Martijn F. Nouwen

Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition

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Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition

Why this book?

This book discusses and evaluates the functioning, work and effectiveness of the diplomatic EU Code of Conduct Group in tackling harmful tax competition within the European Union and beyond. This Group, which celebrated its 20th anniversary on 9 March 2018, brings together representatives of the EU Member States, the European Commission and the Council of the European Union. As Member States still adhere to the Code Group's diplomatic character, implying confidentiality and closed meetings, its work is hidden by a veil of confidentiality. However, with the help of the EU Transparency Regulation and much persistence, more than 2,500 unpublished documents on the work of the Group were obtained by the author from the Council of the European Union and the European Commission. They provide a rare glimpse into the governance and work of the Group and, with that, to its effectiveness and the positions of individual Member States on many different tax regimes and tax avoidance practices. In this book, the content of these documents is made available to the reader. In addition to tax law, the book considers other relevant disciplines – such as EU law, economics and political science – to ensure a comprehensive approach.

This book investigates the historical background and purpose of the political EU Code of Conduct on Business Taxation, its legal status, the governance and working methods of the Group and the geographical and substantive scope of the Code. It assesses the substance and effectiveness of the Group's decisions in respect of national preferential tax regimes (pseudo-case law) and in respect of coordinated tax policies on general competition-sensitive tax issues (pseudo-legislation). It also discusses the interaction between the Code (soft law) and hard law, notably the State aid and market distortion rules. It concludes with an outlook on the Group's future.This book is of value to academics, tax practitioners, tax policymakers, politicians and non-governmental organizations, as well as to anyone interested in the public debate on fair and sustainable taxation.

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Chapter 1

Introduction

1.1. Motivation and relevance

Following the financial and sovereign debt crisis of 2008-2012 and several tax avoidance affairs, such as LuxLeaks (2014)[1] and the Panama Papers (2016),[2] tax avoidance by multinational companies and the opportunity for it created by "sweetheart tax rulings" by national tax administrations have become matters of public concern and debate. As a result, the OECD (comprised of 36 member countries) and the G20 (the group of 19 countries with the largest GDP and the European Union) placed the fight against tax avoidance and harmful tax competition high on the international political agenda. With these organizations working together on the BEPS Project,[3] a wide range of (soft law) solutions have been and still are being developed at the international level to curb tax avoidance and harmful tax competition, improve the coherence of international tax rules and ensure a more transparent tax environment.[4] As a result of its desire to be at the forefront of the anti-BEPS policy to set world standards and to ensure a coordinated response of its Member States, the European Union has converted many of these international solutions into legally enforceable anti-avoidance rules, including mandatory automatic exchange of tax rulings between Member States (2015),[5] mandatory country-by-country reporting by multinationals (2016),[6] minimum harmonization of anti-avoidance measures (the first and second Anti-Tax Avoidance Directives (ATAD I (2016)[7] and ATAD II

1. *See* https://www.icij.org/investigations/luxembourg-leaks/ (accessed 8 Jan. 2021).
2. *See* https://www.icij.org/investigations/panama-papers/explore-panama-papers-key-figures/ (accessed 8 Jan. 2021).
3. *See* https://www.oecd.org/tax/beps/ (accessed 8 Jan. 2021).
4. *See* https://www.oecd.org/tax/beps/about/ (accessed 8 Jan. 2021).
5. *See* Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 332, pp. 1-10 (2015), Primary Sources IBFD.
6. *See* Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 146, pp. 8-21 (2016), Primary Sources IBFD.
7. *See* Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L/193, pp. 1-14 (2016), Primary Sources IBFD.

(2017))[8] and mandatory disclosure of potentially aggressive tax planning arrangements by intermediaries (2018).[9]

These measures, though second-best, are necessary precisely because (i) the European Union has not made much progress in respect of the substantive harmonization of corporate income taxation; and (ii) there is no (EU) common corporate tax system. 28 (27 since 31 January 2020) different corporate tax systems imply a wealth of mismatches between national tax systems, offering a corresponding wealth of tax planning opportunities for multinationals. Member States try to curb the predictable excesses by means of ever-expanding automatic exchange of tax information between them and common anti-abuse measures rather than adopting the Commission's C(C)CTB proposal (for a common (consolidated) corporate tax base). Member States are very reluctant to harmonize their corporate tax systems because they wish to retain as much competence as possible in designing their own systems of business profit tax, notably to be able to internationally compete for economic activity by offering a competitive tax system and competitive tax rulings. As in tax matters, unanimity is still required for any legislative action at the EU level (*see* articles 113, 114(2) and 115 of the Treaty on the Functioning of the European Union[10] (TFEU)), and each Member State has a veto right and is, therefore, able to pursue its own fiscal policy objectives, or at least block harmonization proposals that it considers contrary to its interests. Member States thus find themselves in fierce competition for economic growth and employment, all of them wanting to attract international companies by offering a business-friendly environment, especially tax-wise. The resulting tax competition creates tax avoidance opportunities for these international companies.

Member States have long been aware of the resulting risk of a race to the bottom, referred to as "fiscal degradation" by former EU Commissioner Monti. On the initiative of this EU Commissioner, Member States, in 1997, adopted a non-legislative, diplomatic gentlemen's agreement to curb unfair tax competition: the EU Code of Conduct for Business Taxation (the Code). This soft law mechanism should stop harmful tax competition

8. *See* Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L 144, pp. 1-11 (2017), Primary Sources IBFD.
9. *See* Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139, pp. 1-13 (2018), Primary Sources IBFD.
10. *See Treaty on the Functioning of the European Union* (13 Dec. 2007), Treaties & Models IBFD.

through preferential tax measures and non-transparent tax ruling practices that are aim to attract internationally mobile activities and create an overall tax loss. This study examines the Code of Conduct for Business Taxation and the activities of its governing body, namely the EU Code of Conduct Group (Business Taxation) (the Group), and seeks to assess how effective the Group has been in realizing the goals pursued by the Code.

The Group, which recently celebrated its 20th anniversary, brings together representatives of the Member States, the European Commission and the Council of the European Union. It has become increasingly significant in the fight against tax avoidance by multinational companies and against the facilitation of such avoidance by means of harmful tax competition among Member States.[11] Its usual work consists of assessing specific tax regimes on the basis of the Code's principles and criteria for identifying unfair tax competition, known as "pseudo-case law". This work has contributed to the dismantling of many preferential tax regimes and practices within the European Union but also internationally, especially in the context of the recent drawing up of the EU tax haven blacklist. The growing importance of the Group is particularly visible in its increasing focus on coordinated solutions for general competition-sensitive tax issues. To name just a few examples, it has developed common policies – some of which have served as forerunners to legally binding solutions – on exchange of information on tax rulings, good tax ruling practices and hybrid mismatches. Such common soft law policies will be referred to in this book as "pseudo-legislation".

Most former and current participants in the Code of Conduct Group, as well as EU officials, consider the Group successful.[12] Nonetheless, in recent years, the Group has become the subject of intense social and

11. *See also* Nouwen, M.F. (2017).
12. For a recent analysis by the Group's (former) Chair regarding the Group's effectiveness, *see*, e.g. working paper of the Group of 16 October 2019, doc. no. 11347/2019; and working paper of the Group of 20 July 2018, doc. no. 8052/2018, p. 1. In addition, *see* position paper of the G5 (i.e. Germany, France, Italy, Spain and the United Kingdom) on the Group's strengths and weaknesses in room document #9 of the Group of 7 April 2015. For a comprehensive, but somewhat outdated analysis of the Commission on the Group's effectiveness and future, *see* annex I of room document #1 of the Group of 27 April 2006, pp. 24-35. The latter document also contains a critical analysis of the Member States on the desirability and effectiveness of the Group in tackling harmful tax competition.

political debate. The European Parliament,[13] national parliaments,[14] national governments,[15] media,[16] academics,[17] non-governmental organizations[18] and the general public have criticized the Group's lack of transparency, its working methods and, last but not least, its alleged ineffectiveness in cracking down on harmful tax practices. In its resolution of 6 July 2016, the European Parliament criticized the Group's secretiveness, noting that "some of these documents should have been made public to allow for public scrutiny and an open political debate on their content".[19] Regarding the Group's perceived ineffectiveness, the European Parliament commented, inter alia, that "the self-notification of potentially harmful measures by Member States is not efficient, the criteria for identifying harmful measures are outdated, and the unanimity principle for reaching decisions on harmfulness has not proven effective",[20] and that "a pattern of systematic obstruction by some Member States to achieving any progress on fighting tax avoidance became clear".[21]

13. *See*, e.g. European Parliament Resolution of 25 November 2015 (TAXE1), 2015/2066 (INI), paras. 40-44, 60 and 87; European Parliament Resolution of 16 December 2015, 2015/2010 (INL), para. AM and recommendation A.3 and B.2; European Parliament Resolution of 6 July 2016 (TAXE2), 2016/2038 (INI), paras. AO-AR and 47-57; European Parliament Resolution of 13 December 2017 (PANA), 2016/3044(RSP), paras. 52-54, 185-189 and 198-200; and European Parliament Resolution of 26 March 2019 (TAXE 3), 2018/2121(INI), paras. 411-418.
14. *See*, e.g. the (Dutch) parliamentary questions in Parliamentary Paper II, 2015-2016, doc. no. 2015Z21690, pp. 1-2.
15. The need for a more open and transparent Code of Conduct Group, for example, has become one of the priorities of the Dutch government's external tax policy. *See*, e.g. working paper of the Group of 10 April 2018, doc. no. 4111/2018; and report of the Group of 8 June 2018, doc. no. 9637/18, para. 11, p. 3.
16. *See*, e.g. the newspaper article on the front page of the Dutch newspaper *Het Financieele Dagblad* of 14 April 2016, titled *Nederland notoire fiscale dwarsligger* ("The Netherlands, a notoriously wayward tax rebel"). The same day, this article even made it to the main Dutch news broadcaster, NOS. *See also* their website, available at http://nos.nl/artikel/2099141-nederland-fiscale-%20dwarsligger-verhalen-uit-de-oude-doos.html (accessed 8 Jan. 2020). In addition, *see* M. Becker, P. Müller & C. Pauly, *How the Benelux Blocked Anti-Tax Haven Laws*, Der Spiegel (6 Nov. 2015), available at https://www.spiegel.de/international/europe/eu-documents-reveal-how-benalux-blocked-tax-haven-laws-a-1061526.html (accessed 8 Jan. 2020).
17. *See*, e.g. Nouwen, M.F. (2017).
18. *See*, e.g. Oxfam, Briefing Note, *Blacklist or Whitewash? What a real EU blacklist of tax havens should look like* (Oxfam 2017), available at https://www-cdn.oxfam.org/s3fs-public/file_attachments/bn-blacklist-whitewash-tax-havens-eu-281117-en_0.pdf (accessed 8 Jan. 2020).
19. *See* European Parliament Resolutions of 6 July 2016 (TAXE 2), 2016/2038(INI), para. 47.
20. *See* id., at para. 52.
21. *See* id., at para. 53.

1 year later, in 2017, an investigation of the EU Observer considered the Code of Conduct Group the "EU's most secretive group".[22]

Nevertheless, although society shows a growing demand for transparency on the part of policymakers, institutions and companies, most Member States still strongly support the Group's diplomatic character, implying confidentiality and closed meetings. Many Member States are convinced that the Group cannot function if this confidentiality is not guaranteed, as they would be reluctant to self-report, provide information on the request of other Member States and discuss measures openly if their assessments and decision-making were monitored publicly. As a result of recently implemented initiatives aimed at increasing the Group's transparency, discussions in the Group are now already less secretive according to several of its participants.[23]

As a consequence of its diplomatic character, the Group's work is hidden behind a veil of confidentiality. Its pseudo-case law and pseudo-legislation are largely unknown to the general public and national parliaments. National governments thus have the possibility to pursue their political agendas relatively unseen, balancing the need to address tax avoidance and harmful tax competition against maintaining a business-friendly fiscal climate. National parliaments and the European Parliament are often not aware of whether – and, if so, why – one or some Member State(s) slowed down or blocked a negative assessment or a rollback obligation regarding a (type of) national tax regime. They also do not seem very aware of the existence of agreed common tax policies that may be construed as pseudo-legislation bypassing parliaments, let alone of the extent of the observance of these agreed policies by individual Member States.[24] The lack of public information on the Group's work also hinders academic research and media scrutiny of the such work. Parliamentary, academic and media attention and scrutiny could enhance the effectiveness of the Group in finding effective anti-tax avoidance solutions and curbing excessive tax competition, but it is true that it might also have a chilling effect on Member States' willingness to share information with the Group.

22. *See* J. Comte, *Inside the Code of Conduct, the EU's most secretive group*, EU Observer (18 July 2017), available at https://euobserver.com/institutional/138550 (accessed 8 Jan. 2020).
23. *See* id.
24. *See* Nouwen, M.F. (2017), pp. 146-148.

The author of this book used the EU Transparency Regulation[25] and much insistence and perseverance to obtain more than 2,500 documents from the Council and the Commission pertaining to the work of the Code of Conduct Group. They include non-published meeting documents (room documents and working papers) of the Group (mostly drafted by the Commission, the EU Presidency or a Member State) and non-published informal meeting minutes (*comptes rendus internes*) of the Commission (drafted by its civil servants attending the Group's meetings). The EU institutions often needed quite some (legal) encouragement to hand over these documents. The documents are of great informative value as regards the actual functioning and decision-making of the Group, reflecting the positions of individual Member States on many preferential tax regimes, as well as on horizontal tax policy issues. Section 1.3. provides further details on the documents obtained.

1.2. Research question

The main research question addressed in this study is: To what extent have the Code of Conduct for Business Taxation and the Code of Conduct Group (Business Taxation) been successful in curbing harmful tax competition within the European Union over the past 20 years?

For that purpose, the following more detailed questions are addressed:

- What is the historical background and original purpose of the Code and which policy considerations are behind its provisions?
- How is the Code's outcome best characterized among the different types of EU soft law, and how can the governance and working methods of the Group be defined in terms of governance theory?
- What is the Group's governance structure, what are the Group's working methods and which stakeholders are involved in its decision-making processes (and to what extent)?
- What is the geographical scope of the Code, and what is the level of commitment of different categories of (EU and non-EU) (Overseas) Countries and Territories to the Code?
- What is the material scope of the Code, and which criteria does the Group apply to assess the compatibility of a national preferential tax regime with the Code?

25. *See* Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, pp. 43-48 (2001).

- Which pseudo-case law did the Group develop, and which pseudo-legal principles can be derived from its pseudo-case law? How effective is it in curbing harmful tax competition, and how does it relate to the Commission's State aid investigations?
- Which pseudo-legislation did the Group develop, has it been followed up by hard law and how effective is it in tackling general competition-sensitive tax issues?
- To what extent could the market distortion rules (articles 116 and 117 of the TFEU) be used as an alternative or a complement to the Code in tackling harmful tax competition?

Where appropriate, this study's findings are supplemented with concrete recommendations for improvement.

1.3. Method, delimitations and documents used

The questions listed at the end of section 1.2. are, in principle, addressed from a legal perspective. However, as the work of the Code of Conduct Group and the Code of Conduct itself are not strictly legal or academic exercises, but more political and diplomatic processes, their functioning will also be evaluated from a governance perspective. Additionally, where relevant, economic aspects will be considered. These different perspectives should allow for a critical analysis of the result of the Group's work and its effectiveness in curbing harmful tax competition. Notwithstanding the relevance of the political and economic aspects, this study primarily adopts the traditional method of doctrinal legal research, i.e. a comprehensive analysis of the Code of Conduct for Business Taxation and of the Group's pseudo-case law and pseudo-legislation adopted on the basis of that Code.

Since most of the documents produced and used for the work of the Code of Conduct Group, including its pseudo-case law and pseudo-legislation, are not publicly available, it was necessary for the author to submit information requests based on Transparency Regulation (EC) No. 1049/2001[26] to obtain these documents. Discussions between the author and Commission and Council (transparency) officials on whether access should be provided or whether Regulation-based exceptions applied led to a lengthy tug-of-war and more than 25 confirmatory applications (EU jargon for "appeals"). In most cases, full or at least wide partial access was granted to the requested documents. In total, more than 2,500 documents were handed over to the

26. *See* id.

author by the Commission and the Council (and these are on file with the author).

These documents were indispensable in understanding the governance and working method of the Group, the content and effectiveness of its pseudo-case law and pseudo-legislation and individual Member States' positions on specific issues. As the evaluation and categorization of the content of these mostly still non-public documents is at the heart of this study, it is necessary to specify their nature, origin and function. The following types of documents are the most relevant and the most frequently used in this study, sometimes cited:

– Room documents and working documents issued by the Commission, the Chair of the Code of Conduct Group, the EU Presidency, the General Secretariat of the Council or individual Member States: These documents generally provide input for debate on the agenda items of the meetings of the Code of Conduct Group or for other Council (preparatory) bodies dealing with Code matters. Some of these documents are not drafted and circulated for discussion purposes, but merely for information purposes.

– Informal meeting minutes (*comptes rendus internes*, sometimes called "flash reports") drafted by officials of the Commission, reporting on the deliberations within the Code of Conduct Group and other Council preparatory bodies dealing with Code-related matters: It is emphasized that these informal Commission minutes are *not* the official (public) progress reports of the Group to the Council (explained further in this section). They are drafted for internal Commission use only and are not been agreed upon or discussed with any of the other attendees of the Group's meetings. Although the informal meeting minutes thus merely represent the Commission's understanding of the deliberations of the Code of Conduct Group, they are of great informative value, given the confidentiality of the Group's deliberations. The role of the Commission – only providing technical assistance to the Group and not voting – is aimed towards establishing a common EU agenda to address harmful tax competition rather than representing any specific Member State's interest, which the author expects to contribute to the objectivity and balance of its informal meeting minutes.

Through this book, the content of these documents is made available to academics, policymakers, politicians, non-governmental organizations, tax advisers, the media and the general public. Relevant parts of these

documents have been quoted in boxes. Apart from showing relevant and interesting results of the Group's decision-making (pseudo-case law and pseudo-legislation), they also provide insights into the Group's decision-making process and the points of view of individual Member States. This allows the readers of this book to make their own judgement as regards the (in)correctness of media reports or political blame-gaming in respect of who were the troublemakers on which issues and why.

The author also obtained many other documents from EU institutions on the basis of his information requests under the EU transparency rules, which were also utilized for this study. They include, in particular: (i) preparatory documents (*travaux préparatoires*) of the Code of Conduct on Business Taxation, including compromise proposals for a code of conduct; (ii) documents drafted by the Legal Service of the European Commission on the European Union's market distortion policy; and (iii) other internal documents, such as "non-papers", notes (*aide-mémoires*), e-mails, letters, etc. of EU institutions on Code-related matters.

Publicly available documents of and information about the Code of Conduct Group were also used in this study, in particular: (i) agendas of Code of Conduct Group meetings; (ii) the official Code of Conduct Group progress reports forwarded to the Economic and Financial Affairs (Ecofin) Council for endorsement; and (iii) work programmes of the Code of Conduct Group. These documents are easily accessible nowadays on a dedicated Code of Conduct Group website of the Council of the European Union.[27] Furthermore, this study draws on (i) the Ecofin Conclusions endorsing the work of the Code of Conduct Group; (ii) published overviews of preferential tax regimes investigated by the Group (pseudo-case law) and guidance agreed by the Group (pseudo-legislation) since 1998; and, (iii) of course, the text of the Code of Conduct itself.

To understand the discussions and the pseudo-case law of the Group, it is necessary to understand the national preferential regimes it assesses. Therefore, national tax legislation and administrative practices were also taken into consideration. To place the work of the Code of Conduct Group in its legal context, EU tax law, ECJ case law, State aid and market distortion investigations and decisions of the Commission, as well as other legal sources were further noted. Relevant literature was also examined and incorporated into this study, particularly academic research in the area of

27. *See* https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/ (accessed 12 Jan. 2020).

EU soft law and social and political sciences. Literature in languages other than English was only incidentally incorporated into this study, a notable example of which was a French-language dissertation (2009) by Mr Dos Santos[28] on, among others, the results of the Code of Conduct Group during its first years of operation.[29] A range of other sources on direct tax policy matters was analysed, including papers, studies and reports from European institutions and international organizations such as the OECD, G20 and United Nations. All of these sources are extensively accounted for in footnotes.

Specific methodological considerations, limitations and relevant sources of information are specified per chapter, mostly in the introduction. As regards the Group's pseudo-case law and pseudo-legislation, the author strived for comprehensiveness. More than 500 assessments of preferential tax regimes were made, and their most relevant political and technical aspects are reported in this book. As further explained in chapter 7, these regimes are categorized into 14 types, each assigned a unique number to facilitate cross-referencing.

This study focuses on assessing the effectiveness of the Code of Conduct Group in tackling harmful tax competition within the European Union during its first 20 years of existence. Work carried out by the Group after 1 January 2020 was not considered, and work carried out in 2019 was considered when possible. This is mainly due to the fact that obtaining documents and information on the Code of Conduct Group on the basis of EU transparency rules is a very time-consuming and administratively cumbersome process.[30] As a consequence, this study, for example, pays only limited attention to the recent developments as regards the EU tax haven blacklist and its effectiveness. In addition, this study does not include a comparative analysis explaining the relationship between the EU Code of Conduct and the OECD works in the field of harmful tax competition.

Apart from desk research and transparency requests, information was attained through interviews with former and current participants in the Code of Conduct Group, especially regarding the Group's working methods. Persons interviewed were (i) (former) officials of the European Commission and of the Council of the European Union involved in the work and attending the meetings of the Code of Conduct Group either at the time

28. Former State Secretary for Tax Affairs of Portugal (1995-1999) and former Member of the Portuguese Permanent Representation in Brussels (2001-2005).
29. *See* Dos Santos, A.C. (2009).
30. *See also* Nouwen, M.F. (2017), pp. 148-149.

of the interview or in the past; and (ii) (former) civil servants of Member States' Ministries of Finance representing their governments in the Code of Conduct Group. The Ministry of Finance of the Netherlands deserves special mention for its provision of information. Apart from interviews, it provided, on the basis of a confidentiality agreement with the author access to not only several meeting documents of the Code of Conduct Group, but also several Dutch informal meeting minutes (*terugkoppelingsverslagen*) drafted by civil servants that attended the Group's meetings.

Both the interviews and the documents provided under strict confidentiality contributed to this study in many ways, but they are not explicitly included in the sources in the footnotes of this study. The purpose of the interviews was not to add an empirical dimension to this study, but merely to better understand the technical and political dynamics of the Group, its governance and working method and its place within the European Union's tax integration mechanisms, as well as to be able to view individual Member States' positions on specific tax regimes and common tax policies from the right perspective.

1.4. Outline

This study consists of nine further chapters.

Chapter 2 describes the emergence and drafting of the Code, including its *travaux préparatoires*, by outlining ten phases of the process leading to the diplomatic gentleman's agreement adopted by the Member States in 1997. It also highlights the Code's original main purpose, i.e. avoiding "fiscal degradation" through excessive tax policy competition, as well as the policy considerations leading to the different provisions of the Code.

Chapter 3 analyses the legal status of the Code by (i) evaluating the Code as an informal para and pre-law steering instrument under the wider umbrella of EU soft law; and (ii) assessing the governance and working methods of the Group in implementing the Code as an Open Method of Coordination-like soft governance process.

Chapter 4 outlines the governance and formal and informal working methods of the Group, as well as the level of involvement of the different stakeholders in the decision-making process on Code matters, including the Code of Conduct Group itself, its Preparatory Group and SubGroups, other high-level working groups, the European Commission, the European Parliament,

the General Secretariat of the Council of the European Union, the *Comité des Représentants Permanents* (Coreper) and Ecofin.

Chapter 5 maps the geographical scope of the Code by analysing the applicability of the principles and criteria of the Code in respect to the different categories of countries and territories, including (in order from strong to weak in terms of political adherence to the Code) EU Member States, Outermost Regions, European territories in respect of which a Member State is responsible for its external relations (only Gibraltar falls into this category), Overseas Countries and Territories, several small islands and third countries.

Chapter 6 analyses the substantive scope of the Code by describing the Group's four-step approach towards assessing national tax measures, which can be inferred from the Code itself, its *travaux préparatoires*, as well as the working practices of the Group, which, in turn, can be derived from its pseudo-case law. These four steps deal with the following questions:
- Step 1: Is the tax regime within the scope of the Code?
- Step 2: Is the tax regime *potentially* harmful? This step is taken on the basis of a "gateway criterion", i.e.: does the regime provide for a significantly lower effective level of taxation than is generally applicable?
- Step 3: Is the tax regime *actually* harmful? This step is taken mostly on the basis of five harmfulness characteristics non-exhaustively listed in the Code.
- Step 4: Is the harmful tax regime nevertheless justified?

Chapter 7 discloses and assesses the pseudo-case law of the Group, structured into the following 14 categories of the most criticized preferential tax regimes:
- generic corporate tax regimes;
- shareholder tax regimes;
- interest regimes;
- notional interest deduction regimes;
- intellectual property regimes;
- insurance company regimes;
- holding company regimes;
- group coordination regimes;
- special holding company regimes;
- intermediate group finance and licence company regimes;
- foreign finance branch regimes;
- informal capital regimes;
- hybrid financing regimes; and
- free zone regimes.

It provides insights into the technical and political aspects of the most interesting cases investigated by the Group. This analysis is based on the non-published room documents and working documents of the Group and the informal meeting minutes drafted by Commission officials, and on the official and published progress reports of the Group. Chapter 7 provides insights into why specific regimes have been approved or found harmful by the Group and outlines the guiding principles developed by the Group regarding the compatibility of different types of tax regimes with the Code. This chapter also draws conclusions on the effectiveness of the Group's pseudo-case law by highlighting both its successes and failures over the past 20 years. Finally, the relationship and overlap between pseudo-case law and State aid is examined, revealing that the effectiveness of the Code is backed by the big stick of State aid prohibition, but also that Commission State aid investigations were facilitated or caused by the (lack of) progress of the Code of Conduct Group.

Chapter 8 discloses and assesses the pseudo-legislation of the Group in the following horizontal-competition-sensitive tax policy areas:
- exchange of information on tax rulings;
- a common tax ruling policy;
- EU-inbound profit transfers;
- EU-outbound payments;
- hybrid mismatches; and
- transfer pricing.

Based on the published progress reports of the Group, the non-published room documents and working documents and the Commission's informal meeting minutes, chapter 8 outlines the development and substance of agreed common tax policies (pseudo-legislation), reflecting on their implementation and the extent of compliance of individual Member States. It highlights possible implications and improvements for the future, commenting on successes as well as inconsistencies and unsatisfactory results.

Chapter 9 examines whether the market distortion provisions (articles 116 and 117 of the TFEU) could be used as an alternative or a complement to the Code in tackling harmful tax competition. Although this instrument has remained a dead letter so far in tax matters and almost dead in non-tax matters, the Commission seems to have recently opened the door for reactivating this "nuclear weapon", responding to persistent calls from the European Parliament to "circumvent" the unanimity requirement in direct tax matters in an effort to end prolonged deadlocks on comprehensive tax avoidance solutions. Based on non-published documents of the Commission's Legal

Service, chapter 9 clarifies the possibilities of this instrument in the area of harmful tax competition.

Chapter 10 summarizes conclusions and answers the main research question of this study.

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