The Trouble with Tax Competition: From Practice to Theory

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*In the past few years, policymakers have argued that everything from Apple’s Irish tax deal to patent boxes to the LuxLeaks tax rulings represented so-called “harmful tax competition.” Despite the common use of this term, there is no internationally accepted definition of harmful tax competition.*

*This Article uses the anti-tax-competition measures proposed and implemented over the last twenty years to reverse-engineer what policymakers believe to constitute harmful tax competition. This Article then distills three important lessons about international tax competition from these measures. First, the different visions of harmful tax competition represented by recent anti-tax-competition measures reveal that, when countries claim to be limiting tax competition, they are not leveling the playing field so much as they are shifting it in their own favor. Second, international tax competition relies on international tax avoidance, and international tax avoidance relies on international tax competition. This in turn means that jurisdictions are complicit in international tax avoidance, while taxpayers (particularly multinational corporations) are complicit in tax competition. Third, these two lessons together suggest that countries are often using both anti-tax-competition measures and anti-avoidance measures not just to limit tax competition by other countries but also to strengthen their own competitive position.*

*Given these lessons, academics and policymakers should avoid the term “tax competition” and instead focus on the underlying issues that countries are in fact debating. Since it is unlikely that policymakers will abandon the tax competition rhetoric entirely, this Article also argues that future efforts to combat international tax competition could avoid some of the problematic implications of this term if they were focused on taxpayers rather than on jurisdictions.*

# Introduction

It has become increasingly common for politicians,[[2]](#footnote-2) policymakers,[[3]](#footnote-3) commentators,[[4]](#footnote-4) and academics[[5]](#footnote-5) worldwide to engage in debates over international tax competition and to decry the race to the bottom on corporate tax rates. The terms “tax competition” and “race to the bottom”[[6]](#footnote-6) generally encompass efforts by individual countries to change their corporate income tax systems to attract investors, revenue, or other resources away from other countries. As this Article will show, however, there is in fact no agreed-upon definition of international tax competition. Moreover, not only is the definition of tax competition a subject of debate, but so too is everything else related to tax competition. Is tax competition good or bad? What types of tax competition are harmful, and what types are not? What is wrong with tax competition? Although academics and policymakers have tried to answer these questions, results have been limited at best.

The lack of agreement on what tax competition is and when it becomes a problem, however, has not prevented countries from trying to stop it. This Article therefore enters the debate over tax competition from another angle. Rather than trying to define what tax competition is or what is wrong with it as an objective matter, this Article looks at the many recent developments in the fight against tax competition in order to reverse-engineer the definition of harmful tax competition as understood by countries and international organizations. If countries are designing rules to fight tax competition, a study of what those rules are targeting can tell us what those countries consider to be harmful tax competition.[[7]](#footnote-7) In other words, this Article applies lessons from the practice of limiting international tax competition to inform the theory surrounding this concept.

This reverse-engineering of a definition of harmful tax competition leads to three important insights. First, it is impossible to settle on one definition of tax competition or one explanation for why or when tax competition becomes harmful because countries do not in fact want to eliminate tax competition entirely. Instead, the goal of each individual country is to constrain tax competition in a way that favors that country.

Second, the distinction between tax avoidance and tax competition is much less clear than is generally understood in both the academic literature and policymaking circles. Generally, tax competition is thought to be competition between countries, while tax avoidance is thought to be efforts by individual taxpayers to avoid the taxes imposed by one or several countries. In reality, however, the value of tax avoidance nowadays relies on tax competition. This lesson shows that jurisdictions are complicit in tax avoidance schemes – and that taxpayers (primarily multinational corporations) are complicit in tax competition. It also shows that recent efforts to curtail tax avoidance are in fact disguised efforts to limit tax competition.

Taken together, these two insights combine to make a third argument: since anti-avoidance measures are also targeting international tax competition, and since measures targeting international tax competition are in fact efforts to shift competition in favor of the country passing the anti-tax-competition measure, then both the recent anti-tax-competition and many of the recent anti-avoidance measures proposed and implemented by individual countries and international entities are themselves forms of competition.

This Article proceeds in four parts. Part I highlights both the lack of agreement on what is or is not tax competition and the lack of clear empirical findings on what is or is not harmful about tax competition. This Part also sets out the general arguments for and against tax competition, highlighting their link to debates over market competition.

Part II discusses efforts to curtail tax competition from the past several decades and uses these efforts to identify what countries understand to constitute harmful tax competition. This Part briefly sets out the consensus over harmful tax competition that grew out of work done by the Organisation for Economic Co-operation and Development (OECD) and the European Union at the end of the 1990s, and it then introduces several more recent developments in the fight against tax competition and tax avoidance, including the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project, the Commission’s state aid decisions, the European Union’s recent proposals for an anti-avoidance directive and a common corporate tax base, and several unilateral efforts. Part II argues that many of these more recent developments reveal that countries’ beliefs about what is harmful about tax competition have changed over the past two decades.

Part III then considers the lessons that academics and policymakers can learn from countries’ evolving understanding of what constitutes harmful tax competition. This Part argues that measures designed to combat tax competition are often in fact designed to make the country implementing the measures itself more competitive. This lesson is important not just for individual countries but also for the European Union, whose recent forays into anti-tax-competition measures may have been at least partly designed to make the EU as a whole more appealing to investors and residents in face of anti-EU sentiment and in the wake of Brexit. This Part also argues that tax avoidance and tax competition must be considered together. Taken together, these two lessons suggest that recent efforts to curtail both tax avoidance and tax competition have in fact been efforts on the part of some countries to make themselves more competitive.

Part IV provides policy proposals for how to incorporate the insights set out in Part III into future international tax reforms. Part IV advocates for less reliance on the terms “tax competition” and “harmful tax competition” and also suggests that anti-avoidance measures that are focused on taxpayers rather than jurisdictions may be the most effective tools for eliminating the benefits of tax competition instead of merely shifting those benefits between jurisdictions.

This Article adds to the existing literature on interjurisdictional competition generally[[8]](#footnote-8) and tax competition more specifically[[9]](#footnote-9) and fills a significant gap in these literatures by arguing that discussions of and debates over tax competition distract from the actual debates that academics and policymakers need to be having. While the debates continue over what tax competition is or is not and what can be done, countries continue to pass legislation or enter into international agreements to curtail what they perceive to be harmful about tax competition. This Article bridges the gap between theory and practice to identify what countries are intending to target with their anti-tax-competition measures and to consider what this tells us about what politicians really mean when they rail against tax competition. It highlights that using the term “tax competition” masks a much more complex debate, and that this term incorporates normative judgments that vary depending on the speaker. Just as Richard Revesz previously argued in the context of interjurisdictional competition over environmental regulations that we should eliminate the term “race to the bottom” and replace it with discussions that “focus instead on the underlying causes of the socially undesirable results,”[[10]](#footnote-10) this Article argues that the term “tax competition” causes more trouble than it is worth, and that debates over international tax policy and competition between jurisdictions should focus on what countries are actually attempting to do when they use this term.

# What is International Tax Competition?

The appropriate first step in an article discussing international tax competition would seem to be define the term “tax competition.” Defining what is and is not tax competition, however, highlights the fundamental problem with this term: there is no agreed-upon definition of tax competition. Although the literature on tax competition has grown significantly over the past several decades,[[11]](#footnote-11) recent works by Devereux and Loretz and Keen and Konrad have highlighted that there is very little consensus on what it means.[[12]](#footnote-12) There is no agreement in the economic or legal literature as to what is meant by tax competition, whether tax competition is taking place, what (if anything) is harmful about tax competition, whether tax competition should be limited, and, if so, how it could or should be limited.

The literature on tax competition builds on the literature discussing interjurisdictional competition more generally. That more general literature, characterized by early work by Charles Tiebout and Wallace Oates, often considers competition between states within a federal system.[[13]](#footnote-13) To simplify significantly, different strands of the literature conclude that certain types of competition lead to maximization of social welfare,[[14]](#footnote-14) while others conclude that tax competition leads to an overall decrease in social welfare due to negative externalities or a disconnect from the democratic preferences of state-level voters.[[15]](#footnote-15) This literature is often used to defend or reject federal-level regulation or intervention. While the tax competition literature builds on these insights, it differs from the general interjurisdictional competition literature because of the lack of a federal or supranational regulatory body in the international context.[[16]](#footnote-16) In the tax competition literature, therefore, if tax competition is found not to lead to a maximization of social welfare, another round of inquiry opens up, which is who or what can limit such competition.[[17]](#footnote-17)

As a general matter, the term “international tax competition” refers to competition between jurisdictions based on their corporate income tax systems.[[18]](#footnote-18) Beyond that, however, there is little consensus over what this term means and when a country’s setting of its tax rates or definition of its tax base (or bases) becomes tax competition. As Devereux and Loretz state in a recent paper reviewing the empirical literature on tax competition, “Few definitions [of tax competition] have been offered in the literature.”[[19]](#footnote-19) Even the definitions that have been proposed, however, differ in terms of how they define tax competition: some focus only on the “uncooperative setting of tax rates,” other definitions focus on the setting of both tax rates and tax bases, others focus just on using rates to attract mobile income,[[20]](#footnote-20) and others focus on using the tax system to attract not just income but also other spillovers such as resource flows.[[21]](#footnote-21)

 One thing to note in terms of the definition of tax competition is the fact that this term generally builds on the concept of competition in a private market (referred to here as “market competition”).[[22]](#footnote-22) Many articles that have considered tax competition have used the vocabulary of market competition, positing that tax competition raises similar issues as market competition and can therefore be analogized to different models that have developed in the context of market competition.[[23]](#footnote-23) Policymakers also often rely on this analogy.[[24]](#footnote-24)

Yet this analogy quickly breaks down under any real scrutiny, which may be one reason for the weakness of existing definitions of tax competition. Market competition, in its most basic sense, is competition amongst firms for consumers and revenues, and the generally accepted free market view of competition is that an open market where multiple firms are competing will lead to the equilibrium price that maximizes overall welfare. Tax competition, however, is a competition for something else, and the lack of agreement over what that is creates a circular problem where using the term “competition” both raises and answers the questions that underlie the entire concept. Are countries competing just for revenues? Or are they trying to attract something other than pure tax revenue by competing for resource flows (such as capital, investors, firms, profits, people, skills, and jobs) or cross-border spillovers (such as greater information or environmental improvements)?[[25]](#footnote-25) Are they instead providing a service or good, such as the right to locate within a jurisdiction?[[26]](#footnote-26) The most likely answer is that different countries are competing for different things, but that complicates the seemingly simple competition analogy.

Furthermore, using the term “competition” presupposes that unfettered tax competition is a good thing that will lead to an increase in welfare. Discussions of tax competition that export the market competition model into the tax sphere thus automatically bring with them a normative tilt: if market competition is an economic good, and if tax competition is just another version of market competition, then tax competition must itself be normatively good. But, while competition for tax rates or bases may have the same downward effect on taxes as competition for customers has on prices, this may not lead to welfare maximization given that decreased tax revenues do not necessarily lead to an increase in welfare if those tax revenues would have led to welfare-maximizing government spending or otherwise maximized national welfare.[[27]](#footnote-27)

 The term tax competition therefore raises significant problems in and of itself. No one can agree on what it is, it is something of a misnomer since it suggests a stronger link to market competition than may in fact exist, and yet it continues to be used by policymakers and academics despite these weaknesses.[[28]](#footnote-28) In the past two decades, countries and commentators have implicitly addressed these problems by shifting their focus from tax competition to so-called “harmful tax competition.”[[29]](#footnote-29) However, there is also no accepted definition of harmful tax competition,[[30]](#footnote-30) nor is there any agreement on what, if anything, is harmful about tax competition.[[31]](#footnote-31) The term itself is circular, in that any use of it has already determined that some version of international tax competition is harmful and that the speaker has already decided what that version is and what harm is being caused. In order to consider what different speakers could perceive to be harmful, the following Sections briefly lay out the most common arguments for and against international tax competition. These arguments come from several different strands of literature, with some previous articles focusing on whether the best economic model for tax competition is a game theory model or a neoclassical market competition model,[[32]](#footnote-32) others extrapolating from tax rate and other data to determine whether tax competition is taking place,[[33]](#footnote-33) others debating whether and how to respond to tax competition,[[34]](#footnote-34) and still others assessing responses that had already taken place.[[35]](#footnote-35)

## Arguments for International Tax Competition (or against Limiting International Tax Competition)

Many arguments in favor of tax competition essentially emphasize the similarities between tax competition and market competition.[[36]](#footnote-36) One such argument builds on the work done by Charles Tiebout in the 1950s, pursuant to which competition between jurisdictions makes governments more efficient and more responsive to the preferences of their citizens.[[37]](#footnote-37) The Tiebout model focused on competition between local jurisdictions, but commentators have used it to defend international tax competition between countries, arguing that such competition ensures that business activities are located in the country that will lead to the most efficient production of income and use of spillovers.[[38]](#footnote-38) One criticism of this strand of arguments, however, is that Tiebout’s model relies on several assumptions that are even less accurate in the context of international tax competition than in the context of competition between local jurisdictions, including that individuals can easily move between countries in order to express their preferences.[[39]](#footnote-39)

A second argument in favor of tax competition that builds on similarities between market competition and tax competition is based on the Leviathan concept, under which governments, rather than being benevolent entities acting on behalf of their citizens and voters, are in fact interested only in maximizing government revenue.[[40]](#footnote-40) If this is the case, then tax competition, by putting downward pressure on taxation, can limit the ability of self-interested governments to grow.[[41]](#footnote-41) This argument only supports unfettered tax competition, however, if governments are in fact Leviathans, and research into this has suggested that this model is only persuasive when there are very high levels of government waste.[[42]](#footnote-42)

A third argument in favor of tax competition and against any efforts to curtail it does not build on the supposed link between tax competition and market competition. This argument instead claims that tax policy is one of the areas that is viewed as fundamental to any country’s sovereignty, so any limitation on a country’s ability to design its tax system is an encroachment on sovereignty.[[43]](#footnote-43) According to this argument, the right to raise revenue through taxation is one of the fundamental elements of sovereignty. Countries therefore view the setting of tax rates and the definition of the tax base to fall within their right to tax, and any challenge to this is often presented as an impermissible interference in the affairs of a sovereign state.[[44]](#footnote-44) This argument is particularly weak when the countries are themselves part of the organization tackling tax competition or when the challenge to tax competition takes the form of a treaty or other exercise of sovereignty by the country that is subject to challenge.[[45]](#footnote-45) However, even when this argument is made in the context of challenges to tax competition that target individual countries without their input,[[46]](#footnote-46) it relies on a simplistic view of sovereignty[[47]](#footnote-47) that countries are often willing to violate in other contexts.[[48]](#footnote-48)

A fourth argument in favor of international tax competition that does not build on the market competition analogy builds on the work of Diamond and Mirrlees that showing that the optimal corporate tax rate in a small open economy is zero.[[49]](#footnote-49) This argument posits that tax competition that involves reducing rates on corporate income is in fact beneficial because it pushes countries toward the optimal level of corporate income taxation. One weakness with this argument is that this finding is often overinterpreted to mean that there should be no tax at all on capital, but Diamond and Mirrlees’ finding would still support either a residence-based tax on capital or a source-based tax on capital combined with a residence country tax credit.[[50]](#footnote-50) This finding also only applies to small open economies, which are more likely to be price takers than price makers[[51]](#footnote-51) and so may not be as true for larger countries. A further weakness with this argument is that it does not address forms of tax competition other than the reduction of the corporate income tax rate to zero.

One final argument in favor of tax competition is less of an argument than a form of acceptance. Several commentators have recently argued that tax competition is either inevitable or a natural and necessary response to the structure of an international tax system focused on encouraging capital mobility.[[52]](#footnote-52) Although this may not be the strongest rallying cry in favor of international tax competition, it is an argument against efforts to limit such competition.

## Arguments against International Tax Competition (or for Limiting International Tax Competition)

On the other side of this debate, most arguments against tax competition focus implicitly on the fundamental differences between tax competition and market competition. These arguments point out that taxes are not merely prices for a good or service but are also used by jurisdictions to provide other goods and services to their citizens and to redistribute wealth. One such argument against tax competition is that it leads to an underprovision of public goods. As suggested by Oates in the 1970s, if tax competition leads governments to raise less than they otherwise would in tax revenues, then governments will also not be able to provide the amount of public goods that they would have provided in the absence of tax competition.[[53]](#footnote-53) In the context of more developed countries, this argument often focuses on tax competition undermining the ability of countries to provide citizens with the full benefits of a social welfare state.[[54]](#footnote-54)

In the context of less developed countries, a more recent version of this focuses on human rights and suggests that tax competition is harmful because it leads to reduced revenue for social assistance and other types of government spending that would decrease human suffering.[[55]](#footnote-55) Along with the underprovision of public goods, this argument also focuses particularly on the pressures imposed on developing countries by tax competition and implies a lack of complete sovereignty on the part of these countries in the face of tax competition.[[56]](#footnote-56) This argument, however, relies on the assumption that the tax level that would be set in the absence of tax competition would be preferable.[[57]](#footnote-57) Devereux and Loretz have pointed out that, due to the lack of a counterfactual, it is impossible to know whether governments would have provided the welfare-maximizing (or even just a welfare-improving) level of public goods in the absence of tax competition.[[58]](#footnote-58) Others, such as Keen, have pointed out that, even if tax competition could theoretically lead to underprovision of public goods, it is not clear what type of tax competition has this result, and some of the recent efforts to police tax competition may themselves do more harm than good in this area.[[59]](#footnote-59) Hines has also pointed out that, even if suboptimal spending on social welfare could theoretically result from tax competition, recent data suggests that this is not in fact taking place, at least in developed countries.[[60]](#footnote-60) Still others have suggested that, with regards to developing countries, this argument essentially calls for international redistribution of income, for which the international tax system may not be particularly well suited.[[61]](#footnote-61)

A related argument is that tax competition forces jurisdictions to rely on revenue sources other than the corporate income tax, which are both more distortionary and more regressive.[[62]](#footnote-62) Commentators that make this argument point out that, because international tax competition is focused on corporate income taxation, it forces jurisdictions that can no longer raise sufficient revenue by taxing capital to rely more on labor taxation.[[63]](#footnote-63) This is arguably both more distortionary (since taxing labor income more leads to greater distortions to the labor-leisure tradeoff) and more regressive (since shifting the tax base more toward labor limits the redistributive effects of the tax system).[[64]](#footnote-64) This argument therefore suggests that the shift toward labor taxation has consequences for both efficiency and equity. Commentators have countered, however, that this argument presumes that capital income taxation is more different than labor taxation than economic literature suggests.[[65]](#footnote-65) If, instead, the incidence of both the corporate income tax and an income tax more focused on labor ultimately falls on labor, then the distortionary and regressive effects of shifting from the former to the latter may be more limited than this argument suggests.

A further argument in favor of limiting tax competition is that competition between jurisdictions leads to an inefficient global allocation of capital. According to this argument, tax competition leads investors to allocate capital to locations where they would not otherwise choose to invest. This leads to investors favoring international investments over foreign investments, which in turn undermines capital export neutrality by creating a tax-motivated reason for allocating capital to a location where it would not otherwise be allocated.[[66]](#footnote-66) The response to this argument has been, first, that this assumes that the allocation of capital that would occur in an environment with multiple higher tax systems would itself be efficient, and, second, that any such reallocation of capital may be normatively good if it allows developing countries or other countries that would not otherwise be attractive to investors to attract capital.[[67]](#footnote-67)

## Areas of Agreement on International Tax Competition

This lack of agreement over what tax competition is and whether it should be encouraged or discouraged has not prevented academics from continuing to research tax competition, but the results of this research have not led to many agreed-upon conclusions. Likely in part because of the lack of agreement on what tax competition even is,[[68]](#footnote-68) Devereux and Loretz recently stated that, despite “ a flurry of activity to provide evidence for the existence of tax competition[,] so far the findings have at best been inconclusive.”[[69]](#footnote-69) For example, although there has been some recent work suggesting that countries reduce their tax rates in response to a reduction in neighboring countries’ tax rates,[[70]](#footnote-70) other recent work at the local level has challenged this finding.[[71]](#footnote-71) There is also no agreement over which countries act as leaders in setting tax rates and which act as followers,[[72]](#footnote-72) nor is the effect of greater openness on tax revenues clearly predictable.[[73]](#footnote-73) Given the lack of consensus over what is harmful about tax competition, there is also little clear empirical guidance on what – if anything – to do to prevent or limit tax competition. While some advocate for greater cooperation between countries or the implementation of a minimum tax across multiple countries,[[74]](#footnote-74) others have acknowledged the political impracticality of these suggestions and have searched for other models.

 This is not to say that there is absolutely no agreement in the tax competition literature. Many studies have shown that international investment is strongly influenced by tax policy and that foreign investors are responsive to changes in tax policy.[[75]](#footnote-75) Although the exact elasticity of foreign investment to statutory tax rate changes is up for debate, there is agreement that foreign investment increases as statutory corporate income tax rates decrease.[[76]](#footnote-76) There is also agreement that both statutory corporate income tax rates and effective corporate income tax rates have decreased over the past few decades, with effective rates dropping even more sharply than statutory rates.[[77]](#footnote-77) Finally, many studies that have focused on tax competition have agreed that small countries are the most likely to benefit.[[78]](#footnote-78)

 International tax competition is therefore more complicated than it may at first appear, given how casually policymakers and commentators use this term.[[79]](#footnote-79) Although there is some agreement about the role of small countries, recent reductions in corporate income tax rates, and the responsiveness of foreign investment to tax rate changes, there is little agreement on the fundamentals of tax competition, ranging from what it is to what – if anything – is harmful about it.

 But this lack of agreement has not stopped countries and multinational or international organizations from criticizing tax competition and implementing measures to limit tax competition. On the non-governmental side, organizations like the Tax Justice Network argue that tax competition is a major problem that needs to be stopped, and they go so far as to refer to this as a “tax war” with “no redeeming features.”[[80]](#footnote-80) On the governmental side, countries are working both unilaterally and as part of larger organizations to curtail the forms of tax competition that they view as problematic. The next Part of this Article catalogues some of the ways in which countries are trying to stop tax competition. In doing so, this Article flips the existing discussion of tax competition on its head. Rather than setting out a definition of what tax competition is and designing tools to combat its harmful features, this Article uses what countries are already doing to reverse-engineer what they think is wrong about tax competition. In response to concerns expressed by others that the world is moving faster than the theory of tax competition,[[81]](#footnote-81) this Article uses the practice of countries and international organizations to inform debates and discussions about the theory of international tax competition.

# Recent Efforts to Limit International Tax Competition

 Countries have two options when they are facing what they perceive to be tax competition. First, a country can attempt to win the competition itself, whether by lowering rates, implementing tax regimes that are more preferential than those of other countries, or reforming their tax system entirely to attract investors or other resources away from other jurisdictions.[[82]](#footnote-82) This Article refers to such efforts as offensive tax competition. Second, a country can implement measures to prevent other countries from competing. This Article refers to such measures as anti-tax-competition measures, and this Part focuses entirely on such anti-tax-competition measures and use these measures to reverse-engineer what the countries that implement or propose them consider to be harmful tax competition. While the division between offensive tax competition and anti-tax-competition measures is not always clear, this Article defines the latter as measures that are either publicly advertised as responding to harmful tax competition or that are directly focused on eliminating the *ability* of countries to implement offensive tax competition measures.

 The use of tax policy to compete for investors and other resources has gone on for centuries.[[83]](#footnote-83) Limiting the ability of other countries to engage in tax competition, however, has only been a major focus of jurisdictions for the past few decades. Before the 1980s, most large countries were able to compete based on their role as capital importers, so they did not feel pressure to reduce tax rates in response to rate reductions by other countries.[[84]](#footnote-84) To the extent that there was any focus on curtailing tax competition from other countries, it took the form of changing domestic laws to discourage the use of so-called “tax havens,” which were defined based on their low or non-existent overall corporate income tax rates.[[85]](#footnote-85) In the 1960s and 1970s, the United States was the large economy that was most focused on preventing tax competition, while European countries were more supportive of tax competition.[[86]](#footnote-86)

 In the 1980s and 1990s, however, tax competition became a greater concern to more countries. During this time, both foreign direct investment (FDI) and portfolio investment increased dramatically,[[87]](#footnote-87) and countries at all stages of development started using their tax systems to attract investments.[[88]](#footnote-88) In response, countries became more concerned with tax competition, and many developed countries in Europe and beyond started to implement blacklists of individual tax havens that would be subject to defensive measures, including higher taxation.[[89]](#footnote-89) These blacklists focused on entire countries, and they listed countries based on low tax rates combined with a lack of information exchange or transparency. These blacklists were compiled by individual countries, however, and there was no large-scale international efforts to tackle tax competition until the late 1990s.

 At the end of the 1990s, however, the Organisation for Economic Co-operation and Development, then made up of twenty-nine developed countries,[[90]](#footnote-90) and the European Union, then made up of fifteen Member States,[[91]](#footnote-91) both responded to this changed investment environment by attempting to tackle tax competition. Section A uses the efforts made by both entities to illustrate the consensus over harmful tax competition that emerged in the late 1990s and early 2000s. Since several other articles have been written about these developments,[[92]](#footnote-92) Section A outlines them only briefly. Section B then introduces readers to developments that have occurred more recently and illustrates how these newer developments represent a change from the consensus of the late 1990s and 2000s.

## The Development of a Partial Consensus over Harmful Tax Competition

At the end of the 1990s, both the European Union and the OECD initiated projects to curtail certain types of tax competition. In 1997, the EU Commission issued “A Package to Tackle Harmful Tax Competition,” which stated that

“unrestrained competition for mobile factors can both bias tax systems against employment and make an orderly and structured reduction in the overall tax burden more difficult. It also reduces the room for manoeuvre to meet other Community objectives, such as the protection of the environment. Furthermore, tax competition can hamper efforts to reduce budget deficits...”[[93]](#footnote-93)

The Commission proposed several possible measures focused on corporate income taxation. One such measure was the creation of a Code of Conduct for Business Taxation, which was issued later in 1997 and which set out guidelines for determining when a preferential tax regime in a Member State represented harmful tax competition.[[94]](#footnote-94) At the same time, the EU Member States then created the Code of Conduct (Business) Group (the “Code Group”), which provided the locus for Member States to assess one another’s preferential tax regimes. Preferential tax regimes are provisions that give preferential tax treatment (generally in the form of lower rates) to specific types of taxpayers or income. The Code of Conduct identified harmful preferential regimes by setting out five factors for the Code of Conduct Group to consider when assessing Member State regimes.[[95]](#footnote-95)

 The Commission also proposed publishing guidance on when fiscal measures would constitute impermissible state aid.[[96]](#footnote-96) State aid had been prohibited in the European Union since the original treaty establishing the European Coal and Steel Community in the early 1950s,[[97]](#footnote-97) and fiscal state aid consists of government subsidies in the form of reduced tax rates or other preferential tax treatment. In 1998, the Commission published guidelines on the application of the EU prohibition on state aid to measures relating to direct business taxation in 1998.[[98]](#footnote-98) This essentially provided the necessary enforcement tool for the Code of Conduct, since it gave warning that the Commission could – and would – pursue harmful tax regimes as illegal state aid if they were not eliminated under the Code of Conduct.[[99]](#footnote-99)

 At the same time that the EU was announcing its intention to crack down on harmful tax competition in the form of preferential regimes and fiscal state aid, the OECD also announced a similar intention. In 1998, the OECD issued its own report entitled “Harmful Tax Competition: An Emerging Global Issue,” which came to be known as the “1998 Report.”[[100]](#footnote-100) In this report, the OECD divided its work on tax competition into two parts: identifying harmful tax regimes and labeling tax havens. The work on harmful tax regimes did not specify any country by name but instead set out twelve different factors that would be used in the future to identify specific regimes that would, regardless of country, be declared harmful tax competition.[[101]](#footnote-101) At the time that it published the 1998 Report, the OECD also created the Forum on Harmful Tax Practices (“FHTP”), which was made up of all OECD member countries and which was responsible for assessing all preferential regimes in OECD countries. The work on tax havens was intended to identify entire countries, but, as will be discussed below, this second strand of work was eventually not pursued due to opposition from certain OECD member countries.[[102]](#footnote-102)

### Preferential regimes

 Both the EU and the OECD therefore considered preferential regimes to be a prime example of harmful tax competition. Although the factors identified in the EU’s Code of Conduct and the OECD’s 1998 Report differed slightly, they essentially focused on the same types of regimes. According to these two documents, tax regimes were harmful when (i) they offered rates that were lower than the overall corporate rate in the jurisdiction, (ii) they applied to geographically mobile income, (iii) they targeted foreign taxpayers or activities as opposed to domestic taxpayers or activities, and (iv) they lacked transparency or exchange of information with other jurisdictions.[[103]](#footnote-103) In 1999, the EU’s Code Group identified sixty-six regimes that met these criteria, which were then either replaced or amended.[[104]](#footnote-104) Since then, the Code Group has met regularly to consider Member State regimes.[[105]](#footnote-105) In 2000, the OECD’s FHTP identified forty-seven potentially harmful regimes, most of which were also abolished or amended.[[106]](#footnote-106) The FHTP continued to meet and assess regimes, issuing several reports between 2000 and 2006.[[107]](#footnote-107)

 Yet the EU and the OECD did not share exactly the same vision of what constituted harmful tax competition since each entity also identified another category of harmful tax competition that was not shared by the other entity. For the European Union, fiscal state aid could rise to the level of harmful tax competition, while, for the OECD, the planned work on tax havens suggested that entire countries could be engaged in harmful tax competition.

### Fiscal state aid

 The prohibition on state aid is currently enshrined in Article 107 of the Treaty on the Functioning of the European Union (TFEU), which prohibits “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States.”[[108]](#footnote-108) This prohibition focuses on government measures that provide a so-called “selective advantage.” In other words, a general tax system that provides for a low rate will not be illegal state aid, but a specific tax regime that provides more favorable treatment than the general tax system could be illegal state aid.[[109]](#footnote-109)

 Even before 1998, the Commission was using the state aid prohibition to challenge tax measures that could be seen as representing tax competition.[[110]](#footnote-110) In 1997 and 1998, however, the EU institutions made the link between illegal state aid and harmful tax competition explicit, first when the Council issued the Code of Conduct (Business) and then when the Commission issued the Commission notice on the application of the State aid rules to measures relating to direct business taxation (“the 1998 State Aid Notice”).[[111]](#footnote-111)

 After the 1998 State Aid Notice, the Commission opened investigations into several tax regimes, including Germany’s control and coordination center regime,[[112]](#footnote-112) Luxembourg’s finance company and coordination center regimes,[[113]](#footnote-113) Belgium’s coordination center and U.S. foreign sales company regimes,[[114]](#footnote-114) and France’s headquarters and logistics center regime.[[115]](#footnote-115) These regimes were all found to grant selective advantages and therefore to constitute illegal state aid, meaning that they had to be abolished.[[116]](#footnote-116)

### Tax havens

 The OECD in the late 1990s did not share the EU’s concern about state aid, but it had its own separate vision of tax competition, which was the fight against tax havens. In 2000, the FHTP issued a report in which it listed thirty-five countries that met the OECD criteria for tax havens[[117]](#footnote-117) and that had not committed to comply with the principles of the 1998 Report.[[118]](#footnote-118) The OECD’s plan was for the work on tax havens and tax regimes to move forward in tandem. In 2001, however, after President Bush came into office in the United States, this plan changed when the United States’ position on tax competition changed. Treasury Secretary Paul O’Neill announced in May 2001 that the United States would not support any efforts “to dictate to any country what its own tax rates or tax systems should be, and [would] not participate in any initiative to harmonize world tax systems. The United States simply has no interest in stifling the competition that forces governments – like businesses – to create efficiencies.”[[119]](#footnote-119) In other words, the United States adopted the arguments that tax competition was both akin to market competition and a valid exercise of state sovereignty.[[120]](#footnote-120) Although the U.S. focused broadly on any anti-competitive effort, it was understood by many observers and those taking part in the work of the FHTP to be most directly concerned with the tax haven work.[[121]](#footnote-121) Several other countries also reacted negatively to the OECD’s efforts to target tax havens, with Luxembourg and Switzerland abstaining from the 1998 Report and Belgium, Luxembourg, Portugal, and Switzerland all abstaining from a later 2001 Report.[[122]](#footnote-122) In response to this opposition to labeling entire countries as tax havens based on their corporate income tax rates, the OECD severely limited its work on tax havens and separated that work from the work on harmful tax practices.[[123]](#footnote-123)

### Emerging consensus

Therefore, by the early 2000s, both the OECD and the European Union had similar views of what constituted tax competition of the sort that countries wanted to curtail or limit. Given the overlap between the membership of both entities, this similarity is not surprising.[[124]](#footnote-124) Since these two entities represented between well over fifty percent of worldwide GDP during this period,[[125]](#footnote-125) this shared view provides an important insight into what developed countries considered to be harmful tax competition.

First, as a general matter, both the EU and the OECD focused on “harmful tax competition.” No longer was tax competition in and of itself harmful; instead, there was some subcategory of tax competition that could be labeled harmful tax competition, and this was the only competition that should be targeted. Both entities explicitly acknowledged this shift, with the Commission stating that “[t]ax competition in itself is generally to be welcomed, as a means of benefiting citizens and of imposing downward pressure on government spending”[[126]](#footnote-126) and the OECD stating that it “recognises the distinction between acceptable and harmful preferential tax regimes.”[[127]](#footnote-127) Even in the state aid context, the 1998 State Aid Notice stated that state aid could be relevant to “the objective of tackling harmful tax competition.”[[128]](#footnote-128)

 Second, as part of this shift in focus toward harmfultax competition, both the EU and the OECD accepted that they could not target entire countries based just on rate. As shown by the OECD’s shift away from focusing on tax havens, for example, the view of tax competition as being based on an entire country’s tax rate was not shared among the large developed countries. Instead, harmful tax competition involved the narrower implementation of measures that applied only to certain taxpayers or income rather than a country’s sovereign decision to set a low corporate income tax rate or not to have a corporate income tax at all.

Third, once the EU and the OECD determined that harmful tax competition did not take the form of country-wide tax rates, both entities focused on similar factors. The Code Group and the FHTP looked at similar indicators to determine which regimes were harmful. These factors focused on regimes that provided preferential rates for geographically mobile income and considered whether the income was earned primarily by foreign taxpayers or for foreign activities or whether the regime lacked provisisions to ensure transparency or exchange of information.

According to these factors, having an overall high rate would not protect a country if it had a regime with a low rate or if it lacks transparency – but an overall low rate *would* protect a country if it did not have regimes with even lower rates. In other words, while a 10% overall rate might have been enough to label a country a “tax haven” in the past, that number on its own now means nothing. Instead, on the rate front, a 10% rate on a certain subset of income would not be viewed as harmful tax competition if the country’s overall rate were also 10%, but an even higher rate (say, 15%) could end up being found harmful if the country’s overall rate were higher than that (say, 35%).

This view of tax competition therefore takes a relative approach: only if a regime provides a rate that is markedly lower than the overall tax rate will the regime be considered to be harmful tax competition. A rule that focuses on relative rates represents a fundamentally different understanding of harmful tax competition than does a rule that focuses on absolute rates. According to a rule that focuses on relative rates, if a country is willing to collect only 10% of all income, including that of its own residents, then it has the sovereign right to do so. If, however, that country imposes a higher rate on its own residents or certain types of non-mobile income and only imposes the low rate on income that can be easily moved away from other countries, then the preferential rate represents harmful tax competition. This difference can be understood as requiring countries to essentially give away revenue in order not to be thought of as engaging in harmful tax competition.[[129]](#footnote-129) If countries are willing and able to collect less from their own residents, then they are permitted to collect that same low rate from any other income to which they can lay claim as well. If, however, they are only willing to reduce the rate on foreign income or income that is easily mobile, then they will be seen as being engaged in harmful tax competition.

The factors considered by the Code Group and the FHTP are in many ways similar to the elements that the Commission listed in the 1998 State Aid Notice on fiscal state aid measures, although the state aid prohibition has a broader view of what measures constitute harmful tax competition. Under the state aid analysis, a tax provision would be found to be illegal state aid if it provided an advantage and if that advantage were selective. The 1998 State Aid Notice clarifies that, while there is overlap between the requirements for a selective advantage and the factors underlying the EU’s Package to Tackle Harmful Tax Competition and the OECD’s 1998 Report, it is much easier for the Commission to find a selective advantage than it is for the Code Group or the FHTP to find a harmful tax practice. According to the 1998 Report, “a tax measure whose main effect is to promote one or more sectors of activity constitutes aid.”[[130]](#footnote-130) This includes measures that favor “only national products which are exported,” but it also extends to measures that target “all of the sectors that are subject to international competition” and different rates for “an entire section of the economy,” even if that section of the economy produces non-geographically mobile income.[[131]](#footnote-131)

 By the early 2000s, therefore, there were two general views of what constituted harmful tax competition. According to the OECD and the EU’s Code of Conduct, harmful tax competition was focused on geographically mobile income, likely in response to the significant increase in portfolio investment in the 1980s and 1990s.[[132]](#footnote-132) Such a focus seemed to acknowledge the different ways that countries had historically used their tax systems to encourage foreign investment. While many developed countries used tax systems to encourage portfolio investment in their jurisdictions, some also used their tax systems to *discourage* foreign direct investment, since there were concerns about foreign ownership of domestic companies and competition for consumers and employees with domestic companies.[[133]](#footnote-133) In contrast, many developing countries wanted the foreign direct investment that developed countries were trying to discourage, and penalizing regimes that attracted such investment in developing countries was inconsistent with efforts to encourage development.[[134]](#footnote-134) Furthermore, regimes that attracted geographically mobile income were seen as particularly problematic because such income was understood to be more responsive to tax rate changes than immobile income,[[135]](#footnote-135) so they posed a more immediate threat to the ability of jurisdictions to set their own tax rates than regimes that applied to income that, by its nature, required a taxable entity of some sort in the jurisdiction. Finally, regimes that applied to geographically mobile income, particularly geographically mobile income owned by foreign investors, seemed to represent less of a statement of the will of the voters.[[136]](#footnote-136)

 The Commission state aid regime, however, did not have this limited view of harmful tax competition. According to the 1998 State Aid Notice, any difference in treatment, whether in base or rate, that applied to a separate group of taxpayers could constitute state aid, even if the income receiving benefits were geographically immobile. According to this view of harmful tax competition, any special treatment was harmful to competition within the European Union, and a regime that encouraged taxpayers to shift all their employees and activities to another jurisdiction was just as harmful as a regime that encouraged taxpayers to shift only their income to that jurisdiction.

While there were criticisms of these overall approaches of tax competition from commentators who argued that any effort by developed countries to curtail tax competition was undermining the ability of developing countries to increase economic growth,[[137]](#footnote-137) this was the closest that the international community came to consensus over what was and was not tax competition. In brief, pure rate competition was definitely not harmful, while competition by way of preferential regimes that targeted geographically mobile income definitely was harmful. Competition by way of other preferential tax benefits could be preferential within the European Union, but this view of harmful tax competition was not as broadly supported.

 The different visions of tax competition that existed in the early 2000s are outlined in the table below:

TABLE I: Harmful Tax Competition in the Early 2000s

|  |  |  |
| --- | --- | --- |
|  | *What is harmful tax competition?* | *What is NOT harmful tax competition?* |
| Harmful tax regimes (FHTP and Code Group) | All of the following:* Preferential rates relative to overall rates
* Regimes that apply to geographically mobile income
* Regimes that apply only to foreign taxpayers or foreign activities
 | Any of the following:* Overall low rates
* Preferential regimes that apply to immobile income
* Regimes that apply to domestic taxpayers or domestic activities
 |
| State aid prohibition | * Any difference in treatment that applies only to certain taxpayers or income
 | * Overall low rates
 |

## The Consensus Breaks Down: Recent Developments in the Fight Against Harmful Tax Competition

In the fifteen years following the developments set out above, countries and commentators came to believe that the shared view of harmful tax competition was too narrow. Starting in 2012, amid conversations about growing tax avoidance by multinationals, politicians and news media started to focus on offensive tax competition measures such as Ireland’s 12.5% corporate rate,[[138]](#footnote-138) the low or non-existent corporate tax rates in countries like the Cayman Islands, the Dutch Antilles, and Bermuda,[[139]](#footnote-139) and administrative rulings that reduced effective tax rates close to zero.[[140]](#footnote-140) Although much of the news focused on the role of multinational companies like Google, Amazon, and Apple,[[141]](#footnote-141) these stories highlighted that efforts to curtail harmful tax competition had not eliminated the differences between jurisdictions that made these tax avoidance transactions profitable.

The OECD, the European Union, and individual countries responded to this change in consensus with a new round of anti-tax-competition measures. This Part outlines the recent developments undertaken by the OECD, the European Union, and various individual countries to illustrate how the vision of harmful tax competition that existed in the early 2000s has evolved and changed in recent years.

### Recent OECD efforts to curtail harmful tax competition

 In 2015, the FHTP formally changed its approach in two ways.[[142]](#footnote-142) Under the OECD/G20 BEPS Project, the FHTP was charged with “revamp[ing] the work on harmful tax practices.”[[143]](#footnote-143) It was given two separate mandates as part of this work: first, the FHTP needed to develop a method for requiring the spontaneous exchange of tax rulings related to preferential regimes with other interested countries, and, second, the FHTP needed to change its assessment of preferential regimes to consider whether such regimes required “substantial activities.”[[144]](#footnote-144)

 In response to the first mandate, the FHTP developed a framework that sets out when a country must automatically exchange information on a tax ruling with other countries that could be affected by the ruling.[[145]](#footnote-145) As a general matter, tax rulings are written agreements between a country and a taxpayer that provide guidance on how a transaction or structure will be taxed or how income will be allocated in a multinational structure or transaction. Rulings are designed to provide taxpayers with certainty, but, as shown by the international reaction to the rulings that were released as part of LuxLeaks[[146]](#footnote-146), they are also seen by some as allowing taxpayers to benefit from effective tax rates that are lower than may be apparent from publicly available information.[[147]](#footnote-147) Concerns about rulings allowing for hidden tax competition led to the mandate to the FHTP to require spontaneous exchange, and the FHTP responded by requiring that countries exchange any ruling that “in the absence of spontaneous information exchange gives rise to BEPS concerns.”[[148]](#footnote-148) The framework it provided was meant to help countries identify when rulings would rise to that level.

 The framework for spontaneous exchange of rulings is notable for at least two reasons. First, it does not require any changes in the substance of the rulings. Regardless of what rulings provide, the entire focus of this work is on transparency and exchange of information. This is consistent with many recent international tax developments that focus on transparency and implicitly assume that exchange of information will be sufficient to eliminate bad behavior, whatever it may be.[[149]](#footnote-149) This does not, however, provide clear guidance on what elements of rulings beyond secrecy could be harmful. Second, even without a clear explanation of what elements of rulings could be harmful, the new focus on rulings shows a shift in the understanding of what constitutes harmful tax competition. Previously, the FHTP focused on regimes that by their terms provided reduced rates to certain groups of taxpayers.[[150]](#footnote-150) Now, the FHTP is acknowledging that those are not the only possible examples of harmful tax competition. Instead, administrative rulings that are provided to individual taxpayers may rise to the level of tax competition.

 In response to the second mandate to require substantial activities, the FHTP interpreted this charge to mean that it needed to create an approach to requiring substantial activities that would first be applied to regimes providing benefits to IP income and would then be applied to all preferential regimes.[[151]](#footnote-151) After two years of negotiations and a publicly brokered compromise between the United Kingdom and Germany, the FHTP agreed to the so-called “nexus approach.”[[152]](#footnote-152) This approach requires that, in the context of IP regimes such as patent boxes (which apply a reduced tax rate to income from IP assets such as patents), a regime must require that taxpayers can only receive benefits on an amount of IP income that is proportionate to the amount of research and development (R&D) expenditures incurred in the jurisdiction providing the regime.[[153]](#footnote-153) In other words, a regime that allows income to receive benefits even when the substantial activity that contributed to the income was done elsewhere will be harmful. For IP regimes, this means that income could not receive benefits if the R&D were done elsewhere. For other types of regime, the FHTP is still in the process of determining what constitutes substantial activities that cannot be done in a jurisdiction separate from the one providing preferential rates to the income arising out of those activities.[[154]](#footnote-154)

 This development is notable because requiring substantial activities changes the focus of the FHTP. Previously, even if a regime was low-tax, preferential, and provided benefits to geographically mobile income, it would not be found to be harmful if it provided for transparent sharing of information and was not ring-fenced.[[155]](#footnote-155) Now, that regime could be found to be harmful if it does not require that the income arise out of substantial activities within the jurisdiction providing the regime. For purposes of IP regimes, the FHTP defined qualifying expenditures as only including “expenditures that are incurred for the purpose of actual R&D activities,”[[156]](#footnote-156) meaning that the proportion of expenditures incurred for local R&D activities is what will determine whether an IP regime is harmful or not. In the context of other preferential regimes, the FHTP acknowledged that expenditures may not be the best proxy for substantial activities and instead listed activities that themselves could be sufficient for a regime to be found not to be harmful.[[157]](#footnote-157) However these are defined, the FHTP has now narrowed its view of permissible preferential regimes. Regimes that were not harmful under the 1998 Report now could be harmful if “substantial activities” are located in a separate jurisdiction separate from the income benefiting from a reduced rate.[[158]](#footnote-158)

### Recent EU efforts to curtail harmful tax competition

 Since 1997, the Commission and Code Group have continued to challenge a variety of Member State tax regimes as examples of harmful tax competition.[[159]](#footnote-159) On the Commission side, the Commission’s Directorate-General for Competition (DG-COMP) has recently expanded its understanding of the state aid prohibition to extend to individual tax rulings provided to multinational companies. In its 1998 State Aid Notice, the Commission had explicitly stated that administrative tax rulings, pursuant to which Member State tax administrations provided interpretive guidance to taxpayers, could be considered to be illegal state aid if they allowed for administrative discretion that went “beyond the simple management of tax revenue by reference to objective criteria.”[[160]](#footnote-160) Following this Notice, several regimes that provided for such rulings were found to be illegal state aid in 2002 and 2003,[[161]](#footnote-161) and the European Court of Justice confirmed this finding in the context of Belgian coordination centers in 2006.[[162]](#footnote-162) In 2014, the Commission also issued a draft notice of state aid that was even more explicit in stating that administrative tax rulings could constitute illegal state aid.[[163]](#footnote-163) Later in 2014, building on the earlier investigations and its own notice, the Commission then initiated investigations about tax rulings provided by the Netherlands, Ireland, and Luxembourg to Starbucks, Apple, Fiat, and Amazon.[[164]](#footnote-164) In 2016, the Commission found several of these rulings to be illegal state aid, and, in keeping with the rules of Article 107, demanded that the multinational companies pay back ten years of the taxes that they ostensibly owed to the countries that had provided the aid.[[165]](#footnote-165)

 These decisions were met with surprise and outrage in the United States, where many of the multinationals that had received the rulings were incorporated.[[166]](#footnote-166) Much of the criticism was directed at the recovery: the Commission had ordered the Netherlands to collect € 30 – € 40 million (plus interest) from Starbucks and Ireland to collect over € 13 billion (plus interest) from Apple.[[167]](#footnote-167) From an American perspective, this was seen as a pure money grab, with U.S. companies being asked to pay the very countries that had been responsible for the state aid to begin with.[[168]](#footnote-168) From an EU perspective, however, these investigations were seen as consistent with previous state aid investigations and a necessary part of the fight against harmful tax competition. In comments after the Apple decision was handed down, Margrethe Vestager, the Commissioner for Competition, stated repeatedly that the rulings provided to U.S. companies were unfair and inconsistent with a level playing field between companies, and that recovery was necessary to guarantee fair competition between companies.[[169]](#footnote-169) Ministers in France and Germany also voiced their support for the decisions, stating that they were necessary for the fight against harmful tax competition.[[170]](#footnote-170) In other words, harmful tax competition was harmful because of how it affected market competition between companies. According to this view, if Apple and Starbucks were able to compete on unequal footing with companies that did not receive similar tax rulings, then the rulings that they received were distorting the market within the European Union.[[171]](#footnote-171)

 Questions remain as to whether the Commission diverged too far from its previous analysis of selective advantage in reaching its recent decisions.[[172]](#footnote-172) The affected Member States (and some companies that received the aid) have appealed the decisions to the Courts of Justice of the European Union (CJEU), and it will take several years to receive an ultimate decision on appeal.[[173]](#footnote-173) Until a final decision has been issued, however, the Commission’s recent investigations and decisions mark an important development in the EU’s efforts to curtail harmful tax competition. While the Commission had used the state aid prohibition to challenge rulings and other tax provisions, the more recent actions showed the Commission’s willingness to use state aid as a tool against tax competition even when the companies benefiting are not based in the European Union and even when the measure provided is an individual ruling rather than an entire regime.[[174]](#footnote-174) One thing to note about these recent investigations, however, is that the state aid prohibition continues to define harmful tax competition more broadly than the FHTP, even after the FHTP broadened its own definition. While the FHTP now views tax rulings as potentially representing harmful tax competition, this is only true for rulings that could “give[] rise to BEPS concerns.”[[175]](#footnote-175) The Commission has no such limitation on which types of rulings could represent harmful tax competition for state aid purposes, and it instructs in its guidance that rulings can rise to the level of impermissible state aid when they “misappl[y] national tax law,” resulting in a reduced tax burden; when they are not available to all similarly situated taxpayers; or when other similarly situated taxpayers do not receive similarly favorable tax treatment.[[176]](#footnote-176) This is a much broader scope of rulings that could represent harmful tax competition than the scope envisioned in the spontaneous exchange requirement.

 The Code Group has also been updating its definition of harmful tax competition, and this work has overlapped significantly with the work of the FHTP. This overlap is perhaps most evident in the context of IP regimes such as patent boxes, where the Code Group directly followed the lead of the FHTP and expanded its definition of harmful tax competition to also focus on substantial activities as defined by the nexus approach.[[177]](#footnote-177) At the end of 2014, the FHTP first proposed the nexus approach, which was then accepted pursuant to an agreement between the UK and Germany.[[178]](#footnote-178) A month later, the Code Group announced its adoption of the nexus approach for assessing patent boxes as well,[[179]](#footnote-179) and the FHTP publicly announced its own adoption of the nexus approach in early 2015.[[180]](#footnote-180) Therefore, rather than developing two different approaches to assessing harmfulness in patent boxes, both the FHTP and the Code Group adopted the approach developed in the FHTP. The Code Group then assessed the IP regimes of the EU Member States in 2015 and 2016.[[181]](#footnote-181)

 A further EU development in the context of tax competition has been the Commission’s recent announcement of two directives aimed at eliminating tax competition: the proposed Common Corporate Tax Base (CCTB) Directive and the proposed Common Consolidated Tax Base (CCCTB) Directive. Although these directives claim to focus more on concerns about tax avoidance and compliance costs,[[182]](#footnote-182) they will also have the effect of significantly limiting the ability of EU Member States to engage in tax competition if implemented. These both arose out of discussions of a EU-wide common corporate tax base that formally began in 2001.[[183]](#footnote-183) After several rounds of discussion,[[184]](#footnote-184) the Commission proposed a Directive on a Common Consolidated Corporate Tax Base (CCCTB) in March 2011.[[185]](#footnote-185) This proposed directive would have allowed companies to choose whether or not to use the common base or to continue to calculate their tax bases separately for all Member States in which they operated.[[186]](#footnote-186) Countries that did use the common base would then opt into a consolidation system, pursuant to which EU-wide losses could be used against EU-wide income when calculating the taxable base.[[187]](#footnote-187) Due to both the difficulties of agreeing to a consolidation system and the optionality of the CCCTB, many Member States opposed the proposal, and it remained pending in the Council for over five years. In October 2016, the Commission issued two draft proposals for both a new CCCTB Directive and a Directive for a Common Corporate Tax Base (CCCTB).[[188]](#footnote-188) These would require companies over a certain size to use the common base, but they would introduce the consolidation regime after the common base, so the creation of a full common consolidated base would take place in stages.[[189]](#footnote-189)

 If one or both of these common base proposals were implemented, they would significantly change the face of tax competition throughout the European Union since they would eliminate the ability of countries to compete on their bases and would instead focus competition purely on rate. Therefore, no longer would countries be able to provide any preferential regimes to specific types of income or taxpayers; instead, all income would be aggregated into the common base, and the only locus for competition would be the rate that each Member State applied to the portion of the base allocated to them.

 A final EU-wide proposal for combating tax competition was the announcement by the Commission in September 2016 that the EU would compile a list of non-cooperative jurisdictions outside of the European Union.[[190]](#footnote-190) The Commission plans to compile this list in three steps. First, the Commission will create a “neutral scoreboard of indicators,”[[191]](#footnote-191) which will consider a jurisdiction’s economic to the EU, its reliance on financial services exports, and its appeal to taxpayers engaged in tax avoidance.[[192]](#footnote-192) This scoreboard will also consider the jurisdiction’s compliance with international transparency and exchange of information standards, the existence of preferential regimes in the jurisdiction, and the jurisdiction’s corporate tax rate.[[193]](#footnote-193) Second, after the Commission has produced its scoreboard, the Commission and the Code Group will formally screen certain third countries based on their scores. Third, after the screening process, countries that “refused to cooperate or engage with the EU regarding tax good governance” will be placed on the list.[[194]](#footnote-194) This is essentially a return to the country-wide blacklists of the pre-1997 era, but rate is now only one of the factors to be considered, and the others focus on economic linkages to Europe, the role of financial services, the tax avoidance environment, and tax good governance.

### Recent efforts to curtail international tax avoidance

As mentioned above, many of these recent developments in the fight against tax *competition* came about in response to news stories and political outrage about tax *avoidance* by multinational companies. However, the main response to such stories was to focus on international tax avoidance. Much of the literature separates tax avoidance from tax competition. While tax competition focuses on actions by individual countries to change their tax systems in order to compete with other countries, tax avoidance focuses on actions taken by taxpayers to reduce the taxes they pay to one or more countries.[[195]](#footnote-195) As with tax competition, tax avoidance lacks a clear definition or a clear line of when it becomes harmful, but the literature generally focuses on the difference between permissible tax planning and illegal tax evasion.[[196]](#footnote-196) Rules that were designed to prevent international tax avoidance focus not on limiting jurisdictional competition but instead on preventing taxpayers from aggressively interpreting existing domestic law to reduce their tax burdens.

 Perhaps the largest recent development in the fight against tax avoidance was the OECD’s BEPS Project. Although it was described briefly above during the discussion of the spontaneous exchange of rulings and the nexus approach as a tool against tax *competition*, most of the BEPS Project was focused explicitly on tax *avoidance*. The Project was presented as a way for governments to prevent taxpayers from taking advantage of discrepancies between domestic tax systems,[[197]](#footnote-197) and many of the proposals and recommendations that came out of the Project were presented as tools for preventing or limiting aggressive tax planning by taxpayers.[[198]](#footnote-198) There were fifteen different Action Items that made up the BEPS Project, and the outputs that were produced under the majority of these Action Items were targeted at tax avoidance opportunities.[[199]](#footnote-199) For all of these Action Items, the OECD issued a report that set out recommended rules or required minimum standards.[[200]](#footnote-200) While commentators have questioned how much these reports will change the international tax environment,[[201]](#footnote-201) many countries have modified their domestic tax rules to reflect the BEPS outputs,[[202]](#footnote-202) and others have signed on to international agreements to implement certain minimum standards.[[203]](#footnote-203)

 After the OECD announced the outputs of the BEPS Project in October 2015,[[204]](#footnote-204) the Council of the European Union agreed in June 2016 to the Anti-Tax Avoidance Directive (“ATAD”).[[205]](#footnote-205) This was developed as part of the Commission’s overall Anti-Tax Avoidance Package, which the Commission billed as a set of “concrete measures to prevent aggressive tax planning, boost tax transparency and create a level playing field for all businesses in the EU,”[[206]](#footnote-206) and Member States of the European Union will be required to implement its provisions in their domestic legislation by January 1, 2019.[[207]](#footnote-207) There are five required provisions. Three of them are similar to outputs under the BEPS Project: the ATAD requires that Member States implement anti-hybrid rules, CFC rules, and interest limitation rules that are consistent with the BEPS recommendations.[[208]](#footnote-208) The ATAD also requires that Member States implement an exit tax, pursuant to which taxpayers who leave one Member State must pay a supplementary tax to ensure that they do not escape taxation by moving,[[209]](#footnote-209) and that Member States implement a general anti-abuse rule, pursuant to which tax administrations will be able to prevent artificial arrangements designed to avoid taxation.[[210]](#footnote-210)

 Separate from both the OECD and the EU developments, several individual countries also recently implemented rules intended to prevent international tax avoidance. In 2015, the United Kingdom implemented the diverted profits tax (“DPT”),[[211]](#footnote-211) which was billed in the press as the “Google tax” based on its focus on multinational companies such as Google that had been criticized in the UK press for paying low effective rates of tax.[[212]](#footnote-212) The DPT imposes a tax of 25% on the profits earned by a multinational that were diverted from the United Kingdom.[[213]](#footnote-213) The DPT determines such profits by looking at two situations: (i) where there should have been a permanent establishment in the United Kingdom and (ii) where there was not enough substance in another jurisdiction to justify the income being allocated to that jurisdiction rather than the United Kingdom.[[214]](#footnote-214) In 2016, Australia implemented a similar rule, known as the multinational anti-avoidance law (“MAAL”).[[215]](#footnote-215) The MAAL also applies to multinational companies, but, rather than imposing a tax on profits, it doubles the tax avoidance penalties that the Australian authorities can impose on the taxpayer.[[216]](#footnote-216) The MAAL applies if one of the principal purposes of a transaction was to obtain a tax benefit and if, even though a foreign entity is providing goods or services to Australian customers through an Australian entity, sufficient income has not been allocated to a permanent establishment in Australia.[[217]](#footnote-217)

 The United States also proposed two unilateral measures to target tax avoidance at the same time. First, the U.S. Treasury under the Obama Administration amended the U.S. Model Treaty to limit treaty benefits if a taxpayer benefits from a so-called “special tax regime.”[[218]](#footnote-218) While double tax treaties such as the U.S. Model Treaty set default rules for how taxpayers in the two signatory countries will be taxed, the new version of the U.S. Model Treaty reverses some of these default rules if a taxpayer is benefiting from “any legislation, regulation or administrative practice that provides a preferential effective rate of taxation to such income or profit, including through reductions in the tax rate or the tax base.”[[219]](#footnote-219) This development, which went into effect in 2016, expands on the FHTP’s view of harmful tax regimes to include preferential regimes that apply “preferential treatment to interest, royalties, or guarantee fees as compared to income from sales of goods or services.”[[220]](#footnote-220) Preferential treatment is defined to include a preferential rate, as well as a “permanent reduction in the tax base with respect to such income” and “a preferential regime for companies that do not engage in an active business in the residence state.”[[221]](#footnote-221)

 Second, in 2015 and 2016 the Obama Administration proposed that the United States impose a minimum tax, pursuant to which all U.S. taxpayers would be subject to a minimum tax rate of 19%.[[222]](#footnote-222) In other words, if U.S. taxpayers had paid an overall effective rate of less than 19% on their worldwide income, they would be required to pay the difference in taxes to the United States. This proposal was never made into law, but, like the DPT and the MAAL, it represents a new development in the arsenal of tools that countries could design to combat international tax avoidance.

These are not, of course, the only rules that are targeted to tax avoidance. Jurisdictions across the world have a variety of specific anti-avoidance rules such as interest limitation rules and general anti-avoidance rules such as substance-over-form or economic substance tests.[[223]](#footnote-223) The developments listed in this section are, however, the proposals and rules that have received the most international attention in the past few years, and they are more explicitly focused on *international* tax avoidance than many existing and proposed domestic rules, which are focused on tax avoidance at both the national and international level.

### Changes from the previous consensus

After the OECD and the EU Commission issued their plans to target harmful tax competition in the late 1990s, there was general agreement that harmful tax competition consisted of preferential tax regimes that applied relatively lower rates to geographically mobile income, where those rates were either only provided only to foreign taxpayers or where the regime itself was shrouded in secrecy. At the same time, the EU Commission had a broader state-aid-based view of what constituted harmful tax competition, and this viewed any preferential tax regime as harmful, regardless of who or what type of income benefited. This broader view, however, was still in the process of being applied and interpreted, so its divergence from the existing OECD/EU consensus was not yet clear.

Now, over fifteen years later, countries and international organizations have developed new views of what constitutes harmful tax competition. As shown by the descriptions above, countries over the past several years have been actively developing both unilateral and multilateral responses to concerns about tax competition and tax avoidance. Given that there is no agreement in the academic literature about what constitutes harmful tax competition or where the line between tax planning and impermissible tax avoidance falls, what can we learn from these developments about what countries consider to be harmful tax competition?

On the tax competition front, the section above listed several recent developments: (i) the nexus approach for preferential tax regimes such as patent boxes, (ii) the requirement that certain tax rulings be exchanged between jurisdictions, (iii) the recent state aid investigations of rulings provided to multinational companies, (iv) the EU’s common tax base proposals, and (v) the EU’s proposed list of non-cooperative jurisdictions. These developments illustrate several possible ways of understanding what is harmful about tax competition and when tax competition should be limited. While these ways of understanding harmful tax competition in many ways diverge from one another, they also contrast with the vision of harmful tax competition that was set out by the OECD’s Forum on Harmful Tax Practices and the EU Code Group in the late 1990s.

According to the FHTP and the Code Group, general corporate tax rates in and of themselves were not sufficient to constitute harmful tax competition. Instead, harmful tax competition could only exist when a country had a tax regime that had a lower rate than the normal corporate tax system and it applied this lower rate to geographically mobile income. Even when these two requirements were met, both the FHTP and the Code Group agreed that harmful tax competition only existed if there were another indicator of harmfulness, whether it was that the regime restricted its benefits to foreign taxpayers or that it lacked transparency. According to this vision of tax competition, therefore, a low rate without anything else is not harmful. Furthermore, a low rate that applies just to some types of income is not harmful if that income is from, say, manufacturing, or some other activity that is not geographically mobile. Finally, even if there is a low rate that applies to geographically mobile income, providing that rate to income earned by both domestic and foreign taxpayers alike is also not harmful so long as the jurisdiction is transparent about how it applies the regime. This vision of harmful tax competition therefore allowed – and perhaps encouraged – jurisdictions to compete over general corporate tax rates, preferential rates provided to immobile income such as manufacturing income, and preferential rates provided to mobile income such as financial services income so long as domestic taxpayers also benefited from the low rate.

All of the recent developments suggest that this vision of harmful tax competition was too narrow, but not all of them modify this vision in the same way. The nexus approach makes it harder for jurisdictions to compete over mobile income, since it now requires R&D to be done in the jurisdiction providing the regime. It therefore narrows the view of acceptable tax competition that existed for the past decades and considers preferential rates provided to mobile income such as IP income to be harmful even if domestic taxpayers also benefited from the low rate. This is only true, however, if taxpayers did not also locate the activities contributing to the income in the jurisdiction with the regime.[[224]](#footnote-224) The nexus approach therefore views a regime that encourages taxpayers to shift jobs and activities along with income (or to shift income back to the jurisdiction with the jobs and activities) as not harmful and instead as acceptable tax competition.

 The spontaneous exchange of tax rulings required under Action 5 of the BEPS Project also perceives the earlier vision of harmful tax competition as too narrow. According to the discussion in the Action 5 Report, harmful tax competition does not only tax place by way of statutory tax provisions that differ from the normal corporate tax system. Instead, tax administrations can also engage in harmful tax competition by issuing discretionary rulings that provide for different treatment than what might be understood under the statutory tax provisions, and secrecy of these rulings is enough to raise concerns about harmful tax competition.

 The EU’s recent state aid investigations also view administrative discretion as a possible avenue for tax competition. At a more general level, the state aid prohibition views any reduction in tax base or rate that derogates from the normal tax system as a possible indicator of harmful tax competition, so its view of harmful tax competition remains broader even after the recent developments in the FHTP and the Code Group. This means that the state aid prohibition could view any low rate as harmful tax competition so long as it is not also provided to all other taxpayers.[[225]](#footnote-225) This is broader than the earlier FHTP and Code of Conduct consensus, where any such derogation is harmful only if it is in the context of geographically mobile income and it is limited to foreign taxpayers, and it is also broader than the view represented by recent developments such as the nexus approach, which still requires a lack of substantial activities, and the spontaneous exchange of rulings, which only implicates rulings that the FHTP has determined raise BEPS concerns.[[226]](#footnote-226)

 The EU’s common tax base proposals do not represent a different view of tax competition so much as an entrenchment of the view that rate competition is never harmful. By requiring Member States to use one definition for their corporate tax bases, they eliminate the ability of any base competition. In other words, if adopted without exception, a common base would eliminate the possibility of any preferential regimes since all income would be aggregated and then allocated to individual countries. It would, however, put significant pressure on overall rates, since those would be the only remaining locus of competition.

 Yet the EU’s proposed list of non-cooperative jurisdictions points to a very different vision of harmful tax competition. This proposal returns to the earlier vision of harmful tax competition that was rejected by the FHTP in the early 2000s, according to which entire jurisdictions can be viewed as harmful. The EU’s list differs from previous blacklists, however, in that it focuses on factors other than just overall tax rate. While one of the risk indicators is the lack of a corporate tax (or a tax rate of 0%), the other factors include the competitive threat to EU Member States (due to its economic ties with the EU, the amount of financial services income, and the overall environment), preferential regimes, transparency, exchange of information, and willingness to improve tax governance.[[227]](#footnote-227) Therefore, the EU’s list has moved away from just focusing on the rate competition that raised such concern fifteen years ago, but it has returned to the view that an entire jurisdiction can be engaged in harmful tax competition.

 So, given all of these developments, what is harmful tax competition? Under the nexus approach, it is a reduced rate on geographically mobile income when the jurisdiction providing the rate does not also require that the jobs creating the income be located there. Under the prohibition on state aid, it is a reduced rate on any income when that same rate is not provided to other taxpayers. Under the proposal for spontaneous exchange of rulings and the prohibition on state aid, it is a reduced rate on income provided by administrative rulings as well as statutory law. Under the common tax base proposals, it is any difference in corporate tax bases across countries. Under the EU’s proposed list of non-cooperative jurisdictions, it is an overall tax system of a country that is linked to the EU, that does not follow good tax governance principles, and that may have preferential regimes, although those are not the focus. These different visions of tax competition are outlined in the table below:

TABLE 2: More Recent Visions of Harmful Tax Competition

|  |  |  |
| --- | --- | --- |
|  | *What is harmful tax competition?* | *What is NOT harmful tax competition?* |
| Nexus approach | All of the following:* Preferential rates relative to overall rates
* Regimes that apply to geographically mobile income
* Regimes that do not require jobs and infrastructure associated with geographically mobile income
 | Any of the following:* Overall low rates
* Preferential regimes that apply to immobile income
* Regimes that encourage taxpayers to shift jobs or infrastructure associated with geographically mobile income
 |
| State aid prohibition | * Any difference in treatment that applies only to certain taxpayers or income, whether in the form of administrative rulings or statutory law
 | * Overall low rates
 |
| Spontaneous exchange of rulings | * Any difference in treatment that applies only to certain taxpayers or income, if that treatment is provided by an administrative ruling that is not shared with other jurisdictions
 | * Any ruling that is shared with other jurisdictions
 |
| CCCTB and CCTB | * Any difference in tax base
 | * Any difference in tax rate
 |
| List of non-cooperative jurisdictions | * Overall tax system of a country that has economic connections to the European Union and lacks good governance
 | * Good tax governance
 |

 At the same time, jurisdictions were also designing and implementing rules that focused not on jurisdictions that were competing for taxpayers but instead on taxpayers who were avoiding taxation. The BEPS Project recommended domestic rules that individual countries could adopt to limit such tax avoidance. The EU’s ATAD went further and required certain rules in EU Member States that would make it more difficult for taxpayers to reduce their taxes. The United Kingdom and Australia also implemented their own anti-avoidance rules, subjecting multinational corporations to heightened tax rates or doubled penalties if such taxpayers engaged in certain types of transactions intended to reduce or eliminate taxes. Finally, the United States amended its model treaty to incorporate the FHTP and Code of Conduct vision of harmful tax competition into an anti-avoidance rule, and it proposed a minimum tax that would have incorporated the pre-1998 prohibition on rate competition into an anti-avoidance rule. Although all of these rules were presented as targeting taxpayers, rather than other jurisdictions, they were proposed and put into effect at the same time as the anti-tax-competition measures described above, and they were also presented as responses to the many examples of international corporate tax avoidance in the media at the time. As will be shown in Part III, they were therefore not as separate from the anti-tax-competition measures as they may have at first appeared.

# How Should the Policy of Tax Competition Inform the Theory of Tax Competition?

 The recent unilateral and multilateral developments in the fight against tax competition represent different visions of what constitutes harmful tax competition. Given these differences, what can countries learn as they craft their own anti-tax-competition measures, and what can academics and policymakers learn about the international tax landscape? This Part III sets out three different insights that can be distilled from the developments set out in Part II.

## Shifting the Playing Field

One lesson that can be learned from these developments is that, no matter what politicians may say in their rhetoric about the inherent harm caused by tax competition, most countries’ definition of harmful tax competition is informed by where they believe themselves to be most competitive. In other words, fighting international tax competition is not about leveling the playing field; it is instead about shifting the playing field. This in turn focuses competition on areas where a country believes itself to have an advantage and away from those areas where it does not have an advantage.

This lesson can be seen across the history of anti-tax-competition measures. Before the striking increase in foreign direct and portfolio investment in the 1980s and 1990s, large countries generally did not feel the need to pass anti-tax-competition measures because their size was sufficient to make them competitive.[[228]](#footnote-228) In the 1980s and 1990s, however, as size alone stopped being sufficient, larger countries started to feel the effect of tax competition. Although their rates were dropping during this period, large countries still retained higher rates in general than small countries until the late 1990s,[[229]](#footnote-229) so their solution was to define harmful tax competition as low corporate rates.[[230]](#footnote-230) They could not compete based on rates, so they eliminated the ability of smaller countries to do so. By the late 1990s, however, large and small countries alike had overall low rates, so the statutory corporate rate was now a playing field on which large countries could compete.[[231]](#footnote-231)

Where they could not compete, however, was on effective corporate rates, which by this time had plummeted below statutory rates,[[232]](#footnote-232) so they shifted the playing field again, this time permitting countries to compete based on statutory rates, but not allowing them to compete based on special rates for foreign taxpayers. Whereas larger and more politically powerful countries had previously viewed rates as a competitive field on which they could not win, they now accepted competition for rates, but they realized that they could only compete on rates if these were generally applicable rates. If countries were permitted to keep high overall rates, which could in turn make them more appealing to investors and employees if the revenue from those rates were used to provide governmental benefits, and yet they could also compete by having preferential rates that applied only to foreign mobile income, then the countries that could now compete on rates would no longer have an advantage.[[233]](#footnote-233) Hence the shift in focus to preferential regimes rather than rates.

This historical perspective also explains the simultaneous focus on lack of transparency and exchange of information as indicators of harmful tax competition. The larger developed countries that made up the majority of EU and OECD countries in the late 1990s were shifting toward being able to compete based on rates, but some countries that previously would have been considered tax havens based on rates were also shrouded in secrecy. By disallowing such secrecy, which the majority of EU and OECD countries no longer protected to the same extent, they could again shift the area over which they were competing in their favor. Furthermore, eliminating secrecy was necessary to ensure that countries knew whether and how preferential regimes applied to foreign taxpayers.

 Readers may argue that this story ignores the United States, which retained a relatively high statutory corporate income tax rate throughout this period even as other countries reduced their rates. If the U.S. rate stayed high and yet the international tax system no longer viewed rate competition as harmful, isn’t that inconsistent with the view that countries only permitted tax competition where they themselves could prevail? No, because the U.S. story requires a consideration of the different political interests at play in the country during this period. As mentioned earlier, the 1998 Report (to which the United States agreed) foresaw a two-step approach: first, a list of tax havens based on rates and secrecy, and, second, a focus on harmful tax regimes.[[234]](#footnote-234) Yet, by the early 2000s, the OECD was only pursuing the second step. One relevant change that occurred between 1998 and the early 2000s was the shift from the Clinton Administration to the Bush Administration. Whereas a Democratic administration appeared willing to view rate competition as harmful, which would limit the ability of countries to reduce their rates significantly below the U.S. rate, a Republican administration was apparently unwilling .[[235]](#footnote-235) This was at least in part because the Republican Party at the time was pushing for either the complete elimination of the corporate income tax or at least a significant reduction in the U.S. corporate income tax rate.[[236]](#footnote-236) Allowing other countries to compete based on rate therefore may not have put the United States at a competitive advantage at the time, but it was likely intended to create pressure on the United States to itself engage in competition and reduce its corporate income tax rate.[[237]](#footnote-237) The U.S. is therefore yet another example of how entities (in this case, political parties) use their definition of harmful tax competition to shift the playing field in their favor. While the U.S. as a whole may not have been doing that, Republicans who hoped to reform the corporate tax system in the early 2000s were attempting to use their definition of harmful tax competition to shift the policy reform playing field in their favor and move toward the type of tax system that they desired.[[238]](#footnote-238)

 The insight that countries use anti-tax-competition measures in order to shift competition to a field where they are more competitive can be seen even more clearly in the recent developments mentioned earlier. In the context of the BEPS Project, the nexus approach shifted the playing field for harmful regimes away from rates granted to domestic taxpayers, which had previously been permitted, and instead towards competition for jobs, infrastructure, and education. Under the nexus approach as envisioned by the countries participating in the FHTP, a country could only have a patent box if that country could also support the R&D necessary to create the IP assets that contributed to the income benefiting from the patent box. The United Kingdom and Germany, with large economies with significant investments in infrastructure and education, supported the nexus approach. These two countries could not compete based purely on rate, so they pushed for a view of harmful tax competition that would shift the competition to an area where they believed they could compete more successfully: jobs, infrastructure, and education.

 The renewed focus on rulings also illustrates this shift toward an area where the OECD countries felt they were more competitive. The Action 5 spontaneous exchange requirement views certain types of secret administrative rulings as a version of harmful tax competition, and the OECD countries believed that they could compete more successfully by removing certain secret discretionary rulings from the playing field altogether. That said, as shown by recent state aid investigations, several OECD member countries (including Belgium, Ireland, Luxembourg, and the Netherlands) did issue secret discretionary rulings. If they were competing successfully on this playing field, why would they allow the playing field to shift away from where their comparative advantage lay? There may be political reasons that these countries felt the need to agree to the BEPS outputs even when they did not favor them, but another explanation is that at least some of these countries were able to keep the playing field tilted in their favor even as they appeared to be agreeing to shift it over to countries without any rulings. The Action 5 Report says nothing about eliminating rulings, nor does it require that any rulings other than those listed in the Report be exchanged, nor does it prescribe any defensive measures once rulings are exchanged. While Action 5 eliminates some of the benefit of granting rulings, it does not take away the benefit entirely. Thus, countries that provided rulings may have retained their competitive advantage even while countries without rulings thought that they were gaining an advantage.

 The anti-tax-competition developments in the European Union further support this view, but they add a separate lesson of their own. The EU’s current fight against tax competition is much broader than other efforts to curtail tax competition. While the OECD has now expanded the definition of harmful tax competition to include preferential rate competition that is not combined with competition for jobs and many secret tax rulings, the EU’s recent actions have represented an even more expanded view of what constitutes harmful tax competition. Not only have they followed the OECD’s lead and included preferential rate competition without competition for jobs in an expanded view of harmful tax competition, but, as shown by the recent state aid investigations, any regime that differs from a Member State’s normal tax system can be considered to be illegal state aid, and thus harmful tax competition.[[239]](#footnote-239) Also, as shown by the CCTB and CCCTB proposals, any variation in tax bases could in the future be seen as harmful tax competition. The European Union therefore at first seems to be undermining the argument that a jurisdiction’s anti-tax-competition measures are designed to shift the playing field toward an area where that jurisdiction can best compete, since the EU measures appear designed to eliminate all difference between Member States and therefore eliminate tax competition entirely.

 But the European Union is attempting to eliminate only the competition among its own Member States. The long-term goal is to position the EU so that it can compete more successfully as an entire bloc with other jurisdictions. Currently, as shown by the existence of the Code Group, most of the tax competition concerns of the European Union are about intra-EU competition: different Member States are policing one another and competing with one another. The goal of the recent proposals and the Commission’s reinvigorated state aid activity, however, is to eliminate this competition entirely in order for the EU as a whole to compete with countries outside the European Union. This is particularly relevant in the wake of the UK’s Brexit vote, when the European Union needs to show Member States the value of staying within the EU.[[240]](#footnote-240) If the long-term result of anti-tax-competition measures such as the state aid prohibition and the proposed common bases will be to make the EU as a whole more attractive to investors and residents compared to other countries, that may be a necessary tool in the EU’s efforts to offset anti-European sentiments.[[241]](#footnote-241)

## The Interdependence of Tax Competition and Tax Avoidance

A further lesson is that the division in the literature between tax competition and tax avoidance ignores the interdependence of these two concepts.[[242]](#footnote-242) As shown by the simultaneous development of anti-tax-competition measures and anti-avoidance measures and the rhetoric that linked these two together, one of the main tools against tax competition is now rules that target taxpayers rather than jurisdictions. This lesson can be seen in the BEPS outputs that were *not* targeted at tax competition, the EU’s ATAD, the UK and Australian rules targeting the diverted profits of multinationals, and the Obama Administration’s measures to limit international tax avoidance. Although Action 5 of the BEPS Project explicitly targeted tax competition, the majority of BEPS Action Items, and the BEPS Action Plan itself, were focused on taxpayers. In the first two pages of the BEPS Action Plan, for example, the OECD identified the fundamental problem facing the international tax system as the existence of “opportunities for MNEs to greatly minimi[z]e their tax burden” and identified governments as one of the victims of this tax avoidance.[[243]](#footnote-243) Yet a closer look at the BEPS outputs highlights that most of the targeted tax avoidance transactions or arrangements existed only because of tax competition between jurisdictions, and that preventing taxpayers from benefiting from these arrangements would also reduce the benefit that jurisdictions receive from having preferential regimes or reduced overall rates. For example, CFC rules are most important when the foreign subsidiary is established in a jurisdiction with a low corporate tax rate; if CFC rules are effective at subjecting such subsidiaries to the parent jurisdiction’s higher rate, then multinationals will have less of an incentive to establish subsidiaries in lower-tax jurisdictions, thereby undermining the benefit to these jurisdictions of having a low rate.

 This lesson – that tax competition is often dependent on tax avoidance, and vice versa – can also be seen in the EU’s ATAD, the UK’s DPT, the Australian MAAL, the U.S. special tax regime provision, and the U.S. minimum tax proposal. By requiring Member States to implement CFC rules and interest deductibility rules, the ATAD again limits the benefits of tax competition. Furthermore, as pointed out in earlier work by Kane, many hybrid mismatch arrangements are made possible by the opportunism of individual governments, not the taxpayers themselves,[[244]](#footnote-244) and eliminating such arrangements, as both the ATAD and Action 2 of the BEPS Report do, again makes it less beneficial for jurisdictions to keep their rates low. The DPT and MAAL are also premised on the idea that the jurisdiction to which a multinational diverts its profits has a lower rate than either the U.K. or Australia. By subjecting taxpayers who engage in such diversion of income to either a significantly higher rate or increased penalties, both laws make it less appealing for countries to have low tax rates, which may no longer be enough to attract income. The recent U.S. anti-avoidance proposals also target taxpayers, but they identify the taxpayers to target by using different visions of tax competition. Under the special tax regime provision, a taxpayer benefiting from harmful tax competition is engaging in tax avoidance. Under the minimum tax, in contrast, any taxpayer benefiting from an effective rate of less than 19% is engaging in tax avoidance. Other examples of the interdependence of tax competition and tax avoidance include the rulings that were at the heart of both the Action 5 spontaneous exchange requirement and the Commission’s recent state aid cases. Although these rulings are provided to individual taxpayers and are essentially stamps of approval for taxpayer-designed arrangements, they only exist because the tax administration is willing to provide certain treatment to taxpayers.

 This lesson is important for at least three reasons. First, taxpayers are not the only parties involved in tax avoidance. Countries are also complicit in encouraging and allowing tax avoidance, and the value of many international tax avoidance arrangements depends on at least one country providing a system that effectively applies a low rate, either because the jurisdiction’s overall statutory rate is low or because some other element in the tax system (i.e., the definition of the base, the treatment of different entities, or individual rulings provided to taxpayers) leads to effective low taxation. Kane previously noted that tax arbitrage exists because of government opportunism,[[245]](#footnote-245) and this Article argues that many other types of tax avoidance at the heart of recent anti-avoidance projects, also exist because of government opportunism. Jurisdictional competition is at the heart of many existing tax avoidance strategies, and these strategies would be significantly less appealing if jurisdictions were not competing with each other.

 Second, the symbiosis between tax avoidance and tax competition also shows that, just as taxpayers are not the only parties involved in tax avoidance, jurisdictions are also not the only parties involved in tax competition. Taxpayers are also encouraging and demanding tax competition. For example, taxpayer demands for rulings formed the basis of the state aid investigations. More generally, multinational corporations have played an integral role in recent efforts to curtail both tax avoidance and tax competition. Previously, tax competition was presented as a competition between jurisdictions for investors (among other things), which meant that, while investors played a role in tax competition, they were not necessarily leading the charge. That has changed as multinational corporations play a larger role in the global economy, and as their business models become progressively more dependent on income and assets that are more responsive to taxation.

 As discussed previously, the global landscape for foreign investment shifted away from foreign direct investment to foreign portfolio investment, which in turn meant that more geographically mobile income was being earned by non-resident taxpayers who could easily move it out of jurisdictions that subjected it to high tax rates. Alongside that shift has been a shift from tangible to intangible business assets, which are also easier to shift between jurisdictions. Even many multinational corporations that appear to earn income primarily from tangible assets or geographically immobile income have significant income from more mobile assets and income. As shown by some of the anti-avoidance and anti-tax-competition measures that have recently been implemented,[[246]](#footnote-246) some jurisdictions consider tax competition to be harmful when some market producers are more able than others to demand lower rates or more favorable treatment than other market producers. In other words, harmful tax competition is now integrally tied to market competition, not because the two are directly analogous but because certain producers are able to influence tax competition and thereby also influence the competition between themselves and other, less powerful, competitors.

 This impact of multinationals on tax competition was manifest in the United States White Paper that defend U.S. companies targeted by Commission state aid investigations.[[247]](#footnote-247) The influence of multinational corporations was also evident as governments were unwilling to eliminate patent boxes entirely, despite economic literature showing that these were not economically efficient.[[248]](#footnote-248) Thus, governments were acting on behalf of taxpayers benefiting from tax competition, either in other jurisdictions, as was the case with the White Paper, or in the jurisdictions that assisted the taxpayers, as was the case with patent boxes. Awareness of this interaction between multinationals and tax competition can also be seen in the MAAL’s explicit focus on multinational corporations, as well as the DPT’s implicit focus on the same taxpayers.[[249]](#footnote-249) Both Australia and the United Kingdom acknowledged in passing these rules that they were targeted directly at multinationals, which were creating a demand for lower tax rates and favorable regimes that were in turn viewed as harmful tax competition.[[250]](#footnote-250)

 Third, the interdependence of tax avoidance and tax competition suggests that both recent and ongoing efforts to combat tax avoidance are in fact disguised efforts to fight tax competition. As the earlier sections of this Article highlighted, countries in the OECD and the EU were recently able to agree to an expanded view of harmful tax competition, but that view still ignored overall rates and focused only on certain types of income. By focusing on tax avoidance, however, and presenting multinational taxpayers as the target of their efforts, countries could indirectly target a broader vision of harmful tax competition, even going so far as to make overall rate differences less beneficial. This suggests that, in the future, reforms that focus on tax avoidance may be the most successful ways to combat tax competition. This is particularly relevant advice given the European Union’s blacklist proposal, which has received significant criticism and may be less effective than the other parts of the EU’s anti-avoidance package.

 Many of the recent measures listed above suggest that countries may already have learned this lesson about the interdependence of tax avoidance and tax competition. The U.S. special tax regimes provision, for example, borrows the concept of preferential regimes from the context of tax competition, but its response to these regimes is not to penalize the country with the regime but instead to deny treaty benefits to the taxpayer benefiting from the regime. Both the MAAL and the DPT also penalize the taxpayer for engaging in tax avoidance and not the jurisdiction engaging in tax competition, even though the underlying issue that these rules are targeting is at least in part competition from other jurisdictions. Finally, the reason for much of the outrage about the Commission’s recent state aid investigations was that the Commission penalized the taxpayers benefiting *from* the tax competition rather than the countries engaging *in* tax competition. These recent developments illustrate that countries (and supranational bodies) have realized that one of the more effective ways of addressing tax competition is to target the taxpayers that are benefiting from such competition through tax avoidance transactions.

## Defensive Anti-Tax-Competition and Anti-Avoidance Measures as Offensive Tax Competition

Finally, building on the two lessons set out above, one further lesson from recent developments is that many countries are essentially using their anti-tax-competition and anti-avoidance measures as offensive tax competition measures. As mentioned earlier, countries that are facing tax competition from other jurisdictions have two main options: to engage in competition themselves or to pass defensive measures against other jurisdictions. By limiting the ability of other jurisdictions to compete and shifting the locus of competition to an area where they themselves are more likely to win, countries with anti-tax-competition measures are in fact using these anti-tax-competition measures as offensive tax competition measures. The nexus approach, for example, allows the OECD countries with stronger R&D environments to compete with other jurisdictions that do not have such environments. The requirement that previously hidden rulings be shared with other jurisdictions allows countries that do not have secrecy provisions or that do not give rulings to compete more effectively against those that previously did. The EU’s recent proposals and investigations could, if they are implemented and upheld, allow the EU to compete more effectively against other jurisdictions outside the EU.

 Recent anti-avoidance rules, such as the Australian MAAL and the UK DPT, are *also* effectively offensive tax competition measures. Although these were presented as rules targeting tax avoidance by multinationals, they are also being used by Australia and the United Kingdom to compete with other jurisdictions. Soon after the UK introduced the DPT, for example, Amazon announced that it would start booking its online sales profits to the UK, rather than Luxembourg, where it had previously claimed to be earning its income for the past eleven years.[[251]](#footnote-251) In other words, the DPT allowed the UK to undercut competition from Luxembourg, and Australia’s similarly designed rule is likely intended to undercut competition as well. Simalarly, under the Obama Administration, when there seemed to be little chance of corporate tax reform, the United States’ only significant deviation from the OECD consensus on tax competition was to propose a minimum tax, which shifted the acceptable competition away from rate. In other words, the U.S.’s recent unilateral effort to curtail tax avoidance was also an effort to shift the competitive space in a direction that was more favorable to its own tax system. At the time, the U.S. had a top statutory corporate tax rate of 35% – and most observers thought that this was unlikely to change in the near future. As countries around the world dropped their corporate rates well below 35%,[[252]](#footnote-252) the United States’ response was to view competition just based on rate as harmful, thereby attempting to shift competition to any other area where the United States was more likely to be able to compete.

 But what about multilateral efforts sold as being targeted at tax avoidance? At least some of these were actually targeting tax competition, but were they also designed to be offensive tax competition and to shift the playing field for competition in a direction where the countries involved could prevail? Some of them were, in the sense that they were designed to undermine rules that were allowing certain countries to attract investors through differences in rules designating the base. As mentioned earlier,[[253]](#footnote-253) several of the anti-avoidance rules recommended or required by the BEPS Project focused on eliminating the benefits that countries received by having rates that were significantly lower than the rates of the countries implementing the rules. The recommendations on CFC rules, interest deductibility rules, and transfer pricing rules therefore made low rates less beneficial to countries. They did not attempt to limit the ability of countries to implement such low rates, as anti-tax-competition measures would have, but they made such rates less beneficial. The same was true of the CFC rule and interest deductibility rule in the EU’s ATAD. These rules therefore all made rate competition less beneficial, thereby shifting away from pure rate competition. Other outputs of the BEPS Project and portions of the ATAD also shifted the playing field, but they did so by making differences in rules less beneficial to countries since taxpayers could no longer benefit from them. Consider the anti-hybrid rules from Action 2. Hybrid mismatch arrangements were often the result of governmental opportunism.[[254]](#footnote-254) Rules eliminating these mismatches therefore undermine this opportunism and eliminate the ability of the countries that were benefiting from creating arbitrage opportunities to continue to do so.[[255]](#footnote-255) In the ATAD, the anti-hybrid rule had the same effect. These recent anti-avoidance rules therefore shift the competition in several different directions. Some discourage rate competition, thereby moving the focus to jobs, infrastructure, or other resources on which higher-rate countries can compete more easily. Those that reduce the benefits of differential rules, however, point in the opposite direction and support rate competition by making it easier for countries to compete directly on the statutory corporate rate rather than on base-narrowing measures that differ across countries. Still other anti-avoidance rules, such as the ATAD’s exit tax and general anti-avoidance rule, were not favoring any certain type of jurisdiction and were instead focused on making expatriation of a company or avoidance in general more costly, regardless of the corporate tax rate or system of the country involved.

 To summarize, all the recent anti-tax-competition measures and unilateral anti-avoidance rules outlined in this Article act as forms of offensive tax competition. They do not just eliminate options for competition – they also open up new areas for competition, and these areas are ones where the countries implementing the anti-tax-competition measures or anti-avoidance rules are more proficient. The nexus approach, for example, shifts competition from rates to jobs. A minimum tax shifts competition from effective rates to anything else, including infrastructure, rate of return, legal protection, or other elements on which an investor might base its investment decisions. A common base shifts competition away from base-definition and toward statutory rates. A state aid prohibition that eliminates all differences favors countries with low statutory corporate rates and no regimes over those with high statutory corporate rates and preferential regimes, but it also has the long-term effect of making the entire EU a low-rate entity that can compete with third countries on both rate and other bases. Yet while some of the recent multilateral anti-avoidance rules also favor the countries that implemented them, this is not true of all of them, and even the recent anti-avoidance rules that do move the competition away from its current focus favor a variety of types of jurisdictions and competition.

 So the recent developments in the fight against tax competition have revealed at least three fundamental lessons. First, international tax competition and international tax avoidance depend on each other. Eliminating international tax competition entirely would make it harder for taxpayers to benefit from international tax avoidance, while eliminating international tax avoidance would make international tax competition less attractive to jurisdictions. Second, because there is no agreed-upon definition of harmful tax competition, countries generally define this term not to eliminate tax competition entirely but instead to disallow only those types of competition where they believe they could not prevail. Rather than leveling the playing field entirely, they use anti-tax-competition measures to shift the playing field to locations where they believe they can prevail. Third, many countries are therefore using their anti-tax-competition and anti-avoidance measures to engage in tax competition themselves.

 It should be noted that the second and third lessons do not necessarily mean that policymakers are acting maliciously or hypocritically when they implement measures to combat tax competition and tax avoidance. As pointed out in Part I, there is no universal definition of tax competition and there is no agreement regarding what type of tax competition is harmful.[[256]](#footnote-256) In the absence of any neutral view of what constitutes harmful tax competition, countries will naturally revert to their own view, and they will perceive any regime or tax system that appears to be attracting resource flows or spillovers that they believe should be their own as competing unfairly. In other words, without any neutral definition, tax competition is in the eye of the beholder, and each country is going to behold harmfulness in any situation where it believes itself to be losing ground against other countries.[[257]](#footnote-257)

# What Should Be Done?

 Given these three lessons, how should academics and policymakers engage with current and future efforts to fight international tax competition? This Part IV sets out two proposals for how to move forward in the fight against international tax competition.

## Changing the Rhetoric

 First, policymakers should avoid the term “tax competition” whenever possible and should explicitly define what the believe countries to be competing over and what tools they believe countries to be using to engage in this competition. As shown in Part I, there is no agreement in the academic literature about what this term means. As shown in Part II and III, there is also no agreement among countries and policymakers about what this term means. Although there was a short-lived consensus that harmful tax competition at least included preferential regimes that granted lower rates to geographically mobile income if those regimes were either secret or not allowed to domestic taxpayers, there was still no agreement over what else this term included, and the international community soon decided that this definition was too narrow. More recently, countries and international and supranational organizations have broadened their definitions of what constitutes harmful tax competition, but they still do not agree on what this term encompasses. Some think that any variation within a domestic tax system is harmful;[[258]](#footnote-258) some think that any variation between tax systems is harmful;[[259]](#footnote-259) some think that overall rates are harmful;[[260]](#footnote-260) some think that rates on their own are not harmful but that low rates applied to income that arose from activities outside the jurisdiction are harmful;[[261]](#footnote-261) and some think that secrecy and discretion on the part of tax administrations are harmful.[[262]](#footnote-262)

 The fact that countries and organizations are using measures to combat tax competition as ways for them to compete more effectively explains why there is no agreement on what constitutes tax competition. This term – and its more recently accepted companion, “harmful tax competition” – can never be defined because neither term has any intrinsic meaning. Essentially, harmful tax competition is whatever a country wants to prevent to make itself more competitive, and using the term “tax competition” allows politicians, policymakers, and academics to mask the normative preferences that each of them brings to the term. Instead of using this term, policymakers and others should focus on *what* they are actually competing for.

 The problems with using the term “tax competition” can be seen in the debates over patent boxes: while companies that had acquainted themselves with the work of the FHTP from the late 1990s understood the term “harmful tax competition” to mean competition for the headquarters of a company and therefore saw patent boxes that did not encourage companies to shift location to another jurisdiction as not being harmful, the term had evolved with the nexus approach to mean competition for income separate from activities, regardless of where a company was headquartered, which in turn meant that many patent boxes that would have complied with the term in the 1990s now no longer do. Eliminating the use of the term “tax competition” will also force politicians and policymakers to be more explicit about both what they think other countries are doing wrong and where they believe their countries are more competitive, which could also make debates over measures more open and could possibly lead to more well-designed rules. Currently, politicians make vague references to level playing fields, fairness, and competition, which allow them to mask their actual concerns. Again in the context of patent boxes, if the debate were explicitly focused on the fact that high-tax jurisdictions believe that they can attract R&D with their infrastructure, education, and environment for jobs but that they cannot attract R&D through their rates, that could lead to more awareness on the part of taxpayers of why rates in that jurisdiction may be higher than in the jurisdictions offering only low or no rates and no infrastructure.

## Shifting the Focus to Taxpayers

It is unlikely, however, that policymakers will stop referring to tax competition, given that its vagueness and lack of definition are likely what makes the term so appealing. Therefore, this Article proposes that future efforts to curtail tax competition should be more explicit about the interdependence of tax avoidance and tax competition. Currently, discussions of international tax avoidance and international tax competition seesaw between enemies: either countries are behaving badly and engaging in harmful tax competition, which is stealing revenue, jobs, and other resources from innocent other countries,[[263]](#footnote-263) or multinationals are behaving badly and engaging in tax avoidance, which is stealing revenue from those same innocent countries whose rules are being interpreted aggressively.[[264]](#footnote-264) In reality, as the recent measures to combat both tax competition and tax avoidance show, all countries are engaged in tax competition to a certain degree, and the rules that they design to curtail the harmful behavior of other countries and taxpayers often contribute to this competition. Furthermore, international tax avoidance relies on international tax competition, and international tax competition benefits countries because of international tax avoidance. Therefore, the stories above, of countries or taxpayers stealing resources from innocent countries, ignore the actual interactions between the countries and taxpayers involved. Focusing on the interaction between tax avoidance and tax competition will therefore force efforts to curtail either of these to acknowledge that countries often encourage tax avoidance and that taxpayers (particularly multinational corporations that can more easily shift investments) often encourage tax competition.

 This acknowledgment would also shift discussions of tax competition toward considering whether there is a different link between market competition and tax competition than is traditionally acknowledged in debates over international tax competition. As discussed in Part I, the analogy between market competition and tax competition has historically been at the root of the troubles with the term “tax competition” and has explained why debates over international tax competition cannot come to any agreement. Yet, as shown by the recent state aid investigations and unilateral anti-avoidance rules that targeted multinational corporations, at least some jurisdictions believe that tax competition and market competition have become more intertwined. Under the view of harmful tax competition represented by these recent developments, taxpayers, in the form of large multinational corporations, now have the market power to demand rate reductions, tax rulings, or the like from jurisdictions, which means that they are spurring on tax competition in order to distort the market in which they compete. If this is the case, then tax competition is not, as those who extrapolate from the Tiebout model to argue in favor of unfettered international tax competition would claim, just another version of market competition. Instead, in certain circumstances, international tax competition may be distorting market competition if it is taking place in the form of rulings or preferential regimes that allow certain taxpayers to shift the playing field in their favor *against* their market competitors. This would in turn mean that neoclassical models of market competition would argue in favor of curtailing it in some way. Whether this is in fact the case or how to identify and curtail the types of international tax competition that are distorting market competition are questions that would need to be answered. The first step toward asking these questions, however, is moving the debate over tax competition away from jurisdictions and toward taxpayers and acknowledging the interdependence of tax avoidance and tax competition.

 Finally, focusing on tax avoidance by taxpayers rather than tax competition by jurisdictions could have the effect of reducing the elements of tax competition that benefit certain countries without tilting the competition in favor of the countries passing the anti-avoidance measures. Although this was not true for all the anti-avoidance measures discussed in this Article, it was the case for at least some of them, and it suggests that a measure focusing on taxpayers is less likely to itself represent tax competition.

#  Conclusion

This Article has used the practice of anti-tax-competition measures to challenge the theory of international tax competition. Despite the existence of a significant literature on tax competition, there is little agreement on what tax competition is, whether it is taking place, whether it is harmful, and whether it should be encouraged or discouraged. Yet this lack of agreement has not prevented policymakers at the domestic and international level from railing against tax competition and implementing measures intended to prevent other countries from engaging in tax competition. This Article looks at these measures to determine what policymakers, in the absence of any uniform definition of the term, believe constitutes harmful tax competition.

By highlighting how many different visions of harmful tax competition currently exist, this Article distills three important lessons about tax competition. First, the different visions of harmful tax competition represented by recent anti-tax-competition measures reveal that countries generally define harmful tax competition as any competition in which they themselves do not have a comparative advantage. In other words, when countries claim to be limiting tax competition, they are not leveling the playing field so much as they are shifting it in their own favor. Second, international tax competition relies on international tax avoidance, and international tax avoidance relies on international tax competition. Even though these concepts are treated as separate in the academic literature, they are in fact interdependent. This in turn means that jurisdictions are complicit in international tax avoidance, that taxpayers (particularly multinational corporations) are integral to tax competition, and that one way to combat tax competition is to limit tax avoidance. Third, these two lessons mean that countries are often using their anti-tax-competition measure not just to limit tax competition by other countries but also to strengthen their own competitive position. The same is true for many unilateral and multilateral anti-avoidance measures, although some of the latter may have reduced the benefits of competition for all jurisdictions, including those that passed the measures.

Given these lessons, this Article argues that the main trouble with tax competition is that the term itself allows policymakers and politicians to hide behind a vague term in order to advance their own interests, and it also allows debates over this issue to continue without resolution since even academics do not agree on the meaning of the term. This Article therefore argues that, in theory, we should limit the use of this term and that, rather than discussing “tax competition” or “harmful tax competition,” discussions of international tax issues should focus on whatever underlying issues countries are in fact debating. Yet it acknowledges that this change is unlikely to occur in the policy space, given that the vagueness of the term is what makes it so appealing to policymakers. Therefore, this Article also argues that, although recent efforts to combat tax competition may have just shifted the playing field in favor of the countries that were part of these efforts, recent efforts to combat tax avoidance also eliminated some of the benefits of tax competition without necessarily tilting the playing field in the favor of any one jurisdiction. If policymakers refuse to abandon the tax competition rhetoric, future efforts to combat tax competition should focus on taxpayers rather than jurisdictions, thereby acknowledging the interdependence of tax avoidance and tax competition and staying out of the troubled waters of tax competition.

1. \*\* Associate Professor of Law, Georgetown University Law Center. Thanks to Jake Brooks, Stephen Cohen, Brian Galle, Michael Knoll, Benjamin Leff, Eloise Pasachoff, participants in the Tulane Tax Roundtable, the Tax Policy and Public Finance Colloquium at UCLA School of Law, and the Georgetown University Law Center faculty workshop for comments on earlier drafts, and to Charles Bjork and Cassandra Vangellow for excellent research assistance. From September 2013 through August 2015, I was an Advisor to the Base Erosion and Profit Shifting Project at the Organisation for Economic Co-operation and Development (OECD), and I continue to work as a consultant to the OECD. The views and opinions expressed in this Article are mine alone and do not reflect the official policy or position of the OECD. All discussions and arguments in this Article are based on publicly available information. [↑](#footnote-ref-1)
2. *See, e.g.*, George Parker, *George Osborne puts corporation tax cut at heart of Brexit recovery plan*, Financial Times, July 3, 2016, https://www.ft.com/content/d5aedda0-412e-11e6-9b66-0712b3873ae1 (referring to EU finance ministers decrying the UK’s participation in the “race to the bottom”). [↑](#footnote-ref-2)
3. *See, e.g.*, Margrethe Vestager, *Fair Competition And A Level Playing Field*, Huffington Post, Sept. 12, 2016, http://www.huffingtonpost.com/margrethe-vestager/fair-competition-and-a-le\_b\_11971432.html. [↑](#footnote-ref-3)
4. *See, e.g.*, Oxfam, Tax Battles (2016), https://www.oxfam.org/sites/www.oxfam.org/files/file\_attachments/bp-race-to-bottom-corporate-tax-121216-en.pdf. [↑](#footnote-ref-4)
5. *See infra* notes 36-80 and accompanying text. [↑](#footnote-ref-5)
6. This Article does not adopt the term “race to the bottom” as a technical term and uses it here only to familiarize readers with the issue being discussed. As shown by the debates between Richard Revesz, Kirsten Engel, Daniel Esty, Joshua Sarnoff, and Peter Swire, and others, the term “race to the bottom” is itself a term that is the subject of significant debate. *See, e.g.*, Kirsten H. Engel, *State Environmental Standard-Setting: Is there a “Race” and is it “to the Bottom”?*, 48 Hastings L.J. 271 (1997); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U L. Rev. 1210 (1992). [↑](#footnote-ref-6)
7. This is a similar approach that other authors have taken to using current practice to inform theories of optimal taxation. *See, e.g.*, N. Gregory Mankiw, Matthew Weinzierl & Danny Yagan, *Optimal Taxation in Theory and Practice*, 23 J. Econ. Pers. 147 (2009). [↑](#footnote-ref-7)
8. For more on this literature, *see, e.g.*, Ricard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to the Critics*, 82 Minn. L. Rev. 535 (1997); Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 J. Pub. Econ. 333 (1988); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956); [↑](#footnote-ref-8)
9. For more on this literature, *see, e.g.*, Wallace E. Oates, Fiscal Federalism (Harcourt Brace Jovanovich, 1972); James R. Hines, Jr., *Corporate Taxation and International Competition*, *in* Taxing Corporate Income in the 21st Century 268-95 (A. J. Auerbach, J. R. Hines Jr., & J. Slemrod, 2007) [hereinafter Hines 2007]; Michael Devereux & Simon Loretz, *What Do We Know About Corporate Tax Competition*?, 66 Nat’l Tax J. 745 (2013); Jeffrey Owens, *The David H. Tillinghast Lecture: Tax Competition: To Welcome or Not?*, 65 Tax L. Rev. 173 (2012); Adam H. Rosenzweig, *Why Are There Tax Havens?*, 52 Wm. & Mary L. Rev. 923 (2010); Diane Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, 9 Fla. Tax Rev. 555 (2009); James R. Hines, Jr., *Will Social Welfare Expenditures Survive Tax Competition?*, 22 Oxford Rev. Econ. Pol’y, 330 (2006) [hereinafter Hines 2006]; Michael Littlewood, *Tax Competition: Harmful to Whom?*, 26 Mich. J. Int'l L. 411 (2004); Julie Roin, *Competition and Evasion: Another Perspective on International Tax Competition*, 89 Geo. L.J. 543 (2001); Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 Harv. L. Rev. 1573 (2000); John Douglas Wilson, *Theories of Tax Competition*, 52 Nat’l Tax J. 269 (1999); John D. Wilson, *A Theory of Interregional Tax Competition*, 19 J. Urb. Econ. 296 (1986); George R. Zodrow & Peter Mieszkowski, *Pigou, Tiebout, Property Taxation and the Underprovision of Local Public Goods*, 19 J. Urb. Econ. 356 (1986); David F. Bradford & Wallace E. Oates, *The Analysis of Revenue Sharing in a New Approach to Collective Fiscal Decisions*, 85 Q.J. Econ.416 (1971); Michael Keen & Kai A. Konrad, *International Tax Competition and Coordination* (Max Planck Institute for Tax Law and Public Finance, Working Paper 2012 – 06). [↑](#footnote-ref-9)
10. Revesz, *supra* note 5, at 1253. [↑](#footnote-ref-10)
11. *See* Keen & Konrad, *supra* note 8, at 59 (“Thirty years ago,…there was almost no formal literature on international tax competition and coordination. Its growth since then has been spectacular, and it has produced a range of elegant, and in some cases powerful, results.”). [↑](#footnote-ref-11)
12. Devereux & Loretz, *supra* note 8; Keen & Konrad, *supra* note 8. [↑](#footnote-ref-12)
13. Tiebout, *supra* note 7; Oates, *supra* note 8. [↑](#footnote-ref-13)
14. *See* Revesz, *supra* note 7, at 538 (citing Oates & Schwab, *supra* note 7, as concluding that “interjurisdictional competition leads to maximization of social welfare”). [↑](#footnote-ref-14)
15. *See, e.g.*, Oates, *supra* note 8. [↑](#footnote-ref-15)
16. *See, e.g.*, Ring, *supra* note 8, at 595 (pointing out the difference between tax competition and other types of competition due to the lack of a supra-state to address or regulate market failure). [↑](#footnote-ref-16)
17. *See, e.g.*, Littlewood, *supra* note 8. [↑](#footnote-ref-17)
18. Although there are some instances of tax competition that focuses on the individual income tax, those are not normally the focus of tax competition discussions, particularly at the international level. This Article focuses entirely on international competition over corporate taxes. [↑](#footnote-ref-18)
19. Devereux & Loretz, *supra* note 8, at 746. [↑](#footnote-ref-19)
20. *See, e.g.*, Roin, *supra* note 8, at 546 (stating that “tax competition occurs when one country seeks to entice investment within its borders (and possibly enhanced tax revenues) through the expedient of reduced business taxation). [↑](#footnote-ref-20)
21. Devereux & Loretz, *supra* note 8, at 746. Note that even when commentators attempt to define tax competition as broadly as possible, they often miss elements that other commentators or countries believe to be necessary in the definition of tax competition. *See, e.g.*, Ring, *supra* note 8, at 561-562 (stating that “[i]n its broadest conception the phrase [“tax competition”] captures a country’s use of any feature of its tax system to ‘enhance’ its competitive advantage in the marketplace for capital, investment, and/or nominal business presence,” thereby not including competition for externalities or substantial business presence. [↑](#footnote-ref-21)
22. Other authors have also noticed this overlap. *See, e.g.*, Ring, *supra* note 8, at 570-575 (critiquing the overlap); Revesz, *supra* note 5 (not critiquing the overlap). [↑](#footnote-ref-22)
23. *See, e.g.*, Devereux & Loretz, *supra* note 8; Roin, *supra* note 8, at 552 (directly substituting words in a description of market competition in order to arrive at a description of tax competition). But note that even Tiebout acknowledged in his model that jurisdictional competition is not directly analogous to market competition when he referred to this as a “market-*type* solution.” Tiebout, *supra* note 7, at 416, 424 (emphasis added). [↑](#footnote-ref-23)
24. Owens, *supra* note 8. [↑](#footnote-ref-24)
25. *See* Roin, *supra* note 8, at 552 (referring to competition for investors); Devereux & Loretz, *supra* note 8, at 746 (highlighting that competition could also be for resource flows and spillovers). [↑](#footnote-ref-25)
26. Revesz, *supra* note 7, at 538. [↑](#footnote-ref-26)
27. *See* Keen & Konrad, *supra* note 8, at 42 (highlighting that national governments are not just focused on maximizing revenues but instead on maximizing “national welfare”). [↑](#footnote-ref-27)
28. *See, e.g.*, Margrethe Vestager, *Fair Competition And A Level Playing Field*, Huffington Post, Sept. 12, 2016, http://www.huffingtonpost.com/margrethe-vestager/fair-competition-and-a-le\_b\_11971432.html; George Parker, *George Osborne puts corporation tax cut at heart of Brexit recovery plan*, Financial Times, July 3, 2016, https://www.ft.com/content/d5aedda0-412e-11e6-9b66-0712b3873ae1 (referring to EU finance ministers decrying the UK’s participation in the “race to the bottom”); Owens, *supra* note 8, at 173; Wolfgang Schoen, *Tax Competition in Europe: General Report* (Eur. Ass’n of Tax Law Professors) http://www.eatlp.org/uploads/Members/GeneralReportSchoen.pdf. [↑](#footnote-ref-28)
29. There are, of course, also political reasons for this shift because focusing on harmful tax competition fits with the recent view that tax competition in general is not a problem. [↑](#footnote-ref-29)
30. *See, e.g.*, Allison Christians & Marco Garofalo, *Using Tax as an Investment Promotion Tool* (forthcoming chapter 26-27) (highlighting that there is no agreement on the difference between “fair-but-fierce” competition and harmful competition). [↑](#footnote-ref-30)
31. *See, e.g.*, Keen & Konrad, *supra* note 8. (“the literature has not answered the basic question that has loomed over policy debates since [the 1998 Report]: How can one distinguish tax competition that is ‘harmful’ from that which is not? Progress has been made, but not yet enough to confidently determine whether, for instance, the presumption should be against or in favor of preferential regimes.”). [↑](#footnote-ref-31)
32. These build off of debates within the broader interjurisdictional competition literature. *See* Revesz, *supra* note 5; Engel, *supra* note 5. [↑](#footnote-ref-32)
33. *See* Hines 2006, *supra* note 8; Hines 2007, *supra* note 8. [↑](#footnote-ref-33)
34. *See* Avi-Yonah, *supra* note 8; Rosenzweig, *supra* note 8; Roin, *supra* note 8; Engel, *supra* note 5. [↑](#footnote-ref-34)
35. *See* Littlewood, *supra* note 8. [↑](#footnote-ref-35)
36. *See* Wilson, *supra* note 8 at 298 (stating that Tiebout and others who view competition as a good treat interjurisdictional competition and market competition analogously, while those who view it as a problem do not). [↑](#footnote-ref-36)
37. Roin, *supra* note 8, at 545. [↑](#footnote-ref-37)
38. Roin, *supra* note 8, at 546. [↑](#footnote-ref-38)
39. Avi-Yonah, *supra* note 8, at 1611. *See generally* Tiebout, *supra* note 7, at 419 (listing the assumptions of perfect mobility, full knowledge on the part of voters, large number of potential jurisdictions for voters to live, irrelevance of employment opportunities, lack of externalities, optimal community size for every pattern of community services, and reaction of communities to optimal community size, all of which are arguably inaccurate descriptions of the environment in which international tax policy is set). [↑](#footnote-ref-39)
40. Avi-Yonah, *supra* note 8, at 1614; Charles E. McLure, *Tax Competition: Is What’s Good for the Private Goose also Good for the Public Gander?*, 39 Nat’l Tax J. 341 (1986). [↑](#footnote-ref-40)
41. Avi-Yonah, *supra* note 8, at 1614. [↑](#footnote-ref-41)
42. Avi-Yonah, *supra* note 8, at 1616; Jeremy Edwards & Michael Keen, *Tax Competition and Leviathan*, 40 Eur. Econ. Rev. 113 (1996). [↑](#footnote-ref-42)
43. *See, e.g.*, Ring, *supra* note 8, at 580 n. 75 (citing Carlson); Ring, *supra* note 8, at 559. [↑](#footnote-ref-43)
44. *See, e.g.*, Jon Stone, *It’s our sovereign right to set 0% corporation tax rate, UK-protected tax haven Bermuda says*, The Independent, Dec. 12, 2016, http://www.independent.co.uk/news/uk/politics/tax-havens-bermuda-worst-zero-per-cent-corporation-tax-rate-a7469386.html. [↑](#footnote-ref-44)
45. *See* Stephen D. Krasner, Sovereignty: Organized Hypocrisy (Princeton University Press, 1999). [↑](#footnote-ref-45)
46. *See, e.g.*, Jon Stone, *It’s our sovereign right to set 0% corporation tax rate, UK-protected tax haven Bermuda says*, The Independent, Dec. 12, 2016, http://www.independent.co.uk/news/uk/politics/tax-havens-bermuda-worst-zero-per-cent-corporation-tax-rate-a7469386.html. [↑](#footnote-ref-46)
47. Note that this view of sovereignty ignores the ways that this concept has evolved over time. *See* Ring, *supra* note 8, at 557-558, 561 (pointing out how sovereignty evolved in the 20th century and could continue to evolve in the 21st century). [↑](#footnote-ref-47)
48. *See* Krasner, *supra* note 44 (highlighting that countries often violate norms of sovereignty when cost-benefit analysis favors this); Ring, *supra* note 8, at 581 (stating that it is not clear that imposing penalties based on a country’s tax rate is an actual violation of sovereignty). [↑](#footnote-ref-48)
49. Peter A. Diamond & James A. Mirrlees, *Optimal Taxation and Public Production I: Production Efficiency; II: Tax Rules*, 61 Am. Econ. Rev. (1971). *See* Hines 2006, *supra* note 8, at 333-334; Wilson, *supra* note 8, at 281. [↑](#footnote-ref-49)
50. Keen & Konrad, *supra* note 8, at n. 36. [↑](#footnote-ref-50)
51. Hines 2007, *supra* note 8, at 270. [↑](#footnote-ref-51)
52. *See* Julie A. Roin, *Can Income from Capital Be Taxed?: An International Perspective*, *in* Taxing Capital Income 211, 217 (Henry J. Aaron, Leonard E. Burman & C. Eugene Steurerle 2007); Rosenzweig, *supra* note 8, at 933. [↑](#footnote-ref-52)
53. Oates, *supra* note 8 (cited in Devereux & Loretz, *supra* note 8). [↑](#footnote-ref-53)
54. Avi-Yonah, *supra* note 8, at 1578. Note that this is essentially the reverse of the pro-competition sovereignty argument because countries that make this point are arguing that they are being limited in their domestic sovereign right to provide the protections that their citizens demand. Ring, *supra* note 8. [↑](#footnote-ref-54)
55. *See, e.g.*, William Hoke, *Consider Human Rights in Tax Avoidance Discussions, Oxfam Director Says*, Tax Notes, Sept. 23, 2016, http://www.taxnotes.com/worldwide-tax-daily/tax-avoidance-and-evasion/consider-human-rights-tax-avoidance-discussions-oxfam-director-says/2016/09/23/18609481. [↑](#footnote-ref-55)
56. *See, e.g.*, Allison Christians, *Fair Taxation as a Basic Human Right*, 91 Int’l Rev of Constitutionalism 211, 212-13 (2009); Ring, *supra* note 8, at 576 (stating that developing countries cannot raise the necessary revenue for economic growth if they only way to attract investment includes reducing rates). [↑](#footnote-ref-56)
57. Roin, *supra* note 8, at 553, 570. [↑](#footnote-ref-57)
58. Devereux & Loretz, *supra* note 8, at 747, 751. [↑](#footnote-ref-58)
59. Keen & Konrad, *supra* note 8, at 44-46 (explaining why limiting preferential regimes may actually increase tax competition); Michael Keen, *Preferential Regimes Can Make Tax Competition Less Harmful*, 54 Nat’l Tax J. 757, 757-62 (2001). [↑](#footnote-ref-59)
60. Hines 2006, *supra* note 8 (noting that corporate tax revenues as a proportion of GDP have remained at the same level, and they remain a small portion of the overall revenue raised by countries, which suggests that social welfare expenditures do not depend entirely on the corporate income tax). *But see* Keens and Simone 2004 (finding that corporate tax revenues did not stay constant in developing countries). [↑](#footnote-ref-60)
61. David Elkins, *The Merits of Tax Competition in a Globalized Economy*, 91 Ind. L.J. 905, 950(2016). [↑](#footnote-ref-61)
62. Roin, *supra* note 8, at 546, 549. [↑](#footnote-ref-62)
63. Avi-Yonah, *supra* note 8, at 1625. [↑](#footnote-ref-63)
64. Avi-Yonah, *supra* note 8, at 1625. [↑](#footnote-ref-64)
65. Roin, *supra* note 8, at 570. [↑](#footnote-ref-65)
66. Roin, *supra* note 8, at 549; Avi-Yonah, *supra* note 8, at 1578, 1625. [↑](#footnote-ref-66)
67. Roin, *supra* note 8 (suggesting that eliminating tax competition might actually hurt developing countries). [↑](#footnote-ref-67)
68. Note that this disagreement is shared by the articles and studies considering tax competition. Some focus on the base of competition, thereby focusing on competition over statutory rates, competition over effective rates, or competition in the form of preferential regimes. Some focus instead on what the competition is for, thereby focusing on general overall regimes and their effect on investment, residence, or other resources. [↑](#footnote-ref-68)
69. Devereux & Loretz, *supra* note 8, at 745. *But see* Hines 2007, supra note 8, at 292 (concluding that data on corporate tax policy illustrates competition between countries to attract foreign investors); Mihir A. Desai, “Are We Racing to the Bottom? Evidence on the Dynamics of International Tax Competition,” *Proceedings of the Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association* (1999), 176–187. [↑](#footnote-ref-69)
70. *See, e.g.*, Friedrich Heinemann, Michael Overesch & Johannes Rincke, *Rate-cutting Tax Reforms and Corporate Tax Competition in Europe*, 22 Econ. & Pol. 498, 498-518 (2010); Scott J. Basinger & Mark Hallerberg, *Remodeling the Competition for Capital: How Domestic Politics Erases the Race to the Bottom*, 98 Am. Pol. Sci. Rev. 261, 261-76 (2004). [↑](#footnote-ref-70)
71. Robert S. Chirinko & Daniel J. Wilson, *Tax Competition among U.S. States: Racing to the Bottom or Riding on a Seesaw?* (Federal Reserve Bank of San Francisco, Working Paper 2008-03) (finding that state taxes had a negative reaction function, meaning that state tax rates increased as other states decreased their rates). [↑](#footnote-ref-71)
72. *See* Devereux & Loretz, *supra* note 8, at 763 (stating that, after a 2002 paper by Altshuler and Goodspeed that identified the U.S. as a Stackelberg leader after the Tax Reform Act of 1986, “most of the newer contributions see the EU as the driving force of tax competition….Chatelais and Peryat (2008) identify small countries located in the center of Europe as key drivers of tax competition. In contrast, Crabbé and Vandenbussche (2009) find a domino effect of strategic interaction starting from the new member states.”). [↑](#footnote-ref-72)
73. Devereux & Loretz, *supra* note 8, at 760 (“there appears to be a negative relationship between measures of openness and statutory or forward-looking measures of tax rates. But – perhaps because openness has the effect of raising profit – if anything, there is a positive relationship with measures of taxation based on tax revenues.”). [↑](#footnote-ref-73)
74. *See, e.g.*, Ruding Committee, Report of the Committee of Independent Experts on Company Taxation, Office for Official Publications of the European Communities, Luxembourg (1992). [↑](#footnote-ref-74)
75. *See* Hines 2007, *supra* note 8, at 270-275 (providing an overview of the literature on this issue). [↑](#footnote-ref-75)
76. *See* Hines 2006, *supra* note 8, at 333 (setting out range of possible elasticities, ranging from -0.6 to -3.5). [↑](#footnote-ref-76)
77. *See* Hines 2007, *supra* note 8, at 276-280. [↑](#footnote-ref-77)
78. James R. Hines, Jr., *Do Tax Havens Flourish?*, 19 Tax Pol’y & Econ. 65 (2005). This builds on the Diamond and Mirrlees finding that the optimal corporate tax rate for small open economies is zero because it means that small countries may benefit most from tax competition because their optimal rate is zero. *See* Hines 2006, *supra* note 8, at 333-34; Hines 2007, *supra* note 8, at 270; Keen &Konrad, *supra* note 8, at 20. Note that there is some debate as to whether small countries are most likely to engage in tax competition, however. *See* Hines 2007, *supra* note 8, at 277-78 (summarizing debates over this question). *But see* Dhammika Dharmapala & James R. Hines, Jr., *Which Countries Become Tax Havens?*, 93 J. Pub. Econ. 1058, 1058-68 (2009). [↑](#footnote-ref-78)
79. Academics have noted that tax competition is a complicated concept. *See* Wilson, *supra* note 8, at 298 (stating that “[c]ompetition among governments is now seen as a less straightforward phenomenon than perhaps originally envisioned”). [↑](#footnote-ref-79)
80. *See* Tax Justice Network – Tax Competition, http://www.taxjustice.net/faq/tax-competition/ (last visited Feb. 1, 2017).

http://www.taxjustice.net/faq/tax-competition/. [↑](#footnote-ref-80)
81. *See* Keen & Konrad, *supra* note 8, at 60 (stating that “[w]hile much of the theory in this area predated the greatly increased policy importance of the issues, the risk now is that the world will move more quickly than the theory”). [↑](#footnote-ref-81)
82. This is, for example, what the House Republican Blueprint claims to do by introducing a destination-based cash flow tax in the United States. *See* *A Better Way – Our Vision for a Confident America*, Better.GOP, June 24, 2016, https://abetterway.speaker.gov/\_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf. [↑](#footnote-ref-82)
83. *See* Keen & Konrad, supra note 8, at 1 (referring to a tax measure favoring foreign manufacturers passed in 1763 by Catherine the Great). [↑](#footnote-ref-83)
84. Hines 2007, *supra* note 8, at 292. [↑](#footnote-ref-84)
85. *See* Rosenzweig, *supra* note 8, at 926 n.1, 2, and 11, 974-82 (setting out the history of U.S. efforts to limit tax havens from the 1960s onward). [↑](#footnote-ref-85)
86. Roin, *supra* note 8. [↑](#footnote-ref-86)
87. Hines 2006, *supra* note 8, at 332 (stating that “FDI increased rapidly in the 1980s and 1990s”; Mitchell A. Kane, *Strategy and Cooperation in National Responses to International Tax Arbitrage*, 53 Emory L.J. 89, 109 (2004) (highlighting the increased amount of portfolio investment in this period); Owens, supra note 8, at 180 (stating that, within the OECD, “inward and outward portfolio investment grew from around 1% of GDP in 1990 to around 7%” in [2010].) [↑](#footnote-ref-87)
88. There were some exceptions in the form of developed countries that used their tax systems to *discourage* foreign direct investment. *See* Kane, *supra* note 86, at 130; Hines 2006, *supra* note 8, at 334. These exceptions do not extend to portfolio investment, however. [↑](#footnote-ref-88)
89. *See, e.g.*, Government of Spain, Article 1 of Royal Decree 1080/1991, of 5 July 1991. [↑](#footnote-ref-89)
90. This excludes the six countries that became members after 1999 (Chile, Estonia, Israel, Latvia, Slovak Republic and Slovenia). *See* OECD – List of OECD Member countries – Ratification of the Convention on the OECD, http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm (last visited Feb. 1, 2017). [↑](#footnote-ref-90)
91. This excludes the thirteen countries that became Member States after 1999 (Bulgaria, Croatia, Cyrus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia). *See* European Union – EU Member Countries, https://europa.eu/european-union/about-eu/countries/member-countries\_en (last visited Feb. 1, 2017). [↑](#footnote-ref-91)
92. *See, e.g.*, Littlewood, *supra* note 8; Ring, *supra* note 8; Allison Christians, *Networks, Norms, and National Tax Policy*, 9 Wash. U. Global Studies L. Rev. 1 (2010); Hugh J. Ault, *Reflections on the Role of the OECD in Developing International Tax Norms*, 34 Brook. J. Int’l. L. 757 (2009). [↑](#footnote-ref-92)
93. *Communication from the Commission to the Council Towards Tax Co-ordination in the European Union*, at 2, COM (1997) 495 final (Jan. 1, 1997) [hereinafter 1997 EU Tax Competition Package]. [↑](#footnote-ref-93)
94. Conclusions of the ECOFIN Council Meeting Concerning Taxation Policy, 1998 O.J. (C 2/01)

 [hereinafter Code of Conduct announcement]. [↑](#footnote-ref-94)
95. These five factors were (i) whether the benefits are provided only to non-residents or in respect of transactions with non-residents, (ii) whether benefits are ring-fenced from the domestic market (i.e., they are not available to domestic taxpayers), (iii) whether benefits are granted without any real economic activity or substantial economic presence in the jurisdiction providing the benefit, (iv) whether transfer pricing rules depart from internationally accepted principles, and (v) whether the regime lack transparency. Code of Conduct announcement, *supra* note 93. [↑](#footnote-ref-95)
96. 1997 EU Tax Competition Package, *supra* note 92, at 5. The Package also proposed measures meant to prevent distortions in indirect taxation. [↑](#footnote-ref-96)
97. *See* Treaty Instituting the European Coal and Steel Community, art. 4(c), Apr. 18, 1951, 261 U.N.T.S. 140. [↑](#footnote-ref-97)
98. *See* European Commission, Commission notice on the application of the State aid rules to measures relating to direct business taxation (98/C 384/03) [hereinafter “1998 State Aid Notice”]. [↑](#footnote-ref-98)
99. Ruth Mason, [forthcoming article]. [↑](#footnote-ref-99)
100. Organisation for Economic Co-operation and Development, Harmful Tax Competition: An Emerging Global Issue (1998) [hereinafter the 1998 Report]. See also Organization for Economic Co-operation and Development, Countering Harmful Tax Practices More Effectively Taking Into Account Transparency and Substance: Action 5: 2015 Final Report (OECD, 2015) [hereinafter Action 5 2015 Report]. [↑](#footnote-ref-100)
101. These twelve factors were broken into four “key factors” and eight “other factors.” Before getting to these factors, any regime that would be challenged as harmful had to be both preferential and within the scope of the 1998 Report. 1998 Report, *supra* note 99. The first requirement meant that it had to provide benefits that only went to certain taxpayers. If it applied to all income earned by all taxpayers, it was not preferential. If it applied to only some types of income or only some taxpayers, however, it was preferential. 1998 Report, *supra* note 99. It also had to be in scope, which meant that the income to which it provided benefits had to be geographically mobile. 1998 Report, *supra* note 99. Once a regime was determined to be preferential and in scope, then it was assessed against the remaining twelve factors. The four key factors included whether the regime: (i) had a lower tax rate than the overall tax rate in the country, (ii) was ring-fenced such that it provided benefits only to foreign investors, (iii) lacked transparency, and (iv) lacked effective exchange of information with other interested countries. The 1998 Report also listed eight factors that could be indicative of harmfulness, although they were not on their own sufficient to identify harmfulness: (i) an artificial definition of the tax base, (ii) failure to adhere to international transfer pricing principles, (iii) foreign source income exempt from residence country tax, (iv) negotiable tax rate or tax base, (v) existence of secrecy provisions, (vi) access to a wide network of tax treaties, (vii) regimes which are promoted as tax minimization vehicles, and (viii) the regime encouraging purely tax-driven operations or arrangements. [↑](#footnote-ref-101)
102. *See infra* notes 118-122 and accompanying text. [↑](#footnote-ref-102)
103. Code of Conduct announcement, *supra* note 93. [↑](#footnote-ref-103)
104. *See* European Commission - Harmful tax competition, http://ec.europa.eu/taxation\_customs/business/company-tax/harmful-tax-competition\_en (last visited Feb. 1, 2017). [↑](#footnote-ref-104)
105. *See* European Council – Code of Conduct Group (Business Taxation),

http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/ (last visited Feb. 1, 2017) (listing Code of Conduct Group meetings). [↑](#footnote-ref-105)
106. Action 5 2015 Report *supra* note 99. One was found harmful but was then abolished. These regimes fell into nine categories: insurance regimes, financing and leasing regimes, fund management regimes, banking regimes, headquarters regimes, distribution center regimes, service center regimes, shipping regimes, and miscellaneous regimes. Organisation for Economic Co-operation and Development, Towards Global Tax Co-operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs: Progress in Identifying and Eliminating Harmful Tax Practices 12-14 (2000) [hereinafter 2000 Report]. [↑](#footnote-ref-106)
107. 2000 Report, *supra* note 105; Organisation for Economic Co-operation and Development, The OECD’s Project on Harmful Tax Practices: The 2001 Progress Report (2001) [hereinafter 2001 Report]; Organisation for Economic Co-operation and Development, The OECD’s Project on Harmful Tax Practices: The 2004 Progress Report (2004) [hereinafter 2004 Report]; Organisation for Economic Co-operation and Development, The OECD’s Project on Harmful Tax Practices: Consolidated Application Note: Guidance in Applying the 1998 Report to Preferential Tax Regimes (2004) [hereinafter CAN]; Organisation for Economic Co-operation and Development, The OECD’s Project on Harmful Tax Practices: 2006 Update on Progress in Member Countries (2006) [hereinafter 2006 Report]. [↑](#footnote-ref-107)
108. Article 107 has been renumbered throughout the history of the European Union. In 1998, it had the same wording, but it was Article 92 at the time of the 1998 State Aid Notice. See 1998 State Aid Notice, *supra* note 97. [↑](#footnote-ref-108)
109. 1998 State Aid Notice, *supra* note 97. [↑](#footnote-ref-109)
110. See, e.g., Case 173/73, Italy v. Commission. [↑](#footnote-ref-110)
111. 1998 State Aid Notice, *supra* note 97. [↑](#footnote-ref-111)
112. 2003/512/EC – issued September 5, 2002. [↑](#footnote-ref-112)
113. 2003/438/EC – issued October 16, 2002; 2003/501/EC – issued October 16, 2002. [↑](#footnote-ref-113)
114. 2003/755/EC – issued February 17, 2003; 2004/77/EC – issued June 24, 2003. [↑](#footnote-ref-114)
115. 2004/76/EC – issued May 13, 2003. [↑](#footnote-ref-115)
116. 2003/512/; 2003/438/EC; 2003/501/EC; 2003/755/EC; 2004/76/EC; 2004/77/EC. [↑](#footnote-ref-116)
117. *See* 1998 Report, *supra* note 99. [↑](#footnote-ref-117)
118. 2000 Report, *supra* note 105, at 9. [↑](#footnote-ref-118)
119. Ring, *supra* note 8, at 568. [↑](#footnote-ref-119)
120. For more on the lobbying efforts by the Center for Freedom and Prosperity that led to this change in position, *see* Ring, *supra* note 8, at 567-68. [↑](#footnote-ref-120)
121. *See* Littlewood, *supra* note 8. [↑](#footnote-ref-121)
122. For more on these abstentions, *see* Littlewood, *supra* note 8; s*ee also* 1998 Report, *supra* note 99; 2001 Report, *supra* note 106. [↑](#footnote-ref-122)
123. Although the OECD did issue a list of seven uncooperative tax haven jurisdictions in 2002, http://www.oecd.org/countries/monaco/listofunco-operativetaxhavens.htm, the focus of the FHTP shifted to individual regimes instead of countries, with its following reports focusing entirely on regimes. 2004 Report, *supra* note 112; CAN, *supra* note 112; 2006 Report, *supra* note 112. See Keen & Konrad, *supra* note 8, at 1-2 (pointing out how the OECD focused on transparency between 1998 and 2013). At the same time, the OECD established the Global Forum on Taxation (“the Global Forum”), which was later renamed the Global Forum on Transparency and Exchange of Information for Tax Purposes. The Global Forum maintained the original focus of assessing countries on a country-by-country basis, but this assessment was now based on transparency and exchange of information rather than tax rate. The OECD presented the Global Forum as “engag[ing] in a dialogue with non-OECD countries on tax issues” rather than preventing or labeling harmful tax competition. Action 5 2015 Report, *supra* note 99, at 16. [↑](#footnote-ref-123)
124. *Compare* OECD – List of OECD Member countries Ratification of the Convention on the OECD, http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm (last visited Feb. 1, 2017), *with* European Union – EU Member Countries, https://europa.eu/european-union/about-eu/countries/member-countries\_en (last visited Feb. 1, 2017). [↑](#footnote-ref-124)
125. *See* World Bank Indicators: GDP, http://data.worldbank.org/indicator/NY.GDP.MKTP.PP.CD (last visited Feb. 1, 2017). [↑](#footnote-ref-125)
126. 1997 EU Tax Competition Package, *supra* note 92, at 2. [↑](#footnote-ref-126)
127. 1998 Report, *supra* note 99, at 8. [↑](#footnote-ref-127)
128. 1998 State Aid Notice, *supra* note 97, at 2. [↑](#footnote-ref-128)
129. *See* Keen & Konrad, *supra* note 8, at 46 (stating that the “intuitive attraction of imposing uniformity as a coordination measure is in making it more costly for countries to tax mobile capital by ensuring that this implies a revenue loss from less mobile capital”). [↑](#footnote-ref-129)
130. 1998 State Aid Notice, *supra* note 97, at 5-6. [↑](#footnote-ref-130)
131. 1998 State Aid Notice, *supra* note 97, at 6. See also Commission, Irish corporation tax decision, 22 July 1998. [↑](#footnote-ref-131)
132. Kane, *supra* note 86, at 129. [↑](#footnote-ref-132)
133. Kane, *supra* note 86, at 130. [↑](#footnote-ref-133)
134. *See* Padma Mallampally and Karl P. Sauvant, “Foreign Direct Investment in Developing Countries,” in 36 *Finance & Development* 1 (1999). [↑](#footnote-ref-134)
135. *See* 1998 Report, *supra* note 99. [↑](#footnote-ref-135)
136. Avi-Yonah, *supra* note 8, at1627-1628 (suggesting “a distinction between generally applicable tax decreases that reduce the overall size of the public sector and tax decreases or subsidies that are limited only to foreign investors. In the former case, the tax reduction represents the wishes of the electorate and does not confer a windfall on foreign investors. In the latter case, the electorate is unlikely to be involved, because tax holidays to foreign investors are rarely the subject of political attention / even if they are made public. Moreover, the tax holiday represents a windfall to the multinational because the multinational benefits from a large public sector financed by high, generally applicable taxes”). [↑](#footnote-ref-136)
137. *See, e.g.*, Vaughn E. James, *Twenty-First Century Pirates of the Caribbean: How the Organization for Economic Cooperation and Development Robbed Fourteen CARICOM Countries of Their Tax and Economic Policy Sovereignty*, 34 Miami Inter-Am. L. Rev. 1 (2002); Christians, *supra* note 55.

 [↑](#footnote-ref-137)
138. *See, e.g.*, *Tax Torment*, The Economist, Mar. 17, 2011, http://www.economist.com/node/18396230 (citing the French Prime Minister’s reference to the Irish rate as “tax dumping”). [↑](#footnote-ref-138)
139. *See, e.g.*, Charles Duhigg and David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, NY Times, Apr. 28, 2012, http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html. [↑](#footnote-ref-139)
140. *See Major UK companies cut secret tax deals in Luxembourg*, BBC, May 11, 2012, http://www.bbc.com/news/business-17993945. [↑](#footnote-ref-140)
141. *See* *Starbucks, Google and Amazon grilled over tax avoidance*, BBC News, Nov. 12, 2012, http://www.bbc.com/news/business-20288077; Charles Duhigg and David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, NY Times, Apr. 28, 2012, http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html. [↑](#footnote-ref-141)
142. Note that the OECD had been focusing on tax competition for several years before this, but much of the focus had been on information exchange and the interaction between tax administrations and taxpayers. *See* Owens, *supra* note 8, at 192-97. [↑](#footnote-ref-142)
143. Organisation for Economic Co-operation and Development, Action Plan on Base Erosion and Profit Shifting 18 (OECD 2013) [hereinafter BEPS Action Plan]. [↑](#footnote-ref-143)
144. BEPS Action Plan, *supra* note 142. [↑](#footnote-ref-144)
145. Action 5 2015 Report, *supra* note 99, at 45-60. [↑](#footnote-ref-145)
146. The International Consortium of Investigative Journalists – Luxembourg Leaks: Global Companies’ Secrets Exposed, https://www.icij.org/project/luxembourg-leaks (last visited Feb. 1, 2017). [↑](#footnote-ref-146)
147. For more on LuxLeaks, *see* Omri Y. Marian, *Is Something Rotten in the Grand Duchy of Luxembourg?*, 84 Tax Notes Int’l 281 (2016). [↑](#footnote-ref-147)
148. Action 5 2015 Report, *supr*a note 99, at 51. [↑](#footnote-ref-148)
149. *See, e.g.*, Itai Grinberg, The Battle Over Taxing Offshore Accounts, 60 UCLA L. Rev. 304, 383 (2012). [↑](#footnote-ref-149)
150. *See supra* notes 123-128 and accompanying text. [↑](#footnote-ref-150)
151. Note that this was presented as merely an elaboration of the twelfth factor (i.e., the eighth “other” factor). Action 5 2015 Report, *supra* note 99, at 23. [↑](#footnote-ref-151)
152. German Federal Ministry of Finance, *Germany and UK agree joint proposal for rules on preferential IP regimes* (November 11, 2014), *available at* www.budesfinanzministerium.de/Content/EN/Pressemitteilungen/2014/2014-11-11-rules-on-preferential-ip-regimes.html [hereinafter “German press release”]; HM Treasury, HM Revenue & Customs, and the Rt Hon George Osborne MP, *Germany and UK agree joint proposal for rules on preferential IP regimes* (November 11, 2014), *available at* www.gov.uk/government/news/germany-and-uk-agree-joint-proposal-for-rules-on-preferential-ip-regimes [hereinafter “UK press release”]. [↑](#footnote-ref-152)
153. Because of the constraints of EU law, this had to come up with a work-around, but the intent behind this was to focus on expenditures within the jurisdiction, and many non-EU countries have designed their rules to comply with this focus on jurisdiction. For more on this, *see* Lilian V. Faulhaber, *The Luxembourg Effect: Patent Boxes and the Limits of International Cooperation*, 101 Minn. L. Rev. (forthcoming 2017). [↑](#footnote-ref-153)
154. *See* Action 5 2015 Report, *supra* note 99, at 37-44. [↑](#footnote-ref-154)
155. *See supra* notes 123-128 and accompanying text. [↑](#footnote-ref-155)
156. Action 5 2015 Report, *supra* note 99, at 27. [↑](#footnote-ref-156)
157. Action 5 2015 Report, *supra* note 99, at 37-40. [↑](#footnote-ref-157)
158. Although the Action 5 2015 Report focuses on which entity undertook the expenditures, as opposed to where the expenditures were incurred, the initial understanding of the FHTP was that the substantial activities factors was meant to align substance in one jurisdiction with income in the same jurisdiction. *See* Faulhaber, *supra* note 152. [↑](#footnote-ref-158)
159. *See* 2006 Report, *supra* note 112; European Council – Code of Conduct Group (Business Taxation), http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/ (last visited Feb. 1, 2017). [↑](#footnote-ref-159)
160. 1998 State Aid Notice, *supra* note 97, at 6. [↑](#footnote-ref-160)
161. 2003/512/; 2003/438/EC; 2003/501/EC; 2003/755/EC; 2004/76/EC; 2004/77/EC. [↑](#footnote-ref-161)
162. Kingdom of Belgium (C-182/03) and Forum 187 ASBL (C-217/03) v. Commission (June 22, 2006). [↑](#footnote-ref-162)
163. Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU (2014), available at http://ec.europa.eu/competition/consultations/2014\_state\_aid\_notion/draft\_guidance\_en.pdf. This Notice was made available for consultations, and it was then finalized in 2016 as the 2016 Notice [hereinafter 2016 Notice]. [↑](#footnote-ref-163)
164. European Commission Press Release IP/14/1105, State aid: Commission investigates transfer pricing arrangements on corporate taxation of Amazon in Luxembourg (Oct. 7, 2014); European Commission Press Release IP/14/663, State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg) (June 11, 2014). A year later, the Commission announced a further investigation into rulings provided by Luxembourg to McDonald’s. European Commission Press Release IP/15/6221, State aid: Commission opens formal investigation into Luxembourg's tax

treatment of McDonald’s. Around the same time, the Commission also opened investigations into ruling regimes, including those provided by Gibraltar and Belgium. State aid SA.3491: United Kingdom – Gibraltar corporate tax regime; European Commission Press Release IP/15/4080, State aid: Commission opens in-depth investigation into the Belgian excess profit ruling system. [↑](#footnote-ref-164)
165. For a more in-depth discussion of recovery, *see, e.g.*, Lilian V. Faulhaber, *Beyond Apple: State Aid as a Model of a Robust Anti-Subsidy Rule*, 48 Geo. J. Int’l L. [forthcoming]. [↑](#footnote-ref-165)
166. *See,* *e.g.*, *Europe's 'unfair' Apple tax ruling sparks US anger*, BBC News, Aug. 30, 2016, http://www.bbc.com/news/business-37226101 (quoting Senator Charles Schumer calling the Apple decision “a cheap money grab”). [↑](#footnote-ref-166)
167. European Commission Press Release IP/15/5880, Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules (Oct. 21, 2015); European Commission Press Release IP/16/2923, State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion (Aug. 30, 2016). [↑](#footnote-ref-167)
168. David Morgan & Jason Lange, *EU ruling on Apple stirs calls for U.S. tax reform*,Reuters,Aug. 30, 2016, http://www.reuters.com/article/eu-apple-usa-idUSL1N1BB1P1 (citing House Ways and Means Chairman Kevin Brady calling the Apple decision “a predatory and naked tax grab”). [↑](#footnote-ref-168)
169. *See, e.g.*, Margrethe Vestager, *Fair Competition And A Level Playing Field*, Huffington Post, Sept. 12, 2016, http://www.huffingtonpost.com/margrethe-vestager/fair-competition-and-a-le\_b\_11971432.html. [↑](#footnote-ref-169)
170. *See Tim Cook dénonce la <<stupidité politique>> de Bruxelles,* Ouest-France, Sept. 1, 2016, http://www.ouest-france.fr/high-tech/apple/apple-tim-cook-denonce-la-stupidite-politique-de-bruxelles-4445514. [↑](#footnote-ref-170)
171. Margrethe Vestager, *Fair Competition And A Level Playing Field*, Huffington Post, Sept. 12, 2016, http://www.huffingtonpost.com/margrethe-vestager/fair-competition-and-a-le\_b\_11971432.html. [↑](#footnote-ref-171)
172. *See* U.S. Department of the Treasury, The European Commission’s Recent State Aid Investigations of Transfer Pricing Rulings (2016), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf [hereinafter “Treasury White Paper”]; Mason, *supra* note 98. [↑](#footnote-ref-172)
173. *Apple/State aid – Irish Cabinet appeals European Commission Decision*, Eversheds International, Sept. 9, 2016, http://www.eversheds.com/global/en/what/publications/shownews.page?News=en/ireland/apple-state-aid; Action brought on 23 December 2015 — Netherlands v Commission (Case T-760/15). [↑](#footnote-ref-173)
174. Note that many previous state aid investigations focused on individual measures, but some commentators argued that this was novel. *See* Treasury White Paper, *supra* note 171. [↑](#footnote-ref-174)
175. Action 5 2015 Report, *supra* note 99, at 51. The Action 5 Final Report currently includes the following rulings in this definition: (i) taxpayer-specific rulings related to preferential regimes, (ii) cross-border unilateral APAs or other cross-border unilateral tax rulings addressing transfer pricing rules, (iii) cross-border rulings providing for a unilateral downward adjustment to the taxpayer’s taxable profits if that is not directly reflected in the taxpayer’s financial/commercial account, (iv) permanent establishment rulings, and (v) related party conduit rulings. Action 5 2015 Report, *supra* note 99, at 48-51. The Report leaves open the possibility that other rulings could also be found to raise BEPS concerns. Action 5 2015 Report, *supra* note 99, at 51. [↑](#footnote-ref-175)
176. 2016 Notice, *supra* note 162, at 38. [↑](#footnote-ref-176)
177. *See* Bob van der Meade, *EU Update on patent boxes and the EU Code of Conduct Group*, International Tax Review, Feb. 24, 2015, http://www.internationaltaxreview.com/Article/3430573/EU-Update-on-patent-boxes-and-the-EU-Code-of-Conduct-Group-Business-Taxation.html; Council of the European Union Press Release IP 16603/14, Outcome of the Council Meeting (Dec. 9, 2014). [↑](#footnote-ref-177)
178. German press release, *supra* note 151; UK press release, *supra* note 151. [↑](#footnote-ref-178)
179. Council of the European Union Press Release IP 16603/14, Outcome of the Council Meeting (Dec. 9, 2014) [↑](#footnote-ref-179)
180. Organisation for Economic Co-operation and Development, Action 5: Agreement on Modified Nexus Approach for IP Regimes (February 2015). [↑](#footnote-ref-180)
181. *See* Joe Kirwin, *French Patent Box Rates Challenged in EU Conduct Group*, Bloomberg BNA, Oct. 3, 2016, <https://www.bna.com/french-patent-box-n57982077841/>. [↑](#footnote-ref-181)
182. European Commission, Proposal for a Council Directive on a Common Corporate Tax Base (CCTB) [hereinafter 2016 CCTB Proposal]; European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) [hereinafter 2016 CCCTB Proposal]. [↑](#footnote-ref-182)
183. European Commission, Towards an Internal Market without tax obstacles: A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities (COM(2001) 582 , October 23, 2001). [↑](#footnote-ref-183)
184. These discussions involved the 2004 issuance of a “non-paper.” http://ec.europa.eu/taxation\_customs/sites/taxation/files/resources/documents/taxation/company\_tax/common\_tax\_base/cctbwpnon\_paper.pdf [↑](#footnote-ref-184)
185. European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) COM(2011) 121, March 16, 2011 [hereinafter 2011 CCCTB Proposal]. [↑](#footnote-ref-185)
186. 2011 CCCTB Proposal, *supra* note 181. [↑](#footnote-ref-186)
187. 2011 CCCTB Proposal, *supra* note 181. [↑](#footnote-ref-187)
188. European Commission, Press Release IP/16/3471: Commission proposes major corporate tax reform for the EU. [↑](#footnote-ref-188)
189. 2016 CCTB Proposal, *supra* note 181; 2016 CCCTB Proposal, *supra* note 181. [↑](#footnote-ref-189)
190. See European Commission, Questions and Answers on the common EU list of non-cooperative tax jurisdictions (Sept. 15, 2016). [↑](#footnote-ref-190)
191. European Commission, Questions and Answers on the common EU list of non-cooperative tax jurisdictions (Sept. 15, 2016). [↑](#footnote-ref-191)
192. See European Commission, First step towards a new EU list of third country jurisdictions: Scoreboard [hereinafter Commission Scoreboard], available at https://ec.europa.eu/taxation\_customs/sites/taxation/files/2016-09-15\_scoreboard-indicators.pdf. [↑](#footnote-ref-192)
193. *See* Commission Scoreboard, *supra* note 191. [↑](#footnote-ref-193)
194. European Commission, Questions and Answers on the common EU list of non-cooperative tax jurisdictions (Sept. 15, 2016). [↑](#footnote-ref-194)
195. *See, e.g.*, Jane G. Gravelle & Pamela J. Jackson, Cong. Research Serv., R40004, Major Tax Issues in the 111th Congress (2009) (setting out the difference between tax evasion and tax avoidance). [↑](#footnote-ref-195)
196. *See, e.g.*, Shannon Weeks McCormack, *Tax Shelters and Statutory Interpretation: A Much Needed Purposive Approach*, 2009 U. Ill. L. Rev. 697.   [↑](#footnote-ref-196)
197. BEPS Action Plan, *supra* note 142. [↑](#footnote-ref-197)
198. See Organisation for Economic Co-operation and Development, 2015 Final Reports: Executive Summaries. [↑](#footnote-ref-198)
199. Action 3 proposed controlled foreign company (“CFC”) rules, which were designed to prevent taxpayers from shifting income outside of a jurisdiction or deferring taxation by establishing a wholly-owned subsidiary. Organisation for Economic Co-operation and Development, Designing Effective Controlled Foreign Company Rules, Action 3: 2015 Final Report (2015). [↑](#footnote-ref-199)
200. The four Action Items that resulted in minimum standards are Action 5 (the nexus approach for IP regimes and spontaneous exchange of rulings), Action 6 (either a limitation-on-benefits provision or a principal purpose test), Action 13 (country-by-country reporting), and Action 14 (mutual agreement procedures). OECD – BEPS – Frequently Asked Questions, available at http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm (last visited Feb. 1, 2017). [↑](#footnote-ref-200)
201. *See* Itai Grinberg, *T*he New International Tax Diplomacy, 104 Geo. L.J., 1137, 1137-96 (2016). [↑](#footnote-ref-201)
202. *See, e.g.*, HM Revenue & Customs, Corporation Tax: Patent Box – compliance with new international rules (Dec. 9, 2015). [↑](#footnote-ref-202)
203. Organisation for Economic Co-operation and Development, Press Release: A boost to transparency in international tax matters: 31 countries sign tax co-operation agreement to enable automatic sharing of country by country information (Jan. 27, 2016). [↑](#footnote-ref-203)
204. *See* Organisation for Economic Co-operation and Development, 2015 Final Reports: Executive Summaries. [↑](#footnote-ref-204)
205. Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [hereinafter ATA Directive]; see also European Commission, The Anti Tax Avoidance Directive, available at https://ec.europa.eu/taxation\_customs/business/company-tax/anti-avoidance-package/anti-avoidance-directive\_en (stating that the Council adopted the Directive on June 20, 2016). [↑](#footnote-ref-205)
206. European Commission, Anti Tax Avoidance Package, available at http://ec.europa.eu/taxation\_customs/business/company-tax/anti-avoidance-package\_en. [↑](#footnote-ref-206)
207. European Commission, ATA Directive, *supra* note 204. [↑](#footnote-ref-207)
208. ATA Directive, *supra* note 204. [↑](#footnote-ref-208)
209. ATA Directive, *supra* note 204. [↑](#footnote-ref-209)
210. ATA Directive, *supra* note 204. [↑](#footnote-ref-210)
211. See HM Revenue & Customs, Diverted Profits Tax: Guidance (Nov. 30, 2015) [hereinafter DPT Guidance] (stating that the measure was introduced in 2014 and became effective as of April 1, 2015). [↑](#footnote-ref-211)
212. *See, e.g.*, Robert Peston, *Who wins from Google tax?*, BBC, Dec. 10, 2014, http://www.bbc.com/news/business-30420571. [↑](#footnote-ref-212)
213. DPT Guidance, *supra* note 210. It applies a higher rate to income from ring-fenced activities. [↑](#footnote-ref-213)
214. DPT Guidance, *supra* note 210. [↑](#footnote-ref-214)
215. Parliament of the Commonwealth of Australia, House of Representative, Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015: Explanatory Memorandum, 23-52 [hereinafter MAAL Guidance]. [↑](#footnote-ref-215)
216. MAAL Guidance, *supra* note 214. [↑](#footnote-ref-216)
217. MAAL Guidance, *supra* note 214. [↑](#footnote-ref-217)
218. U.S. Dept. of the Treasury, 2016 U.S. Model Income Tax Convention; U.S. Dept. of the Treasury, Press Release: Treasury Announces Release of 2016 U.S. Model Income Tax Treaty (Feb. 17, 2016). [↑](#footnote-ref-218)
219. U.S. Dept. of the Treasury, Select Draft Provisions of the U.S. Model Income Tax Convention: New Article 3 Paragraph 1(l), Definition of “Special Tax Regime” (listing specific exceptions to this definition of special tax regimes). [↑](#footnote-ref-219)
220. U.S. Dept. of the Treasury, Preamble to 2016 U.S. Model Income Tax Convention (Feb. 17, 2016), at 2-3. [↑](#footnote-ref-220)
221. U.S. Dept. of the Treasury, Preamble to 2016 U.S. Model Income Tax Convention (Feb. 17, 2016), at 3. [↑](#footnote-ref-221)
222. U.S. Dept. of the Treasury, General Explanations of the Administration’s Fiscal Year 2016 Revenue Proposals, 19-22; U.S. Dept. of the Treasury, General Explanations of the Administration’s Fiscal Year 2017 Revenue Proposals, 9-12. [↑](#footnote-ref-222)
223. *See, e.g.*, EATLP 2016 Congress reports: Tax Avoidance Revisited: Exploring the Boundaries of Anti-Avoidance Rules in the EU BEPS Context. [↑](#footnote-ref-223)
224. This is a simplified version of what the nexus approach does and ignores the changes that had to be made to comply with EU Member State understandings of EU law. For more on the difference between the design of the nexus approach and the intended effect, *see* Faulhaber, *supra* note 152. [↑](#footnote-ref-224)
225. This is a simplified version of the selectivity requirement, the outlines of which have been contested by Member States and companies. *See, e.g.*, Treasury White Paper, *supra* note 171; 2016 Notice, *supra* note 162. [↑](#footnote-ref-225)
226. Action 5 2015 Report, *supra* note 99. [↑](#footnote-ref-226)
227. Commission Scoreboard, *supra* note 191. [↑](#footnote-ref-227)
228. *See supra* note 82-88 and accompanying text. [↑](#footnote-ref-228)
229. *See supra* note 82-88 and accompanying text. [↑](#footnote-ref-229)
230. *See supra* note 82-88 and accompanying text. [↑](#footnote-ref-230)
231. From 1982 to 1999, the average statutory corporate rate dropped from 46% to 33%. James R. Hines, Jr., *Corporate Taxation and International Competition* (Ross Sch. Of Bus., Paper No. 1026, 2005) http://www.bus.umich.edu/otpr/WP2005-9.pdf. [↑](#footnote-ref-231)
232. Desai, *supra* note 68. [↑](#footnote-ref-232)
233. *See* Avi-Yonah, *supra* note 8. [↑](#footnote-ref-233)
234. *See supra* note 116-122 and accompanying text. [↑](#footnote-ref-234)
235. For more on the behind-the-scenes lobbying that contributed to this shift in policy, *see* Ring, *supra* note 8. [↑](#footnote-ref-235)
236. Kane, *supra* note 86. [↑](#footnote-ref-236)
237. Kane, *supra* note 86. [↑](#footnote-ref-237)
238. Note also that, while the United States had a high overall rate, it had in fact reduced many specific rates that would apply to foreign investors. *See* Elkins, *supra* note 60. [↑](#footnote-ref-238)
239. See European Commission, Press Release IP/16/3606: State aid: Commission finds Hungarian advertisement tax in breach of EU rules (finding that a tax with progressive rates was impermissible state aid that favored companies with low or no profits); European Commission, Press Release IP/16/3104: State aid: Commission opens in-depth investigation into Poland's tax on the retail sector (stating that a progressive tax rate could constitute state aid if it favors small retailers over large retailers); European Commission, Press Release IP/16/2404: State aid: Commission finds Hungary's food chain inspection fee and tax on tobacco sales in breach of EU rules (finding that a turnover tax with progressive rates was impermissible state aid that favored companies with low turnover over countries with high turnover). [↑](#footnote-ref-239)
240. “Brexit” refers to the result of the UK referendum on June 23, 2016, where the majority of voters elected to leave the European Union. [↑](#footnote-ref-240)
241. *See, e.g.*, Nigel Farage, *Nigel Farage: Ireland, if you think Apple is bad you ain’t seen nothing yet*, The Irish Times, Sept. 8, 2016, http://www.irishtimes.com/opinion/nigel-farage-ireland-if-you-think-apple-is-bad-you-ain-t-seen-nothing-yet-1.2784083 (focusing only on the short-term consequences of the state aid prohibition). [↑](#footnote-ref-241)
242. This is not the first paper to acknowledge this interdependence, *see* Hines 2007, *supra* note 8, at 269, but much of the literature on these two issues separates them out. [↑](#footnote-ref-242)
243. BEPS Action Plan, *supra* note 142, at 2. [↑](#footnote-ref-243)
244. *See* Kane, *supra* note 86. [↑](#footnote-ref-244)
245. Kane, *supra* note 86. [↑](#footnote-ref-245)
246. *See e.g.*, *supra* note 214-216 and accompanying text (describing the MAAL); *supra* note 210-213 and accompanying text (describing the DPT); *supra* notes 159-175 and accompanying text (describing the recent state aid investigations). [↑](#footnote-ref-246)
247. *See* Treasury White Paper, *supra* note 171. [↑](#footnote-ref-247)
248. *See* Faulhaber, *supra* note 152. [↑](#footnote-ref-248)
249. *See supra* note 214-216 and accompanying text (describing the MAAL); *supra* note 210-213 and accompanying text (describing the DPT). [↑](#footnote-ref-249)
250. *See supra* note 214-216 and accompanying text (describing the MAAL); *supra* note 210-213 and accompanying text (describing the DPT). [↑](#footnote-ref-250)
251. Simon Bowers, *Amazon to begin paying corporation tax on UK retail sales*, The Guardian, May 22, https://www.theguardian.com/technology/2015/may/23/amazon-to-begin-paying-corporation-tax-on-uk-retail-sales. [↑](#footnote-ref-251)
252. The drop in average statutory corporate income tax rates continued to drop from 2000 through 2015 to 25%. Organisation for Economic Co-operation and Development, Tax Policy Reforms in the OECD 2016 (2016). [↑](#footnote-ref-252)
253. *See supra* notes 241-249 and accompanying text. [↑](#footnote-ref-253)
254. Kane, *supra* note 86. [↑](#footnote-ref-254)
255. Other examples include Action 6 (limiting the ability of jurisdictions to attract investors by allowing them to benefit from treaties without being subject to tax); Action 7 (limiting the ability of jurisdictions to attract investors by allowing them to escape taxation under treaties); and Action 12 (limiting the ability of jurisdictions to attract investors by not requiring them to provide information about possibly abusive transactions). [↑](#footnote-ref-255)
256. *See supra* Part I. [↑](#footnote-ref-256)
257. This is, of course, also not saying that some countries are *not* acting hypocritically when they curtail harmful tax competition. If some countries are doing so, however, it would be consistent with the vision of sovereignty arguments as organized hypocrisy. *See* Krasner, *supra* note 44. [↑](#footnote-ref-257)
258. *See supra* notes 159-175 and accompanying text (setting out harmful tax competition as envisioned by recent state aid investigations). [↑](#footnote-ref-258)
259. *See supra* notes 181-188 and accompanying text (setting out harmful tax competition as envisioned by proposals for a CCTB and CCCTB). [↑](#footnote-ref-259)
260. *See supra* notes 221 and accompanying text (setting out harmful tax competition as envisioned by the U.S. minimum tax proposals). [↑](#footnote-ref-260)
261. *See supra* notes 218-220 and accompanying text (setting out harmful tax competition as envisioned by the U.S. special tax regimes provision and the nexus approach). [↑](#footnote-ref-261)
262. *See supra* notes 223-224 and accompanying text (setting out harmful tax competition as envisioned by the Action 5 spontaneous exchange of rulings requirement). [↑](#footnote-ref-262)
263. *See, e.g.*, Marian, *supra* note 146. [↑](#footnote-ref-263)
264. *See, e.g.*, Charles Duhigg and David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, NY Times, Apr. 28, 2012, http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html. [↑](#footnote-ref-264)