# TABLE OF CONTENTS

*Instructions for the Reader* xi

## Chapter 1 – The Issue of (Harmful) Tax Competition

1.1 What is Tax Competition?
   - 1.1.1 Basic concept of tax competition 1
   - 1.1.2 Main categorisations of tax competition 2
   - 1.1.3 Main forms and features of tax incentives 4
   - 1.1.4 Concept of tax competition in an international context 6

1.2 Upside and Downside of Tax Competition: “Harmful” Tax Competition
   - 1.2.1 Introduction 9
   - 1.2.2 “Good” tax competition 10
   - 1.2.3 “Harmful” tax competition 11
   - 1.2.4 More on harmful tax competition: foreign direct investment vs. portfolio (passive) investment 12
   - 1.2.5 “Active” versus “passive” tax competition and the “prisoner’s dilemma” 16
   - 1.2.6 Where is the borderline? 18

1.3 (Harmful) Tax competition: Theory, evidence and methodological issues
   - 1.3.1 Overview 20
   - 1.3.2 Theories and evidence on interjurisdictional tax competition in the US experience 21
   - 1.3.3 Significance of US studies and experience for the EU 23
   - 1.3.4 Methodologies to study tax competition in an international (and EU) context 25
   - 1.3.5 Direct taxation and its impact on locational decisions of companies 28

1.4 Economic evidence of (harmful) tax competition in the European Union
   - 1.4.1 Introduction 30
   - 1.4.2 (Harmful) tax competition and the Ruding Report 31
     - 1.4.2.1 The Ruding Report (1992) and the Commission reaction 31
     - 1.4.2.2 Main differences in tax systems of the Member States 32
     - 1.4.2.3 Survey on the impact of taxation on locational decisions of firms 34
   - 1.4.3 The Monti Memorandum, the Commission Report and (harmful) tax competition: the “Monti Cross” 35
   - 1.4.4 Further economic evidence of tax competition in Europe 37
Tax Competition and EU Law

1.4.5 The 2001 Commission study on company taxation in the EU

1.4.5.1 Overview

1.4.5.2 Relationship with the Ruding Report; key developments in the EU

1.4.5.3 Comparison of “benchmark” tax systems of Member States (qualitative analysis)

1.4.5.4 Comparison of effective tax burdens in the Member States (quantitative analysis)

1.4.5.5 Comparison with the Ruding Report and the Baker & McKenzie studies

1.4.5.6 Synthesis

1.5 Main Conclusions

Chapter 2 – EU Legal Framework of (Harmful) Tax Competition

2.1 Introduction

2.2 Fundamental Treaty Provisions and Tax competition

2.2.1 Main economic objectives and means of attainment; sovereignty of Member States in direct taxation

2.2.2 More on direct taxation: means of harmonisation and the subsidiarity principle

2.2.3 Loyalty principle

2.2.4 Tax competition as the norm

2.3 Internal market rules and (harmful) tax competition

2.3.1 Establishment of the “internal market”

2.3.2 Fundamental freedoms and (harmful) tax competition

2.3.3 Exercise of fundamental freedoms and tax competition

2.3.4 Treaty rules on competition between undertakings and State aid

2.3.5 Legal and economic considerations of internal market rules and impact on tax competition

2.4 Treaty rules on market distortions and tax competition

2.4.1 Treaty structure and main goal of internal market distortions provisions

2.4.2 Article 96: substantive and procedural requirements

2.4.3 Article 97

2.4.4 Impact on (harmful) tax competition

2.4.5 Potential significance of Articles 96 and 97 in relation to harmful tax competition in the future

2.5 Economic and monetary union (EMU) and tax competition

2.5.1 EMU and direct tax policies of Member States: basic legal and institutional framework

2.5.2 The case of the Irish 2001 Budget
2.5.3 Application of EMU provisions as an additional tool against harmful tax competition? 91

2.6 Conclusion 93

Chapter 3 – EC State Aid Rules and (Harmful) Tax Measures of Member States 97

3.1 Introduction 97

3.2 What is State aid?
3.2.1 Overview of the concept of State aid within the EU 98
3.2.2 Categorisation of State aids by form 100
3.2.3 Categorisation of State aids by objective 102
3.2.4 Significance of State aid in the EU and recent policy trends 103

3.3 EC Treaty rules on State aid 105
3.3.1 Basic substantive law on State aid: Article 87(1) 105
3.3.2 Exemptions from the incompatibility principle and “regional” aid 108
3.3.3 Procedural rules for the granting of State aid: Article 88 111
3.3.4 Commission discretion, legal nature of the Commission documents on State aid, and principle of legitimate expectations 114

3.4 Fiscal State aid 119
3.4.1 Categorisation of fiscal State aid measures 119
3.4.2 Fiscal State aid in Commission practice and in ECJ case law 120
3.4.3 Investment allowances and relationship with Treaty fundamental freedoms 121
3.4.4 (Special) depreciation rules: the German Airlines case 124
3.4.5 Administrative practices and lax behaviour of tax authorities 126
3.4.6 Tax-free areas: the Madeira ZFM and the Trieste FIC 128

3.5 The Commission decision in the Irish corporation tax case 130
3.5.1 Background 130
3.5.2 The 1998 Commission Recommendations 132
3.5.3 Further considerations on the Recommendations and follow-up 133
3.5.4 The Irish corporation tax case as the milestone in the Commission’s change of policy 135

3.6 Fiscal State aid, the 1998 Commission Notice and harmful tax competition 136
3.6.1 Overview 136
3.6.2 Criteria for application of Article 87 to direct tax measures 138
3.6.3 Specificity criterion: benchmark tax system vs. special tax incentives 140
3.6.4 The justification of the “nature or general scheme of the tax system” 144
3.6.5 The Notice and the administrative practices of tax authorities 148
3.6.6 Implementation of the Notice: the Commission large-scale investigation on fiscal State aid of July 2001 and its outcome 150

3.7 New rules on regional fiscal aid and the future of tax-free areas 152
3.7.1 Introduction 152
3.7.2 The new guidelines on national regional aid and the “outermost regions” 153
3.7.3 The rules on regional fiscal aid contained in the Notice 155
3.7.4 Impact of the new rules on the Canary Islands regime 156
3.7.5 Is there a future for tax-free areas? The Madeira ZFM case 159
3.7.6 Tax credits and tax holidays: the case of the Basque Provinces 162
3.7.7 Fiscal regional State aid: some conclusions 164

3.8 The 2001 Commission large-scale investigation: notional taxation, ring-fenced “offshore” regimes and methods of relieving double taxation 166
3.8.1 Tax base aid: coordination centres and similar intra-group regimes; the Belgian example 166
3.8.2 Analysis of these regimes and of notional methods to determine the taxable base under EC (fiscal) State aid rules 169
3.8.3 Other intra-group finance regimes: the Netherlands CFM and the French Centrales de trésorerie 176
3.8.4 Tax rate and tax liability aid: ring-fencing and offshore regimes; the Gibraltar case 183
3.8.5 Methods of relieving international double taxation: the Irish regime on foreign-source income 187

3.9 Synthesis: Treaty rules on State aid as an effective tool against harmful tax competition 190

Chapter 4 – Non-Legally Binding Rules and Harmful Tax Competition: The Code of Conduct and the OECD Reports 195
4.1 Introduction 195
4.2 The EU “Package” to tackle harmful tax competition and the Code of Conduct 196
4.2.1 Historic overview: the three parts of the “Package” 196
4.2.2 The Code of Conduct: legal nature, scope, and criteria to identify harmful tax regimes 199
4.2.3 Consequences of the application of the Code of Conduct and implementation rules 204

viii
### Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.2.4 Evaluation of the Code</td>
<td>205</td>
</tr>
<tr>
<td>4.3 Follow-up to the Code of Conduct: The “Primarolo” Report and the “2000 Guidelines”</td>
<td>207</td>
</tr>
<tr>
<td>4.3.1 Establishment of the “Code of Conduct Group” and its work</td>
<td>207</td>
</tr>
<tr>
<td>4.3.2 The “Primarolo Report” and the “2000 Guidelines”</td>
<td>208</td>
</tr>
<tr>
<td>4.3.3 Financial services and royalty income</td>
<td>209</td>
</tr>
<tr>
<td>4.3.4 Insurance activities</td>
<td>211</td>
</tr>
<tr>
<td>4.3.5 “Headquarter company” regimes: the “centres” and intra-group services</td>
<td>212</td>
</tr>
<tr>
<td>4.3.6 Holding and offshore company regimes</td>
<td>213</td>
</tr>
<tr>
<td>4.3.7 Reactions of Member States to the Primarolo Report</td>
<td>215</td>
</tr>
<tr>
<td>4.3.8 Comments on the Primarolo Report and the 2000 Guidelines; the “2003 Agreement”</td>
<td>216</td>
</tr>
<tr>
<td>4.4 Financial services regimes</td>
<td>219</td>
</tr>
<tr>
<td>4.4.1 Overview</td>
<td>219</td>
</tr>
<tr>
<td>4.4.2 Financial services performed to third parties: the Irish IFSC and the Madeira ZFM and relationship with the State aid rules</td>
<td>220</td>
</tr>
<tr>
<td>4.4.3 Intra-group financial services: the Luxembourg and Netherlands “finance company” regimes</td>
<td>223</td>
</tr>
<tr>
<td>4.4.4 The Netherlands “CFM” regime</td>
<td>229</td>
</tr>
<tr>
<td>4.4.5 “Finance branch” regimes and the 2000 Guidelines</td>
<td>233</td>
</tr>
<tr>
<td>4.5 “Headquarter company” regimes and intra-group activities performed by “centres”</td>
<td>237</td>
</tr>
<tr>
<td>4.5.1 Overview</td>
<td>237</td>
</tr>
<tr>
<td>4.5.2 The Belgium regimes for coordination centres and service centres</td>
<td>238</td>
</tr>
<tr>
<td>4.5.3 Distribution centre regimes</td>
<td>241</td>
</tr>
<tr>
<td>4.6 “Holding company” regimes and the participation exemption</td>
<td>244</td>
</tr>
<tr>
<td>4.6.1 Use of holding companies and criteria to assess the harmfulness of their tax treatment</td>
<td>244</td>
</tr>
<tr>
<td>4.6.2 The participation exemption: the Netherlands example and the 2000 Guidelines</td>
<td>246</td>
</tr>
<tr>
<td>4.6.3 The Danish participation exemption and its recent changes</td>
<td>253</td>
</tr>
<tr>
<td>4.6.4 Special holding company regimes: the Luxembourg “1929 holding company” and the soparfi regimes</td>
<td>257</td>
</tr>
<tr>
<td>4.6.5 Spain: the ETVE</td>
<td>259</td>
</tr>
<tr>
<td>4.6.6 Recent trends in the EU and the future of the participation exemption and holding companies</td>
<td>262</td>
</tr>
<tr>
<td>4.7 Discretion of Tax authorities: the old and new Netherlands ruling practices</td>
<td>264</td>
</tr>
<tr>
<td>4.8 The OECD effort to counter harmful tax competition</td>
<td>268</td>
</tr>
<tr>
<td>4.8.1 Introduction</td>
<td>268</td>
</tr>
</tbody>
</table>
4.8.2 The 1998 OECD Report: scope and criteria to identify harmful tax competition 269
4.8.3 Countermeasures recommended by the 1998 Report and the “Forum on Harmful Tax Practices” 274
4.8.4 The 2000 Report on harmful tax practices and the list of tax havens 276
4.8.5 Reactions to the 2000 Report (and the MOU) and follow-up 279
4.8.6 The 2001 Progress Report and the milder approach of the OECD 281
4.8.7 Comments on the 2001 Report and its flaws 284
4.8.8 The new black list, the Model Convention on information exchange and the way forward for the OECD project 286
4.9 Concluding remarks on the EU and the OECD projects to counter harmful tax competition 290

Chapter 5 – Unilateral Countermeasures Against Harmful Tax Competition and EU Law 295

5.1 Introduction and scope 295
5.2 Description of most common unilateral countermeasures to undo harmful tax competition 295
  5.2.1 Overview 295
  5.2.2 Specific (or targeted) countermeasures: CFC legislation and restriction of deductibility of payments to low-taxed entities 296
  5.2.3 General countermeasures: denial of participation exemption (for EU subsidiaries) and other statutory anti-abuse rules 297

5.3 EC Treaty Freedoms and Countermeasures 300
  5.3.1 Introduction 300
  5.3.2 Freedom of establishment and the anti-abuse (tax) laws of Member States 301
    5.3.2.1 Articles 43–48 EC Treaty: freedom of primary and secondary establishment 301
    5.3.2.2 Applicability in the direct tax area 303
    5.3.2.3 The Treaty freedoms, abuse of EC law, and national anti-abuse (tax) measures 307
    5.3.2.4 The principle of proportionality and direct taxation 315
    5.3.2.5 Summary 317
  5.3.3 Free circulation of capital 318
    5.3.3.1 Articles 56–58 EC Treaty 318
    5.3.3.2 Justifications for restrictions 319
    5.3.3.3 Case law on Article 58(1)(a) 320
    5.3.3.4 Case law on Article 58(1)(b) 321
Contents

5.3.3.5 Relationship with freedom of establishment 323

5.4 Compatibility of CFC legislation (and other specific countermeasures) with the freedoms of establishment and capital 324

5.4.1 Main features of CFC legislation 324

5.4.1.1 Introduction 324

5.4.1.2 CFC regimes: jurisdictional vs. global approach 325

5.4.1.3 Entity vs. transactional approach 326

5.4.1.4 Tax policy considerations 327

5.4.1.5 CFC legislation and international tax principles 328

5.4.1.6 CFC regimes and EU Member States 329

5.4.2 CFC rules applying to regimes of Member States: compatibility with EC law 332

5.4.2.1 Compatibility of CEN with the Treaty 332

5.4.2.2 Compatibility of CFC rules with freedom of establishment 336

5.4.2.2.1 Introduction 336

5.4.2.2.2 Is CFC legislation covered by the Treaty? 337

5.4.2.2.3 Is there a discrimination or restriction? 338

5.4.2.2.4 Is there a justification? 339

5.4.2.2.5 Is there a less restrictive means of achieving the same objective? The proportionality principle 342

5.4.2.3 Compatibility of CFC rules with freedom of capital movement 344

5.4.3 CFC regimes applying to non-EU Member States 345

5.4.3.1 Scope 345

5.4.3.2 Is this situation covered by the freedom of establishment? 346

5.4.3.3 Is there a discrimination or restriction? 350

5.4.3.4 Is there a justification? 352

5.4.3.5 Compatibility with the free circulation of capital 353

5.4.4 Synthesis: when is CFC legislation compatible with the Treaty? 353

5.5 Compatibility of general countermeasures with EC Law 355

5.5.1 Scope 355

5.5.2 Denial of participation exemption 355

5.5.3 Application of general anti-abuse rules 358

5.6 Countermeasures against authorised or non-assessed State aid regimes 359

5.6.1 Issue 359

5.6.2 Countermeasures, loyalty principle and authorised aids 360

5.6.3 Countermeasures and tax regimes not assessed under the fiscal State aid rules by the Commission 362
Tax Competition and EU Law

5.7 Application of countermeasures to Code of Conduct Blacklisted Regimes and the Loyalty principle

5.7.1 Issue

5.7.2 Evaluation

5.7.3 Impact on the fundamental freedoms and possible justifications

5.8 Conclusion

Chapter 6 – Synthesis and Proposal

6.1 Overview

6.2 Synthesis of the main findings

6.2.1 Concept of tax competition and the economic model in the EU

6.2.2 EU legal framework and “harmful” tax competition

6.2.3 Assessment of the existing framework dealing with harmful tax competition and the need for a new comprehensive approach

6.3 Commission direct tax policy in the 21st century and impact on (harmful) tax competition

6.3.1 Commission strategy in corporate taxation for the coming years

6.3.2 New tax treaty policy and countermeasures against harmful tax competition

6.3.3 The Netherlands/Portuguese Tax Treaty

6.3.4 Comprehensive approaches to tax EU-wide corporate profits: impact on harmful tax competition

6.3.5 Prospects

6.4 Proposal to deal with harmful tax competition in the EU

6.4.1 Summary and main thrust

6.4.2 Choice of instrument and legal basis

6.4.3 Scope

6.4.4 Concept of harmful tax competition: objective and subjective aspect

6.4.5 Categories of harmful tax measures

6.4.6 Administrative practices

6.4.7 Procedural rules: black list and body in charge of its administration

6.4.8 The issue of countermeasures in domestic laws and tax treaties

6.5 Example of a resolution on harmful tax competition

Draft Council Resolution on a common framework for dealing with harmful tax competition in the European Union

6.6 Conclusion

Main Bibliography
Contents

Main Cases of the European Court of Justice and of the Court of First Instance 423

Main Commission Notices and Decisions on Fiscal State aid 427

Main EU Legislation, Official Documents and Reports 429

Main OECD official documents 433

Index 435