

CHAPTER 1

INTRODUCTION

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1.1 Motivation and relevance

Following the financial and sovereign debt crisis (2008-2012) and several tax avoidance affairs, such as LuxLeaks (2014)¹ and the Panama Papers (2016)², tax avoidance by multinational companies and the opportunity for it created by ‘sweetheart tax rulings’ by national tax administrations have become matters of public concern and debate. As a result, the Organisation for Economic Cooperation and Development (OECD), comprising thirty-six Member countries, and the G20 (the group of nineteen countries with the largest GDP’s and the EU) placed the fight against tax avoidance and harmful tax competition high on the international political agenda. Working together under the Base Erosion and Profit Shifting (BEPS) project³, a wide range of (soft law) solutions have been, and still are being developed at international level to curb tax avoidance and harmful tax competition, improve the coherence of international tax rules and ensure a more transparent tax environment.⁴ As a result of its desire to be at the forefront of the anti-BEPS policy to set world standards, the EU has converted many of these international solutions into legally enforceable anti-avoidance rules, including mandatory automatic exchange of tax rulings between Member States (2015)⁵, mandatory country-by-country reporting by multinationals (2016)⁶, minimum harmonization of anti-avoidance measures (the so-called ATAD 1 (2016)⁷ and ATAD 2 (2017)⁸ Directives), and mandatory disclosure of potentially aggressive tax planning arrangements by intermediaries (2018)⁹.

These measures are second-best, showing that the EU does not make much progress in substantive harmonization of corporate income taxation. All of these measures are necessary precisely because there is no (EU) common corporate tax system. Twenty-eight (twenty-seven since 31 January 2020) different corporate tax systems imply a wealth of mismatches between national tax systems, offering a corresponding wealth of tax planning opportunities for multinationals. Member States try to curb the predictable excesses by (i) ever-expanding automatic exchange of tax information between them and (ii) common anti-abuse measures. Hence the above measures, rather than adopting the Commission’s C(C)CTB proposal (a common (consolidated) corporate tax base). Member States are very reluctant to harmonize their corporate tax systems because they wish to retain as much competence as possible in designing their own systems of business profits tax, notably to be able to internationally compete for economic activity by offering a competitive tax system and competitive tax rulings. As in tax matters, unanimity is still required for any legislative action at EU level (Articles 113, 114(2) and 115 TFEU), each Member State has a veto right and is, therefore, able to pursue its own fiscal policy objectives or at least to block harmonization proposals which it considers contrary to its interests. Member States thus find themselves in fierce competition for economic growth and employment, all of them wanting to attract international companies by offering a

¹ See <https://www.icij.org/investigations/luxembourg-leaks/>.

² See <https://www.icij.org/investigations/panama-papers/explore-panama-papers-key-figures/>.

³ See <https://www.oecd.org/tax/beps/>.

⁴ See <https://www.oecd.org/tax/beps/about/>.

⁵ See Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJEU L/332/2015, p. 1-10.

⁶ See Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJEU L/146/2016, p. 8-21.

⁷ See Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJEU L/193/2016, p. 1-14.

⁸ See Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJEU L/144/2017, p. 1-11.

⁹ See Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJEU L/139/2018, p. 1-13.

business-friendly environment, especially taxwise. The resulting tax competition creates tax avoidance opportunities for these international companies.

Member States have long been aware of the resulting risk of a race to the bottom, referred to as ‘fiscal degradation’ by the former EU Commissioner Monti. At the initiative of this EU-Commissioner, Member States therefore in 1997 adopted a non-legislative, diplomatic gentlemen's agreement to curb unfair tax competition: the EU Code of Conduct for Business Taxation. This soft law mechanism should stop harmful tax competition through preferential tax measures and non-transparent tax ruling practices that are aimed at attracting internationally mobile activities and create an overall tax loss. This study examines the Code of Conduct for Business Taxation and the activities of its governing body: the EU Code of Conduct Group (Business Taxation) (‘Group’), and seeks to assess how effective the Group has been in realising the goals pursued by the Code.

This Group, which recently celebrated its twentieth anniversary, brings together representatives of the Member States, the European Commission, and the Council of the European Union. It has become increasingly significant in the fight against tax avoidance by multinational companies and against the facilitation thereof by harmful tax competition between Member States.¹⁰ Its usual work consists of assessing specific tax regimes on the basis of the Code’s principles and criteria for identifying unfair tax competition, known as ‘pseudo-case law’. This work has contributed to the dismantling of many preferential tax regimes and practices within the EU but also internationally, especially in the context of the recent drawing up of the EU tax haven blacklist. The growing importance of the Group is particularly visible in its increasing focus on coordinated solutions for general competition sensitive tax issues. For example, it has developed common policies, some of which have served as a forerunner for legally binding solutions, on exchange of information on tax rulings, good tax ruling practices, and hybrid mismatches – to name just a few examples. Such common soft law policies will be referred to as ‘pseudo-legislation’.

Most former and current participants in the Code of Conduct Group, and also EU officials, consider the Group as successful.¹¹ Nonetheless, in recent years, the Group has become the subject of intense social and political debate. The European Parliament¹², national

¹⁰ See also Nouwen, M.F. (2017).

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

¹² See, e.g., European Parliament Resolution of 25 November 2015 (TAXE1), 2015/2066 (INI), par. 40-44, 60 and 87; European Parliament Resolution of 16 December 2015, 2015/2010 (INL), par. AM and recommendation A.3 and B.2; European Parliament Resolution of 6 July 2016 (TAXE2), 2016/2038 (INI), par. AO-AR, and 47-57; European Parliament Resolution of 13 December 2017 (PANA), 2016/3044(RSP), par. 52-54 and 185-189, and 198-200; and European Parliament Resolution of 26 March 2019 (TAXE 3), 2018/2121(INI)par. 411-418.

parliaments¹³, national governments¹⁴, media¹⁵, academics¹⁶, NGO's¹⁷, and the general public have criticised the Group's lack of transparency, its working methods, and last but not least, its alleged ineffectiveness in cracking down on harmful tax practices. In its resolution of 6 July 2016, the European Parliament criticized the Group's secretiveness noting that: "some of these documents should have been made public to allow for public scrutiny and an open political debate on their content."¹⁸ Regarding the Group's perceived ineffectiveness, the European Parliament commented, inter alia, that "the self-notification of potentially harmful measures by Member States is not efficient, the criteria for identifying harmful measures are outdated, and the unanimity principle for reaching decisions on harmfulness has not proven effective"¹⁹, and: "a pattern of systematic obstruction by some Member States to achieving any progress on fighting tax avoidance became clear"²⁰. One year later, in 2017, an investigation of the EU Observer considered the Code of Conduct Group the "EU's most secretive group"²¹.

Nevertheless, although society shows a growing demand for transparency on the part of policymakers, institutions and companies, most Member States still strongly support the Group's diplomatic character, implying confidentiality and closed meetings. Many Member States are convinced that the Group cannot function if this confidentiality is not guaranteed, as States would be reluctant to self-report, to provide information on request of other Member States and to discuss measures openly if their assessments and decision-making were monitored publicly. As a result of recently implemented initiatives aimed at increasing the Group's transparency, discussions in the Group would now already be less secretive according to several of its participants.²²

As a consequence of its diplomatic character, the Group's work is hidden by a veil of confidentiality. Its pseudo-case law and pseudo-legislation are largely unknown to the general public and to national parliaments. National governments thus have the possibility to pursue their political agenda relatively unseen, making a trade-off between the need to address tax avoidance and harmful tax competition against maintaining a business-friendly fiscal climate. National parliaments and the European Parliament are often not aware whether, and if so, why one or some Member State(s) slowed down or blocked a negative assessment or a rollback obligation as regards a (type of) national tax regime. Neither do they seem very aware of the

¹³ See, e.g., (Dutch) parliamentary questions in Parliamentary Paper II, 2015-2016, doc. no. 2015Z21690, 1-2.

¹⁴ The need of a more open and transparent Code of Conduct Group, for example, has become one of the priorities of the Dutch government's external tax policy. See, e.g., working paper of the Group of 10 April 2018, doc. no. 4111/2018 and report of the Group of 8 June 2018, doc. no. 9637/18, par. 11, p. 3.

¹⁵ See, e.g., the newspaper article on the frontpage of the Dutch Newspaper 'Het Financieele Dagblad' of 14 April 2016 titled 'Nederland notoire fiscale dwarsligger' ('The Netherlands, a notoriously wayward tax rebel' (<https://fd.nl/economie-politiek/1147351/nederland-notoire-fiscale-dwarsligger#>). The same day this article even made it to the main Dutch news broadcaster 'NOS'; see also their website: <http://nos.nl/artikel/2099141-nederland-fiscale-%20dwarsligger-verhalen-uit-de-oude-dooos.html>. In addition, see M. Becker, P. Müller and C. Pauly, Der Spiegel, How the Benelux Blocked Anti-Tax Haven Laws, 6 November 2015 (<https://www.spiegel.de/international/europe/eu-documents-reveal-how-benalux-blocked-tax-haven-laws-a-1061526.html>).

¹⁶ See, e.g., Nouwen, M.F. (2017).

¹⁷ See, e.g., Oxfam Briefing Note, Blacklist or Whitewash, What a real EU blacklist of tax havens should look like, November 2017.

¹⁸ See European Parliament Resolutions of 6 July 2016 (TAXE 2), 2016/2038(INI), par. 47.

¹⁹ See European Parliament Resolutions of 6 July 2016 (TAXE 2), 2016/2038(INI), par. 52.

²⁰ See European Parliament Resolutions of 6 July 2016 (TAXE 2), 2016/2038(INI), par. 53.

²¹ See J. Comte, EU Observer, Inside the Code of Conduct, the EU's most secretive group, 18 July 2017 (<https://euobserver.com/institutional/138550>).

²² See J. Comte, EU Observer, Inside the Code of Conduct, the EU's most secretive group, 18 July 2017 (<https://euobserver.com/institutional/138550>).

existence of agreed common tax policies, which may be construed as pseudo-legislation bypassing parliaments, let alone of the observance of these agreed policies by individual Member States.²³ The lack of public information on the Group's work also hinders scientific research and journalistic scrutiny of the work of the Group. Parliamentary, scientific and media attention and scrutiny could enhance the effectiveness of the Group in finding effective anti-tax avoidance solutions and curbing excessive tax competition, but it is true that it might also have a chilling effect on Member States' willingness to share information with the Group.

The author of this study has used the EU Transparency Regulation²⁴ and much insistence and perseverance to obtain more than 2,500 documents from the Council and the Commission pertaining to the work of the Code of Conduct Group. They include non-published meeting documents ('room documents' and 'working papers') of the Group (mostly drafted by the Commission, the Presidency or a Member State) and non-published informal meeting minutes ('*comptes rendus internes*') of the Commission (drafted by its civil servants attending the Group's meetings). The EU institutions often needed quite some (legal) encouragement to hand over these documents. The documents are of great informative value as regards the actual functioning and decision-making of the Group, reflecting the positions of individual Member States on many preferential tax regimes as well as on horizontal tax policy issues. Section 1.3 provides further details on the documents obtained.

1.2 Research question

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

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

- What is the historical background and original purpose of the Code and what policy considerations are behind its provisions?
- How is the Code best characterized among the different types of EU-soft law, and how can the governance and working methods of the Group be defined in terms of governance theory?
- What is the Group's governance structure?; what are the Group's working methods?; and which stakeholders are to which extent involved in its decision-making process?;
- What is the geographical scope of the Code? What is the level of commitment of different categories of (EU and non-EU) (overseas) countries and territories to the Code?;
- What is the material scope of the Code? Which criteria does the Group apply to assess the compatibility of a national preferential tax regime with the Code?;
- What pseudo-case law did the Group develop? Which pseudo-legal principles can be derived from its pseudo-case law? How effective is it in curbing harmful tax competition? How does its pseudo-case law interrelate with Commission state aid investigations?;
- What pseudo-legislation did the Group develop? Has it been followed up by hard law? How effective is it in tackling general tax competition sensitive tax issues?; and

²³ See Nouwen, M.F. (2017), p. 146-148.

²⁴ See Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJEU L/145/2001, p. 43-48.

- To what extent could the market distortion rules (Articles 116 and 117 TFEU) be used as an alternative or a complement to the Code in tackling harmful tax competition?

Where appropriate, this study will accompany its findings by concrete recommendations for improvement.

1.3 Method, delimitations, and documents used

The above questions are in principle addressed from a legal perspective. However, as the work of the Code of Conduct Group and the Code of Conduct itself is neither a strictly legal nor a scientific exercise, but more a political and diplomatic process, its functioning will also be evaluated from a governance perspective. Additionally, where relevant, also economic aspects will be considered. These different perspectives should allow for a critical analysis of the result of the Group's work and its effectiveness in curbing harmful tax competition. Notwithstanding the relevance of the political and economic aspects, this study primarily adopts the traditional method of doctrinal legal research, i.e., a normative analysis of the Code of Conduct for Business Taxation and of the Group's pseudo-case law and pseudo-legislation adopted on the basis of that Code.

Since most of the documents produced and used for the work of the Code of Conduct Group, including its pseudo-case law and pseudo-legislation, were not publicly available, it was necessary for the author to submit information requests based on the Transparency Regulation (EC) No. 1049/2001²⁵ to obtain these documents. Discussions between the author and Commission and Council (transparency) officials on whether access should be provided or Regulation-based exceptions applied led to a lengthy tug-of-war and more than twenty five confirmatory applications (EU jargon for 'appeals'). In most cases full or at least wide partial access was granted to the requested documents. In total, more than 2,500 documents were handed over to the author by the Commission and the Council.

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

- *room documents* and *working documents* issued by the Commission, by the Chair of the Code of Conduct Group, by the EU Presidency, by the General Secretariat of the Council, or by individual Member States. These documents generally provide input for debate on the agenda items of the meetings of the Code of Conduct Group, or for other Council (preparatory) bodies dealing with Code-matters. Some of these documents are not drafted and circulated for discussion purposes, but merely for information purposes.
- *informal meeting minutes* ('*comptes rendus internes*'; sometimes called 'flash reports') drafted by officials of the Commission, reporting on the deliberations in the Code of Conduct Group and other Council preparatory bodies dealing with Code-(related) matters. It is emphasized that these informal Commission minutes are *not* the official (public) progress reports of the Group to the Council (see this Section below). They have been drafted for internal Commission use only. They have not been agreed upon

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

or discussed with any of the other attendees of the Group's meetings. Although the informal meeting minutes thus merely represent the Commission's understanding of the deliberations of the Code of Conduct Group, they are of great informative value given the confidentiality of the Group's deliberations. The role of the Commission - only providing technical assistance to the Group and not voting - is aimed at establishing a common EU agenda to address harmful tax competition, rather than representing any specific Member State interest, which the author expects to contribute to the objectivity and the balance of its informal meeting minutes.

Through this study, the content of these documents is made available to academics, policymakers, politicians, non-governmental organisations, tax advisors, the media and the general public. They are quoted to the extent a verbal reproduction is functional for this study. Apart from showing relevant and interesting results of the Group's decision-making (pseudo-case law and pseudo-legislation), they also provide insights into the Group's decision-making process and into the points of view of individual Member States. This allows the readers of this study to make their own judgment as regards the (in)correctness of media reports or political blame-gaming on the question of who were the troublemakers on which issues and why.

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

Also, publicly available documents of and information about the Code of Conduct Group have been used in this study, in particular: (i) agendas of Code of Conduct Group meetings (ii) the official Code of Conduct Group progress reports forwarded to the Ecofin Council for endorsement and (iii) work programmes of the Code of Conduct Group. These documents are nowadays easily accessible on a dedicated 'Code of Conduct Group'-website of the Council of the European Union.²⁶ Furthermore, this study also draws on: (i) the Ecofin Council Conclusions endorsing the work of the Code of Conduct Group, (ii) published overviews of preferential tax regimes investigated by the Group (pseudo-case law) and guidance agreed by the Group (pseudo-legislation) since 1998, (iii) and – of course – the text of the Code of Conduct itself.

To understand the discussions and the pseudo-case law of the Group, it is necessary to understand the national preferential regimes it assesses. Therefore, note has also been taken of national tax legislation and administrative practices. To place the work of the Code of Conduct Group in its legal context, note has further been taken of EU tax law, CJEU case law, state aid and market distortion investigations and decisions of the Commission, as well as other legal sources. Also, relevant literature has been examined and incorporated in this study, particularly academic research in the area of EU soft law and social and political sciences. Literature in other languages than English has only incidentally been incorporated in this study, notably a French-language dissertation (2009) of Mr Dos Santos, a former State Secretary for Tax Affairs of Portugal (1995-1999) and a former Member of the Portuguese Permanent Representation in Brussels (2001-2005) on, among others, the results of the Code of Conduct Group during its

²⁶ See <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/>.

first years of operation.²⁷ A range of other sources on direct tax policy matters has been studied, including papers, studies, and reports from European institutions and international organisations such as the OECD, the G20, and the United Nations. All these sources are extensively accounted for in footnotes.

Specific methodological considerations, limitations, and relevant sources of information have been specified per Chapter, mostly in the introduction. As regards the Group's pseudo-case law and pseudo-legislation, the author aspired to comprehensiveness. More than five hundred assessments of preferential tax regimes have been analysed, and the most relevant political and technical aspects of them are being reported in this study. As further explained in Chapter 7, these regimes have been categorized into fourteen types, each case having been assigned a unique number to facilitate cross-reference.

This study is focused on assessing the effectiveness of the Code of Conduct Group in tackling harmful tax competition within the EU during its first twenty years of existence. Work carried out by the Group after 1 January 2020 has not been considered, and work carried out in 2019 has been considered where possible. This is mainly due to the fact that obtaining documents and information on the Code of Conduct Group on the basis of EU transparency rules is a very time-consuming and administratively cumbersome process²⁸. As a consequence, this study, for example, pays only limited attention to the recent developments as regards the EU tax haven blacklist and its effectiveness.

Apart from desk research and transparency requests, interviews with former and current participants in the Code of Conduct Group have provided information, especially on the Group's working methods. Persons interviewed were (i) (former) officials of the European Commission and of the Council of the European Union involved in the work and attending the meetings of the Code of Conduct Group either at the time of the interview or in the past, (ii) (former) civil servants of Member States' Ministries of Finance representing their governments in the Code of Conduct Group. The Ministry of Finance of the Netherlands deserves special mention for its provision of information. Apart from interviews, it provided access – on the basis of a confidentiality agreement with the author – not only to several meeting documents of the Code of Conduct Group, but also to several Dutch informal meeting minutes (*'terugkoppelingsverslagen'*) drafted by civil servants which attended the Group's meetings.

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

1.4 Outline

This study consists of the following nine further Chapters:

- Chapter 2 describes the emergence and drafting of the Code, including its *travaux préparatoires*, by outlining ten phases of the process leading to the diplomatic

²⁷ See Dos Santos, A.C. (2009).

²⁸ See also Nouwen, M.F. (2017), p. 148-149.

gentleman's agreement adopted by the Member States in 1997. Also, it highlights its original main purpose: avoiding 'fiscal degradation' by excessive tax policy competition, as well as the policy considerations leading to the different provisions of the Code.

- Chapter 3 analyses the legal status of the Code by (i) evaluating the Code as an informal para- and pre-law steering instrument under the wider umbrella of EU soft law and (ii) assessing the governance and working methods of the Group implementing the Code as an Open Method of Coordination(-like) soft governance process.
- Chapter 4 outlines the governance and formal and informal working methods of the Group, as well as the level of involvement of the different stakeholders in the decision-making process on Code-matters, including the Code of Conduct Group itself and its Preparatory Group and SubGroups, other high-level working groups, the European Commission, the European Parliament, the General Secretariat of the Council of the European Union, the *Comité des Représentants Permanents* (Coreper), and the Economic and Financial Affairs Council (Ecofin).
- Chapter 5 maps the geographical scope of the Code by analysing the applicability of the principles and criteria of the Code in respect to the different categories of countries and territories, including (ascended in order from weak to strong in terms of political adherence to the Code): Member States; Outermost Regions (OMR's); European territories for whose external relations a Member State is responsible (only Gibraltar falls in this category); Overseas Countries and Territories (OCT's); several small island, and third countries.
- Chapter 6 analyses the substantive scope of the Code by describing the Group's four-step approach of assessing national tax measures, which approach can be inferred from the Code itself, its *travaux préparatoires*, as well as from the working practices of the Group which, in turn, can be derived from its pseudo-case law. These four steps are:
 - step 1: is the tax regime within scope?
 - step 2: is the tax regime *potentially* harmful? This step is taken on the basis of a 'gateway criterion': does the regime provide for a significantly lower effective level of taxation than generally applicable?
 - step 3: is the tax regime *actually* harmful? This step is taken mostly on the basis of five harmfulness characteristics non-exhaustively listed in the Code; and
 - step 4: is the harmful tax regime nevertheless justified?
- Chapter 7 discloses and assesses the pseudo-case law of the Group structured in the following fourteen categories of most criticised preferential tax regimes:
 - generic corporate tax regimes;
 - shareholder tax regimes;
 - interest regimes;
 - notional interest deduction regimes
 - intellectual property regimes;
 - insurance company regimes;
 - holding company regimes;
 - group coordination regimes;
 - special holding company regimes;
 - intermediate group finance and license company regimes;
 - foreign finance branch regimes;
 - informal capital regimes;
 - hybrid financing regimes; and
 - free zone regimes.

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

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

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

- Chapter 9 examines whether the market distortion provisions (Articles 116 and 117 TFEU) could be used as an alternative or a complement to the Code in tackling harmful tax competition. Although this instrument has remained a dead letter so far in tax matters, and almost dead in non-tax matters, the Commission seems to have recently opened the door for re-activating this 'nuclear weapon', responding to persistent calls from the European Parliament to 'circumvent' the unanimity requirement in direct tax matters to end prolonged deadlocks on comprehensive tax avoidance solutions. Based on non-published documents of the Commission's Legal Service, this Chapter clarifies the possibilities of this instrument in the area of harmful tax competition.
- Chapter 10 summarises conclusions and answers the main research question of this study.