]

This chapter is divided into four sections. The first section focuses on the proposals aimed at refining the Rwandan tax system of harmful tax practices. The aim of this section is to show how Rwanda can remove harmful tax aspects from its system. The second section develops actions that should be taken at the EAC level to close the gap at the Community level.

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[1] S Douma, *Legal Research in International and EU Tax Law* (Kluwer 2014), p. 32.

[2] OECD (1998), *Harmful Tax Competition: An Emerging Global Issue*, OECD Publishing, p. 15; K van Raad, *Materials on International & EU Tax Law* (13th edn, International Tax Center 2013), p. 1312; M Gaffney, 'Competition: More Harm than Good' (1999) *Int'lT.Rev.* 10(1), p. 47.

[3] R S Avi-Yonah, 'Bridging the North/South Divide: International Redistribution and Tax Competition' (2004) *MichJIntlL* 26, p. 387; N Nikolakakis, *The International Legal Ramifications of the OECD's Harmful Tax Competition Crusade* (LL.M Thesis, McGill Univ. 2006), p. 32; P Lampreave, 'Fiscal Competitiveness versus Harmful Tax Competition in the European Union' (2011) *BFIT* 65(6), p. 6; M Nouwen, 'The Gathering Momentum of International and Supranational Action against Aggressive Tax Planning and Harmful Tax Competition: The State of Play of recent Work of the OECD and European Union' (2013) *Euro.Tax.* 53(10), p. 11; M Nouwen, 'The European Code of Conduct Group Becomes Increasingly Important in the Fight against Tax Avoidance: More Openness and Transparency is Necessary' (2017) *Intertax* 45(2), p. 139.

This mainly concerns the draft Code of Conduct. The third section attempts to demystify the understanding of tax competition in the EAC. The fourth section proposes an EAC model against harmful tax competition before the conclusion comes.

7.1. Refining the Rwandan tax system

The proposals in this section have a unilateral character. This means that their adoption and implementation should be done at the national level and does not require agreement with other states, whether at the regional or international level. Although unilateral measures are the easiest to implement, their effectiveness in combating harmful tax competition is challenged. Nevertheless, their implementation is not meaningless, especially in the context of regional integration. In fact, if one state adopts and implements unilateral measures, this can be a starting point to exert political pressure on other states to do the same. Similarly, the pioneer state can serve as a model for other states in the fight against harmful tax competition.

Granted that, the proposals developed here concern adjustments that should be made to correct the identified harmful tax aspects. Once cleaned up, Rwanda's system will appear pristine not only within the EAC but also in the international tax arena.

7.1.1. Proposals on preferential tax rates

With regard to the 0% and 15% PTRs provided for in the investment law, two aspects have been identified as harmful. One aspect is the time frame during which a qualifying taxpayer can benefit from a PTR. In the absence of transparent legislation providing for this time frame, the administration can take discretionary measures in a non-transparent manner to establish a time frame. To avoid such consequences, it is proposed to add a paragraph at the end of Annex I of the investment law reading as follows:

> The preferential CIT rate of zero percent (0%) provided for in this Annex shall be granted annually upon positive review of the factual fulfillment of the conditions thereto pertaining.

A similar paragraph should be added *mutatis mutandis* at the end of Annex IV of the investment law which provides for the preferential CIT rate of 15%. This addition makes it clear that the preferential CIT rate granted in this measure is not open-ended. This would also limit the discretion of the administration, which can either grant a longer period or terminate the benefit. It would also make the measure more transparent and not harmful in any of its aspects.

Similarly, the PTR of 0% needs to determine, or at least make determinable, the level of employment and training to Rwandans that is 'adequate' enough. Since the number of

employees required may depend to a large extent on the company's business activities and the degree to which it uses technology, the proposal is to consider the level of employment adequate, pro rata to the company's overall business and the proportion of the company's business or profits attributable to Rwanda. In this consideration, Annex I (1^0)(b) of the Investment Law should read:

> To provide adequate employment and training to Rwandans pro rata to the company's overall business and the portion of the company's business or profits attributable to Rwanda.

In addition, the pro rata consideration should apply to all categories of employees, i.e senior managers, technical, and support staff. A similar provision should also be added *mutatis mutandis* among the requirements to benefit from a PTR of 15%.

Besides, the preferential CIT rate of 3% on foreign-sourced trading income of a registered investor operating as a global trading or paper trading, pure holding companies, and foreign-sourced royalties of a registered investor operating as an intellectual property company has been criticized as *prima facie* appearing harmful in several aspects including the possibility of attracting paper companies and letter-box companies. Therefore, the recommendation is to make the measure not ring-fenced and emphasize the substantial economic presence requirement. Failure of that, the measure could be abolished. The preferential CIT rates of 25% and 15% given to export investments were also criticized as likely harmful regarding the gateway criterion and ring-fencing criterion 2 alongside the absence of other conditions to measure the satisfaction with other criteria. Thus, it is a recommendation to the legislature to make the measure not ring-fenced and to complete the law and set additional requirements, responding sufficiently to the criteria of transparency, substantial economic presence requirement, and compliance with the OECD rules on profit determination.

7.1.2. Proposals on tax rulings

As mentioned in the previous chapters, the currently available rulings are public. Normally, public rulings raise a few questions regarding their potential harmfulness. Even so, one issue raised is about their methods of publication, which has been shown to be flawed, therefore, in need of improvement. In this context, it is proposed that, in addition to the current publication methods, tax rulings also be published in the official gazette. Therefore, the second paragraph of article 9(1) of the law on tax procedures should be amended to include this element and reads: '*[…] are published in the Official Gazette and through a nationwide media*'. Once worded in

this way, the suspicion linking the tax rulings to the harmful tax practices shall notably be brought to an end. Moreover, both rulings should be published, including the private rulings. If need be, the private rulings can be published in an edited format.

Another concern in this respect is the low use of private rulings. Notwithstanding the fact that they are initiated by an individual taxpayer, the benefits associated with this practice are for both sides. Under current Rwandan tax laws, there is no law prohibiting the use of private rulings. Nevertheless, they are less used in practice. In order to ensure transparency, it is recommended that if it happens to issue a private ruling, it must also be published, if need be in an anonymous form. In addition, further practical details should be laid down to determine the procedure for conducting the private rulings. These details should include elements such as the procedure to request a ruling, the timeframe to be issued, the formats to be used, the information required, and other necessary documents.

7.1.3. Proposals on advance pricing agreements

In Rwanda, APAs are primarily concerned with their practical aspect, which is low compared to their theoretical aspect. The rules governing transfer pricing matters under Rwandan law are largely not applied and have remained ineffective since they were first enacted in 2005. The current income tax law provides the principle that prices in controlled transactions between related parties must be at the arm's length.[4] The law is complemented by a ministerial order that sets out the rules for transaction price adjustments.[5] For effective implementation, it is proposed to improve the administrative technical aspects of transfer pricing practices, such as staff training. This is necessary to ensure that the tax administration is equipped with competent staff who have the required level of skills to deal with the transfer pricing technicalities. Otherwise, transfer pricing rules could remain ineffective for another long time.

7.1.4. Disband tax settlement

As for tax settlements, these are suspected of being harmful. Therefore, their abolition is an ideal solution alongside their replacement by an independent board to review appeals of the cases where taxpayers have not been satisfied with administrative appeal decisions. The proposed Board should be fully independent and its members should have expertise in tax matters. It should be under the responsibility of the ministry of finance, whose minister or a

[4] Law No. 016/2018 of 13/04/2018 establishing taxes on income, *O.G.* No. 16 of 16/04/2018, art. 33(1).
[5] Ministerial Order No. 003/20/10/TC of 11/12/2020 establishing general rules on transfer pricing, *O.G.* No. 40 of 14/12/2020.

representative should chair it. Other members may include representatives of the RRA, the Institute of Certified Public Accountants of Rwanda, Rwanda Bar Association, academia, and Private Sector Federation. Due to the complexity of tax matters and the paucity of tax specialists in Rwanda, the mandate may be for three years, renewable. However, a member should not serve more than two consecutive terms.

Other practical details, including the conditions for admissibility of appeals, procedures, timeframe, decision-making process, and notification of the decision, should be determined by an Order of the Prime Minister. Taking a dispute to this Board should not be mandatory. The taxpayer should have the choice of bringing the dispute directly before the competent court or taking the matter to the Board before initiating the court' proceedings. However, both avenues should not be exercised simultaneously, and the court option should prevail if they are exercised simultaneously.

It is worth noting that a similar, but not the same, institution used to exist under the name of 'Tax Appeals Commission'. This was established by articles 33 to 37 of Law No. 25/2005 of 04/12/2005 on tax procedures. The practical modalities of this Commission were established by the Prime Minister's Order No. 08/03 of 09/05/2007 on the establishment, composition, and functioning of Tax Appeals Commission. This Commission and its procedures were abolished in 2008 by Law No. 74/2008 of 31/12/2008 modifying and complementing the Law No. 25/2005 of 04/12/2005 on tax procedures.

One reason for the abolition was the EAC Customs Management Act requirement to the Partner States to establish tax appeals tribunals to hear appeals against the Commissioner's decisions.[6] The Commission was, therefore, abolished to leave the room for the then created commercial courts to handle commercial matters including tax disputes. The Commission was also criticized for being dominated by the RRA, which was seen as a fruitless procedure to take the matter before almost similar persons.

To be successful, the proposed Board should differ from the disbanded tax appeals commission, especially in terms of composition and independence. The composition of the tax appeals commission has been dominated by the ministry of finance and the RRA.[7] Indeed, apart

[6] EAC, The East African Community Customs Management Act (2004 as amended to date) art. 231.
[7] Prime Minister's Order No. 08/03 of 09/05/2007 on establishment, composition and functioning of the Tax Appeals Commission, *O.G.* No. Special of 10/05/2007, art. 3.

from the representatives of these institutions, the other three members were also appointed by the ministry of finance,[8] which would not be the case with the proposed board, whose members would be scattered in different institutions whose ordinary functions have a significant relation to tax disputes. The proposed composition of the new board also implies full independence, which is different from the disbanded tax appeals commission.

In addition, the proposed Board would alleviate some issues facing the resolution of tax disputes, such as the low expertise of judges in tax matters. The Board could also speed up the process compared to the current delays in the courts due to backlogs and long procedural rules. This Board would not be dominated by the RRA and would be made up of independent members, as in principle the judges should be. Most importantly, the members of the Board would be people with a high degree of expertise and specialization in tax matters.

Besides the above suggestions to clean up the identified harmful aspects of the favorable tax measures, one recommendation can be made to the general system.

7.1.5. Recommendation to join the Inclusive Framework

It is recommended that Rwanda joins Inclusive Framework. Stemming from the OECD/G20 BEPS Project, the framework was designed as an open opportunity to allow countries, especially developing countries, which did not initially participate in the BEPS Project, to participate on an equal footing in its implementation, provided they show interest and committment. Interest and commitment are expressed through an agreement to implement the four minimum standards.[9] Thus, the commitment thus entails a peer review schedule for implementation with the resulting political peer pressure in the event of a negative review.[10] This means that the commitment is not limited to joining Inclusive Framework but also extends to a preparedness to score positively when reviewed for the implementation of the four minimum standards. These are namely Action 5 on countering harmful tax competition more effectively, Action 6 on preventing tax treaty abuse, Action 13 on country-by-country reporting

[8] Ibid.
[9] M Hearson, 'Developing Countries' Role in International Tax Cooperation' (2017), p. 5 <www.g24.org/wp-content/uploads/2017/07/Developing-Countries-Role-in-International-Tax-Cooperation.pdf> accessed on 31/08/2018; UNECA, 'Base Erosion and Profit Shifting in Africa: Reforms to Facilitate Improved Taxation of Multinational Enterprises' (2018) p. 19; H J Ault, 'Tax Competition and Tax Cooperation: A Survey and Reassessment' in J Monsenego and J Bjuvberg (eds), *International Taxation in a Changing Landscape* (Wolters Kluwer 2019), p. 6.
[10] I J Mosquera Valderrama, 'Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism' (2015) *WTJ* 7(3), p. 5.

of corporate financial information, and Action 14 on resolving disputes between states that give rise to double taxation.

In particular, with regard to Action 5 on curbing harmful tax practices, accession to Inclusive Framework would provide Rwanda with important tools to build a system free harmful tax competition aspects. Rwanda coul also gain practical skills in developing defensive measures that can help protect its tax base against the spillover effects of harmful tax competition. It would also be momentous for Rwanda to join other developing countries in fighting together to protect their interests in international tax law making and governance.

At this time, it is commendable that Rwanda has joined the OECD Development Centre. It is equally commendable that Rwanda has taken steps to join the Global Forum. All these show Rwanda's political will to join other countries in the fight against harmful tax practices, among others. To strengthen this aspiration, joining Inclusive Framework would be an added value. Given the political will already expressed on the matter, it is likely that joining Inclusive Framework would not pose many challenges.

Above are the proposals to build a Rwandan tax system that is free from harmful tax competition. These proposals fall within the realm of unilateral actions. Given the international nature of harmful tax competition, the next section develops the proposals that can be undertaken at the EAC level.

7.2. Closing the EAC shortcomings

As argued in chapter five, the EAC is moving towards a market integration, which may, unprecedentedly, make harmful tax competition unmanageable with the current legal instruments. This situation, therefore, calls for pre-emptive actions to prevent potential harmfulness. Moreover, given the international nature of harmful tax competition, international responses are generally more effective than national responses. The OECD noted that and advised that when dealing with a problem which is essentially global in nature, multirateral measures should be adopted.[11] In addition, the OECD noted the importance of international cooperation to avoid the risks that a country may face if it unilaterally eliminates preferential treatment, as this can lead to business activities moving to other countries that continue to offer

[11] OECD 1998 Report (n 2) p. 37.

preferential treatment.[12] This motivates the consideration of going beyond Rwanda to suggest measures that need to be taken at the EAC level.

The EAC commitment to fighting harmful tax competition has been noted by the Community's Legislative Assembly. In 2012, this Assembly noted an expectation that Partner States would sign a Code of Conduct against harmful tax competition in the future.[13] In this context, this sub-section primarily concerns the draft Code of Conduct.

Indeed, the EAC, with reference to EU best practices, has initiated a process that resulted in a draft Code of Conduct against harmful tax competition. Thinking about and drafting this Code represent a commendable effort that should be quickly taken up by the EAC Partner States. However, it is unfortunate that this Code has remained a draft to date. It has neither been adopted nor officially recognized at any EAC level. As a solution, it is proposed to expedite the procedures to finalize and adopt it as soon as possible. The following paragraphs attempt to suggest some modalities for adoption, some corrections that need to be made before its final adoption, and some enforcement mechanisms that should be considered for the effectiveness of the Code.

7.2.1. Modalities for the adoption of the Code of Conduct

Due to the nature of a Code of Conduct, which is not a legally binding instrument but a political document, it is recommended that the Code of Conduct be adopted by the EAC Council. This should be done on the basis of article 14(1) of the EAC Treaty, which describes the Council as the Community's policy organ. In this regard, the Council has the mandate and power to take policy decisions for the efficient and harmonious functioning and development of the Community, as well as to issue regulations, directives, decisions, recommendations, and opinions.[14]

Given the seriousness of tax competition, it is proposed that the Code of Conduct be adopted as a directive. In other words, to mitigate possible resistance, the Code should specify the objective to be achieved by all EAC Partner States and leave each Partner free to choose the form and method of transposing the directive into its national laws.

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[12] Id., p. 38; B Dickinson and N Nersesyan, OECD Tax and Development: Principles to Enhance the Transparency and Governance of Tax Incentives for Investment in Developing Countries, p. 4 <www.oecd.org/ctp/tax-global/transparency-and-governance-principles.pdf> accessed 23/04/2020.

[13] EAC, 2nd Meeting of the 1st Session of the 3rd East African Legislative Assembly, Oral Answers to Priority Questions, Question: EALA/PQ/OA/3/06/2012, Nairobi, 13/09/2012, p. 12.

[14] Treaty for the Establishment of the East African Community (As amended to date), art. 14(3)(a) & (d) and 16.

The choice about the legal nature of the Code is an important element, as the legal nature of an instrument impacts its effects, forces, implementation mechanisms, and organs. Thus, if the Code of Conduct against harmful tax competition in the EAC is adopted as a directive, it becomes a legally binding instrument and constitutes a hard law. With this nature, failure to comply with it shall call for sanctions along with a possibility of taking the matter to the EACJ for judgment. In contrast, if the Code is adopted as a non-legally binding instrument, it shall be part of soft law, the enforcement of which depends only on political peer pressure from the Partner States. In this case, the EACJ has *prima facie* no jurisdiction to intervene in case of non-compliance.

Thus, comparing the two, it is proposed that the Code be adopted as a Directive, which can easily lead to a robust enforcement mechanism before the EACJ. Non-compliance, which is likely to occur, would also invoke the liability of the defaulting state and expose it to sanctions. This would also close the loophole of low political will in the EAC that may make the Code less effective. Adopting the Code as a directive will also re-emphasize the sovereignty of the EAC Partner States in tax matters. In light of this, Partner States will feel less infringed on their sovereignty, which may increase their support, and thus, increase the Code's political acceptance and influence which are necessary for its success. However, a number of elements still need to be fine-tuned before the Code is adopted.

7.2.2. Salient corrections before adoption

Before it is adopted, some provisions of the draft Code need to be corrected. This applies to article 1(d) and (f), which loosely define harmful tax competition and harmful tax practices as two separate phenomena. Here, it is proposed that harmful tax competition and harmful tax practices should not be separated. Rather the two should be used as synonymous and interchangeable. Similarly, it is proposed to define tax competition as a generally accepted phenomenon, in contrast to harmful tax competition, which is generally not accepted. Besides the need to simplify the definition of tax competition, this can be defined as:

> Provision of special tax measures in the context of a state's sovereign right to establish a fair national tax system that is investment-friendly by lowering the tax burden through minimizing the tax rate and/or tax base.

In contrast, harmful tax competition can be defined as *prima facie* referring to:

> A situation of practices that go beyond building a just national tax system that is designed to attract genuine investment, to set unfair channels that intentionally erode the tax bases

> of other jurisdictions, while leaving the national tax base unaffected, and without a proportional corresponding economic activity.

Another salient correction concerns article 3 of the draft Code on standstill and rollback clauses. The second paragraph of this article requires EAC Partner States to roll back, as soon as possible, the legal provisions and practices that constitute harmful tax practices. To ensure the effectiveness of the Code, it is better to propose a timeframe of five years from the date of publication in Community Gazette for Partner States to comply with the rollback clause. Otherwise, the term 'as soon as possible' is ambigous and Partner States may deliberately feign taking a long time to comply with the Code. After the initial five-year period, the Committee of Experts[15] should take over the management of harmful tax competition matters, including a review of national laws and practices relating to harmful tax competition.

The timeframe of five years is reasonable considering that all EAC Partner States are developing countries. In fact, a shorter period than five years would be ideal, considering the negative effects of harmful tax competition. However, as noted by the Council of the EU, a relatively longer period is necessary for developing countries to deal with harmful tax competition. Indeed, the Council noted that:

> Certain developing countries should be given more time to reform their harmful preferential tax regimes covering manufacturing activities and similar non-highly mobile activities considering the heavier economic impact of these reforms on such countries.[16]

Moreover, it is even the COCG's practice to grant an extended deadline when there are genuine institutional or legal impediments to compliance.[17] Thus, to avoid the negative consequences that could occur with a shorter deadline, the five-year period is reasonable for EAC Partner States to roll back harmful tax practices.

In the same vein, the second paragraph of article 7 of the draft Code advises that where a Partner State's regime permits negotiability of tax rates and bases, it should be reviewed. Here,

[15] Draft Code of Conduct against Harmful Tax Competition in the East African Community, art. 20(1).
[16] CEU, The revised EU list of non-cooperative jurisdictions for tax purposes (Council conclusions of 12/03/2019), 7441/19 FISC 169 ECOFIN 297, 12/03/2019, p. 3; CEU, Report on COCG assessment of Costa Rica's manufacturing activities under the Free Zones regime (CR002), 9652/19 ADD 8, FISC 274 ECOFIN 515, 27/05/2019, p. 2.
[17] CEU, Report on COCG assessment of Switzerland's Cantonal administrative company status (auxiliary company) regime (CH001), 13196/19, FISC 390, 16/10/2019, p. 2; CEU, Report on COCG assessment of Switzerland's Cantonal mixed company status regime (CH002), 13202/19, FISC 391, 16/10/2019, p. 2; CEU, Report on COCG assessment of Switzerland's Cantonal holding company status regime (CH003), 13203/19, FISC 392, 16/10/2019, p. 2.

the term 'advises' is not as explicit as an obligation to eliminate such practice. For the sake of clarity, it is therefore proposed to replace the term 'advise' by a term that implies a direct obligation to eliminate such a practice, such as 'terminate', 'eliminate', 'discontinue', or 'abolish'. The second paragraph of article 7 should, therefore, read as follows: '*Where such a regime may exist, it should be terminated in order to eliminate the harmful tax practices*'.

In order to increase transparency, article 11 of the draft Code on advance tax rulings should add that all advance tax rulings must be published in the Official Gazette to take effect. Publication in the official gazette is seen as a way of informing the public of the existence of such a ruling, which increases transparency as part of the fundamental principles governing the Community,[18] besides being internationally accepted as a tool to curb harmful tax practices.

Moreover, the solution provided for in article 12(4)(a) of the draft Code is disappointing. Under this provision, if it is found that a government is offering state aid or subsidy amounting to harmful tax competition, other Partner States may decide to grant similar aid or subsidy. This should not be a solution and would be seen as legalizing abuses. In fact, once the Code is adopted, any Partner State that may venture to offer aid or subsidies that amount to harmful tax competition will be guilty of malpractice. Therefore, once proven, the solution should not be to do the same, i.e. to misconduct, but rather to stop the activity that constitutes the misconduct. Therefore, it is proposed that this paragraph be deleted before adopting the Code and keep the paragraph that requires the government to review its policy by abolishing or amending it once proven to be harmful.[19]

Still, on the proposals of the changes that must be made before the adoption of the draft Code, article 17(3) contains an idea of considering as exceptions some practices that can normally be considered harmful but be tolerated. These concern the measures used to promote the economic development of particularly disadvantaged regions. It is suggested that disadvantaged sectors be added to this provision. More than that, like for the EU Code of Conduct, it should be made clear in both cases that the support must be proportionate and targeted at its aim.[20] Thus, the first line of article 17(3) would read as follows: '*Insofar as the*

[18] EAC Treaty (n 14) art. 6(d).
[19] EAC draft Code of Conduct (n 15) art. 12(4)(b).
[20] CEU, Report on COCG assessment of Vietnam's Disadvantaged areas regime (VN005), 14114/19 ADD 10 FISC 444 ECOFIN 1005, 25/11/2019, p. 3; K Dirix, 'Harmful Tax Competition: Six Belgian Tax Incentives under the Microscope' (2013) *EC T.Rev.* 5, p. 236; M F Nouwen, *Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition* (Ph.D Thesis, UVA 2020), p. 150.

tax measures serve to promote the economic development of particularly disadvantaged regions or particularly disadvantaged economic sectors in a proportionate manner, […]'. The proposals here are: first to add explicitly the terms 'disadvantaged' and 'proportionate' and, second, to include not only disadvantaged regions but also disadvantaged economic sectors.

Still with respect to adjustments, the Code's scope *ratione materiae* in its current draft is too vague. This is set in article 2(1) which states that the Code applies to '*each tax of every description collected by the Revenue Authority of each Partner State*'. Not only vague, but the rationale for applying the Code to any tax is problematic. This is because some tax bases are considerably less mobile and have very little connection to harmful tax practices. This is the case, for example, with tax on immovable properties where the possibility to move from one jurisdiction to another is practically very limited. Thus, given the relevance of business taxation and its potential to fall into the trap of harmful tax competition, as well as the fact that it has so far been the most mobile compared to other taxes such as consumption, labor, and property taxation, the Code's scope of application *ratione materiae* should be limited to business taxation only.

Similarly, the Code should add that it applies to both legislative provisions and administrative practices. This precision will clarify more the scope of the concerned instruments and practices. Thus, article 2(1) of the draft Code should be worded as follows:

> Without prejudice to Partner States' tax sovereignty, this Code of Conduct applies to business harmful tax competition measures embodied in laws, regulations, or administrative practices of a Partner State.

Moreover, in order to avoid any kind of ambiguity, the Code should set out the criteria against which harmful tax practices should be assessed. These criteria should be enumerated in one article, instead of having them scattered in different articles. In the same vein, ring-fencing and the economic substance requirement should be explicitly enumerated among the criteria for determining harmful tax competition. Besides, the above-mentioned corrections cannot be effective without effective enforcement mechanisms, which is the subject of the next sub-section.

7.2.3. Proposals on enforcement mechanisms

Enforcement mechanisms constitute an important aspect regarding the Code of Conduct. Indeed, enforcement mechanisms are important to ensure that the Code serves the rationale of its adoption, as it would be irrelevant to adopt a Code that is not followed. Therefore, the organs

responsible for enforcing the Code and the summary of enforcement procedures should be clearly defined.

Concerning the enforcement organs, it is proposed to have enforcement at two levels, namely the Committee of Experts and the EACJ. As for the Committee of Experts, this is proposed in the draft Code. Nevertheless, some relevant elements are missing, such as the composition profile and the complementarity between the Committee and the EACJ.

Regarding the composition profile, the Committee should be a technical committee, acting as an EAC watchdog on issues of harmful tax competition. For this reason, its members should have a high level of expertise in tax competition. Therefore, calling the committee a 'Committee of Experts' would be ideal. Other points proposed in the draft Code are concurred with, in particular the representation of each Partner State. What is needed here is to emphasize the profile of the Committee as a technical and not a political committee. Avoiding the political profile should prevent political bias and considerations that could influence the assessment of the measures' harmfulness. Requiring expertise would also help ensure the most objectively reliable results possible, which would add value to the effectiveness of the Code.

Referring a measure to the Committee should be left as open as possible. This should include the possibility for the Committee itself to decide *proprio motu* on evaluating a measure in any Partner State. Referral should also be open to Partner States, the EAC Council, and any interested physical or moral person. The last opportunity would allow NGOs active in tax competition matters, to access the Committee and the EACJ. However, residence in the EAC should be the prerequisite in order to limit possible interference with the sovereignty of EAC Partner States.

The procedure should be divided into different stages. These include the identification stage, which consists of targeting a particular measure as potentially harmful. This will be done by the Committee, a Partner State, the EAC Council, and any interested physical or legal person residing in the EAC. The identification claim shall be submitted to the Committee of Experts for further consideration. The Committee shall conduct a preliminary procedure to examine the admissibility of the claim and the measure's potential harmfulness. If the outcome is positive, the Committee shall notify the concerned state and invites it to submit its observations. If need be, discussions may also be held between the Committee and the representatives of the concerned state. The Committee shall then decide whether the measure in question is harmful

or has harmful aspects and, if so, make recommendations for further action. At this level, a disagreement on the Committee's outcome may be referred to the EACJ for a final binding judgment. Access to the EACJ in this respect should be the same as access to the Committee of Experts.

In light of the above proposals, their adoption and implementation may play a role in managing tax competition in the EAC. Nevertheless, limited understanding of harmful tax competition can be a handicap. To overcome this, a demystification of some features at Community level is needed.

7.3. Demystifying the myth

Currently, there is a myth in the EAC that tax competition is a bad thing. This stems from a low level of awareness of harmful tax competition matters in the EAC. The lack of awareness is most evident in the confusion between tax competition *per se* and harmful tax competition. Moreover, a number of available documents on tax competition in the EAC automatically condemn PTRs as harmful tax competition, which is not really correct.

Even the draft Code of Conduct falls into the same trap. This is evident in some of its articles, such as article 1(d) which defines harmful tax competition as resulting from '*preferential tax regimes that offer tax advantages to particular entities at the detriment of other entities operating within the same country or other countries thereby putting the other entities in a less competitive position*'.[21] This definition focuses on the provision of PTRs without referring to other elements of harmful tax competition, such as ring-fencing, lack of transparency, lack of economic substance requirement, and non-compliance with internationally agreed principles on transfer pricing. Equally confusing, article 1(d) and (f) of the draft Code consider harmful tax competition and harmful tax practices as two separate phenomena, which is not really the case.

The same is true for article 13 of the draft Code on effective tax rates. This article lists several mechanisms that can be used to eliminate harmful tax practices in the EAC. Examples include harmonization of VAT, zero-rated regimes, exempted transactions, tax bases, tax incentives, treatment of losses (loss carry forward), excise taxes, and alignment of tax administration procedures.[22] It is obvious that most of the mechanisms proposed in this article

[21] EAC Draft Code of Conduct (n 15) art. 1(d).
[22] Id., art. 13(2) and (3).

have nothing to do with harmful tax competition. To overcome this, there is a need to develop awareness of harmful tax competition among EAC citizens,[23] coupled with the development of expertise on harmful tax competition in the EAC. This can be done through capacity building programs, including but not limited to organizing training, conferences, seminars, and other scholarly activities on tax competition issues. To operationalize all the suggestions mentioned earlier, an overall recommendation is to adopt an EAC model against harmful tax competition.

7.4. Developing an EAC model against harmful tax competition

Without underestimating the relevance of EU and OECD standards in curbing harmful tax competition, chapter four section five of this book identified some drawbacks of their application in developing countries. It therefore becomes necessary to reflect on the possibility of a model that can better serve developing countries. This section confirms the need for a regional standard instead of borrowing from the EU and OECD standards, which may be less applicable and less beneficial. The section also explores the feasibility of developing a regional model with standards of harmful tax competition in the EAC and develops recommendations on which the model can be built to ensure it fits the context and needs of the EAC.

Without undermining the need for regional standards, it is worth noting that the need does not preclude the possible lessons that developing countries can learn from EU and OECD standards. One, chapter six of this book clearly shows how possible EU and OECD standards can be used to assess regimes outside the EU and OECD. However, as mentioned in the conclusion of chapter six, this possibility should be taken with limitations. For instance, if developing countries purely adopt the EU and OECD standards which specifically aim to rule out profit shifting, and other forms of aggressive tax planning, they may risk to unnecessarily lose FDI which is the main concern of developing countries in tax competition. Two, the development and implementation of EU and OECD standards have been positive for their members. Even if difficult to apply them to developing countries, they can learn from the EU and OECD standards and develop their own standards without necessarily starting from scratch. Three, if the EU and OECD standards have achieved positive results for their members, it is an encouragement to developing countries that if they develop their standards, they can also achieve positive results. Four, developing countries can learn from the EU and OECD,

[23] Kambuni, 'AAI & TJN-Africa Tax Competition Study: Key Findings, Highlights of Successes and Challenges, and Recommendations', in M Mukuna, 'Regional Policy Round Table: Harmful Tax Competition in East Africa: A Race to the Bottom' (2011) TJN-Africa & ActionAid, p. 9.

particularly the definitional and interpretive elements of the criteria to determine the harmfulness of a regime, the functioning of the monitoring body, etc.

However, in view of the demerits of EU and OECD standards discussed in the fifth section of chapter four, it would be untenable to think that pure adoption of them by developing countries is feasible. Indeed, apart from the drawbacks, the EU and OECD standards have not been adopted as binding rules, rather as soft rules. Yet, low tax morale and compliance in developing countries may challenge successful implementation of soft rules, such as the EU and OECD standards against harmful tax competition. Thus, the feasibility for developing countries to purely adopt the EU and OECD is limited.

In studying the feasibility of adoption by developing countries of standards developed by the EU and OECD, it may be relevant to ask whether developing countries can benefit from implementing the EU and OECD standards. In the author's view, the answer is negative. This is because, even though the EU and OECD have have made considerable efforts to curb harmful tax competition, which have produced good results in their territories, absolute application of their standards may not benefit developing countries because of the demerits associated thereto. A question that arises from this would be, 'what can be done then?' One possible answer is for developing countries to develop their own standards that fit the context and meet their real needs. Part of implementing this advice is to design developing countries' standards through regional organizations. In this regard, a model against harmful tax competition in the EAC can be an example.

Indeed, the global nature of harmful tax competition compels global cooperation to curb the spread of harmful tax competition. On several occasions, the EAC Partner States have expressed their willingness to combat harmful tax competition.[24] The EAC has even reached the stage of drafting a Code of conduct against harmful tax competition. In view of the discussions in section two of this chapter, the remaining process is to adopt the draft code after correcting the loopholes and errors identified in it.

Since no other regional organization of developing countries has standards against harmful tax competition comparable to those of the EU and OECD, it is likely that the EAC model will be followed by other developing countries. Indeed, being in a similar situation

[24] See for instance EAC, 2nd Meeting of the 1st Session of the 3rd East African Legislative Assembly, Oral Answers to Priority Questions, Question: EALA/PQ/OA/3/06/2012, Nairobi, 13/09/2012, pp. 10-11; P Abbott et al., 'East African Taxation Project: Rwanda Country Case Study' (2011) IPAR, p. 14.

(capital-importing) may justify the preference for the EAC model over the EU and OECD models (capital-exporting). However, for this expectation to become realistic, it is necessary to think about recommendations on how to build regional standards that fit the context and needs of the region.

In that regard, the first concern is to determine the context and the needs of the EAC, to which the model should respond. Contextually, the EAC partner states are all developing countries and capital importers. In this regard, the needs of the EAC can be summarized as the need to attract FDI, as one of the ways to promote development and economic growth. However, this should be done without engaging in harmful tax competition. Unlike the EU and OECD where the focus of tax competition is on profit shifting, the EAC concern in tax competition is about the attraction of FDI. In other words, when EAC members engage in strategic uncoordinated FDI attraction, they end up harming each other. Thus, without underestimating a variety of benefits associated with the presence of MNCs, when developing countries compete by lowering the tax burden on MNCs, it becomes harmful as it does not help them to have MNCs that do not pay taxes in host countries. Moreover, some preferential regimes aimed at attracting FDI should be tolerated, even if harmful. These are, for example, the regimes that promote education, health, exports, and other public interest sectors of similar objectives. These sectors are of particular importance to developing countries. In fact, developing countries cannot develop with poor education and health systems as they cannot develop if they import more than they export. There should also be an emphasis on the substantial economic presence requirement concretized by the provision of employment to nationals, plants and building for manufacturing activities, etc. All that being said, an ideal EAC model should encourage FDI attraction while curbing harmful tax competition from the perspective of both developing and developed countries.

Furthermore, even if possible to draw some features of the EU and OECD standards, a well-designed model for developing countries should reflect the particular realities of developing countries. For example, to respond to the challenge of low technical capacity of human resources in developing countries, the model should be easy to understand and implement. The model should also take into account the potential difficulties that EAC Partner States, as developing countries, may face in implementing the standards. The model should also provide for a sufficient period of time to rule out existing harmful measures. The model should

also establish strategic mechanisms to ensure a high-level of compliance and provide for compliance monitoring mechanisms.

The model should also address the main concern of developing countries, namely attracting FDI while discouraging profit shifting. In this way, the model should not conflict with either the interests of developing countries or the interests of developed countries. In other words, the ideal model should be able to attract FDI but not at the expense of any other country's tax base. The Model should also adequately protect the base of EAC Partner States by controlling base eroding payments such as excessive interest payments, management fees, royalties and service fees paid from an EAC Partner State to a related party in a no or low tax jurisdiction. Taking all these elements into account, Annex II provides a proposal for an EAC Model Code of Conduct against harmful tax competition.

Conclusion of chapter seven

The content of this chapter followed the trends of chapter six. It would have been futile to point out the problems without proposing the solutions. This was the rationale and focus of this chapter which attempted to suggest measures that should be taken as part of eliminating harmful tax practices from Rwanda's tax system.

Suggestions were made on how to eliminate the identified harmful tax measures or harmful aspects. This means that the measure in question should either be abolished or retained but refined to eliminate the harmful aspect. In other words, for a measure that is completely harmful, the remedy is to eliminate it. This concerned the 3% PTR on foreign-sourced income and pure holdings that should be not ring-fenced and emphasize the substantial economic presence requirement, failing which it should be abolished. The same conclusion holds for the PTRs on export investments that should be not ring-fenced in addition to setting additional requirements regarding transparency, substantial economic presence, and internationally accepted principles on profit determination.

For the measures that are partially harmful, a refinement would be sufficient to save the measure from harmful tax competition. This applies to the 0% and 15% PTRs, tax rulings, and transfer pricing practices. It was also proposed to dissolve the practice of tax settlement and replace it with an independent board of experts. In addition, it was recommended that Rwanda joins the Inclusive Framework. This recommendation is in addition to other steps that Rwanda has taken such as joining the OECD Development Centre and the Global Forum.

In consideration of the international nature of harmful tax competition, Rwanda alone, acting individually, cannot successfully address harmful tax practices in the region. For this reason, to complement the unilateral measures, a number of other measures have been proposed to be implemented at the EAC level. The primary concern was the draft Code of Conduct. It was recommended that the Code be adopted as soon as possible in order to bring discipline to the EAC Partner States with regard to tax competition. Suggestions were also made on the modalities of adoption.

The key element here was the recommendation to the EAC Council to adopt the Code of Conduct as a Directive. Even so, several corrections are necessary before adoption, including the establishment of a timeframe for compliance with the Code's rollback clause, the publication of tax rulings in the official gazette, and the inclusion of disadvantaged economic sectors along with disadvantaged regions as cases of tolerable harmful tax practices. Appropriate definitions of tax competition versus harmful tax competition were also proposed.

Suggestions on enforcement mechanisms were also made. In this context, the establishment of a Committee of Experts to act as a watchdog on harmful tax practices in the EAC was proposed. It was suggested that a measure could be referred to this Committee either by itself *proprio motu*, or by the Council, a Partner State, or any interested physical or legal person residing in the EAC. The procedure to assess a measure was also proposed, the final stage in this procedure being the EACJ judgment on a referral by an interested person in the event of dissatisfaction with the decision of the Committee.

All these proposals, once implemented, would significantly change the situation of tax competition in the EAC. However, the low level of awareness of harmful tax competition in the EAC was mentioned as a handicap. Therefore, one suggestion to overcome this is to increase technical awareness and understanding of tax competition through training, conferences, seminars, and other scholarly activities.

In conclusion, all the suggestions developed here are practically implementable. Therefore, the author recommends that the Rwandan legislature and the EAC take them up. However, this should be done cautiously bearing in mind that tax competition that attracts genuine investment is not problematic while tax competition that unfairly erodes the tax bases of other countries is harmful. Doing so, developing countries should also be mindful of FDI

attraction as their main concern. These are the concluding remarks of the current chapter. The general conclusion is presented in the next chapter.

8 CONCLUDING REMARKS

The objective of this study was to examine Rwanda's tax competition practices in the context of other EAC countries to determine whether Rwanda is within the parameters of internationally accepted practices. It identified Rwanda's favorable tax measures and evaluated them from the perspective of EAC law, complemented by EU and OECD criteria. Although not yet adopted, the draft Code of Conduct was extensively reviewed. Two main reasons motivated the use of the EU and OECD criteria. First, the assessment of Rwanda's tax system should ideally be based on the EAC criteria. Unfortunately, the EAC has not yet established criteria to identify harmful tax practices, a phenomenon that is poorly addressed in the Community. Second, the EU and the OECD have so far been praised internationally for their efforts in the fight against harmful tax competition. Moreover, the criteria they have established have not only been exported beyond their own territories, but they have also reached a level of best practice and qualify as international soft law. The standardized criteria developed by these two leading actors in curbing harmful tax competition have been extensively used to answer the four research questions addressed in this book.

By way of review, the first research question related to the current state of affairs regarding favorable tax measures in Rwanda. The second research question analyzed the conventional benchmarks that can be used to identify harmful tax practices in Rwanda. The third research question assessed the current favorable tax measures in Rwanda. The fourth research question explored suggestions that can be developed to protect Rwanda from harmful tax practices.

These research questions were aimed at the primary objective of the study: to examine Rwanda's situation in relation to harmful tax practices in the context of other EAC Partner States. More specifically, the purpose was to determine whether Rwanda's tax competition falls within internationally acceptable parameters. To this end, four specific objectives were elaborated: (a) to explore the current state of Rwandan favorable tax measures; (b) to identify the conventional benchmarks that can be used to identify Rwandan harmful tax practices; (c) to assess the harmfulness of currently available Rwandan favorable tax measures; and (d) to determine the proposals that can be developed to protect Rwanda from harmful tax practices.

The preparation of this book was mainly doctrinal. This involved the consultation, study, and analysis of primary and secondary materials relating to the subject of the book. The primary materials mainly consulted are the 1997 EU Code of Conduct on business taxation, the 1998 OECD Report on harmful tax competition, the OECD Progress reports, the EAC draft Code of Conduct, the COCG assessment reports, the Rwandan income tax law, and the Rwandan investment law. Secondary consulted materials included a wide range of literature on the subject of the book.

This final (eighth) chapter provides a general conclusion and is divided into five sections. The first section provides an overview of the book as a whole, the second section highlights the main findings, while the third section presents the main recommendations. The fourth section highlights the limitations and areas for future research, and the fifth section presents the main contributions of the study.

8.1. Book overview

This book was divided into eight chapters. The first chapter introduced the book. It did so by justifying the main reasons for conducting the research and why it was necessary. This is mainly due to the global nature of tax competition coupled with the paucity of legal research on the situation of Rwanda in particular and the EAC in general as far as harmful tax practices are concerned. After that, the first chapter summarized the context in which the research was conducted. Emphasis was placed not only on the presentation of Rwanda and its legal and taxation system, but also on the reasons for choosing the EAC among other regional integrations to which Rwanda belongs. Similarly, the relevance of the reference to EU law and OECD instruments was explained. This was followed by the problem statement, key research questions, and research objectives. The first chapter also highlighted the research output and scope, the societal and scientific relevance, research methodology, and an overview of the structure of the book.

The second chapter covered a general panorama of tax competition. In this chapter, the conceptual and historical framework of tax competition was discussed. To this end, various definitions were considered and two historical backgrounds of tax competition were discussed, namely the natural background as opposed to the retaliation background. To better understand tax competition, the impact of globalization on tax competition was highlighted. Then, the main principles underlying the field of tax competition, mainly sovereignty, and especially states' fiscal sovereignty, were examined. This was followed by an elaboration on the vicious circle

between tax sovereignty and tax competition. To show the practices of tax competition, the chapter explained that tax competition is not only global in nature, but also a global issue.

Then, the normative perspectives of tax competition were distinguished from the economic perspectives. In this context, two economic schools of thought that underlie economic studies on tax competition were highlighted, namely the race to public poverty school of thought and the taming of the Leviathan school of thought. From a normative perspective, the correlation between tax competition and regional integration was elaborated and the development of international standards on this issue was highlighted. Recognizing the existence of both positive and negative tax competition, the second chapter ends with an attempt to identify the boundary between the two. This was done through three themes: why it is needed, what the boundaries are, and what is the main concern of lawyers in the area of tax competition. Notwithstanding the highlights made in this chapter, the distinction between bad and good tax competition is largely based on the EU and OECD standards. On this point, it is important to emphasize that the EU and OECD standards change their weight from time to time. That makes bad and good tax competition dynamic concepts, whose controversial discussions are not likely to end soon.

Following second chapter, the third chapter consisted of mapping favorable tax measures under Rwandan law. To this end, the first step was to identify the benchmarks that can be used to determine the qualifying criteria. In the absence of criteria set at the EAC level, and with reference to the EU and OECD criteria, two benchmarking guidelines were identified to determine favorable tax measures. These are the derogation from the generally applicable tax rates or tax bases, and the associated effect of lowering the level of taxation. Using these two benchmarks, some legislative tax measures, such as the PTRs, tax holidays, tax exemptions, and profit tax discounts, were identified as favorable tax measures. In addition, three regulatory and administrative practices were identified as favorable tax measures. These are tax rulings, advance pricing agreements, and tax settlement practices.

The fourth chapter focused on the OECD and EU approaches to harmful tax practices. Starting with the OECD, one of its major works in the area of harmful tax competition was highlighted. This was the OECD 1998 Report on harmful tax competition. This Report was summarized before highlighting some praise and criticisms that were made both for and against the Report. While the Report was praised for its contribution to the regulation of harmful tax competition, to the extent of being seen as a rational riposte to the global issue of harmful tax

competition along with achieving the status of international soft law, it was also criticized by some. The criticism related mainly to the infringement of states' tax sovereignty and the question of legitimacy. The OECD was also criticized and seen as an instrument of powerful high-tax states seeking to impose tax structures on low-tax jurisdictions, as a means of creating tax cartels, etc.

The 1998 OECD Report identified two components of harmful tax competition, namely tax havens and HPTRs. Four factors characterize tax havens: no or only nominal taxes; lack of effective EoI; lack of transparency; and no substantial activities. Four key factors also characterize HPTRs: no or low effective tax rates; ring-fencing; lack of transparency; and lack of effective EoI. Seventeen years after this Report, the OECD, in association with the G20, pubished another report on the BEPS, Action 5 of which addresses harmful tax practices. This Action 5 was described as a revamp of the OECD's works on harmful tax practices, thus completing the 1998 Report. In this context, BEPS Action 5 focuses on transparency and EoI.

Not only the OECD, but also the EU played an important role in regulating harmful tax competition. Through the ECOFIN Council, the EU adopted a Code of Conduct on business taxation in December 1997. This Code established five criteria to be used in determining the (un) harmfulness of a tax measure, namely the lower level of taxation; ring-fencing; lack of substantial activity requirement; non-compliance with the OECD Rules on profit determination; and the lack of transparency. Given their respective international influence in regulating harmful tax competition, the OECD factors and the EU Code criteria were compared to identify the similarities and differences between the two. The same chapter discussed the role of these organizations in regulating harmful tax competition. The chapter ended with a discussion on the merits and demerits of the EU and OECD standards from the perspective of developing countries.

The content of chapter five had a similar spirit as chapter four. It was about the EAC approaches to harmful tax competition. The chapter started with some observations on the existence of harmful tax competition in the EAC Partner States before looking at the EAC agenda to tackle harmful tax practices. The EAC agenda in this regard consists mainly of tax harmonization and the draft Code of Conduct. Although not yet adopted as an EAC document in force, its main provisions have been extensively reviewed. These included the provisions to identify the harmful tax competition, provisions on transparency and EoI, and the standstill and rollback clauses, to name a few. This review paved the way for a comparison between the EU

Code of Conduct and the EAC draft Code of Conduct. The fifth chapter ended with a review of the EAC contribution to the regulation of harmful tax competition through the lens of positive and negative perspectives.

Building on the previous chapters, the sixth chapter dissected the Rwandan regime of favorable tax measures. In doing so, the primary objective was to determine which favorable tax measures are harmful and which are not. To this end, the first exercise was to identify the benchmarking criteria to be used. Then, each favorable tax measure was evaluated and in total thirteen measures were assessed. As a result, two measures are *prima facie* harmful,[1] six are not harmful,[2] three are not harmful but contain harmful aspects,[3] while two could not be assessed due to a lack of sufficient information.[4] Following that, the current status of Rwanda's EoI was discussed and Rwanda was commended for its progressive efforts on EoI practices. Chapter six ended with a tour d'horizon of the current discussions about the introduction of the global minimum tax rate, with a focus on GloBE proposals.

To respond to the issues identified in chapter six, particularly in relation to the favorable tax measures evaluated, chapter seven focused on proposing remedies to build a Rwandan tax system free of harmful tax practices. Some of the proposed remedies are to be taken at the Rwandan level, while others are to be taken at the EAC level. Regarding domestic measures, it has been proposed that Rwanda abolishes the preferential CIT rate on foreign-sourced income and pure holdings or makes the measure not ring-fenced besides emphasizing the substantial economic presence requirement; provides additional requirements for the preferential CIT rate to export investments; adopts transparent legislation specifying the time frame for granting PTRs; publishes tax rulings in the official gazette; improves technical understanding of transfer pricing practices; disbands the tax settlement practices and replaces them with the institution of an Independent Board of Experts; and acts on the recommendation to join the Inclusive Framework. At the EAC level, it has been suggested that this Community learn from EU best practices in relation to the Code of Conduct. These proposals include, *inter alia*, fast tracking the adoption of the EAC Code of Conduct as a directive to give it more weight. Several

[1] 3% PTR and PTR to export investment (see 6.2.1).
[2] Five years tax holidays (see 6.2.2); seven years tax holidays (see 6.2.2); exemption to agricultural products (see 6.2.3); capital gains tax exemption (see 6.2.3); exemptions to the Development Bank of Rwanda, Agaciro Development Fund Corporate Trust, and Business Development Fund (see 6.2.3); and profit tax discounts (see 6.2.4).
[3] 0% PTR (see 6.2.1), 15% PTR (see 6.2.1), and Tax rulings (see 6.3.1).
[4] APAs (see 6.3.2) and tax settlements (see 6.3.3).

corrections were also made to the current version of the EAC draft Code of Conduct, as well as some suggestions that will help ensure a high level of states' compliance with the Code, once it is adopted. Chapter seven also made suggestions aimed at demystifying the myth of tax competition in the EAC and ended with reflections on the possibility of developing an EAC Model against harmful tax competition.

Finally, the eighth and current chapter closes the book. It does so through five sections, respectively synthesizing the book; highlighting the key findings; elaborating on recommendations; identifying limitations along with recommended areas for future research; and contributions of the study.

8.2. Recapitulation of key findings

Considering the four research questions that guided this study, the main findings related to each research question are presented below:

With regard to the current situation of favorable tax measures under Rwandan law, this book examined the current situation of favorable tax measures in Rwanda. These were defined as tax measures that derogate from the generally applicable tax system by providing for a lower level of taxation, either through a reduction in tax rates or tax bases. Accordingly, these measures have a significant impact or potential impact on the business location. Such measures are therefore potentially harmful but not yet confirmed harmful, and therefore require evaluation to determine their actual status. In this context, several measures have been determined as favorable tax measures, i.e potentially harmful. These include PTRs, tax holidays, tax exemptions, profit tax discounts, tax rulings, advance pricing agreements, and tax settlements. These measures were then evaluated to determine the extent to which they are harmful or harmless.

Based on the first research question, the second research question focused on the conventional benchmarks to identify Rwandan harmful tax practices. Considering the international nature of tax competition, it also becomes necessary to examine this area in an international context. Thus, the determination of benchmarking criteria is also usually elaborated in an international or regional context. Considering the regional organizations of which Rwanda is a member, the benchmarks established at the EAC level would be ideal to assess the Rwandan situation. However, in the absence of these, this book has largely relied on EU and OECD benchmarks, combined with a close look at the benchmarks from the EAC draft

Code of Conduct. These are a lower level of taxation referred to as the gateway criterion, ring-fencing, lack of economic substance requirement, lack of transparency, and the lack of EoI.

From this perspective, the third research question sought to determine the extent to which the currently available Rwandan favorable tax measures are harmful. In this regard, the potentially harmful favorable tax measures identified in answering the first research question were assessed, one by one, against the benchmarks set in answering the second research question. The results of the assessment showed that some favorable tax measures, although potentially harmful, are not actually harmful. This is the case of tax holidays, tax exemptions, and profit tax discounts. One measure, that is the tax settlement, was identified as harmful, though with some reservations due to the low level of information in the public domain. The preferential CIT rates and tax rulings were evaluated as not harmful in general, but possess one or more harmful aspects. The result of the evaluation also pointed out the difficulties in evaluating the advance pricing agreements due to a lack of sufficient data.

Following that, the fourth research question was about the design of proposals to protect Rwanda from harmful tax practices. In light of the previous findings, several suggestions were made and were clustered into four groups. The first cluster concerns proposals that can be implemented unilaterally at the domestic level. The second cluster is about proposals that can be undertaken at the EAC level. The third is about proposals that seek to demystify the myth of tax competition in the EAC in order to remove the confusion between tax competition *per se* and harmful tax competition. The fourth is about the possibility of developing an EAC model against harmful tax competition. Thus, from the above-mentioned proposals, several recommendations are possible.

8.3. Recommendations

Based on the above key findings and from the book as a whole, several practical and actionable recommendations are made below. Some are addressed to the Government of Rwanda, others to the EAC level.

First, it is recommended that the GoR takes some unilateral actions to limit the identified aspects of harmful tax practices. This include, in particular, proposals to adopt transparent legislation specifying the timeframe for granting a PTR; publish tax rulings, both public and private, in the official gazette; disband the tax settlement practices and replace them with a Board of Independent Experts; abolish the 3% PTR or make the measure not ring-fenced besides

emphasizing its substantial economic presence requirement; and make the PTR for export investments not ring-fenced and set additional requirements sufficiently respond to transparency, substantial economic presence requirement, and internationally accepted principles on profit determination. It is also a recommendation to improve administrative technical matters related to transfer pricing practices. Similarly, Rwanda is recommended to join the Inclusive Framework as one way to improve the regulation and the practices of EoI and transparency, alongside joining hands with other developing countries to fight for the protection of their interests in the context of international tax law making and governance. With particular reference to GloBE, developing countries, including Rwanda, are advised to adopt the GloBE proposal cautiously as it is *prima facie* designed to benefit capital exporting countries but not really capital importing countries. Developing countries should also be aware and mindful that GloBE is not necessarily good for their interests as they remain sovereign to walk out of multilateral measures in favor of unilateral measures in terms of allocation of taxing rights.

Second, the EAC is recommended to finalize and adopt the EAC Code of Conduct against harmful tax competition as soon as possible. To give it more weight, it is suggested that the Code be adopted as a directive. Once adopted, standstill and rollback clauses should be clearly highlighted in the Code as some of the key clauses. Also, some corrections need to be made before the adoption of the Code. It is also important for the Code to have standards for harmful tax competition that reflect the real needs of developing countries, namely attracting investment alongside protecting the tax base against artificial profit shifting. Moreover, collective action should be taken at the EAC level to ensure that the Community Partner States do not engage in harmful tax competition, not only with each other within the Community, but even with other states outside the Community.

Third, the EAC is recommended to learn from the best practices of the EU and the OECD in regulating harmful tax competition. In fact, instead of reinventing the wheel, the EAC is recommended to refer to the EU code of conduct and develop an adapted model, which takes into account the specific context and needs of the region. Such a model should aim to curb harmful tax competition, but without breaching the contextual needs of the EAC to attract FDI. The model should also be easy to understand and implement. It should also give Partner States sufficient time to to roll back existing harmful measures, and provide for strategic compliance and monitoring measures.

Fourth, there is a need to improve the understanding of tax competition in the EAC. In this regard, more research on harmful tax competition in the EAC is needed. Thus, tax law researchers, academics, and practitioners are recommended to vigorously address this area with a special focus on EAC.

8.4. Areas for future research

Without undermining the contribution of this book to the study of tax competition, it is fair to admit that it is not exhaustive. Quite a number of issues related to the topic studied here remain unresolved. This admission arises from the practical impossibility of conducting an exhaustive research. It is also linked to an assertion that predicts the continuity of tax competition challenges in the future, thus requiring different solutions.[5] Therefore, the broad field of tax competition in the EAC certainly deserves further study.

Some areas of unresolved problems require special attention. These include, *inter alia*, the study of the situation of harmful tax practices in each EAC Partner State, a comprehensive comparative study between the approaches of the EAC and the EU in the fight against harmful tax competition, a comprehensive elaboration of what the EAC can learn from the EU in terms of regulating harmful tax competition, the regulation of harmful tax competition in developing countries, the particular needs of capital-importing countries in relation to the regulation of harmful tax competition, the impact of BEPS Action 5 on EAC Partner States, and the approaches that the EAC can take to position itself in the new global tax governance. It would also be interesting to conduct an in-depth study on the relevance of the OECD's GloBE and its impact on developing countries, with a particular focus on the EAC and Rwanda. Thus, research that could focus on one or more of these topics would add important value to the existing body of knowledge on international tax competition.

8.5. Study contributions

This study claims a variety of specific contributions to existing knowledge. Without pretending to be exhaustive, the main contribution claims are as follows:

1. The study was triggered by reports that Rwanda was engaging in harmful tax competition. This is contradicted in this book with scientific facts. To that extent, this

[5] R Azam, 'Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS' (2017) *SuffolkU.L.Rev.* 50(4), p. 523.

book claims and affirms that Rwanda is sovereignly engaged in tax competition like any other sovereign state, but not wrongly engaged in harmful tax competition.

2. The overall objective was to assess Rwanda's tax practices to determine whether Rwanda is within the parameters of internationally accepted tax competition. The study concluded that there are no pseudo-binding, legal or political standards that directly apply to Rwanda with respect to tax competition. However, an academic and scientific analysis using the international standards on harmful tax competition concluded that some measures under Rwandan law amount in whole or in part to harmful tax practices.

3. With respect to the EAC, the position of this book is that there are as yet no binding EAC benchmarks of harmful tax competition. Thus, without an established binding order, legal or political, defining what is permitted and/or what is not permitted, there is no way to affirm, from a legal perspective, that there is harmful tax competition vis-à-vis EAC law, and any or similar claim would be baseless.

4. This book makes some suggestions to fine-tune the Rwandan system of all aspects of harmful tax practices vis-à-vis the EU and OECD standards. It also recommends the EAC to move forward in regulating harmful tax competition within the Community especially by adopting a Code of conduct that recognizes the need to attract FDI without engaging in harmful tax competition.

5. This book claims to add to the existing body of knowledge on tax competition, in particular by highlighting the dynamics around the distinction between bad and good tax competition and the influential role of the EU and OECD in such dynamic determination.

6. This book claims to have emphasized that a low-tax rate is not problematic in matters of tax competition. Rather, it is ring-fencing that is most problematic. That is to say that offering favorable tax rates or tax bases is generally acceptable as long as residents and non-residents have equal access, i.e., as long as the regime does not erode other states' tax bases without affecting its own tax base.

7. This book is also the first of its kind on harmful tax competition in Rwanda. It not only adds to the existing literature on the subject in general, but also establishes a foundation that can be used for further research on harmful tax competition in the EAC, as well as

for restructuring harmful tax competition policies at both the national and regional levels.

8. This book has shown the possibility and extent of the application of the EU and OECD standards by jurisdictions outside the EU and OECD, particularly developing countries, to build tax systems that are free of harmful tax competition and to fill the gap in developing countries that do not have legal foundations to curb harmful tax competition. However, this book has also shown that the EU and OECD norms are insufficient to root out all harmful tax practices when viewed in the general perspective, both in developed and developing countries.

9. This research study provides a cautionary note to EAC Partner States that they may be listed or de-listed at any time by the OECD or the COCG, along with the political consequences thereto related. It also recommends developing countries to be mindful of the implications of multilateral solutions and the differences in interests between developed countries (capital exporters / residence jurisdictions) and developing countries (capital importers / source jurisdictions).

10. This book represents a viable project that cannot be completed soon given the dynamics of (harmful) tax competition discussions.

Samenvatting (Dutch Summary)

Schadelijke Belastingconcurrentie in de Oost-Afrikaanse Gemeenschap

Een casestudy naar het beleid in Rwanda in het licht van de EU- en OESO-benaderingen

In deze dissertatie wordt schadelijke belastingconcurrentie in de Oost-Afrikaanse Gemeenschap (OAG) onderzocht, met een bijzondere focus op de situatie in Rwanda. De EU- en OESO-benaderingen dienen hierbij als het referentiekader. Het doel van deze studie is te bepalen in hoeverre belastingconcurrentie door Rwanda en, in het verlengde daarvan, de andere OAG-landen, binnen de parameters van internationaal geaccepteerde praktijken valt. In deze context worden de fiscale maatregelen met betrekking tot belastingconcurrentie door de Rwandese overheid geïdentificeerd en beoordeeld aan de hand van zowel OAG-regelgeving als EU- en OESO-criteria. Hoewel deze OAG-regelgeving tot op heden nog niet is geïmplementeerd, zal ook uitgebreid worden stilgestaan bij de conceptversie van de gedragscode tegen schadelijke belastingconcurrentie in de OAG.

Er zijn twee hoofdredenen om de EU- en OESO-criteria te hanteren als referentiekader om het beleid in Rwanda te evalueren. Idealiter zou een beoordeling van het belastingstelsel in Rwanda aan de hand van OAG-criteria plaatsvinden. Helaas heeft de OAG zelf nog geen normen vastgelegd waarmee schadelijke belastingpraktijken als zodanig kunnen worden geïdentificeerd. Daarnaast genieten de inspanningen van de EU en OESO in de strijd tegen schadelijke belastingconcurrentie internationale erkenning. De criteria die de EU en OESO hiervoor vastlegden, worden daarom ook buiten hun respectievelijke territoria gehanteerd en doorgaans als best practices of zelfs zachte wetgeving gezien door de internationale gemeenschap.

Dit onderzoek is uitgevoerd aan de hand van vier onderling samenhangende onderzoeksvragen. De eerste onderzoeksvraag betreft de huidige situatie in Rwanda met betrekking tot belastingmaatregelen die de nationale economie bevoordelen. De tweede onderzoeksvraag analyseert de benchmarks aan de hand waarvan schadelijke belastingpraktijken gewoonlijk als zodanig worden geïdentificeerd. De derde onderzoeksvraag betreft de beoordeling van de

huidige belastingmaatregelen ten gunste van de nationale economie door de Rwandese overheid, om te bepalen of deze al dan niet schadelijk zijn. De vierde onderzoeksvraag verkent verschillende voorstellen die gedaan kunnen worden om te voorkomen dat de Rwandese overheid zich inlaat met schadelijke belastingpraktijken. Het formuleren van een nieuwe of betere wijze om acceptabele en schadelijke belastingpraktijken van elkaar te onderscheiden, behoort expliciet niet tot de doelstelling van dit onderzoek. In plaats daarvan zullen de criteria die hiervoor al zijn ontwikkeld en worden erkend door de internationale gemeenschap worden toegepast op het specifieke geval van Rwanda.

De bevindingen die in deze dissertatie worden gepresenteerd, zijn voornamelijk het resultaat van een theoretische benadering, aangevuld met rechtsvergelijkend onderzoek. Aan de theoretische benadering werd concrete invulling gegeven middels deskresearch, die bestond uit een grondige studie van de relevante literatuur. Dit omvat kritische analyses van binnenlandse, regionale en internationale wetteksten, tekstboeken, academische publicaties, rapporten en andere betrouwbare en beschikbare documenten. Voor het aanvullende rechtsvergelijkend onderzoek zijn de EU-wetgeving en OESO-instrumenten inzake belastingconcurrentie uitgebreid bestudeerd. Hiervoor zijn onder andere de OESO- en COCG-rapporten uit de databases van beide instituten geraadpleegd. Het verrichten van rechtsvergelijkend onderzoek was hierbij overigens niet het doel. In deze studie dienen de rapporten slechts als referentiekader, ter verheldering of als bronnen van inspiratie. Voor het onderzoek zijn documenten geraadpleegd die beschikbaar waren tot aan augustus 2021. De bronnen die centraal staan in dit boek zijn: het OAG-verdrag, de ontwerp gedragscode tegen schadelijke belastingconcurrentie in de OAG, de Europese gedragscode inzake de belastingregeling voor ondernemingen uit 1997, de COCG-evaluatieverslagen, de OESO-voortgangsrapportages, de Rwandese belastingwet uit 2018 en de Rwandese investeringswet uit 2021.

De dissertatie is onderverdeeld in acht hoofdstukken. Hoofdstuk één dient ter introductie en geeft een overzicht van de volledige dissertatie. Het hoofdstuk begint met een bespreking van de relevantie van de studie. Hier wordt enerzijds gewezen op het gebrek aan juridisch onderzoek naar de situatie omtrent belastingconcurrentie in de gehele OAG en Rwanda in het bijzonder. Daarnaast wordt stilgestaan bij het internationale karakter van belastingconcurrentie. Daarna volgt een bespreking van de context waarin dit onderzoek werd uitgevoerd. Vervolgens worden het onderzoeksprobleem, de onderzoeksvragen en hoofddoelstellingen van de studie uiteengezet. In de rest van het hoofdstuk worden de reikwijdte, methodologie, belangrijkste

resultaten en maatschappelijke en academische relevantie van het onderzoek besproken. Tot slot wordt een kort overzicht gegeven van de structuur van het boek.

Hoofdstuk twee geeft een algemeen overzicht van belastingconcurrentie en bestaat uit vier secties. In de eerste sectie wordt belastingconcurrentie voorzien van een conceptueel en historisch kader. In deze sectie worden de drie onderling samenhangende begrippen behandeld die centraal staan in de studie naar belastingconcurrentie: belastingconcurrentie, schadelijke belastingconcurrentie en schadelijke belastingpraktijken. Daarnaast wordt een historische achtergrond van belastingconcurrentie geschetst, aan de hand van twee perspectieven: één die belastingconcurrentie als natuurlijk fenomeen construeert en één die belastingconcurrentie als het resultaat van interstatelijke vergelding ziet. In dezelfde sectie wordt tevens stilgestaan bij de rol van globalisering als katalysator voor belastingconcurrentie. In sectie twee worden de principes en praktijken van belastingconcurrentie besproken. Allereerst worden het algemene principe van staatssoevereiniteit en het principe van belastingsoevereiniteit dat hieruit volgt behandeld. Daarna wordt de neerwaartse spiraal die resulteert uit de combinatie van beide begrippen besproken, alsmede de globale praktijk van belastingconcurrentie. In sectie drie wordt stilgestaan bij het normatieve perspectief, als te onderscheiden van het economische perspectief, van waaruit belastingconcurrentie ook kan worden benaderd. In sectie vier wordt getracht schadelijke van onschadelijke belastingconcurrentie te onderscheiden.

In hoofdstuk drie bespreek ik de gunstige belastingmaatregelen in Rwanda. Allereerst bespreek ik welke soort maatregelen kwalificeren als gunstige belastingmaatregelen. Aangezien hier door de OAG nog geen criteria voor zijn vastgelegd, wordt gebruikgemaakt van EU- en OESO-normen om twee categorieën van deze maatregelen van elkaar te onderscheiden: preferentiële en differentiële belastingregelingen. Op die basis worden vervolgens verschillende wetgevingsmaatregelen in Rwanda als gunstige belastingmaatregelen aangemerkt, waaronder preferentiële belastingtarieven, belastingvrijstellingen en kortingen op het winstbelastingtarief. Daarnaast worden drie bestuursrechtelijke en administratieve praktijken als gunstige belastingmaatregelen gekwalificeerd: fiscale rulings, voorafgaande verrekenprijsafspraken en belastingverrekeningen.

In hoofdstuk vier worden de wijzen waarop de OESO en EU schadelijke belastingconcurrentie aanpakken besproken. In sectie één wordt stilgestaan bij het OESO-rapport over schadelijke belastingconcurrentie uit 1998 en de twee vormen van schadelijke belastingconcurrentie die in dit document worden gedefinieerd: belastingparadijzen en schadelijke preferentiële

belastingregelingen. Daarnaast wordt aandacht besteed aan zowel de belangrijkste kritieken als de waardering waarmee het rapport door de internationale gemeenschap is ontvangen. In dezelfde sectie worden tevens de OESO-voortgangsrapportages en de BEPS-rapporten met betrekking tot actiepunt vijf (Action 5) toegelicht. Volgens actiepunt vijf zijn transparantie en informatie-uitwisseling essentieel om schadelijke belastingconcurrentie tegen te gaan. In sectie twee worden de inspanningen van de EU in het tegengaan van schadelijke belastingconcurrentie behandeld. Hier wordt de Europese gedragscode inzake de belastingregeling voor ondernemingen uit 1997 besproken, waarbij uitgebreid wordt stilgestaan bij de vijf criteria uit dit document aan de hand waarvan schadelijke en onschadelijke belastingconcurrentie van elkaar kunnen worden onderscheiden. In sectie drie worden de OESO- en EU-criteria met elkaar vergeleken. In sectie vier bespreek ik de rol die de EU en OESO spelen in het tegengaan van schadelijke belastingconcurrentie. In sectie vijf wordt tot slot stilgestaan bij de voor- en nadelen van de toepassing van EU- en OESO-standaarden omtrent schadelijke belastingconcurrentie in ontwikkelingslanden.

In hoofdstuk vijf staat de aanpak van schadelijke belastingconcurrentie door de OAG centraal. Het hoofdstuk begint met een discussie van bestaande schadelijke belastingconcurrentie in de OAG-lidstaten. Vervolgens worden de belastingharmonisatie-benadering van de OAG en de ontwerp gedragscode tegen schadelijke belastingconcurrentie in de OAG toegelicht. Hoewel het laatste document nog niet van kracht is, worden haar belangrijkste bepalingen uitgebreid geëvalueerd. Op basis van deze evaluatie worden de EU- en OAG-gedragscodes vervolgens met elkaar vergeleken. Tot slot wordt stilgestaan bij de bijdrage die de OAG levert aan het tegengaan van schadelijke belastingconcurrentie.

In hoofdstuk zes wordt het belastingbeleid in Rwanda opnieuw onderzocht, ditmaal om te bepalen welke maatregelen als schadelijk of juist onschadelijk kunnen worden gekwalificeerd. Allereerst worden de criteria die hiervoor zullen worden gebruikt uiteengezet, vervolgens wordt de (on)schadelijkheid van elke maatregel afzonderlijk beoordeeld. Van de tien wetgevingsmaatregelen die hierbij zijn onderzocht, worden twee als *prima facie* schadelijk en zes als onschadelijk beoordeeld. De andere twee maatregelen zijn in principe niet schadelijk, maar bevatten wel schadelijke onderdelen. Dat geldt eveneens voor één van de drie bestuursrechtelijke en administratieve praktijken die zijn onderzocht. De (on)schadelijkheid van de andere twee praktijken kon niet worden vastgesteld wegens een gebrek aan informatie. In dit hoofdstuk bespreek ik tevens het OESO/G20 GloBE voorstel (Pijler 2) en de potentiële gevolgen van dit voorstel voor Rwanda.

In hoofdstuk zeven worden oplossingen aangedragen voor de problemen die in het voorgaande hoofdstuk zijn vastgesteld: hoe kan het beleid in Rwanda worden hervormd om schadelijke belastingconcurrentie te voorkomen? Naast aanpassingen die door de Rwandese overheid zelf kunnen worden geïmplementeerd, wordt ook stilgestaan bij hoe de OAG haar aanpak van schadelijke belastingconcurrentie kan verbeteren. Aan de Rwandese overheid wordt aanbevolen:

- wetgeving te implementeren waarin op heldere wijze de maximale duur van preferentiële belastingtarieven wordt vastgelegd;
- fiscale rulings in het staatsblad te publiceren;
- technische kennis over transfer pricing te verbeteren;
- de huidige praktijken omtrent belastingverrekening af te schaffen en te vervangen door een onafhankelijke raad van experts;
- zich aan te sluiten bij het OECD/G20 BEPS Inclusive Framework, om transparantie en informatie-uitwisseling te bevorderen.

De OAG wordt aangeraden om:

- de best practices uit Europese gedragscode ter harte te nemen;
- de implementatie van de OAG-gedagscode te versnellen;
- enkele wijzigingen door te voeren in de OAG-gedragscode.

Hoofdstuk zeven wordt afgesloten met de presentatie van een model tegen schadelijke belastingconcurrentie in de OAG, dat op basis van bovenstaande bevindingen is geconstrueerd.

In hoofdstuk acht worden de conclusies van het onderzoek uiteengezet. In de eerste sectie wordt het boek samengevat, in sectie twee worden de belangrijkste bevindingen gepresenteerd en in sectie drie worden aanbevelingen gedaan. In sectie vier worden de beperkingen van de studie besproken en aanbevelingen gedaan voor vervolgonderzoek. In de vijfde en laatste sectie wordt tot slot stilgestaan bij de bijdragen die door deze studie worden geleverd.

Hieronder worden de belangrijkste onderzoekresultaten per onderzoeksvraag uiteengezet. De eerste onderzoeksvraag betreft Rwandese gunstige belastingmaatregelen. In dit onderzoek worden daaronder belastingmaatregelen verstaan waarmee de belastingdruk significant wordt verlaagd ten opzichte van de regelingen die over het algemeen worden toegepast, door het reduceren van belastingtarieven of -grondslagen. Dergelijke maatregelen hebben daarom een aanzienlijke impact op het vestigingsklimaat. De volgende maatregelen in Rwanda werden als

gunstige belastingmaatregelen aangemerkt: de preferentiële belastingtarieven (van 0, 3 en 15%), preferentiële exporttarieven, belastingvrijstellingen, kortingen op het winstbelastingtarief, fiscale rulings en belastingverrekeningen.

De tweede onderzoeksvraag betreft de benchmarks aan de hand waarvan schadelijke belastingmaatregelen als zodanig kunnen worden geïdentificeerd. Aangezien de OAG hier zelf nog geen normen voor heeft vastgelegd, werd voor het bepalen van deze criteria een beroep gedaan op de richtlijnen van de EU en OESO, aangevuld door de conceptversie van de gedragscode tegen schadelijke belastingconcurrentie in de OAG. Uitgaande van deze bronnen zijn de volgende benchmarks voor schadelijkheid vastgesteld: het realiseren van een significant lagere effectieve belastingdruk (i.e. het gateway criterium), ring-fencing, de afwezigheid van substance-eisen, een gebrek aan transparantie en een gebrek aan informatie-uitwisseling.

De derde onderzoeksvraag betreft de beoordeling van de huidige belastingmaatregelen ten gunste van de nationale economie door de Rwandese overheid, om te bepalen of deze al dan niet schadelijk zijn. Om deze vraag te beantwoorden zijn de belastingmaatregelen in Rwanda waarvan bij deelvraag één is vastgesteld dat ze mogelijk schadelijk zijn, geëvalueerd aan de hand van de benchmarks die bij het beantwoorden van deelvraag twee zijn vastgelegd. Hieruit blijkt dat meerdere potentieel schadelijke maatregelen dat in de praktijk niet zijn, namelijk belastingvrijstellingen en ondernemingsaftrek. Het preferentiële belastingtarief van 3% en preferentiële exporttarief worden als *prima facie* schadelijk geëvalueerd. Over de fiscale rulings en preferentiële belastingtarieven van 0% en 15% wordt geoordeeld dat ze in principe niet schadelijk zijn, maar wel één of meer schadelijke elementen bevatten. De belastingverrekeningen worden met enige reserve als schadelijk beoordeeld, gezien het gebrek aan beschikbare informatie over deze regelingen. Het evalueren van de voorafgaande verrekenprijsafspraken werd eveneens bemoeilijkt door een gebrek aan informatie.

Om de vierde onderzoeksvraag te beantwoorden, zijn verschillende voorstellen gedaan om schadelijke belastingconcurrentie in Rwanda te voorkomen. Het eerste voorstel betreft een aantal aanpassingen die unilateraal door Rwanda kunnen worden ingevoerd. In het tweede voorstel worden verschillende verbeteringen op regionaal niveau aanbevolen, i.e. beleidswijzigingen die door de OAG kunnen worden geïmplementeerd. Een derde voorstel is om belastingconcurrentie in de OAG te demystificeren, om de misvatting dat belastingconcurrentie *per se* schadelijk is tegen te gaan. In het vierde voorstel wordt een OAG-model tegen schadelijke belastingconcurrentie gepresenteerd.

Deze studie heeft verschillende bijdragen geleverd aan de bestaande kennis over belastingconcurrentie (in Rwanda en de OAG): (a) Op basis van wetenschappelijke analyse is het idee dat Rwanda zich schuldig maakt aan *schadelijke* belastingconcurrentie in twijfel getrokken. In plaats daarvan wordt betoogd dat Rwanda, net als elke andere staat, soeverein is en zich rechtmatig bezighoudt met belastingconcurrentie. (b) Dit boek onderschrijft dat Rwanda's belastingpraktijken over het algemeen binnen de internationaal geaccepteerde parameters voor legitieme belastingconcurrentie vallen, hoewel sommige aspecten van het belastingregime aanpassing behoeven. (c) Deze studie neemt het standpunt in dat er tot dusver nog geen bindende OAG-benchmarks voor schadelijke belastingconcurrentie zijn vastgelegd. Zonder juridisch of politiek bindende afspraken over wat toegestaan is, kan het bestaan van schadelijke belastingconcurrentie vanuit een juridisch perspectief niet worden bevestigd. (d) Het verschil tussen acceptabele en onacceptabele belastingconcurrentie wordt door dit onderzoek geïllustreerd. (e) Het inzicht dat niet een laag belastingtarief maar juist ring-fencing problematisch is met betrekking tot belastingconcurrentie is door deze studie bevestigd. (f) Aangezien dit onderzoek de eerste is die schadelijke belastingconcurrentie in Rwanda adresseert, legt het een fundament voor verder onderzoek over dit onderwerp. (g) Dit onderzoek toont aan dat EU en OESO-standaarden ook op vruchtbare wijze door landen die geen lid zijn van deze organisaties kunnen worden toegepast. Vooral in ontwikkelingslanden, waar de juridische gronden voor het tegengaan van schadelijke belastingconcurrentie grotendeels ontbreken, kunnen de standaarden een belangrijke rol spelen in de strijd tegen schadelijke belastingconcurrentie. Aan de andere kant laat deze studie ook zien dat de OESO- en EU-normen ontoereikend zijn om alle schadelijke belastingpraktijken te voorkomen, zowel in ontwikkelde en ontwikkelingslanden.

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Jurisdiction	Code	Regime name	Year
Aruba	AW013	Transparency regime	2017
	AW012	Special Zone San Nicolas	2017
Armenia	AM002	Governmentally approved projects outside Armenia	2017
	AM001	Reduced tax rate for large exporters	2017
Antigua & Barbuda	AG003	Free trade and special economic zone (FTZ)	2018
	AG001	International business corporations	2017
Barbados	BB008	Fiscal incentives	2017
Belgium	BE018	NID regime	2018
Belize	BZ006	Exemption of foreign source income	2019
	BZ005	Commercial free zones	2019
	BZ003	Fiscal incentives act	2019
	BZ002	Export processing zones – EPZ enterprises	2017
	BZ001	International business company	2017
Cabo Verde	CV004	Incentives for internationalization	2019
	CV002	International financial institution	2017
	CV001	International business centers	2017
Cook Islands	CK006	Development Projects	2017
	CK004	Captive insurance companies	2017
	CK003	Overseas insurance regime	2017
	CK002	International insurance companies	2017
	CK001	International companies	2017
Costa Rica	CR002	Manufacturing activities under the amended free zones	2019
Croatia	HR016	WHT on dividends and profit sharing	2021
	HR017	Tax-deductible expenses of credit institutions	2021
Curacao	CW005	Manufacturing activities under the eZone	2018
Cyprus	CY020	NID regime	2018
Dominica	DM003	General incentive under the fiscal incentives act	2017
	DM002	Offshore banking	2017
	DM001	International business companies	2017
France	FR054	New IP	2019
Grenada	GD006	Export processing	2017
	GD005	Fiscal incentives	2017
	GD004	International trusts	2017
	GD003	International insurance	2017
	GD002	Offshore banking	2017
	GD001	International companies	2017
Hong Kong	HK003	Offshore private equity	2017
	HK002	Offshore funds	2017
Italy	IT019	NID regime	2018

Jordan	JO001	Free zone	2017
Korea	KR002	Free trade / economic zones	2017
	KR001	Foreign investment zone	2017
Liechtenstein	LI003	Interest deduction on equity / NID	2016
	LI001	Tax exempt corporate income	2011
Lithuania	LT008	Holding company	2021
Luxembourg	LU017	New IP regime	2018
Malaysia	MY016	Manufacturing regime under the Pioneer status regime (high technology)	2019
	MY012	Headquarters (or principal hub)	2017
Maldives	MV001	Reduced tax rate	2017
Malta	MT015	Patent box	2019
	MT014	NID regime	2018
Mauritius	MU012	Manufacturing activities under the Freeport zone	2018
	MU010	Partial exemption	2018
Mongolia	MN002	Remote areas	2018
Morocco	MA005	Offshore holding companies	2017
	MA004	Offshore banks	2017
	MA003	Free trade zones	2017
	MA002	Export enterprises	2017
	MA001	Coordination centers	2019
Palau		Assessment under criterion 2.2	2018
Panama	PA005	Foreign-owned call centers	2017
Poland	PL013	Investment zone	2019
	PL012	IP regimes	2019
	PL011	NID regime	2021
	PL010	9% CIT for taxpayers with revenues not exceeding EUR 1.2 million	2019
	PL006	15% CIT rate for small taxpayers	2018
Portugal	PT018	NID regime	2018
Romania	RO009	CIT reduction	2021
	RO010	Exemption	2021
Saint Kitts and Nevis	KN002	Fiscal incentive Act	2018
	KN001	Offshore companies	2017
Saint Lucia	LC005	Exemption of foreign income	2019
	LC003	Free trade zones	2017
	LC002	International trusts	2017
	LC001	International business companies	2017
Seychelles	SC011	Exemption of foreign income	2019
S.Vincent&Grenadines	VC002	International trusts	2017
	VC001	International business companies	2017
Slovakia	SK008	Exemption of capital gains	2018
	SK007	Patent box	2018

Switzerland	CH004	Circular No. 8 of the Federal Tax Administration on principal structures (principal regime)	2012
	CH003	Cantonal holding company status	2012
	CH002	Cantonal mixed company status	2012
	CH001	Cantonal administrative company status (auxiliary company)	2012
Taiwan	TW001	Free trade zone regime, including the International Airport Park Development	2017
Tunisia	TN002	Offshore financial services	2017
	TN001	Export promotion incentives	2017
Turkey	TR004	Regional headquarters	2017
Vietnam	VN005	Disadvantaged areas	2018
	VN001	Export processing	2017

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Annexes

ANNEX I: RECAPUTILATION OF ASSESSED MEASURES

No.	Measure	Gateway	Crit. 1	Crit. 2	Crit. 3	Crit. 4	Crit. 5	Overall assessment	Remedy
1	0% PTR	V	X	X	X[1]	?	X[2]	Not harmful	To specify the timeframe to benefit from PTR; to determine the meaning of 'adequate' level of employment
2	3% PTR	V	?	V	X	?	?	Harmful	Make the measure not ring-fenced and emphasize the substantial economic presence requirement or abolish it
3	15% PTR	V	X	X	X		X[3]	Not harmful	To specify the timeframe to benefit from PTR; to determine the meaning of 'adequate' level of employment
4	PTR to export investments	V	X	V	?	?	?	Harmful	Make the measure not ring-fenced and set additional requirements responding to transparency, substantial economic presence requirement, and internationally accepted principles on profit determination
5	Tax holidays (5 years)	V	X	X	X	?	X	Not harmful	N/A
6	Tax holidays (7 years)	V	X	X	X	?	X	Not harmful	N/A
7	Exemption (agriculture)	V	X	X	X	?	X	Not harmful	N/A
8	Exemption (capital gains on capital market)	V	X	X	X	?	X	Not harmful	N/A
9	Exemption (DBR, ADFT, BDF)	V	X	X	X	?	X	Not harmful	N/A
10	Profit tax discounts	V	X	X	X	?	X	Not harmful	N/A

[1] The measure satisfies the substantial economic presence requirement. However, it fails to specify the 'adequate' level of employment to Rwandans.
[2] The measure is transparent. However, it fails to provide the timeframe to benefit from the preferential treatment.
[3] The measure is transparent. However, it fails to provide the timeframe to benefit from the preferential treatment.

11	Tax rulings	X	?	?	?	?	X	Not harmful	Publish the rulings in official gazette
12	APAs	?	?	?	?	X	?	?	N/A
13	Tax settlements	?	?	?	?	?	X	?	Abolish and replace with an Independent Board

V: harmful; X: not harmful; ?: lack of sufficient information

Criterion 1: ring-fencing 1 (targeting non-residents); Criterion 2: ring-fencing 2 (domestic market exclusion); Criterion 3: substantial economic presence requirement; Criterion 4: internationally accepted principles on profit determination; Criterion 5: transparency

DBR: Development Bank of Rwanda; ADFT: Agaciro Development Fund Corporate Trust; BDF: Business Development Fund

ANNEX II. THE DRAFT CODE OF CONDUCT AGAINST HARMFUL TAX COMPETITION IN THE EAST AFRICAN COMMUNITY[1]

Preamble:

The Council of Ministers of the East African Community;

EXERCISING the powers conferred on the Council by article 14(3)(d) of the Treaty for the Establishment of the East African Community;

RECALLING the need for a comprehensive approach to taxation policy and coordinated actions at the East African level in order to reduce distortions in the common market, prevent significant losses of tax revenues, and promote a more employment-friendly development of tax structures;

ACKNOWLEDGING the positive effects of fair competition and the need to consolidate the competitiveness of the East African Community and the Partner States at international level, while noting that tax competition can also lead to tax measures with harmful effects;

DESIRING to eliminate harmful tax practices and bring about fair tax competition within the Community;

MINDFUL of the EAC Partner States situation of capital importation, involving the need to attract investments and the international global concern to eliminate harmful tax competition;

ACKNOWLEDGING the need for a code of conduct for business taxation designed to curb harmful tax measures;

EMPHASIZING that the code of conduct is issued in the form of a directive and is therefore binding as to the objective to be achieved by all EAC Partner States, but leaves each Partner State free to choose the form and method of transposing the content of the code of conduct in its national laws;
HEREBY ADOPTS THE FOLLOWING CODE OF CONDUCT:

Article 1. Objective

The objective of this Code of conduct is to establish rules to eliminate harmful tax competition by Partner States in order to ensure fair competition in the Community.

[1] The code of conduct may be adopted in several possible forms: directive, code of conduct, etc. Chapter 7.2.1. recommends adopting the code as a directive. Depending on the form, slight adjustments may be needed.

Article 2. Scope of application

This Code of conduct, which concerns those measures which significantly affect, or may affect the location of business activities, applies to business taxation and shall apply to all identical or substantially similar taxes imposed after the entry into force of the Code in addition to, or in place of, existing taxes.

Partner States shall notify each other of any substantial changes in the taxation and related information collection measures covered by this Code.

Business activities in this context include all activities carried on within a group of companies.

Tax measures covered by this Code include those measures embodied in laws, regulations, and administrative measures.

Article 3. Harmful tax competition

Harmful tax competition *prima facie* refers to a situation of practices that go beyond building a just national tax system that is designed to attract genuine investment, to set unfair channels that intentionally erode the tax bases of other jurisdictions, while leaving the national tax base unaffected, and without a proportional corresponding economic activity.

Article 4. Gateway criterion

Within the scope of this Code, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than the levels which generally apply in the Partner State in question shall be considered potentially harmful and shall therefore be covered by this Code. Such a level of taxation may be by virtue of the nominal tax rate, the tax base or any other relevant factor. In assessing this criterion, a due regard shall be put on the measure's effect or potential effect on the location of business.

Article 5. Criteria for assessing harmful tax competition

To assess whether a measure is harmful, the following criteria shall be taken into account, *inter alia*:

1. whether the advantages are granted even without any commensurate real economic activity and substantial economic presence in the Partner State granting such tax advantage, or place restrictions on activities that require a substantial economic presence, or

2. whether advantages are granted, either *de jure* or *de facto*, only to non-residents or in respect of transactions with non-residents or discriminate against domestic investors, or
3. whether advantages are ring-fenced from the domestic market, so that they do not affect the national tax base, or
4. whether advantages are available for highly mobile activities, or are not available to immobile activities, or
5. whether tax measures lack transparency, including cases where the conditions are not clearly defined in public legislation or are subject to administrative discretion, cases where tax advantages are not time-limited, cases where legal provisions are relaxed at the administrative level in a non-transparent manner in particular the absence of regular tax audits verifying whether the profits accrued are commensurate with the tax losses, and cases where there is a lack of effective exchange of information.

Article 6. Interpretation

The Committee shall establish the rules of interpretation and guidance on the possible exact meaning of each criterion. If necessary, the interpretation given by the European Union Code of Conduct Group shall be used as best practice.

Article 7. Tax measure for real and manufacturing activities

Where a tax measure satisfies the substantial economic presence requirement through the generation of employment to nationals, assets and investments; plants and buildings for real and manufacturing activities; as well as the tax measure to support education, health, exports, and other public interest sectors of similar objectives, an assessment will be made in consideration of whether the measure is proportionate and targeted at the objectives pursued.

Article 8. Tax measure in support of disadvantaged regions or sectors

Where a tax measure is used to proportionately support the economic development of particularly disadvantaged regions or sectors, an assessment will be made in consideration of whether the measure is proportionate to and targeted at the objectives pursued.

Article 9. Base eroding payments

Partner States commit to develop rules to control payments that erode the tax base, such as excessive interest payments, management fees, royalties and service fees paid from a Partner State to a related party in a no or low tax jurisdiction.

Article 10. Standstill and Rollback

Partner States undertake not to introduce new tax measures which are harmful within the meaning of this Code. Partner States will therefore observe the principles underlying the Code in determining their future policies and will give due consideration to the review process.

Partner States commit to review their existing laws and established practices in light of the principles underlying the Code and the review process described herein. Within five years of entry into force, Partner States will amend such laws and practices as necessary to eliminate any harmful measure, taking into account the discussions of the Council following the review process.

Article 11. Provision of the relevant information

In accordance with the principles of transparency and openness, Partner States shall inform each other of existing and planned tax measures that may fall within the scope of the Code. In particular, Partner States are invited to provide, at the request of another Partner State, information on any tax measure that appears to fall within the scope of the Code and to engage in such programs of mutual assistance and cooperation as may be appropriate.

Article 12. Establishment of the Code of Conduct Committee

The Council shall establish a technical Committee of experts to monitor the implementation of this Code and to assess tax measures which may fall within its scope. The Council invites each Partner State to nominate two high-level representatives. The chairmanship and vice-chairmanship of the Committee shall be held by the appointed representatives on a rotating basis; they should not belong to one Partner State.

The Committee, which will meet regularly, will select and review the tax measures to be assessed in accordance with the provisions set out in this Code. The group will report regularly on the measures assessed. These reports will be forwarded to the Council for consideration and, if the Council so decides, will be published.

The Council requests the EAC Secretariat to assist the Committee in carrying out the necessary preparatory work for its meetings and to facilitate the provision of information and the review process. To this end, the Council directs Partner States to provide the Secretariat with the necessary information to enable the Secretariat to coordinate the exchange of such information among Partner States.

Article 13. Assessment procedure

The Council, a Partner State, an interested physical or moral person and a non-governmental organization with residence in the EAC, which considers that a tax measure taken by a Partner State is in breach of the Code of conduct, may request the Committee to assess whether that measure is harmful under the Code of conduct. The Committee may also, on its own initiative, undertake to assess whether a Partner State's tax measure is in breach of the Code of conduct and determine whether that measure is harmful within the scope of the Code of conduct.

The Committee shall conduct a preliminary procedure to examine the admissibility of the claim and the measure's potential harmfulness. If the claim is admissible and the measure is potentially harmful, the Committee shall notify the concerned state and invite it to submit its observations.

The Committee shall decide whether the measure in question is harmful and, if so recommends the ways forward. In the event of disagreement on the outcome of the Committee, the matter may be referred to the EACJ for a final binding judgment, following the same procedure as for referral to the Code of Conduct Committee.

The EACJ judgment, which where necessary may include sanctions, shall be binding on the Partner State concerned as to the actions to be taken to eliminate the harmful measure.

Article 14. Geographical extension

The Council considers it advisable that the principles for the elimination of harmful tax measures be adopted on a broad geographical basis as possible. To this end, the Partner States undertake to promote their adoption in third countries.

Article 15. Capacity building and enabling environment

The Council considers it necessary to further develop professionalism and expertise in tax matters, and advises the development of an effective enabling environment that effectively

protects tax bases of the Partner States from tax avoidance and the harmful effects of tax competition.

Article 16. Monitoring and review

In order to ensure the effective implementation of the Code, the Council invites the Code of conduct committee to report to it annually on the implementation of the Code.

The Council and the Partner States will review the provisions of the Code five years after its adoption.

Article 17. Entry into force

The code will take effect on the day of its publication in the Community Gazette.

In witness whereof, the undersigned, being duly authorized thereto, have signed this Code of Conduct:

For the Republic of Burundi

For the Republic of Kenya

For the Republic of Rwanda

For the Republic of South Sudan

For the United Republic of Tanzania

For the Republic of Uganda

Annex III: Overview of the preferential tax regimes examined by the COCG since its creation in March 1998

(CEU, 9639/4/18 REV 4 FISC 243 ECOFIN 557, Brussels, 5/12/2019)

Preferential regimes of EU Member States

State	Code & Regime name	Year	Assessment
Austria	AT001, Holdings (intra-group relief)	1999	Harmful
	AT006, Tax exemptions	1999	Harmful
	AT002, Private foundations	1999	Not harmful
	AT003, Certain exemptions from corporate tax	1999	Not harmful
	AT004, Participation fund companies	1999	Not harmful
	AT005, Investment allowance	1999	Not harmful
	AT007, R&D allowance	1999	Not harmful
Belgium	BE001, Co-ordination centres	1998	Harmful
	BE002, Distribution centres	1998	Harmful
	BE003, Service centres	1998	Harmful
	BE009, US Foreign sales corporations ruling	1999	Harmful
	BE010, Informal capital ruling	1999	Harmful
	BE016, Amended patent income deduction (PID) for small companies	2013	Harmful Harmful
	BE004, Supplementary staff assigned to scientific research and export management	1999	Not harmful
	BE005, Investment deductions	1999	Not harmful
	BE006, Employment and (T) zones	1999	Not harmful
	BE007, Incentives for investment in certain regions	1999	Not harmful
	BE008, Re-conversion zones	1999	Not harmful
	BE011, Holdings	1999	Not harmful
	BE012, Investment funds	1999	Not harmful
	BE013, Measure aimed at determining the level of taxation of foreign companies operating in Belgium, without legal personality or probative accounts	1999	Not harmful
	BE017, Patent box	2017	Not harmful
	BE018, Notional interest deduction	2018	Not harmful
	BE014, Patent income deduction (PID)	2008	Not assessed
	BE015, Profit participation loan	2008	Not assessed
Bulgaria	BG001, Insurance companies	2006	Harmful
	BG005, Measure under foreign investment Act (50% of the corporate tax due retained for a period of 10 years)	2006	Harmful
	BG006, Tonnage tax (shipping regime)	2006	Harmful
	BG002, Gambling activities	2006	Not harmful
	BG003, Investment tax credit for investors	2006	Not harmful
	BG007, Amendments to the investment tax credit	2007	Not assessed
	BG008, Introduction of Art. 189a in the Bulgarian law on corporate income tax	2009	Not assessed
	BG009, Tax measure under Art. 189b in the Bulgarian law on corporate income tax	2010	Not assessed

Cyprus	CY001, International business companies / International branches	2003	Harmful
	CY002, Insurance companies	2003	Harmful
	CY003, International financial services companies	2003	Harmful
	CY004, International banking units	2003	Harmful
	CY005, International general and limited partnerships	2003	Harmful
	CY006, International collective investment schemes	2003	Harmful
	CY009, Foreign income	2003	Harmful
	CY010, Export of services	2003	Harmful
	CY012, Export of goods	2003	Harmful
	CY018, Intellectual property tax	2013	Harmful
	CY019, Patent box	2017	Harmful
	CY007, Shipping regime	2003	Not harmful
	CY008, Capital gains	2003	Not harmful
	CY011, Companies listed at the Cyprus stock exchange (CSE)	2003	Not harmful
	CY013, Co-operative societies	2003	Not harmful
	CY014, Auxiliary tourist buildings or projects	2003	Not harmful
	CY015, Holdings (treatment of foreign dividend)	2003	Not harmful
	CY016, Foreign branches	2003	Not harmful
	CY017, Change in the legislation regarding taxation of interest and the participation exemption	2010	Not assessed
	CY020, Notional interest deduction	2018	Amended
Czech Republic	CZ001, Investment incentives	2003	Harmful
Germany	DE010, Control and coordination centres of foreign companies in Germany	1999	Harmful
	DE001, Shipping regime: tonnage tax	1999	Not harmful
	DE002, Special allowance: Agriculture and forestry	1999	Not harmful
	DE004, Special depreciation: Business investment in former DDR and West Berlin	1999	Not harmful
	DE005, Investment grants: Equipment in former DDR and West Berlin	1999	Not harmful
	DE006, Tax advantages: Commercial investment in BRD/DDR border area Germany	1999	Not harmful
	DE007, special depreciation for SMEs	1999	Not harmful
	DE008, Rollover of capital gains	1999	Not harmful
	DE009, Limits on taxes on commercial income	1999	Not harmful
	DE011, Holding companies	1999	Not harmful
	DE012, Provision for fluctuation in insurance and re-insurance	1999	Not harmful
	DE013, Investor model/film funds	1999	Not harmful
	DE014, Rules for self-generated intangibles	1999	Not harmful
Denmark	DK005, Holding companies	1999	Harmful
	DK001, Early depreciation for vessels	1999	Not harmful
	DK002, Enterprise zones	1999	Not harmful
	DK003, Foreign business operations relief	1999	Not harmful
	DK004, Scheme for early depreciation of certain assets	1999	Not harmful

Estonia	EE001, New investment funds Act	2018	Out of scope
Greece	EL001, Offices of foreign companies	1998	Harmful
	EL002, Ship management offices	1999	Not harmful
	EL003, Shipping regime	1999	Not harmful
	EL004, Exports incentives and incentives for mass Media	1999	Not harmful
	EL005, Incentives for investment	1999	Not harmful
	EL006, Small islands income tax reduction	1999	Not harmful
	EL007, Mutual funds/portfolio investment companies	1999	Not harmful
	EL008, Fixed tax: transferable securities	1999	Not harmful
	EL009, Business share capital companies	1999	Not harmful
	EL010, long term loans in foreign currency	1999	Not harmful
	EL011, Large scale product-line investments financed with Greece foreign capital	1999	Not harmful
	EL012, National infrastructure	1999	Not harmful
	EL015, Patent tax incentive	2018	Not harmful
	EL013, Tax incentives for development	2004	Not assessed
	EL014, Tax incentives for investment	2005	Not assessed
Spain	ES001, Basque country: Co-ordination centres	1998	Harmful
	ES002, Navarra: Co-ordination centres	1998	Harmful
	ES016, Investigation and exploitation of hydrocarbons	1999	Harmful
	ES018, Partial exemption for income from certain intangible assets	2008	Harmful
	ES019, Basque country partial exemption for income from certain intangible assets	2014	Harmful
	ES020, Navarra partial exemption for income from certain intangible assets	2014	Harmful
	ES021, Reduction of income derived from certain intangible assets	2016	Harmful
	ES022, Navarra reduction of income derived from certain intangible assets	2016	Harmful
	ES023, Basque country partial reduction for the exploitation of intellectual and industrial property	2016	Harmful
	ES003, Holding companies	1998	Not harmful
	ES004, Incentives for mining enterprises	1999	Not harmful
	ES005, Canary islands: Economic and tax regimes	1999	Not harmful
	ES006, Basque country: Start up relief	1999	Not harmful
	ES007, Navarra: Start up relief	1999	Not harmful
	ES008, Regional development companies	1999	Not harmful
	ES009, Incentives for SMEs	1999	Not harmful
	ES010, Investment tax credits	1999	Not harmful
	ES011, Venture capital funds and companies	1999	Not harmful
	ES012, Representative office	1999	Not harmful
	ES013, Banks and finance entities	1999	Not harmful
	ES014, 50% profit exemption in Ceuta and Melilla	1999	Not harmful
	ES015, Relief for investments in films and audio-visual productions	1999	Not harmful
	ES017, Shipping regime	1999	Not harmful

Finland	FI001, Aland islands captive insurance	1998	Harmful
	FI002, Ice-Class investment allowance	1999	Not harmful
	FI003, Accelerated depreciation, investments in developing regions	1999	Not harmful
France	FR001, Headquarters and logistic centres	1998	Harmful
	FR002, Royalty income: patents	1998	Harmful
	FR021, Provisions for renewal of mineral reserves	1999	Harmful
	FR022, Provisions for renewal of oil and gas reserves	1999	Harmful
	FR053, Reduced rate for long term capital gains and profits from the licensing of IPRs	2014	Harmful
	FR003, Shipping regime	1999	Not harmful
	FR004, Tax credit for research	1998	Not harmful
	FR005, Corsica incentives 1,2,3	1999	Not harmful
	FR006, Tax free zones: ZFU	1999	Not harmful
	FR007, Enterprise zones	1999	Not harmful
	FR008, Overseas departments	1999	Not harmful
	FR009, Nord-Pas-de-Calais privileged investment zone	1999	Not harmful
	FR010, Benefice mondial and Benefice consolidé	1999	Not harmful
	FR011, Newly created companies	1999	Not harmful
	FR012, St Martin and St Barthelemy	1999	Not harmful
	FR013, Venture capital companies	1999	Not harmful
	FR014, Tax credits for job creating investment	1999	Not harmful
	FR015, Tax credits for staff training costs	1999	Not harmful
	FR016, Holding de participations étrangères	1999	Not harmful
	FR017, Centrales de trésorerie / Finance centres	1999	Not harmful
	FR018, Provisions for risks relating to medium and long term credit operations carried out by banks and credit institutions	1999	Not harmful
	FR019, Technical provisions for insurance and reinsurance undertakings	1999	Not harmful
	FR020, Holding companies with shareholding in foreign companies	1999	Not harmful
	FR023, Tax credit for membership of a groupement de prevention agree	1999	Not harmful
	FR024, Exemption from corporation tax on takeover of ailing companies	1999	Not harmful
	FR025, Legal persons liable for corporation tax whose objects are to transfer use and benefit of movable or immovable property to its members free of charge	1999	Not harmful
	FR026, Distribution by certain companies of capital gains arising 1999 on liquidation	1999	Not harmful
	FR027, Provisions to cover price increases	1999	Not harmful
	FR028, Provisions for setting up foreign branches	1999	Not harmful
	FR029, Provision for employee start-up loans	1999	Not harmful
	FR030, Provisions for risks relating to medium-term credit transactions by firms carrying out works or selling abroad	1999	Not harmful

	FR031, Long-term capital gains on FCPR and SCR securities	1999	Not harmful
	FR032, Carryover of losses on merger (consent)	1999	Not harmful
	FR033, Deferred taxation in the event of merger and practical asset transfer	1999	Not harmful
	FR034, Authorised telecom financing companies	1999	Not harmful
	FR035, Investment companies	1999	Not harmful
	FR036, Reduced rate of 19% on reinvested SME profits	1999	Not harmful
	FR037, Exceptional depreciation for buildings constructed under urban and rural planning arrangements	1999	Not harmful
	FR038, Accelerated depreciation for purchases of software	1999	Not harmful
	FR039, Accelerated depreciation for energy-saving equipment	1999	Not harmful
	FR040, Accelerated depreciation for environmental protection	1999	Not harmful
	FR041, Deduction of cooperative dividends	1999	Not harmful
	FR042, Tax exemption of capital gains on the scale of securities of companies established by special agreement to promote industry, business and agriculture	1999	Not harmful
	FR043, Exemption form corporation tax for the oil storage agency	1999	Not harmful
	FR044, Corporation tax exemption for agricultural cooperatives	1999	Not harmful
	FR045, Provision for renewal of mineral reserves	1999	Not harmful
	FR046, Provision for renewal of oil and gas reserves	1999	Not harmful
	FR047, Press	1999	Not harmful
	FR048, Special depreciation rules for the audio-visual sector	1999	Not harmful
	FR049, Business and industrial real estate companies	1999	Not harmful
	FR050, Companies authorised to provide energy-saving and heat recovery financing	1999	Not harmful
	FR051, Exceptional depreciation for participating interests in companies financing non-industrial fishing	1999	Not harmful
	FR052, Securities in innovation financing companies	1999	Not harmful
	FR054, New IP regime	2019	Not harmful
Croatia	HR001, Corporate income tax act	2013	Not harmful
	HR002, Hill and mountain areas Act	2013	Not harmful
	HR003, Areas of special state concern Act	2013	Not harmful
	HR004, Investment promotion Act	2013	Not harmful
	HR005, Reconstruction and development of the City of Vukovar Act	2013	Not harmful
	HR006, Free zones Act	2013	Not harmful
	HR007, Maritime code	2013	Not harmful
	HR008, Investment promotion Act (2012)	2013	Not harmful
	HR009, Investment promotion Act (2015)	2016	Not assessed

	HR010, Amendments to the law on corporate income	2017	Not assessed
	HR013, Incentive measures for research and development projects	2019	Not assessed
	HR011, Investment promotion Act (2017)	2018	Out of scope
	HR012, Ordinance on the procedure of conducting advance pricing agreements	2018	Out of scope
Hungary	HU001, Offshore companies	2003	Harmful
	HU009, Intangible property for royalties and capital gains	2014	Harmful
	HU002, 10 years tax holidays	2003	Not harmful
	HU003, Venture capital companies	2003	Not harmful
	HU004, Holding companies	2003	Not harmful
	HU005, Investment tax relief subject to special approval	2003	Not harmful
	HU006, Revenue from stock exchange operations	2003	Not harmful
	HU008, Royalty income	2004	Not harmful
	HU011, Intellectual property box	2017	Not harmful
	HU007, Interest from affiliated companies	2004	No broad consensus
	HU010, Tax base for interest payments received from abroad	2010	Not assessed
Ireland	IE001, The international financial services centre (Dublin)	1998	Harmful
	IE004, 10% manufacturing rate	1999	Harmful
	IE005, Petroleum taxation	1999	Harmful
	IE006, Shannon Airport Zone	1999	Harmful
	IE008, Foreign income	1999	Harmful
	IE002, Research and technical development	1999	Not harmful
	IE003, Mining taxation	1999	Not harmful
	IE007, New investments: buildings in Run-down urban areas	1999	Not harmful
	IE009, Exemption of oncome from Government securities	1999	Not harmful
	IE010, Non-resident companies	1999	Not harmful
	IE011, Specified collective investment undertakings	1999	Not harmful
	IE012, Film	1999	Not harmful
	IE013, Investment in renewable energy projects	1999	Not harmful
	IE014, Tax exemption for profit/gain from the occupation of woodlands	1999	Not harmful
	IE016, Knowledge development box	2016	Not harmful
	IE015, Holding company	2005	Not assessed
Italy	IT001, Trieste financial services and insurance centre	1998	Harmful
	IT017, Patent box (old)	2014	Harmful
	IT002, Shipping regime	1999	Not harmful
	IT003, Listed companies: reduced rates	1999	Not harmful
	IT004, Incentives for restructuring the banking sector	1999	Not harmful
	IT005, Tax deduction for interest on additional capital contributions from foreign head offices to Italian PE	1999	Not harmful
	IT006, Dual income tax	1999	Not harmful

	IT007, IRAP exemptions	1999	Not harmful
	IT008, SMEs	1999	Not harmful
	IT009, Special depreciation regime	1999	Not harmful
	IT010, Special regime for investment funds	1999	Not harmful
	IT011, Substitute tax regime for corporate reorganisations	1999	Not harmful
	IT012, Tax advantages for certain trade and commercial activities	1999	Not harmful
	IT013, Regional incentives: South of Italy	1999	Not harmful
	IT014, Incentives for scientific research	1999	Not harmful
	IT018, Patent box (new)	2015	Not harmful
	IT019, Notional interest deduction	2018	Not harmful
	IT015, Holdings	2004	Out of scope
	IT016, International tax ruling practice	2004	Out of scope
Lithuania	LT001, Free economic zones	2003	Harmful
	LT003, Enterprises with foreign invested capital	2003	Harmful
	LT004, Strategic investors	2003	Harmful
	LT008, Holding company regime	2019	Harmful
	LT002, Benefits in respect of reinvested profits	2003	Not harmful
	LT005, Special tax zones (IP components)	2017	Not harmful
	LT007, New special corporate income tax regime for patented assets and copyrighted software (patent box)	2018	Not harmful
	LT006, Review of the corporate income tax regime for special tax zones	2018	Not assessed
Luxembourg	LU001, Coordination centres	1998	Harmful
	LU002, Tax exempt 1929 holding companies	1998	Harmful
	LU003, Finance companies	1998	Harmful
	LU004, Provisions for fluctuations in reinsurance	1998	Harmful
	LU013, Finance branches	1999	Harmful
	LU014, Intellectual property (old patent box)	2008	Harmful
	LU005, Audio-visual investment certificates	1999	Not harmful
	LU006, Tax holidays for new businesses	1999	Not harmful
	LU007, Special depreciation arrangement for assets intended for environmental protection and energy saving, and for assets adjusting work places for disabled workers	1999	Not harmful
	LU008, Application of the parent company/subsidiary system to resident companies with share capital	1999	Not harmful
	LU009, Depreciation of equipment and tools used solely for scientific or technical research operation	1999	Not harmful
	LU010, Shipping regime	1999	Not harmful
	LU011, Investment funds	1999	Not harmful
	LU012, Venture capital investment certificates	1999	Not harmful
	LU017, Draft law relating to the tax regime for IP (new patent box)	2018	Not harmful
	LU015, Group financing companies: advance confirmation or margin	2010	Not assessed
	LU016, Intra-group financing: safe harbour rule	2017	Not assessed
Latvia	LV001, Special economic zones and free ports	2003	Harmful

	LV002, High-tech companies	2003	Not harmful
	LV003, Big investment schemes	2003	Not harmful
	LV004, Shipping regime	2003	Not harmful
	LV005, Start-up tax reliefs	2017	Not assessed
Malta	MT001, Offshore trading and non-trading companies	2003	Harmful
	MT002, Offshore insurance companies	2003	Harmful
	MT003, Offshore banking companies	2003	Harmful
	MT004, International trading companies	2003	Harmful
	MT005, Dividends from (other) Maltese companies with foreign income	2003	Harmful
	MT007, Investment service companies	2003	Harmful
	MT012, Special granted tax exemption	2003	Harmful
	MT013, Exemption for royalty income from patents	2014	Harmful
	MT006, Shipping regime	2003	Not harmful
	MT008, Business promotion Act	2003	Not harmful
	MT009, Onshore free port	2003	Not harmful
	MT010, Business promotion regulations	2003	Not harmful
	MT014, Notional interest deduction	2018	Not harmful
	MT015, New patent box	2019	Not harmful
	MT011, Non-resident companies	2003	Not assessed
Netherlands	NL001, Cost plus ruling	1998	Harmful
	NL002, Resale minus ruling	1998	Harmful
	NL003, Intra-group finance activities	1998	Harmful
	NL004, Holding companies	1998	Harmful
	NL005, Royalties	1998	Harmful
	NL006, International group financing	1998	Harmful
	NL007, Finance branch	1998	Harmful
	NL011, US Foreign sales corporations ruling	1999	Harmful
	NL012, Informal capital ruling	1999	Harmful
	NL014, Non-standard rulings (including Greenfield-rulings)	1999	Harmful
	NL016, Innovation box	2007	Harmful
	NL008, Shipping regime	1999	Not harmful
	NL009, Tax credits for investments in energy saving equipment	1999	Not harmful
	NL010, Accelerated depreciation of new buildings in certain regions	1999	Not harmful
	NL013, Investment allowance	1999	Not harmful
	NL015, Film industry	1999	Not harmful
	NL018, Patent box (new)	2017	Not harmful
	NL017, Interest box	2007	Not assessed
Poland	PL001, Special economic zones (original rules)	2003	Harmful
	PL002, Special economic zone (amended rules)	2003	Harmful
	PL013, Polish investment zone (PIZ)	2019	Harmful
	PL006, 15% corporate income tax rate for small taxpayers	2018	Not harmful
	PL011, Notional interest deduction regime	2019	Not harmful
	PL012, IP regime	2019	Not harmful
	PL003, Special economic zones (amended rules)	2006	Not assessed
	PL005, GAAR and rulings	2017	Not assessed

	PL007, One-time depreciation of factory new fixed assets	2018	Not assessed
	PL009, Increase of the one-time depreciation limit for fixed assets and intangible assets	2018	Not assessed
	PL010, 9% corporate income tax for taxpayers with revenues not exceeding EUR 1.2 million	2019	Not assessed
	PL004, Shipbuilding and complementary industries	2017	Out of scope
	PL008, Increased tax incentives for R&D activities	2018	Out of scope
Portugal	PT001, Madeira and Sta Maria (Azores) free zones	1999	Harmful
	PT016, Partial exemption for income from patents and other industrial property rights	2014	Harmful
	PT002, Shipping regime	1999	Not harmful
	PT003, Research and development expenses	1999	Not harmful
	PT004, Micro and small enterprises	1999	Not harmful
	PT005, Tax incentives for contractual investment	1999	Not harmful
	PT006, Tax credit for investment	1999	Not harmful
	PT007, Reinvested capital gains	1999	Not harmful
	PT008, SGII companies	1999	Not harmful
	PT009, SCR, SDR and SFE companies	1999	Not harmful
	PT010, Holding companies	1999	Not harmful
	PT011, Reinsurance companies	1999	Not harmful
	PT012, Accelerated depreciation	1999	Not harmful
	PT013, Investment funds	1999	Not harmful
	PT014, Industrial free zones	1999	Not harmful
	PT017, Patent box (new)	2017	Not harmful
	PT015, Madeira free zones	2008	Not assessed
	PT018, Notional interest deduction	2018	Out of scope
Romania	RO001, Free zones	2006	Harmful
	RO003, Large investment deduction	2006	Harmful
	RO004, Export activities	2006	Harmful
	RO005, Special tax exemptions	2006	Harmful
	RO006, Patent profits exemption	2006	Harmful
	RO002, Disadvantaged zones6	2006	Not harmful
	RO007, Industrial parks	2006	Not harmful
	RO008, Profit tax exemption for companies with innovation and R&D activities	2018	Review on hold
Slovakia	SKOO1, 10 years tax holiday for foreign owned companies	2003	Harmful
	SK002, Tax exemption for newly started companies	2003	Harmful
	SK003, 100% corporate income tax credits for foreign investors	2003	Harmful
	SK004, 100% corporate income tax credits for foreign investors (first amendment)	2003	Harmful
	SK005, 100% corporate income tax credits for foreign investors (second amendment)	2003	Harmful
	SK007, Patent box	2018	Not harmful
	SK006, Investment aid tax credit	2008	Not assessed
	SK008, Exemption of gains from the sale of shares and business	2018	Not assessed
Slovenia	SI002, Foreign income	2003	Harmful

	SI001, Special economic zones	2003	Not harmful
	SI003, Newly established companies	2003	Not harmful
	SI004, Exemption of revenues from profit participation	2005	Not assessed
	SI005, Investment incentives allowance	2005	Not assessed
	SI006, Taxation of interests and royalties	2005	Not assessed
	SI007, Implementation of PSD, IRD and merger directive	2005	Not assessed
	SI008, Enlargement of the period for a loss carry-over	2006	Not assessed
	SI009, Relief for investment in research and development	2006	Not assessed
	SI010, Harmonisation of the amendments to the mergers directive	2006	Not assessed
	SI011, Exemption of dividends and capital gains	2007	Not assessed
	SI012, Venture capital scheme	2007	Not assessed
	SI013, Amendments to the economic zones Act	2007	Not assessed
	SI014, Tax reliefs for Pomurje region	2010	Not assessed
	SI015, Amendments to the economic zones Act	2010	Not assessed
Sweden	SE001, Foreign insurance companies	1999	Not harmful
	SE002, Investment companies	1999	Not harmful
	SE003, Tax allocation reserve of 20%	1999	Not harmful
	SE004, Holdings	2004	Not assessed
United	UK002, Gibraltar 1992 companies	1998	Harmful
Kingdom	UK004, Gibraltar exempt companies	1998	Harmful
(including	UK005, Gibraltar qualifying companies	1998	Harmful
Gibraltar)	UK018, Gibraltar income tax Act (ITA) 2010	2011	Harmful
	UK019, Patent box (old)	2013	Harmful
	UK020, Gibraltar treatment of assets holding companies	2014	Harmful
	UK001, International headquarters companies	1998	Not harmful
	UK003, Gibraltar captive insurance companies	1998	Not harmful
	UK006, Rollover relief on disposal of ships	1999	Not harmful
	UK007, Gibraltar shipping and aviation	1999	Not harmful
	UK008, Film industry	1999	Not harmful
	UK009, Enterprises zones	1999	Not harmful
	UK010, SMEs in Northern Ireland	1999	Not harmful
	UK011, Special scheme for accelerated depreciation	1999	Not harmful
	UK012, Gibraltar development incentives	1999	Not harmful
	UK013, Non taxation of financial activities of non-resident companies	1999	Not harmful
	UK014, Scientific research allowances	1999	Not harmful
	UK015, Independent investment managers	1999	Not harmful
	UK016, Cost plus rulings	1999	Not harmful
	UK021, Patent box (new)	2017	Not harmful
	UK017, Gibraltar proposals for a new corporate tax regime	2002-2009	Not harmful
	Dependent or associated territories of Member States		
Anguilla	AI001, Measure under criterion 2.2	2017	Harmful
	AN001, Offshore companies	1999	Harmful

Netherlands Antilles	AN005, Free zones	1999	Harmful
	AN008, Ruling practice	2004	Harmful
	AN009, Tax treatment of exempt companies under the NFF	2004	Harmful
	AN010, Tax treatment of holding companies under the NFF	2004	Harmful
	AN002, New businesses	1999	Not harmful
	AN003, Mutual funds	1999	Not harmful
	AN004, Captive insurance	1999	Not harmful
	AN006, Rulings	1999	Not harmful
	AN007, Shipping and air transport	1999	Not harmful
Aruba	AW001, Offshore companies	1999	Harmful
	AW002, Exempt companies (AVVs)	1999	Harmful
	AW004, free zones	1999	Harmful
	AW006, Captive insurance	1999	Harmful
	AW012, Special zone San Nicolas	2017	Harmful
	AW013, Transparency	2017	Harmful
	AW003, Tax exemptions and holidays for new businesses	1999	Not harmful
	AW005, Rulings	1999	Not harmful
	AW007, Shipping and air transport	1999	Not harmful
	AW008, New fiscal framework (or Imputation Payment Company (IPC) regime)	2004	Not harmful
	AW011, Shipping and aviation companies	2017	Not harmful
	AW009, Amendments to the IPC regime (IP aspects)	2016	Not assessed
	AW010, Free zone	2017	Under OECD FHTP monitoring
	AW014, Exempt companies	2019	Ibid.
	AW015, Investment promotion	2019	Ibid.
Bermuda	BM002, Measure under criterion 2.2	2017	Harmful
	BM001, Tax exemption guarantee	1999	Harmful
	BM003, Legislative amendments and new guidance under criterion 2.2	2019	-
Curacao	CW001, eZone	2017	Harmful
	CW002, Export companies (or export facility)	2017	Harmful
	CW003, Investment company (formerly: tax exempt entity)	2017	Harmful
	CW005, Manufacturing activities under the eZone regime	2018	Harmful
	CW006, Foreign source income exemption	2019	Harmful
	CW004, Innovation box	2018	Not harmful
Falkland Islands	FK001, Tax holidays	1999	Not harmful
Guernsey	GG001, Exempt companies	1999	Harmful
	GG002, International loan business	1999	Harmful
	GG004, International bodies	1999	Harmful
	GG006, Offshore insurance companies	1999	Harmful
	GG007, Insurance companies	1999	Harmful
	GG008, Zero-ten corporate tax	2008	Harmful
	GG009, Measure under criterion 2.2	2017	Harmful

	GG003, Unit trusts and collective investment companies	1999	Not harmful
	GG005, Captive insurance companies	1999	Not harmful
	GG010, New guidance under criterion 2.2	2019	-
Greenland	GL001, Deduction for investment in mineral processing	1999	Not harmful
	GL002, Surcharge exemption for raw materials concession holders	1999	Not harmful
Isle of Man	IM003, International business companies	1999	Harmful
	IM004, Exemption for non-residents companies	1999	Harmful
	IM005, Exempt insurance companies	1999	Harmful
	IM007, International loan business	1999	Harmful
	IM008, Offshore banking business	1999	Harmful
	IM009, Fund management	1999	Harmful
	IM013, Distributed profits charge	2007	Harmful
	IM014, New tax legislation	2013	Harmful
	IM015, Measure under criterion 2.2	2017	Harmful
	IM001, Free depreciation and balancing charges on ships	1999	Not harmful
	IM002, Special depreciation for tourist premises	1999	Not harmful
	IM006, Tax holidays for industrial undertakings	1999	Not harmful
	IM010, Exempt public companies	1999	Not harmful
	IM011, Film industry tax credits	1999	Not harmful
	IM012, General and non-discriminatory corporate taxation system	2007	Not harmful
	IM016, New guidance under criterion 2.2	2019	-
Jersey	JE001, Tax exempt companies	1999	Harmful
	JE002, International treasury operations	1999	Harmful
	JE003, International business companies	1999	Harmful
	JE004, Captive insurance companies	1999	Harmful
	JE005, Zero-ten corporate tax	2008	Harmful
	JE006, Measure under criterion 2.2	2017	Harmful
	JE007, New guidance under criterion 2.2	2019	-
Caymans	KY002, Measure under criterion 2.2	2017	Harmful
Islands	KY003, Legislative amendments under criterion 2.2	2019	Harmful
	KY001, Tax exemption guarantee	1999	Harmful
Macao	MO001, Offshore banking	1999	Not harmful
Montserrat	MS005, International business companies	2017	Harmful
	MS001, Reduced rate for industrial and offshore companies	1999	Not harmful
	MS002, International business companies	1999	Not harmful
	MS003, Tax holidays for approved enterprises	1999	Not harmful
	MS004, Exemption for newly constructed or enlarged hotels	1999	Not harmful
New Caledonia	NC001, Exemption for 8 years for certain activities in specified communes	1999	Not harmful
	NC002, Metallurgical companies	1999	Not harmful
	NC003, Exemption or reduced rate base for rental income in specified communes	1999	Not harmful

	NC004, 10-15 year exemption in hotel and tourist industry	1999	Not harmful
	NC005, Deductions for investment in creating industries	1999	Not harmful
	NC006, Deduction for capital investment	1999	Not harmful
French Polynesia	PF001, Investment and job incentives (tax exemptions) in certain sectors (tourism, maritime, etc. but excluding banking and insurance)	1999	Not harmful
Saint-Pierre and Miquelon	PM001, Temporary exemptions for certain sectors	1999	Not harmful
	PM002, Partial; exemption from distribution tax	1999	Not harmful
	PM003, Deduction for productive investment	1999	Not harmful
	PM004, Share in the subscribed capital of certain companies	1999	Not harmful
St Helena and Dependencies	SH001, Tax holidays	1999	Not harmful
	SH002, 150% deductions	1999	Not harmful
Turks and Caicos Islands	TC002, Measure under criterion 2.2	2017	Harmful
	TC001, Tax exemption guarantee	1999	Not harmful
	TC003, Legislative amendments under criterion 2.2	2019	-
British Virgin Islands	VG005, International business companies	1999	Harmful
	VG006, Measure under criterion 2.2	2017	Harmful
	VG001, Arising and remittance basis	1999	Not harmful
	VG002, 1% rate	1999	Not harmful
	VG003, Pioneer industry exemption	1999	Not harmful
	VG004, Exemption for newly constructed hotels	1999	Not harmful
	VG007, New guidance under criterion 2.2	2019	-
Wallis and Futuna Islands	WF001, Investment and job incentives	1999	Not harmful
Mayotte	YT001, Temporary tax exemptions for companies	1999	Not harmful
	YT002, Tax deductions for productive investments	1999	Not harmful
	YT003, Capital contributions to certain companies	1999	Not harmful

Other jurisdictions

Andorra	AD001, International trading companies	2017	Harmful
	AD002, International IP companies	2017	Harmful
	AD003, Intra-group finance companies	2017	Harmful
	AD004, Holding companies	2017	Harmful
United Arab Emirates	AE002, Measure under criterion 2.2	2018	Harmful
	AE001, Free zones	2017	Not assessed
	AE003, New guidance under criterion 2.2	2019	-
Antigua and Barbuda	AG001, International business corporations	2017	Harmful
	AG003, Free trade zones	2018	Harmful
	AG002, Merchant shipping Act	2018	-
Armenia	AM001, Reduced tax rate for large exporters	2017	Harmful
	AM002, Governmentally approved projects outside Armenia	2017	Harmful
Australia	AU001, Offshore banking unit	2018	Harmful
Barbados	BB001, International business companies	2017	Harmful
	BB002, International Financial services	2017	Harmful
	BB003, Exempt insurance company	2017	Harmful
	BB004, Qualifying insurance company	2017	Harmful

	BB005, International societies with restricted liability	2017	Harmful
	BB007, International trusts	2017	Harmful
	BB008, Fiscal incentives Act	2017	Harmful
	BB009, Foreign currency earnings credit / credit for overseas projects or services	2017	Harmful
	BB011, Measure under criterion 2.2	2019	Harmful
	BB006, Shipping regime	2017	Not harmful
	BB010, Insurance regime	2019	Under OECD FHTP monitoring
Bahrain	BH001, Measure under criterion 2.2	2017	Harmful
	BH002, New guidance under criterion 2.2	2019	-
Brazil	BR001, Export processing zone	2017	Not harmful
Bahamas	BS001, Measure under criterion 2.2	2017	Harmful
Botswana	BW001, Botswana international financial services centre companies	2017	Harmful
	BW002, Foreign source income exemption	2019	-
Belize	BZ001, International business company (IBC)	2017	Harmful
	BZ002, Export processing zones (EPZ) entreprises	2017	Harmful
	BZ006, Foreign source income exemption	2019	Harmful
	BZ003, Fiscal incentive Act	2019	Not harmful
	BZ004, General income tax Act	2019	Not harmful
	BZ005, Commercial free zone	2019	Not harmful
Canada	CA001, Life insurance business	2018	Not actually harmful
Switzerland	CH001, Cantonal administrative company status (auxiliary company regime)	2012	Harmful
	CH002, Cantonal mixed company status	2012	Harmful
	CH003, Cantonal holding company status	2012	Harmful
	CH004, Circular Number 8 of the Federal Tax Administration on principal structures (principal regime)	2012	Harmful
	CH005, Practice of the Federal tax administration regarding finance branches	2012	Harmful
	CH006, Patent box of the Canton of Nidwalden	2019	Not harmful
	CH007, Notional interest deduction	2019	-
Cook Islands	CK001, International companies	2017	Harmful
	CK002, International insurance companies	2017	Harmful
	CK004, International captive insurance companies	2017	Harmful
	CK005, Encouragement of new industry or enterprise	2017	Harmful
	CK006, Developing projects	2017	Harmful
	CK003, Overseas insurance companies	2017	Does not meet the gateway criterion
Chile	CL001, Business platform	2017	Not actually harmful
China	CN001, Reduced rate for new/high tech enterprises	2017	Not harmful
	CN002, Reduced rate for advanced technology service enterprises	2017	Not harmful
Colombia	CO001, Exempted income derived from software developed in Colombia	2017	Harmful
Costa Rica	CR001, Free zones	2017	Harmful

	CR002, Manufacturing activities under the amended free zones regime	2019	Harmful
	CR003, Foreign source income exemption	2019	-
Cabo Verde	CV001, International business centre	2017	Harmful
	CV002, International financial institutions	2017	Harmful
	CV003, Shipping regime	2019	Not harmful
	CV004, Incentives for internationalisation	2019	Not currently harmful
Dominica	DM001, International business companies	2017	Harmful
	DM002, Offshore banking	2017	Harmful
	DM003, General incentive under fiscal incentives act	2017	Harmful
Fiji	FJ001, Exporting companies	2017	Harmful
	FJ002, Income communication technology (ICT) incentive	2017	Harmful
	FJ003, Concessionary rate of tax for regional or global headquarters	2017	Harmful
Grenada	GD001, International companies	2017	Harmful
	GD002, Offshore banking	2017	Harmful
	GD003, International insurance	2017	Harmful
	GD004, International trusts	2017	Harmful
	GD005, Fiscal incentives under various Acts	2017	Harmful
	GD006, Export processing/commercial free zones enterprises	2017	Not harmful
Georgia	GE001, International financial companies	2017	Not actually harmful
	GE004, Virtual zone person (VZP)	2017	Ibid.
	GE002, Free industrial zones (FIZ)	2017	Not harmful
	GE003, Special trade companies	2017	Not harmful
Hong Kong SAR	HK001, Corporate treasury centres (CTC) (or Profit tax concession for corporate treasury centres)	2017	Harmful
	HK002, Offshore funds	2017	Harmful
	HK003, Offshore private equity funds	2017	Harmful
	HK004, Offshore reinsurance	2017	Harmful
	HK005, Offshore captive insurance	2017	Harmful
	HK006, Shipping regime	2017	Not harmful
	HK007, Qualifying debt instruments	2017	Not harmful
	HK008, Profits tax concessions for aircraft lessors and aircraft leasing managers	2017	Not harmful
	HK009, Foreign source income exemption	2019	-
Indonesia	ID001, Investment allowance	2017	Not harmful
	ID002, Special economic zone	2017	Not harmful
	ID003, Tax reduction (formerly tax holiday)	2017	Not harmful
	ID004, Public / listed company	2017	Not harmful
Israel	IL001, Preferred company	2017	Not harmful
India	IN001, Special economic zones	2017	Not harmful
Jamaica	JM001, Industrial (export related) incentives	2017	Harmful
	JM002, Special economic zones	2017	Not harmful
Jordan	JO001, Free zone	2017	Harmful
	JO002, Development zone	2018	Harmful
	JO003, Least developed zones	2018	Out of scope

	JO004, Aqaba special economic zone	2018	Under OECD FHTP monitoring
Saint Kitts and Nevis	KN001, Offshore companies	2017	Harmful
	KN002, Fiscal incentives Act	2018	Harmful
Korea	KR001, Foreign investment zone	2017	Harmful
	KR002, Free trade / economic zones	2017	Harmful
Saint Lucia	LC001, International business companies	2017	Harmful
	LC002, International trusts	2017	Harmful
	LC003, Free trade zones	2017	Harmful
	LC004, International partnership Act	2018	Harmful
	LC005, Foreign source income exemption	2019	Harmful
Liechtenstein	LI001, Tax exempt corporate income: dividends and capital gains	2011	Harmful
	LI003, Interests deduction on equity	2016	Harmful
	LI002, The special regime for private asset structures	2011	Out of scope
	LI004, Royalty box (or IP box)	2016	Not assessed
Morocco	MA001, Coordination centres	2017	Harmful
	MA002, Export entreprises	2017	Harmful
	MA003, Export free zones or free trade zones	2017	Harmful
	MA005, Offshore holding companies	2017	Harmful
	MA006, Casablanca finance city	2018	Harmful
	MA004, Offshore banks	2017	Not actually harmful
Marshall Islands	MH001, Measure under criterion 2.2	2017	Harmful
Rep. of North Macedonia	MK001, Technological industrial development zone	2019	Under OECD FHTP monitoring
Mongolia	MN001, Free trade zone	2018	Abolished
	MN002, 90% tax credit regime for companies residing in isolated province	2018	Not harmful
Macau SAR	MO002, Offshore companies	2017	Harmful
Mauritius	MU001, Global business licence 1	2017	Harmful
	MU002, Global business licence 2	2017	Harmful
	MU003, Freeport zone	2017	Harmful
	MU005, Captive insurance	2017	Harmful
	MU006, Banks holding a banking licence under the banking Act 2004	2017	Harmful
	MU010, Partial exemption system	2018	Harmful
	MU012, Manufacturing activities under the Freeport zone regime	2018	Harmful
	MU004, Shipping regime	2017	Not harmful
	MU007, Global treasury activities	2017	Not harmful
	MU008, Global headquarters administration	2017	Not harmful
	MU009, Investment banking	2017	Not harmful
	MU013, Intellectual Property (patent box)	2019	Not harmful
	MU011, Banks holding a banking licence under the banking Act 2004	2018	Under OECD FHTP monitoring
Maldives	MV001, Reduced tax (or reduced tax rates on profits sourced outside Maldives)	2017	Harmful
	MV002, Foreign source income exemption	2019	-

Malaysia and Labuan Island	MY001, Labuan Island: International business and financial centre (IBFC) (or Labuan financial services)	2017	Harmful
	MY002, Labuan Island: Financing and leasing (or Labuan leasing)	2017	Harmful
	MY005, Special economic regions	2017	Harmful
	MY006, Treasury management centre	2017	Harmful
	MY007, Pioneer status	2017	Harmful
	MY008, Biotechnology industry	2017	Harmful
	MY011, MSC Malaysia status	2017	Harmful
	MY012, Headquarters (or principal hub)	2017	Harmful
	MY013, Inward re-insurance and offshore insurance	2017	Harmful
	MY003, International trading company	2017	Not harmful
	MY004, Foreign fund management	2017	Not harmful
	MY009, Approved service projects	2017	Not harmful
	MY010, Green technology services	2017	Not harmful
	MY016, Manufacturing activities under the Pioneer status regime (high technology)	2019	Not harmful
	MY014, International currency business units	2018	Under OECD FHTP monitoring
	MY015, Foreign source income exemption	2019	-
Namibia	NA001, Export processing zones	2017	Harmful
	NA002, Exporters	2017	Harmful
	NA003, Foreign source income exemption	2019	-
Nauru	NR001, Foreign source income exemption	2019	-
Niue	NU001, International business companies Act 1994	2017	Harmful
Panama	PA001, Multinational headquarters	2017	Harmful
	PA004, Panama-Pacifico special economic area	2017	Harmful
	PA005, Foreign owned call centres	2017	Harmful
	PA007, Intellectual Property: City of knowledge	2017	Harmful
	PA003, Colon free zone	2017	Not harmful
	PA006, Shipping regime	2017	Not harmful
	PA002, Free zones Act	2017	Out of scope
	PA008, Foreign source income exemption	2019	-
Peru	PE001, CETICOS special economic zone	2017	Not harmful
	PE002, Zofratacna special economic zone	2017	Not harmful
Qatar	QA001, Qatar science and technology park (QSTP) (Free zone at science and technology park)	2019	Under OECD FHTP monitoring
	QA002, Qatar financial centre	2019	Ibid.
	QA003, Free zone areas	2019	Ibid.
	QA004, Foreign source income exemption	2019	-
Seychelles	SC001, International business companies	2017	Harmful
	SC002, International trade zone (ITZ) (or free zones)	2017	Harmful
	SC003, Offshore banks	2017	Harmful
	SC004, Offshore insurance (or non-domestic insurance, insurance of offshore risks)	2017	Harmful
	SC005, Companies special license	2017	Harmful
	SC007, Securities business under the securities act	2017	Harmful
	SC008, Fund administration business	2017	Harmful
	SC010, Manufacturing activities in the international trade	2018	Harmful

	SC011, Foreign source income exemption	2019	Harmful
	SC006, Intellectual property	2017	Non-existent
	SC009, Reinsurance business	2017	Not actually harmful
Singapore	SG002, Offshore insurance incentive	2017	Harmful
	SG003, Development and expansion incentive (DEI): Legal service	2017	Harmful
	SG005, Enhanced headquarters incentive package (or Development and expansion incentive – Services)	2017	Harmful
	SG007, International growth scheme	2017	Harmful
	SG010, Pioneer service companies for HQ activities	2017	Harmful
	SG001, Export of services incentive	2017	Not harmful
	SG004, Financial services sector incentives	2017	Not harmful
	SG008, Maritime sector incentive (shipping)	2017	Not harmful
	SG011, Aircraft leasing scheme	2017	Not harmful
	SG012, Finance and treasury centre	2017	Not harmful
	SG006, Double tax deduction for internationalisation	2017	Out of scope
	SG009, R&D / IP deductions	2017	Out of scope
	SG013, Foreign source income exemption	2019	-
San Marino	SM001, Financing	2017	Harmful
	SM002, Intellectual property	2017	Harmful
	SM003, New companies	2017	Harmful
	SM004, High-tech start-up companies	2017	Harmful
	SM005, Intellectual property regime	2018	Under OECD FHTP monitoring
Eswatini	SZ001, Special economic zones	2019	Not currently harmful (not yet operational)
	SZ002, Foreign source income exemption	2019	-
Thailand	TH001, International headquarters	2017	Harmful
	TH002, International trading centres	2017	Harmful
	TH003, Regional operating headquarters	2017	Harmful
	TH004, Treasury centre	2017	Harmful
	TH005, International banking facilities	2018	Harmful
	TH006, International business centre	2019	Not harmful
Tunisia	TN001, Export promotion incentives	2017	Harmful
	TN002, Offshore financial services	2017	Harmful
Turkey	TR001, Technology development zones	2017	Harmful
	TR004, Regional headquarters	2017	Harmful
	TR002, Corporate tax law provision 5/B (new IP regime)	2017	Not harmful
	TR003, Free zones	2017	Not harmful
Trinidad and Tobago	TT001, Free trade zone	2017	Harmful
Taiwan	TW001, Free trade zone (including the International Airport Park Development regime)	2017	Harmful
United States of America	US001, Delaware – Exemption of investment holding companies, firms managing intangible investments of mutual funds	2017	Not harmful

	US002, Delaware: Deduction of interest from affiliated companies	2017	Not harmful
	US003, Foreign derived intangible income	2018	Under OECD FHTP monitoring
Uruguay	UY001, Free zones	2017	Harmful
	UY002, Shared service centre	2017	Harmful
	UY006, Software and biotechnology industry incentives	2017	Harmful
	UY007, Benefits under law 16,906 for biotechnology	2018	Harmful
	UY004, General powers under Law 16,906 (or investment law incentives under law 16.906)	2017	Not harmful
	UY003, Financial company reorganisation	2017	Not assessed
	UY005, Holding company regime / source principle taxation	2017	Out of scope
	UY008, Foreign source income exemption	2019	-
Saint Vincent & Grenadines	VC001, International business companies	2017	Harmful
	VC002, International trusts	2017	Harmful
US Virgin Islands	VI001, Economic development programme	2017	Harmful
	VI002, Exempt companies	2017	Harmful
	VI003, International banking centre regulatory Act	2017	Harmful
Vietnam	VN001, Export processing zones	2017	Not harmful
	VN002, Industrial parks/zones	2018	Not harmful
	VN004, Economic zones	2018	Not harmful
	VN005, Disadvantaged areas	2018	Not harmful
	VN003, IP benefits	2018	Under OECD FHTP monitoring
Vanuatu	VU001, Measure under criterion 2.2	2017	Harmful
Samoa	WS001, Offshore business	2017	Harmful
	WS002, Foreign source income exemption	2019	-
South Africa	ZA001, Special economic zone	2017	Not harmful
	ZA002, Headquarter companies	2018	Not actually harmful

Curriculum Vitae

Pie Habimana was born in Ruhango, Rwanda on 25 September 1983. He graduated as Bachelor of Laws (LL.B) and Master of Business Law (LL.M) at National University of Rwanda, both *cum laude*, respectively in 2009 and 2012. In 2013 he obtained a Postgraduate Diploma in Legal Practice from the Institute of Legal Practice and Development, Rwanda, and in 2018 he obtained a Postgraduate Certificate in Learning and Teaching in Higher Education from the University of Rwanda. He joined Leiden Law School of Leiden University, the Netherlands as Ph.D Candidate in February 2016. Shortly after his Bachelor, he served as Legal Officer at National University of Rwanda from July 2009 to June 2012. During the same period, he started his academic career in February 2010 when the University appointed him as Tutorial Assistant in the Faculty of Law. In 2012 he was promoted to Assistant Lecturer, and further promoted to Lecturer in 2018. Besides academia, he was called to the bar and in 2011 enrolled in the Rwanda Bar Association. As a researcher in the field of international tax law, he plans to continue diving into this area by applying the knowledge gained through teaching and further research. Pie's particular research interest is harmful tax competition and international tax governance from the perspective of developing countries. Pie Habimana is married to Antoinette Uwamahoro and they are currently blessed with two sons and one daughter: Darron, Dacey, and Danila.