Pie Habimana

Harmful Tax Competition in the East African Community

The Case of Rwanda with Reference to EU and OECD Approaches

IBFD DOCTORAL SERIES 67

Harmful Tax Competition in the East African Community: the Case of Rwanda with Reference to EU and OECD Approaches

Why this book?

This book discusses harmful tax competition in the East African Community (EAC) with reference to EU and OECD approaches. With a focus on Rwanda, the book examines whether Rwanda's tax competition practices are within the parameters of internationally accepted practices. In this context, the book identifies Rwanda's favourable tax measures and assesses each from the perspective of EAC law, complemented by the EU and OECD standards on harmful tax competition.

Given the dearth of legal studies on harmful tax competition in the EAC, this book is the first to address harmful tax competition in depth in an academic context. Thus, it not only sheds light on the current state of harmful tax competition regulation in the EAC but also lays a foundation that can be used for further research on harmful tax competition in the EAC, as well as for the restructuring of harmful tax competition policies at the national and regional levels.

This book also shows the possibility and extent of the application of EU and OECD standards by jurisdictions outside the European Union and OECD, in particular developing countries, to build tax systems that are free from harmful tax competition and to fill the gap in developing countries that do not have sufficient legal foundations to curb harmful tax competition. However, this book also shows that EU and OECD standards are not sufficient to eradicate all harmful tax practices, both in developed and developing countries.

This book also warns EAC Partner States that they can be listed or delisted at any time by the OECD or the EU Code of Conduct Group, which can also have economic and political consequences. Developing countries are also advised to be mindful of the implications of multilateral solutions and the differences in interests between developed countries (capital exporters/residence jurisdictions) and developing countries (capital importers/source jurisdictions) in matters of international taxation. This book is of value to academics, tax policymakers, politicians, tax practitioners and non-governmental organizations, as well as to anyone interested in the topic of harmful tax competition, especially from the perspective of developing countries.

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Pie Habimana

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List of Abbreviations

APA	Advance pricing agreement
AU	African Union
CAN	Consolidated application note
CEU	Council of the European Union
CG	Commissioner General (of the Rwanda Revenue Authority)
CIT	Corporate income tax
COCG	Code of Conduct Group
DEI	Development and expansion incentive
EAC	East African Community
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
EC	European Community
ECJ	Court of Justice of the European Union
ECOFIN	Economic and Financial Affairs Council
ECSC	European Coal and Steel Community
EEC	European Economic Community
EoI	Exchange of Information
FDI	Foreign direct investment
GloBE	Global Anti-Base Erosion
HPTR	Harmful preferential tax regime
IMF	International Monetary Fund
MNC	Multinational corporation
NID	Notional interest deduction
OEEC	Organization for European Economic Co-operation
PTR	Preferential tax rate
R&D	Research and development
RDB	Rwanda Development Board
RIPA	Rwanda Investment Promotion Agency
RRA	Rwanda Revenue Authority
SADC	Southern African Development Community
TFEU	Treaty on the Functioning of the European Union
WHT	Withholding Tax

Chapter 1

General Introduction

1.1. Introduction

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

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

That being the case, the main purpose of this chapter is to introduce the subject of the study, why and how the study was conducted and the research context. This chapter is divided into seven sections. It begins by justifying the need for the research (section 1.2.) before presenting the context

1. M.P. van der Hoek, *Tax Harmonization and Competition in the European Union*, 1 eJournal of Tax Research 1, p. 19 (2003); and H.G. Petersen (ed.), *Tax Systems and Tax Harmonization in the East African Community*, Report for the GTZ and the General Secretariat of the EAC, p. 24 (2010).
2. L. Cerioni, *Harmful Tax Competition Revisited: why not a purely legal perspective under EC law?*, 45 Eur. Taxn. 7, p. 267 (2005), Journal Articles & Opinion Pieces IBFD; S. Drezgić, *Harmful Tax Competition in the EU with Reference to Croatia*, 23 Journal of Economics and Business 1, p. 72 (2005); F. Wishlade, *When Policy Worlds Collide: Tax Competition, State Aid, and Regional Economic Development in the EU*, 34 Journal of European Integration 6, p. 586 (2012); M.P. Devereux & S. Loretz, *What Do We Know about Corporate Tax Competition?*, 66 Nat'l Tax J. 3, p. 745 (2013); and L.V. Faulhaber, *The Trouble with Tax Competition: From Practice to Theory*, 71 Tax L. Rev., p. 311 (2018).
3. OECD, *Countering Harmful Tax Practices More Effectively Taking into Account Transparency and Substance: – Action 5: 2015 Final Report* p. 3 (OECD 2015), Primary Sources IBFD; and H. Gribnau, *The Integrity of the Tax System after BEPS: A Shared Responsibility*, ELR 1, p. 12 (2017).
4. Faulhaber, *supra* n. 2, at p. 323.

in which it was conducted (section 1.3.). Thereafter, the research problem and the focal research questions are presented (section 1.4.). Then follows an indication of the research output and the scope (section 1.5.), as well as the societal and scientific relevance of the research findings (section 1.6.). The methodology used is then explained (section 1.7.), and the chapter concludes with an overview of all sections (section 1.8.).

1.2. Research justification

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

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

5. *Charter of the United Nations* art. 2(1) (26 June 1945), Primary Sources IBFD.
6. *African Union Constitutive Act* arts. 3 and 4 (11 July 2000).
7. *Treaty for the Establishment of the East African Community*, as amended on 14 Dec. 2006 and 20 Aug. 2007, art. 6(1)(a) [hereinafter EAC Treaty].
8. J. Li, *Tax Sovereignty and International Tax Reform: The Author's Response*, 52 CTJ/RFC 1, p. 144 (2004); P. Lampreave, *Fiscal Competitiveness versus Harmful Tax Competition in the European Union*, 65 BFIT 6, p. 4 (2011); and A.C. Santos & C.M. Lopes, *Tax Sovereignty, Tax Competition and the Base Erosion and Profit Shifting Concept of Permanent Establishment*, EC T. Rev. 5/6, p. 296 (2016).
9. J. Englisch & A. Yevgenyeva, *The Upgraded Strategy against Harmful Tax Practices under the BEPS Action Plan*, British L. Rev. 5, p. 622 (2013).
10. A. Sanni, *Sovereign Rights of Tax Havens and the Charge of Harmful Tax Competition*, SAIT (12 Nov. 2011), available at www.thesait.org.za/news/96869/Sovereign-Rights-Of-Tax-Havens-And-The-Charge-Of-Harmful-Tax-Competition.htm (accessed 30 July 2019).

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

Tax competition happens between sovereign nations or territories that set their respective tax systems bidding for investments in an uncooperative way, each acting independently.[11] It consists of lowering the tax burden in order to increase the country's competitiveness, which, in turn, boosts the national economy.[12] This is mainly done by setting favourable tax measures through the provision of preferential tax rates (PTRs) or preferential tax bases. At this level, all taxpayers are beneficiaries,[13] which, along with increasing the national welfare, is not a bad thing.

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

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

The global character of tax competition is shown by its presence everywhere, from developing to developed countries. For illustration purposes,

11. Englisch & Yevgenyeva, *supra* n. 9, at p. 621.
12. C. Pinto, *Tax Competition and EU Law* p. 1 (UVA 2002).
13. Id.
14. P. Dietsch & T. Rixen, *Tax Competition and Global Background Justice*, 22 The Journal of Political Philosophy 2, p. 153 (2014).
15. G.A. McCarthy, *Promoting a More Inclusive Dialogue*, in *International Tax Competition: Globalization and Fiscal Sovereignty* p. 36 (R. Biswas ed., Commonwealth Secretariat 2002).
16. Faulhaber, *supra* n. 2, at pp. 312 and 321; V. Chand & K. Romanovska, *International Tax Competition in Light of Pillar II of the OECD Project on Digitalization*, Kluwer International Tax Blog (14 May 2020), available at http://kluwertaxblog.com/2020/05/14/international-tax-competition-in-light-of-pillar-ii-of-the-oecd-project-on-digitalization/ (accessed 29 July 2021).

starting with developed countries, the issue of harmful tax competition has been frequently tabled in the summits of the European Union and continues to intensify in the EU Member States.[17] Europe also experienced the race to the bottom with a surge of preferential tax regimes in the 1980s-1990s.[18] In addition, the EU Code of Conduct on Business Taxation acknowledged the EU Member States' engagement in (harmful) tax competition and, thus, the need to curb it.[19] Equally, the 1998 OECD Report on Harmful Tax Competition recognized the existence of (harmful) tax competition in both OECD member countries and non-member countries.[20]

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

17. Pinto, *supra* n. 12, at p. 25; C.M. Radaelli, *Harmful Tax Competition in the EU: Policy Narratives and Advocacy Coalitions*, 37 JCMS 4, p. 675 (1999); and O. Pastukhov, *Counteracting Harmful Tax Competition in the European Union*, Sw. JIL 16, p. 166 (2010).
18. Lampreave, *supra* n. 8, at p. 4; A.P. Morriss & L. Moberg, *Cartelizing Taxes: Understanding the OECD's Campaign against Harmful Tax Competition*, 4 CJTL 1, p. 36 (2012); and M.F. Nouwen, *Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition* p. 27 (UVA 2020).
19. EU Code of Conduct 1997: Conclusions of the ECOFIN Council meeting of 1/12/1997 concerning taxation policy DOC 98/C2/01, OJEC, 6 Jan. 1998, C 2/1, available at https://eur-lex.europa.eu/resource.html?uri=cellar:d2cdddef-e467-42d1-98c2-31b70e99641a.0008.02/DOC_2&format=PDF (accessed 21 July 2021) [hereinafter EU Code of Conduct]; and Pinto, *supra* n. 12, at p. 166.
20. OECD, *Harmful Tax Competition: An Emerging Global Issue* pp. 3 and 7 (OECD 1998) [hereinafter OECD 1998 Report]; and B. Persaud, *The OECD Harmful Tax Competition Policy: A Major Issue for Small States*, in *International Tax Competition: Globalization and Fiscal Sovereignty* p. 23 (R. Biswas ed., Commonwealth Secretariat 2002).
21.. EAC, 2nd Meeting of the 1st Session of the 3rd East African Legislative Assembly, Oral Answers to Priority Questions, Question: EALA/PQ/OA/3/06/2012, Nairobi, 13 Sept. 2012, p. 10 [EALA], available at https://www.eala.org/uploads/13%20September%202012.pdf (accessed 21 July 2021).
22. SADC, Memorandum of Understanding on Cooperation in Taxation and related matters, 8 Aug. 2002, art. 4(3)(a), available at https://ihrda.uwazi.io/api/files/1512034024087tiksumtbwit83u2178llq5mi.pdf (accessed 21 July 2021); and Z.C. Robinson, *Tax Competition and its Implications for Southern Africa* p. 267 (UCT 2002).
23. A.W. Oguttu, *International Tax Competition, Harmful Tax Practices and the "Race to the Bottom": a special focus on unstrategic tax incentives in Africa*, 51 CILJSA 3, pp. 299-302 (2018).

examples show how (harmful) tax competition exists in both developed and developing countries.

It is important to highlight that tax competition per se is generally not considered a problem. The problem arises when the situation escalates from good and desirable tax competition to harmful tax competition. Harmful tax competition occurs when states go beyond building a competitive tax system, i.e. beyond lowering the general tax burden for the sake of putting the general taxpayers in a tax-friendly environment, and attempt to erode other states' tax bases by attracting highly mobile investment. The general discussions on good versus bad tax competition are presented in chapter 2, while the normative discussions are detailed in chapters 4 and 5, respectively focusing on the OECD, EU and EAC works on harmful tax competition.

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

Faced with that situation, it becomes evident that states could not stay inactive. In that regard, the OECD rightly pointed out that "[s]tates could not stand back while their tax bases are eroded through the actions of countries which offer taxpayers ways to exploit tax havens and preferential regimes to reduce the tax that would otherwise be payable to them".[25] This consideration pushed states, among other international tax actors, to engage in the fight against harmful tax competition. Given the international character of harmful tax competition, it is evident that multilateral measures are more effective than unilateral measures. This idea justifies the active involvement of international or regional organizations in such endeavours. An example of this is the active role played by the European Union and the OECD at the European and developed-country levels, respectively.

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

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

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

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

Similarly, Rwanda has also improved the competitiveness of its tax system, and significant changes have been made to business taxation laws. This mainly concerns income tax laws and investment promotion and facilitation

26. RW: Ministry of Finance and Economic Planning, *Rwanda Vision 2020*, p. 11 (2000); and RW: *Rwanda Vision 2020*, revised edition 2012, p. 6.
27. N. Huls, *Constitutionalism à la Rwandaise*, in *Constitutionalism and the Rule of Law: Bridging the Idealism and Realism* pp. 197-198 (M. Adams, A. Meuwese & E.H. Ballin eds., CUP 2017).
28. Id., at p. 218.

laws.[29] Currently, these two laws are of great importance to investors, as they contain several favourable tax measures.

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

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

Thus, this study is contextualized in Rwanda, amidst other EAC countries. However, reference is often made to the European Union and OECD for reasons that are explained in section 1.3., along with details on Rwanda as a country under examination.

1.3. Research context

In legal research, the context is important for a better understanding of the circumstances in which the research was conducted. Context also helps one to understand the characteristics of the research input in order to determine

29. RW: Law No. 016/2018 of 13 Apr. 2018 establishing taxes on income, O.G. No. 16 (16 Apr. 2018); and RW: Law No. 006/2021 of 5 Feb. 2021 on investment promotion and facilitation, O.G. No. 04 *bis* (8 Feb. 2021).

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

the possible generalization of the research output. This section describes the context in which the research was conducted. Sequentially, Rwanda and the EAC are introduced first, followed by a brief explanation of the choice of the European Union and OECD as references.

1.3.1. Introduction to Rwanda and EAC

This section introduces Rwanda and the EAC as the jurisdictions under examination (*see* section 1.3.1.1.). Then follows the rationale for choosing the EAC rather than other regional integrations to which Rwanda belongs (*see* section 1.3.1.3.).

1.3.1.1. Introduction to Rwanda and its tax system

Rwanda is a small, landlocked country located in the Eastern-Central part of Africa. It shares borders with Tanzania to the east, Burundi to the south, the Democratic Republic of Congo to the west and Uganda to the north. As of August 2021, Rwanda had a population of about 13 million.[31] Rwanda's gross domestic product in 2020 was USD 10.33 billion,[32] equivalent to 0.01% of the world economy.[33]

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

As far as the Rwandan tax system is concerned, Rwanda's tax law is currently based on a variety of legal instruments, at the top of which is the Constitution.[36] The supremacy of the Constitution is provided for in its article 95, which establishes the hierarchy of laws, while taxation matters are

31. *See* https://www.statistics.gov.rw/statistical-publications/subjects (accessed 28 July 2021).
32. *See* https://tradingeconomics.com/rwanda/gdp (accessed 28 July 2021).
33. Id.
34. Huls, *supra* n. 27, at pp. 197-198.
35. Id., at p. 218.
36. RW: Constitution of the Republic of Rwanda (2003), revised in 2015, O.G. No. Special (24 Dec. 2015).

regulated under article 164. Article 164 states that "tax is imposed, modified or removed by law" and that "no exemption or reduction of a tax can be granted unless authorized by law". Below the Constitution, Rwanda's tax law includes international tax treaties, national laws, orders of the Prime Minister, ministerial orders, Commissioner General rules and instructions. Rwandan tax law also recognizes the use of tax rulings, both public and private.[37]

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

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

The taxes applicable in Rwanda are currently classified into two main categories, depending on where they go after collection. Some are centralized, while others are decentralized. Centralized taxes are collected by the RRA and are destined for the central government treasury. These include VAT, personal income tax, capital gains tax and corporate income

37. RW: Law No. 026/2019 of 18 Sept. 2019 on tax procedures, art. 9, O.G. No. special (10 Oct. 2019).
38. RW: Law No. 15/97 of 8 Nov. 1997 establishing Rwanda Revenue Authority, O.G. No. 22 (15 Nov. 1997), amended by RW: Law No. 08/2009 of 27 Apr. 2009 determining the organization, functioning and responsibilities of Rwanda Revenue Authority, O.G. No. special (15 May 2009).
39. Id., at art. 3.
40. Id., at art. 4.
41. Decentralized taxes are governed by RW: Law No. 75/2018 of 7 Sept. 2018 determining the sources of revenue and property of decentralized entities, O.G. No. 44 (29 Oct. 2018) [hereinafter Decentralized Taxes Law]; and RW: Ministerial Order No. 008/19/10/TC of 16 July 2019 determining tax procedures applicable to collection of taxes and fees for decentralized entities, O.G. No. Special (18 July 2019).

tax. Also centralized are withholding taxes (WHT), such as payroll tax, WHT on imports and public tenders, import duties and consumption taxes. Decentralized taxes are also collected by the RRA but are for the districts. There are only three of these taxes: immovable property tax, trading licence tax and rental income tax.[42]

That being a summary of the main aspects of Rwanda and its tax system viewed through the lens of legal, institutional and structural frameworks, section 1.3.1.2. provides a brief introduction to the EAC.

1.3.1.2. Introduction to the EAC and its law

The EAC has its roots in the 1900s initiatives that brought together the former Eastern African British colonies.[43] The formal EAC as a regional community was established in 1967 as a tripartite intergovernmental organization, consisting of Kenya, Tanzania and Uganda. Ten years later, in 1977, this Community collapsed. Some of the reasons mentioned for the collapse were a lack of political will, a lack of strong participation and cooperation of the private sector and civil society and disproportionate benefit-sharing between member countries.[44] The EAC was later revived in 1999. In 2007, two more members were admitted, i.e. Burundi and Rwanda, and in 2016, South Sudan became the sixth member. The EAC is considered one of the oldest regional economic integration organizations in the world, as its earlier initiatives date back to the early 1900s.[45] However, despite its long existence, it is not the most advanced regional integration in the world today.

42. Decentralized Taxes Law, id., at art. 5.
43. J.A. Mgaya, *Regional Integration: The Case of the East African Community* pp. 2-3 (ANU 1986); W. Masinde & C.O. Omolo, *The Road to East African Integration*, in *East African Community Law: Institutional, Substantive and Comparative EU Aspects* p. 15 (E. Ugirashebuja et al. eds., Brill Nijhoff 2017); A. Titus, *How Can the East African Community Guard against Base Erosion and Profit Shifting while Working towards Deeper Integration? Lessons from the European Union*, 9 World Tax J. 4, p. 574 (2017), Journal Articles & Opinion Pieces IBFD; J. Otieno-Odek, *Law of Regional Integration: A Case Study of the East African Community*, in *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities* p. 19 (J. Döveling et al. eds., LawAfrica Publishing 2018); and A.T. Marinho & C.N. Mutava, *Tax integration within the East African Community: A partial model for regional integration in Africa* p. 1 (2013), available at https://pdfs.semanticscholar.org/3cd7/ce5b507d7a04acd640dfb37401d6aebc33f6.pdf (accessed 27 Mar. 2020).
44. Preamble EAC Treaty.
45. Marinho & Mutava, *supra* n. 43, at p. 1.

In its current status, the EAC is established as a body with perpetual succession and the right to admit new members upon their fulfillment of the requirements for membership.[46] The EAC objectives are outlined in article 5(1) of the EAC Treaty as follows: "The objectives of the Community shall be to develop policies and programs aimed at widening and deepening cooperation among the Partner States in political, economic, social, and cultural fields, research and technology, defense, security, and legal and judicial affairs, for their mutual benefit."

The EAC governance structure is divided by the EAC Treaty into organs and institutions. The organs of the EAC are the Summit, the Council, the Coordination Committee, the Sectoral Committees, the East African Court of Justice (EACJ), the EALA, the Secretariat and other such organs as may be created by the Summit.[47] The Summit consists of the Heads of States or Governments. Its mandate is to provide the general directions and impetus for the development and achievement of EAC objectives.[48] Below the Summit is the Council. This is the EAC's policy organ,[49] and its composition is laid down in article 13 of the EAC Treaty. Chapter 9 of the Treaty concerns the affairs of the EALA, while chapter 8 concerns the affairs of the EACJ.

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

As far as regional integration processes are concerned, the EAC Treaty envisions four stages of fully mature regional integration, namely the establishment of the Customs Union, the Common Market, the Monetary Union and the Political Federation.[52] So far, the EAC has established the Customs Union, which has been in force since 1 January 2005. The Protocol estab-

46. Arts. 3-4 EAC Treaty.
47. Id., at art. 9(1).
48. Id., at arts. 10(1) and 11(1).
49. Id., at art. 14.
50. Id., at art. 9(2) and (3).
51. *See* https://eac.int/eac-institutions (accessed 18 Mar. 2020).
52. Art. 5(2) EAC Treaty.

lishing the Common Market was signed on 1 July 2010, and this phase is underway. The Monetary Union, the Protocol of which was signed on 30 November 2013, and the Political Federation have not yet been started, except for some preliminary and ongoing preparations.

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

With regard to EAC sources of law, the EAC Treaty is silent as to which sources of law are available to the EACJ. As a result, the Treaty serves as the main source of law. Article 23(1) of the Treaty establishes the EACJ as the EAC judicial body responsible for ensuring the adherence to law in the interpretation of, application of and compliance with the Treaty. The Treaty also gives the Court the privilege of establishing its procedural rules to regulate the detailed conduct of the Court's business.[55] These rules are considered as the Court's second source of law. The EACJ also relies heavily on precedents, with a number of judgments referring to these as a source of law.[56]

It is worth noting EAC law per se is minimally developed so far. In other words, the EAC legal order, in the sense of a specific legal system particularly pertaining to the EAC, is at a nascent stage. For this reason, the law in the EAC territory is mainly dominated by the respective domestic laws of

53. Id., at art. 1.
54. Id., at arts. 1 and 151(4).
55. Id., at art. 42(1).
56. EAC: EACJ Appellate Division, 16 Mar. 2012, Appeal No. 2 of 2011, *Alcon International Ltd and The Standard Chartered Bank of Uganda, Attorney General of Uganda and Registrar of the High Court Uganda*, paras. 18 and 19; EAC: EACJ Appellate Division, 15 Mar. 2012, Appeal No. 3 of 2011, *Attorney General of Tanzania and African Network for Animal Welfare*, paras. 23, 24, and 31; EAC: EACJ First Instance Division, 15 May 2015, Ref. No. 1 of 2014, *EALS v. Attorney General of Burundi and The EAC Secretary General*, paras. 33 and 53; EAC: EACJ First Instance Division, 14 Feb. 2013, Ref. No. 1 of 2011, *The EALS v. EAC Secretary General*, pp. 10, 11, 12, 14, 15 and 20; EAC: EACJ First Instance Division, 10 May 2012, Ref. No. 6 of 2011, *Democratic Party and Mukasa Mbidde v. EAC Secretary General and the Attorney General of Uganda*, paras. 18, 33 and 44; EAC: EACJ First Instance Division, 30 Mar. 2012, Ref. No. 10 of 2011, *Legal Brains Trust Ltd v. Attorney General of Uganda*, para. 68; and EAC: EACJ First Instance Division, 24 Feb. 2014, Ref. No. 11 of 2011, *Mbugua Mureithi wa Nyambura v. Attorney General of Uganda & Attorney General of Kenya and Avocats sans Frontières*, paras. 36, 56, 61, 62 and 63.

the Partner States, despite the primacy of EAC law as enshrined in the text of the EAC Treaty,[57] which has, so far, remained more theoretical and less practical. For instance, it is difficult to find a domestic judgment in which the judge has made reference to an EACJ decision.

Given the focus of this book, further elements of EAC law relating to the topic under examination are detailed in chapter 5. In the meantime, it is worthwhile to elaborate on why the EAC was chosen for the study among other regional integration bodies of which Rwanda is a member (*see* section 1.3.1.3.).

1.3.1.3. Rationale behind the choice of the EAC

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

First and foremost, Rwanda, as a member of the EAC, is understandably subject to a legal obligation to abide by the acts of the EAC. The binding supremacy of EAC law over Rwandan law and other Partner States' laws is explicitly stated in article 8(4) of the EAC Treaty, which provides that "community organs, institutions, and laws shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty". This paragraph is complemented by paragraph 5, which sets out the implementation framework of paragraph 4 as follows: "Partner States undertake to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones."[58] Article 16 of the Treaty emphasizes the effects of regulations, directives, decisions and recommendations of the EAC Council by stating that they "[s]hall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may under the Treaty be addressed".

By virtue of the primacy of the EAC organs and institutions, EACJ decisions on the interpretation and application of the EAC Treaty have precedence over national courts' decisions in respect thereof.[59] The EACJ has also affirmed the primacy of EAC law over some matters that are provided

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57. Arts. 8 and 33(2) EAC Treaty; and EAC: EACJ First Instance Division, 17 May 2013, Ref. No. 5 of 2011, *Samuel Mukira Mohochi v. Attorney General of Uganda*, para. 53.
58. Art. 8(5) EAC Treaty.
59. Id., at arts. 8(4) and 33(2); and C. Nalule, *Defining the Scope of Free Movement of Citizens in the East African Community: The East African Court of Justice and its Interpretive Approach*, 62 Journal of African Law 1, p. 6 (2018).

for in domestic laws. For example, the EACJ held that the principle of state sovereignty – which is provided for, guaranteed and protected as inalienable in the respective constitutions of the Partner States – cannot take away the supremacy of EAC law.[60]

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

Furthermore, the choice of the EAC was motivated by the fact that, among the eight regional economic organizations recognized by the African Union,[61] the EAC is the oldest[62] and has progressed faster than others, making it the most active and successful African regional integration organization.[63] The EAC is the most advanced compared to others, currently with a fully functioning Customs Union and an ongoing Common Market. This is unlike other regional integrations to which Rwanda belongs, such as the Common Market for Eastern and Southern Africa, which has only reached the stage of establishing a Customs Union.[64] All these reasons make the EAC the most dynamic regional organization for Rwanda.

Nevertheless – and notwithstanding the above achievements – the development of tax competition regulation in the EAC is not yet advanced. Harmful tax competition is also not commonly understood in the EAC.[65] The few writings that exist on tax competition in the EAC are dominated by the

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60. EAC: EACJ First Instance Division, 17 May 2013, Ref. No. 5 of 2011, *Samuel Mukira Mohochi v. Attorney General of Uganda*, para. 53.
61. C. Nalule, *Advancing Regional Integration: Migration Rights of Citizens in the East African Community* p. 74 (Witwatersrand Univ. 2017).
62. Marinho & Mutava, *supra* n. 43, at p. 1.
63. A.P. van der Mei, *Regional Integration: The Contribution of the Court of Justice of the East African Community*, 69 ZaöRV, p. 404 (2009); and P. Apiko, *Understanding the East African Court of Justice: The Hard Road to Independent Institutions and Human Rights Jurisdiction* p. 4 (Mar. 2017), available at https://ecdpm.org/application/files/1116/6135/1397/EACJ-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf (accessed 27 May 2019).
64. OECD Directorate for Financial and Enterprise Affairs Competition Committee, *Regional Competition Agreements: Inventory of Provisions in Regional Competition Agreements: Annex to the Background note by the Secretariat*, DAF/COMP/GF(2018)12, p. 3 (2018), available at https://one.oecd.org/document/DAF/COMP/GF(2018)12/en/pdf (accessed 26 Aug. 2019).
65. B.C. Kagyenda, *Development of an EAC Model Agreement for the Avoidance of Double Taxation and an EAC Code of Conduct against Harmful Tax Competition*, Final Report, EAC Secretariat – GIZ EAC Tax Harmonization Project, p. 11 (2012).

economic perspective, while writings from the legal perspective are almost non-existent. Also, the distinction between tax competition in the economic sense versus the legal sense, as discussed in section 2.4., is virtually non-existent in the EAC. This situation therefore compels making reference to other laws with advanced developments, such as the EU and OECD instruments, the legal thinking of which on tax competition provides some inspiration for this study.

1.3.2. Why EU and OECD references?

The international character of tax competition compels studying this field in the context of the international or regional legal framework. This book examines the Rwandan aspects of harmful tax competition, amidst other EAC countries, with reference to international standards as developed by the European Union and the OECD. The choice of the two is not happenstance, but rather motivated (*see* section 1.3.2.3.) after a brief introduction to their legal backgrounds (*see* sections 1.3.2.1. and 1.3.2.2.).

1.3.2.1. Brief overview of EU law

The European Union as it is today is a result of a long journey that started in the 20th century, more precisely, shortly after the World War II.[66] Through the historical journey that led to the European Union, several institutions were created, such as the European Coal and Steel Community in 1952[67] and the European Economic Community and the European Atomic Energy Community in 1957.[68] The European Union as such was established by the Maastricht Treaty, signed in 1992, which came into force in 1993 after ratification by the Member States.[69] The European Union currently consists of 27 Member States.[70]

66. J. Fairhurst, *Law of the European Union* p. 3 (6th ed., Pearson Longman 2007).
67. Id., at p. 5; and A. Cuyvers, *The Road to European Integration*, in *East African Community Law: Institutional, Substantive and Comparative EU Aspects* p. 28 (E. Ugirashebuja et al. eds., Brill Nijhoff 2017).
68. Fairhurst, *supra* n. 66, at p. 6; and Cuyvers, id.
69. P. Kent, *Law of the European Union* p. 52 (4th ed., Pearson Longman 2008); Fairhurst, *supra* n. 66, at p. 11; Cuyvers, *supra* n. 67, at p. 30; and D.M. Ring, *What's at Stake in the Sovereignty Debate: International Tax and the Nation-State*, 49 Va. J. Int'l L. 1, p. 36 (2008).
70. *See* https://europa.eu/european-union/about-eu/countries_en (accessed 27 June 2021).

The EU legal order is led by two treaties of equal value, namely the Treaty on European Union and the Treaty on the Functioning of the European Union.[71] It also comprises several other legal instruments, such as the Charter of Fundamental Rights of the European Union, soft law, decisions and opinions of the Court of Justice of the European Union and general principles of law, regulations, directives and recommendations.[72] One element of the EU legal order that falls directly within the scope of this study is the EU Code of Conduct on Business Taxation, adopted on 1 December 1997. The details of this Code and subsequent relevant work are presented in chapter 4 of this book.

1.3.2.2. Brief overview of OECD instruments

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

As far as the regulatory framework of the OECD is concerned, this organization does not have a specific legal order; its instruments consist of decisions, recommendations, declarations, international agreements, arrangements, understandings, etc.[76] In principle, the OECD has no coercive power to impose rules on sovereign member countries, let alone non-members.[77]

71. Cuyvers, *supra* n. 67, at p. 32.
72. Id., at p. 33; A. Cuyvers, *The Legal Framework of the EU*, in *East African Community Law: Institutional, Substantive and Comparative EU Aspects* p. 133 (E. Ugirashebuja et al. eds., Brill Nijhoff 2017); Kent, *supra* n. 69, at pp. 52-53; and Fairhurst, *supra* n. 66, at pp. 54 and 60.
73. *See* www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm (accessed 27 Aug. 2019) [hereinafter OECD Convention].
74. *See* www.oecd.org/about/members-and-partners/ (accessed 26 July 2019).
75. Art. 1 OECD Convention.
76. *See* www.oecd.org/legal/legal-instruments.htm (accessed 12 Nov. 2018).
77. Dietsch & Rixen, *supra* n. 14, at p. 170; M. Seeruthun-Kowalczyk, *Hard Law and Soft Law Interactions in EU Corporate Tax Regulation: Exploration and Lessons for the Future* p. 194 (Edinburgh Univ. 2011); I.J. Mosquera Valderrama, *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, 7 World Tax J. 3, p. 6 (2015), Journal Articles & Opinion Pieces IBFD; and A. Christians, *BEPS and the New International Tax Order*, 2016 BYU L. Rev. 6, pp. 1608 and 1622 (2017).

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

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

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

78. Santos & Lopes, *supra* n. 8, at p. 299.
79. V. Hernandez Guerrero, *Defining the Balance between Free Competition and Tax Sovereignty in EC and WTO Law: The "Due Respect" to the General Tax System*, 5 German LJ 1, p. 93 (2004).
80. Mosquera Valderrama, *supra* n. 77, at p. 6.
81. Art. 5 OECD Convention.
82. Mosquera Valderrama, *supra* n. 77, at p. 1.
83. R.S. Avi-Yonah, *Bridging the North/South Divide: International Redistribution and Tax Competition*, 26 Mich. J. Intl. L., p. 384 (2004); J.C. Sharman, *Norms, Coercion and Contracting in the Struggle against "Harmful" Tax Competition*, 60 Aust. J. Int'l Aff. 1, p. 160 (2006); R.A. Johnson, *Why Harmful Tax Practices will Continue after Developing Nations Pay: A Critique of the OECD's Initiative Against Harmful Tax Competition*, 26 BC Third World L. J. 2, p. 353 (2006); H.J. Ault, *Reflections on the Role of the OECD in Developing International Tax Norms*, 34 Brook. J. Intl. L. 3, p. 758 (2009); J. Wouters & S. van Kerckhoven, *The OECD and the G20: An Ever Closer Relationship*, 43 Geo. W. Int'l L. Rev., p. 350 (2011); Y. Brauner, *What the BEPS?*, 16 Fla. Tax. Rev. 2, p. 62 (2014); and S. Fung, *The Questionable Legitimacy of the OECD/G20 BEPS Project*, 10 ELR 2, p. 80 (2017).
84. Christians, *supra* n. 77, at p. 1611; and R.S. Avi-Yonah, *Globalization and Tax Competition: Implications for Developing Countries*, 74 Cepal Review, p. 64 (2001).
85. Morriss & Moberg, *supra* n. 18, at p. 24.

tilateral forum for tax issues and is the world's most influential organization in international tax matters.[86] The OECD is also a prominent, central, global institution for the technical design of tax policy and as the geopolitical manager of international tax law.[87] Similarly, it appears to be the principal architect of international tax cooperation,[88] the primary forum for the coordination of international taxation[89] and a de facto world tax organization.[90] One of the OECD landmark works that directly lines up with this study is the 1998 Report on Harmful Tax Competition. This Report is discussed in chapter 4 of this book.

1.3.2.3. Rationale behind the choice of the European Union and the OECD

This book extensively refers to the works of the European Union and the OECD in many respects. The rationale behind referring to the European Union and OECD for a study that focuses on Rwanda and the EAC is explained in this section.

Starting with the European Union, the reference to EU law is justified by its role and great progress in terms of regional integration, as well as its particular role in regulating tax competition in the European Union and beyond. The EU Code of Conduct has gained de facto global application, and the Code of Conduct Group (COCG) reviews tax regimes globally.[91] In addition, the influential role of the European Union at the global level is another justification for this choice. For example, the European Commission associates European development aid with the recipient states' commitment to good governance principles in the tax arena.[92] Beyond that, reference to EU law is justified by its comparative aspect with the EAC.

86. Id., at p. 3.
87. A. Christians, *Sovereignty, Taxation and Social Contract*, p. 99 18 Minn. J. Int'l L. 1, p. 99 (2009); A. Christians, *Networks, Norms, and National Tax Policy*, 9 Wash. Univ. Global Studies L. Rev. 1, p. 15 (2010); and A. Christians & L. van Apeldoorn, *The OECD Inclusive Framework* pp. 5-6 (BFIT 2018).
88. Christians, *supra* n. 77, at p. 1609.
89. Ring, *supra* n. 69, at p. 2.
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