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

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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.