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.

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[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

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

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[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]

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[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.

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[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.

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[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

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[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]

[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.

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[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

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<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

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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

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[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

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[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.