Foreword: *The Regulation of Tax Competition: Rethinking “Harmful” Tax Competition in a Global Context*

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In 1996, the G7 Heads of State called for the OECD to pursue a multilateral approach to limit harmful tax practices. The OECD launched its report, *Harmful Tax Competition—An Emerging Global Issue* in 1998.¹ The European Union also began to regulate tax competition among its members through the Primarolo Code of Conduct.² The EU has continued to regulate tax concessions as state aid, with mixed success, since the 1990s, but only within the EU itself. The OECD Harmful Tax Competition project of the 1990s was a failure, largely because of dissent within its ranks. The report was rejected by Luxembourg and Switzerland, both countries that at the time offered low taxed opportunities benefiting from bank secrecy for investors. In 2001, the United States withdrew its support for the Harmful Tax Competition project at the commencement of the tenure of President Bush.

The Harmful Tax Competition project and EU state aid developments emphasised the challenges facing rich countries in managing their tax bases arising from tax competition. Member states of the OECD and EU had become concerned when capital became increasingly mobile following the relaxation of currency controls in the 1980s. The question about whether, and in what circumstances, tax competition might be harmful or beneficial was hotly debated. The EU in releasing the Code of Conduct stated that fair competition could have positive effects, but that some kinds of tax competition were harmful if they would “unduly affect the location of business activity in the Community by being targeted merely at non-residents and by providing them with a more

¹ OECD, Committee on Fiscal Affairs, *Harmful Tax Competition—An Emerging Global Issue* (1998: Paris).

² EU Council, Conclusions of the ECOFIN Council Meeting, 1 December 1997, available https://ec.europa.eu/taxation_customs/system/files/2016-09/coc_en.pdf (accessed 5 July 2021).

favourable tax treatment than that which is generally available”.³ The OECD identified globalisation as having “had a positive effect on the development of tax systems, being, for instance, the driving force behind tax reforms which have focused on base broadening and rate reductions, thereby minimizing tax induced distortions”.⁴ It claimed to be able to identify “harmful” compared to beneficial tax competition, mostly being tailored to non-resident investors through ring-fencing, combined with secrecy.

Economic theory predicted that capital mobility among open economies would lead to a race to the bottom in corporate taxation (both rates and base). Those working on international tax policy during the 1990s realised that in the new globalised world, “we are all capital importers now”. Yet, the concern about capital mobility was from the start a contradictory theoretical framework for a project opposed only to so-called “harmful” tax competition. Taken to its logical conclusion, the theory implied that restricting so-called “harmful” competition would lead to a more general competition in corporate tax, continuing the race to the bottom. We have seen evidence of this, as corporate tax rates trend down and concessions for both tangible and intangible investment expand around the world.

One positive outcome of the OECD Harmful Tax Competition project of the 1990s was the establishment of the Global Forum, extending recognition to countries that were not members of the OECD. The Global Forum, and transnational tax administrative co-operation, began to make progress in the G20-OECD Base Erosion and Profit Shifting (BEPS) project that commenced in 2013. The BEPS project re-opened the tax competition debate in Action 5 on “Harmful Tax Practices”. This time, the focus was on transparency among member states, but Action 5 still seeks to distinguish “harmful” from beneficial tax competition.

In this highly political context, this book by Chidozie Chukwudumogu on the regulation of tax competition could not be more timely. Chukwudumogu must be correct that “tax competition” cannot be perceived solely as either beneficial or harmful. This means that a regulatory—not prohibitory—approach is essential. Chukwudumogu presents a nuanced view, not only from the perspective of rich countries but also taking into account the impact and goals of *all* countries around the world. This is in stark contrast to the harmful tax competition projects of the 1990s, which did not include any representation of developing countries or of tax havens that were not members of the

³ EU, Code of Conduct, https://ec.europa.eu/taxation_customs/business/company-tax/harmful-tax-competition_en (accessed 5 July 2021).

⁴ OECD, 1998: 20; Michael Webb, “Defining the boundaries of legitimate state practice: norms, transnational actors and the OECD’s project on harmful tax competition”, *Review of International Political Economy* 11:4 (2004) 787–827, at 800.

OECD—largely, islands in the Caribbean and the Pacific that were often very poor once their offshore financial activities were discounted.

State-building development policy promoted since the 1960s had been to encourage newly independent developing countries to enact tax incentives for foreign investment, or to instruct former colonial island states to establish themselves as offshore financial centres with low tax rates. Tax incentives remain widespread today. An attempt to prohibit so-called “harmful” tax competition is not likely to be of assistance to these countries. On the contrary, it is likely to harm them because to compete for capital under a regime that did not permit tailoring of tax incentives to foreign investment, developing countries would likely lose even more corporate tax revenue than they were already. Chukwudumogu explains the need for capital in developing countries and explores in detail the potential legitimacy of tax incentives as one way to achieve this. His conclusion is that developing or disadvantaged states should also be supported, in Chukwudumogu’s words, to ensure that tax competition drives genuine capital investment to support economic prosperity. A question remains whether Action 5 does enough to support developing countries seeking capital in the global economy.

Chukwudumogu demonstrates convincingly the need for a global perspective that acknowledges the interdependence of states in the international tax system and the global economy. The Global Forum now includes more than 160 countries or territories, and it is responsible for peer review of harmful tax practices. The BEPS Inclusive Framework represents 140 countries. These are not legally constituted multilateral forums, but they are a significant improvement on the previous regime.

In June 2021, we saw the G7 again entering the fray of international tax competition. The G7 has expressed support for the OECD/G20 negotiations that present the possibility in Pillar One of a new way of taxing super-profits of large multinational enterprises, and in Pillar Two, a global minimum corporate tax rate.⁵ Ultimately, successful regulation of tax competition cannot be achieved by the G7, or even by the G20. A stable agreement depends on broad acceptance by the Inclusive Framework, and this requires a commitment to a more fair, efficient and legitimate global framework for corporate taxation in future. Most importantly, the success of Pillar One and Pillar Two requires an acknowledgement that this is not the *end*, but the *beginning* of serious global regulation of international corporate tax.

⁵ OECD, “Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy” (January 2020) <https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf> (accessed 5 July 2021).

In this book, Chukwudumogu presents a prescient and thorough analysis of a regulatory approach to tax competition that is highly relevant to this ongoing and highly contested issue. This book should be of tremendous interest to those working in the field from an academic, policy or professional perspective.

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